IN THE SUPREME COURT OF FLORIDA

LENARD PHILMORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

SC00-1706

LC#97-1672CFA

Appeal from the Nineteenth Judicial Circuit,
In and for Martin County, Florida
Judge Cynthia Angelos

Initial Brief of Appellant

GLASS & RASTATTER, P.A.
524 So. Andrews Avenue, Ste 301N
Fort Lauderdale, FL 33301
Telephone: (954) 463-2965

PATRICK C. RASTATTER
Fla. Bar #164634
Counsel for Appellant

CERTIFICATE OF INTERESTED PERSONS

Honorable Cynthia Angelos	Trial Judge - 19th Judicial Circuit
Thomas Bakkedahl, Esq.	Prosecutor below
Sherwood Bauer, Esq.	Defendant's trial counsel
Bruce Colton, Esq.	Prosecutor below
Thomas Garland, Esq.	Defendant's trial counsel
John Hetherington, Esq.	Prior trial counsel for Defendant
Rory Little, Esq.	Co-defendant's trial counsel
Kazue Perron	Named victim in Indictment
Lenard Philmore	Defendant/Appellant
Patrick C. Rastatter, Esq.	Appellate counsel for defendant Philmore
Anthony Spann	Co-defendant in Indictment
Robert Udell, Esq.	Co-trial counsel for co-defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

CONSTITUTIONS

Rules and Statutes

PRELIMINARY STATEMENT

The parties are referred to as they stood in the trial court, the defendant, Lenard Philmore, and the prosecution, State of Florida. References to the record-on-appeal are by the symbol "R" followed by the relevant document number. The trial transcript is designated "TR" followed by the appropriate page number. The Supplemental record-on-appeal is designated by the symbol "SR" followed by the relevant page number.

Defendants pretrial motion to suppress statements hearing is found at R 782-957 and SR 6-92. Other non-evidentiary pretrial motions are located at TR 1- 165. Trial proceedings, starting with jury selection are at TR 168 - 2683.

Your undersigned attorney appears as a specially appointed appellate public defender pursuant to an order of the trial court entered October 25, 2000. (R 1340) The defendant, Lenard Philmore, remains incarcerated under a sentence of death.

STATEMENT OF THE CASE

Lenard J. Philmore was charged by way of indictment with the offenses of first degree murder (count I); conspiracy to commit robbery with a deadly weapon (count II); carjacking with a deadly weapon (count III); kidnaping (count IV); robbery with a deadly weapon (count V); and grand theft (Count VI). (R 1-4) Codefendant, Anthony A. Spann, was charged in the same accusatory instrument with the same offenses but his were set forth in counts VII through XII. (R 3-4) The defendants were tried separately. (R 613-618)

Various pretrial motions were filed and heard by the trial court, including Lenard Philmore's "motion to suppress statements of defendant and admission of evidence obtained from statement". (R 243-245) This motion was denied and Lenard Philmore's statements were admitted at trial over objection. (R 566; TR 878, 883, 893, 899-900, 1029)

Trial proceedings culminated in verdicts of guilty as charged as to all offenses set forth in the indictment. (R 636-637) Penalty phase proceedings were subsequently conducted and by a vote of twelve to zero, the jury recommended a sentence of death. (R 766-770)

A *Spencer* hearing was held thereafter and memorandum from counsel reviewed by the trial court. (R 1069, 1162-1201) In addition, a presentence investigation report was ordered and received by the trial judge. (R 1137-1138; 1353) At sentencing, Lenard Philmore received the death penalty for his conviction of first degree murder and prison sentences for his non-capital felony convictions. (R 1223-1239)

Timely notice of appeal to this court followed. (R 1252) This brief is filed in support thereof.

STATEMENT OF THE FACTS

Pretrial Motion Hearings:

In a written "motion to suppress statement of defendant and admission of evidence obtained from statement", Lenard Philmore sought exclusion of a series of statements given by him to police authorities. (R 243-245) The motion addressed statements of defendant provided on November 18, 20, 21, 23, and 26, 1997, following his arrest on November 14, 1997 by the Martin County Sheriff's Department.

As a factual basis the motion recited that Lenard Philmore and codefendant Anthony Spann were arrested on November 14, 1997, by the Martin County Sheriff's Department for the offense of Armed Trespass on Posted Land. The next day an additional charge was lodged against defendant arising out of an Indiantown Bank robbery which occurred on November 14, 1997. At the same time, a missing person, Ms. Kazue Perron, was reported from Palm Beach County. This individual was the owner of an automobile observed being driven by Lenard Philmore prior to his arrest on November 14, 1997.

It was further recited that counsel was provided to defendant on November 15, 1997 in the person of Assistant Public Defender John Hetherington who met with

defendant in the Martin County jail. Law enforcement had been in contact with counsel regarding the now missing owner/operator of the vehicle and the belief that Lenard Philmore and/or Anthony Spann had committed murder. In turn, lawyer Hetherington discussed the situation with defendant Philmore. At that point in time, no compelling evidence existed that would warrant the arrest of Lenard Philmore for murder of the missing owner/operator of the automobile. Law enforcement had not recovered any body, no physical proof that a victim was dead was present, and co-arrestee Spann had not given any statements to the authorities. Despite the foregoing and with no other pertinent information available to him regarding either the police investigation or the client himself and with just two days of representation, counsel convinced Lenard Philmore that he would face murder charges and a corresponding death penalty if he did not cooperate with law enforcement and provide a statement.

Thereafter, in a series of tape recorded statements, defendant in the presence of Mr. Hetherington, first denied and then admitted his responsibility for the shooting death of Kazue Perron. As part of his confession, Lenard Philmore agreed to show the authorities where the decedent's body was located.

In seeking suppression of defendant's several statements and any fruits thereof, the motion asserted the failure of Mr. Hetherington to give effective representation to Lenard Philmore by not insisting that his client remain silent in accordance with his

constitutional privilege to do so. [1] Finally, the motion alleged that the statements were not freely and voluntarily given in that defendant believed he would not be subject to the death penalty if he gave a full and honest account of his actions. (R 243-245)

In a written response, the prosecution asserted that the right to the effective assistance of counsel applies only to representation "at trial" and not to matters pretrial as were involved herein. (R 512-521) The state further argued that Lenard Philmore didn't even have a right to counsel, effective or otherwise, because no prosecution had been undertaken against him at the time of his statements. Accordingly, the state noted, if defendant didn't have the right to a lawyer during his interrogation by law enforcement, he certainly didn't have a right to an effective one. Finally, the prosecution asserted that defendant's several statements were not subject to suppression because there was an absence of state action in obtaining them. (R 512-521)

At the suppression hearing, the state introduced Lenard Philmore's arrest affidavits for his November 15, 1997 trespass on posted land while armed and bank robbery of the same date. (SR 15-16) Also presented was defendant's capias of December 17, 1997 in connection with his indictment for murder, kidnaping, robbery,

[1] Subsequent to the subject statements to law enforcement, Lenard Philmore discharged Assistant Public Defender Hetherington and upon request, the trial court appointed independent counsel who prepared and argued defendant's motion to suppress statements. (R 68, 75-76; SR 2-5)

carjacking and grand theft. (SR 16)

Martin County Sheriff's deputy, Gary Bach, testified he was alerted to the robbery of the First Bank of Indiantown and thereafter became the lead investigator. (SR 25-26) The deputy first came into contact with the defendant on November 15, 1997 at 1:30 a.m. following the latter's arrest for trespass on posted land. (SR 26-27) Deputy Bach, along with Federal Bureau of Investigation Special Agent David Von Hawley, advised Mr. Philmore of his constitutional rights and proceeded to question defendant about the Indiantown Bank robbery. (SR 27-29) Lenard Philmore admitted his participation but requested the advice of an attorney before proceeding further. (SR 29-30)

Later that day, an eyewitness identified defendant's image from a photospread as being the subject bank robber. (SR 30-31) An arrest affidavit was then completed charging Lenard Philmore with the Indiantown Bank robbery. (SR 31)

Two days thereafter, defendant's court appointed lawyer, John Hetherington, advised deputy Bach that his client would provide an additional statement the following day. (SR 31-32) During this interview, Lenard Philmore denied any knowledge or involvement in the abduction of Kazue Perron and agreed to a polygraph examination for verification. (SR 32-34)

On cross-examination, deputy Bach acknowledged he believed from the onset

that defendant was somehow involved in Ms. Perron's disappearance and he so advised attorney Hetherington. (SR 35-37) The deputy thought that "Mr. Philmore was in a lot of trouble and...needed an attorney". (SR 37) The disappearance of Kazue Perron was at the time a major focus of the Martin County Sheriff's Department as well as other police agencies. (SR 39) Defendant's counsel informed Deputy Bach that his client "would cooperate and help [law enforcement] try to get to the bottom of what happened to Ms. Perron". (SR 40)

Fellow sheriff's deputy, Dennis Fritchie, conducted a polygraph examination on defendant on November 20, 1997 to determine the veracity of his police statement two days earlier. (SR 41-44) Although Lenard Philmore had counsel, only the examiner and the subject thereof were permitted in the polygraph room. (SR 45, 48-49) In his pre-test interview, the defendant changed his version of events and admitted his presence during the carjacking of Ms. Perron's Lexus. (SR 51-52, 55) The polygraph session was terminated and another police interrogation scheduled for November 21, 1997 after lawyer Hetherington was informed of his client's "change of story". (SR 52-56) This subsequent interview was initiated by defense counsel. (SR 58)

In his next police statement, Lenard Philmore, in the company of his counsel, admitted to being present at the time Kazue Perron was killed. (SR 60-61) Yet

another polygraph examination was set for November 23, 1999. (SR 61) This test was to ascertain if Lenard Philmore was the gunman who actually shot Ms. Perron. (SR 62-63) Although defendant denied being the shooter, the polygraph showed deception in this area. (SR 64-66) Shortly thereafter, defendant admitted to being the actual gunman. (SR 66)

Once again, attorney John Hetherington was notified of his client's latest version of events which in turn led to the scheduling of a further police interrogation for November 26, 1999. (SR 67-68) Present at his final statement was the defendant Lenard Philmore, his counsel John Hetherington, deputy Dennis Fritchie and assistant state attorney Thomas Bakkedahl. (SR 68-69) At this interview, defendant acknowledged that it was he who shot Kazue Perron. (SR 71) During this admission court appointed counsel was present, as was the defendant's request. (SR 70, 72)

Deputy Fritchie indicated that the polygraph examinations administered to Lenard Philmore were to determine the latter's involvement in the abduction and/or murder of Ms. Perron. (SR 76-77) All preliminary matters were conducted in the presence of defendant's counsel, John Hetherington. (SR 77-78) Each time Lenard Philmore changed his story by admitting to events previously denied, deputy Fritchie would terminate the examination so that defendant could consult with his counsel. (SR 79-80) On both occasions thereafter, attorney Hetherington contacted the

investigating detectives and advised them that his client desired to provide a further statement and take authorities to the then unrecovered body of Ms. Perron. (SR 80-83) It appeared that defendant would assume a pre-interview factual position that he would retreat from in his actual police statement. (SR 84-86)

Based on the numerous changes in Lenard Philmore's version of events, it was apparent to all concerned that defendant was not being straightforward with his counsel. (SR 84-86) In fact, deputy Fritchie told Mr. Hetherington that "you need to go in and talk to your guy [because] he's got a little more involvement then what he told you". (SR 86)

At the evidentiary hearing, Assistant Public Defender John Hetherington of the Nineteenth Judicial Circuit testified he had been a lawyer for eleven years, ten of which were devoted to the practice of criminal law. (R 788-790) On November 15, 1997, the day following defendant's arrest, Mr. Hetherington was appointed to represent Lenard Philmore on the Martin County armed trespass charge as well as the Indiantown bank robbery offense. (R 790-791) After consulting with his client, attorney Hetherington allowed Lenard Philmore to give a tape recorded statement to police detectives on November 18, 1997. (R 790-792) Counsel was aware from his conversations with defendant that the police had already attempted to question him regarding a missing female person out of Palm Beach County about which defendant

purportedly had no knowledge. (R 792-793) In this post *Miranda* statement, Lenard Philmore denied any knowledge regarding the disappearance of Kazue Perron. (R 792 - 795)

After the November 18, 1997 police interview, the authorities required defendant to undergo a polygraph examination which was then scheduled for November 20, 1997. (R 796) Attorney Hetherington testified that he believed almost everything Lenard Philmore said to him including his lack of participation in the abduction of Kazue Perron. (R 795-797)

During the course of the pre-polygraph interview on November 20, 1997, the examiner advised counsel that defendant's "story" had changed regarding his knowledge of Ms. Perron and the session was then terminated. (R 798) Although attorney Hetherington was in the general area, he was not actually present in the immediate vicinity of the polygraph examination. (R 798)

Thereafter on November 21, 1997, defendant Philmore and his counsel met with assistant state attorney Thomas Bakkedahl in the Martin County jail where, after discussions, defendant agreed to lead the authorities to the body of Kazue Perron. (R 799-800) According to attorney Hetherington, he permitted his client to make these damaging admissions because of Lenard Philmore's representation that he was not the actual "shooter", although a participant. (R 800) Following this jailhouse meeting,

defendant led the police to Ms. Perron's body. (R 801)

A subsequent statement was given by Lenard Philmore in the presence of his counsel later in the day on November 21, 1997 following recovery of the victim's body. (R 801) It was attorney Hetherington's belief that defendant's "cooperation might be in his best interest". (R 802) Lenard Philmore's admissions at that point revealed his presence at the abduction and murder of Kazue Perron, although insisting he was not the actual triggerman. (R 804)

A second polygraph examination to be performed on November 23, 1997 was then agreed to by defendant and his counsel. (R 804-805) At its completion, police detectives advised Mr. Hetherington that they believed his client Lenard Philmore was lying regarding his degree of involvement. (R 805-807) Shortly thereafter, defendant advised counsel that he was in fact the person who shot Kazue Perron. (R 807-808)

Yet another police interrogation was scheduled for November 26, 1997 where Lenard Philmore, in the presence of his counsel, implicated himself as both a participant and as the actual killer of Kazue Perron. (R 808-810) During this timeframe, Mr. Hetherington was also receiving information from various law enforcement agencies. (R 811)

On cross-examination, attorney Hetherington acknowledged speaking with defendant about the abduction and possible murder almost immediately upon the

inception of his representation. (R 812) At the same time, counsel was being advised by law enforcement that arrestees Philmore and Spann were prime suspects in the bank robbery and abduction/possible murder of Kazue Perron. (R 812-813) Because of the investigator's "time line" of the suspects travel, Mr. Hetherington had some "reservations" about defendant's insistence that he was involved only in the robbery and nothing else. (R 812-814) It is common practice of criminal defense lawyers "to not believe" their criminally accused clients. (R 813-814) Even though he suspected that Lenard Philmore was involved in Ms. Perron's abduction and possible murder, counsel allowed his client to give a statement to the police on November 18, 1997. (R 813-817) Assistant Public Defender Hetherington fully realized he could have refused his client's cooperation and not provided him to law enforcement. (R 816) Instead, counsel was "just letting him tell the story". (R 813-814)

Following defendant's change of story during his first polygraph examination, it was counsel's observation that Lenard Philmore "kept incriminating himself a little bit, inching himself closer and closer to the actual events of the homicide [in] an incremental process". (R 818-820) This was an obvious indication to attorney Hetherington that his client should stop talking but counsel was hoping for life imprisonment as an ultimate resolution. (R 820-821)

Nevertheless, a second polygraph was scheduled at which time defendant

acknowledged being the shooter. (R 821-823) Mr. Hetherington believed Lenard Philmore's best chance for life imprisonment was if he cooperated and was not the triggerman. (R 823-824) According to counsel, the usual protocol in Martin County is that an accused will reap some benefit if he cooperates with the authorities and Mr. Hetherington didn't believe that this case would be "any different". (R 824)

Mr. Hetherington realized from the onset that he was dealing with a "probable murder" case in which the death penalty was a real possibility based on counsel's "compilation of statutory aggravators". (R 825-826) Although no formal discovery was undertaken, defense counsel had received an "immense amount of information from law enforcement and the prosecutor's office". (R 826-827) Counsel at one point advised his client that disclosing the location of Ms. Perron's body was the right thing to do despite its obvious evidentiary considerations pointing to defendant's guilt in the murder. (R 827-830) Attorney Hetherington did "not necessarily" agree that it was his duty to stop his client from further implicating himself in the murder if somehow it would save the defendant's life. (R 829-830) In his opinion, counsel had sufficient information in his two to three days of representation to permit Lenard Philmore to provide statement after statement even though defendant was continuously and increasingly incriminating himself in a capital murder for which the death penalty sentence was a likely outcome. (R 830-831) Mr. Hetherington believed Lenard

Philmore's cooperation to be "the best course of action". (R 832-833) He kept his advice to defendant regarding the latter's cooperation between the two of them. (R 879) The whole "basis of the cooperation" was to receive consideration from the prosecutor. (R 879 - 880) If Lenard Philmore cooperated with the authorities, he was advised by Assistant Public Defender John Hetherington, that he "could avoid the death penalty" in a prosecution for Kazue Perron's murder. (R 882)

Testifying on his own behalf, the defendant Lenard Philmore, age twenty two, told of his first meeting with Assistant Public Defender John Hetherington the day following his arrest. (R 836-837) They discussed at once the abduction of Kazue Perron and the police investigation that had been communicated to counsel. (R 837-838) After defendant acknowledged his participation in the bank robbery, counsel told him he had better cooperate with the authorities if he hoped to avoid the electric chair. (R 838) Lenard Philmore believed that he was already being charged with murder since appointed counsel came to speak to him about it. (R 838-840)

Although defendant denied any involvement in the murder during his November 18, 1997 police statement, attorney Hetherington continued to speak to his client about the murder charge and the need to cooperate in the investigation so as to help himself. (R 842-844) Defense counsel stressed the need for defendant to disclose the location of Ms. Perron's body so that her husband could conduct a decent

burial. (R 844-845) Based on this conversation, Lenard Philmore ultimately told the police where the deceased was to be found. (R 845, 847)

Continuing to follow counsel's advice, defendant gave his full confession to the abduction and murder in which he was the gunman. (R 544-565, 847-849) Finally, on December 16, 1997, Lenard Philmore, along with his counsel, appeared before the grand jury where defendant again confessed. (R 544 - 565, 849-850)

It was defendant's belief and understanding from his conversations with Assistant Public Defender John Hetherington, that his cooperation with the state would result in a waiver of the death penalty in his prosecution for murder. (R 850-851) The defendant's cooperation would be his mitigation that would allow him to avoid the death penalty. (R 851-852, 862-864, 867-870, 876-878)

In defendant's uncounseled initial police statement of November 15, 1997 he denied any involvement in the murder. (R 853-856) It was not until he received the benefit of appointed counsel's advice that Lenard Philmore confessed to the abduction and murder of Kazue Perron. (R 855-857) Attorney Hetherington's biggest concern was having his client disclose the location of Ms. Perron's body. (R 858-859, 861)

Next testifying at the suppression hearing was Assistant State Attorney Thomas Bakkedahl who had met with both defendant and his counsel on several occasions during law enforcement's investigation of the case. (R 883-884) Prior to Lenard

Philmore's grand jury testimony, this prosecutor met with defendant and reviewed the questions to be asked in front of the grand jury. (R 884) Assistant Public Defender John Hetherington was present for the "preparation" of defendant for his testimony before the grand jury. (R 884-885) Mr. Bakkedahl stated that he had not, on behalf of the state, made any assurances to defendant or his counsel regarding ultimate penalty in a murder prosecution. (R 885-887)

Last testifying at the motion to suppress statements hearing was Thomas Garland, one of two newly appointed lawyers for Lenard Philmore. (R 888-889) Co-counsel Garland stated that following his appointment he spoke to prior counsel Hetherington regarding the reason for permitting defendant's statements to law enforcement so shortly after the arrest. (R 889, 893) Attorney Hetherington told defendant's new counsel that he permitted Lenard Philmore to confess to the police based on an agreement with the prosecutor that his client would receive a sentence of life imprisonment for the murder of Ms. Perron. (R 893-894) Subsequently, prior counsel Hetherington denied making such a statement. (R 895-896)

This completed all the testimony at the hearing on the motion to suppress defendant's several statements. (R 896) The trial judge, upon motion of the state, struck the testimony of co-counsel Thomas Garland as being for impeachment purposes without a properly laid foundation. (R 898-899)

Following argument of respective counsel, the trial judge denied the motion to suppress as it related to defendant's statements to law enforcement in the presence of his counsel on November 18, 21, and 26, 1997. (R 566, 954) The motion was granted as to defendant's statements to the polygraph examiner outside the presence of his attorney on November 20 and 23, 1997. (R 951, 954) The trial judge said she viewed the motion to suppress statements as "going to whether or not the statements were given freely and voluntarily and whether the defendant was afforded the right to counsel as guaranteed him by the constitution at the time the statements were made". (R 948, 952) It was the court's ruling that Lenard Philmore received effective assistance of counsel because of the judge's belief that counsel's "actions were substantially influenced by the defendant's own statements...and wishes...". (R 952-953) Further, the trial judge ruled 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 as contemplated under the Constitution". (R 953)

As to Lenard Philmore's grand jury testimony, the court deferred ruling until a later appropriate time. (R 900-901; 954; TR 174-175; 698; 786-787; 865-866) Thereafter, during trial, the court reconsidered the issue and then denied suppression

of defendant's grand jury testimony. (TR 871-875) The trial judge found that Lenard Philmore's grand jury appearance was made without any promises in exchange for his testimony and "in the presence of competent counsel as it's contemplated in the Constitution". (TR 872-873)

Jury Selection:

Ms. Tajuana Holt was part of the prospective jury panel in seat number eleven. (TR 473, 476) Even before she was questioned by counsel, the prosecutor stated to the court that Ms. Holt "was sleeping for a good portion of yesterday's jury selection" with a request that the judge "keep an eye on her". (TR 476) The trial court agreed to do so. (TR 476)

Upon inquiry, the prospective juror indicated she resided in Hobe Sound, having lived in Martin County her entire life. (TR 507) Ms. Holt had never before been summoned for jury duty and was more than willing to serve. (TR 507)

While the venierwoman was employed at Publix supermarkets, her mother was a deputy clerk of court in Martin County. (TR 507-508) In fact, Rosa Holt was the managing clerk of Judge Angelos' division. (TR 508) The two had not discussed the instant case nor did they even have a practice of discussing the mother's duties at the courthouse. (TR 508)

As to the death penalty, Tajuana Holt agreed that the ultimate penalty has its

place in the appropriate case, just as did a sentence of life imprisonment. (TR 508-509) The prospective juror had not read or heard anything about the case prior to her appearance. (TR 509-510)

Upon further questioning by the prosecutor, Ms. Holt was adamant that she could be fair to both the state as well as the defendant. (TR 512) She indicated that she could, without hesitation, vote the defendant guilty if the state proved him so. (TR 513) Conversely, the prospective juror said that should the state prove only that a horrible crime took place, but not that defendant Philmore committed it, she would vote for an acquittal. (TR 513)

Continuing, Ms. Holt advised the prosecutor that in a potential penalty phase proceeding, she could look the defendant in the eye and tell him she voted for a death sentence should the established aggravating circumstances outweigh the proven mitigating factors. (TR 513) There was nothing known to the prospective juror that would effect her ability to serve on the petit jury. (TR 513-514)

After the inquiry of counsel and prior to the exercise of peremptory challenges, the State sought the excusal of Ms. Holt for cause because "she was sleeping during the proceedings" on both days. (TR 836) The trial judge denied the prosecution's request after noting that Ms. Holt was "actively" participating in the questioning and was definitely not sleeping. (TR 836) The trial judge even asked her in-court clerk to

watch the prospective juror for any lapses with negative results. (TR 843) In denying the prosecutor's cause challenge, the court did not, however, find it to be "contrieved". (TR 843)

Thereafter, the state announced its peremptory excusal of Ms. Holt which was immediately challenged by the defendant. (TR 844) Defense counsel noted a likelihood that the prospective juror was being challenged by the prosecution because of her African-American race. (TR 844) In response the prosecutor stated that his reason for the excusal was a statement by the prospective juror's mother to the state attorney's staff that the state "would be better off without her daughter on the jury". (TR 846) No details were provided. (TR 846)

Defense counsel objected to this unknown hearsay reason while noting that Ms. Holt was the only remaining black member of the panel, the only other two having been excused for medical and pretrial publicity considerations. (TR 846-847) The defense adamantly opposed the dismissal of this African-American woman which effectively created an all white jury to sit in judgment of a black Lenard Philmore. (TR 847)

The trial judge found, however, that the explanation given by the state was "facially race neutral" and therefore genuine. (TR 848-849) Tajuana Holt was then excused peremptorily over defense objection. (TR 849)

Motion In Limine:

Prior to the presentation of evidence, the parties stipulated to the admissibility of much of the physical evidence other than certain photographs which depicted the deceased upon the recovery of her body. (TR 877-900) The trial judge heard argument as to identification exhibits marked "B-B", "B-C" and "B-L" which the defense sought to exclude. (TR 885-886) The latter exhibit was a photograph of the gunshot wound to the victim's head taken at the time of the autopsy. (TR 890-891; SR 170-171) Because Ms. Perron's body had been in water for almost a week and had suffered animal damage to the face, exhibit "B-L" was as the prosecutor noted, "very gruesome". (TR 887-895)

As part of its argument, defense counsel represented to the court that there would be no issue as to fact of death, cause of death or identity of the deceased. (TR 887-890) The trial judge, however, sought a defense stipulation in front of the jury that Lenard Philmore shot and killed Ms. Perron which counsel was not prepared to do. (TR 889-893) Consequently, defense objection to exhibit "B-L" as not relevant and unduly prejudicial was overruled subject to the proper predicate being laid by the medical examiner, Dr. Hobin. (TR 893-895)

Exhibits "B-B" and "B-C" were photographs of the decedent taken at the location where her body was found. (TR 895-896) They depicted Ms. Perron's body

in a canal beyond a row of reeds. (TR 896-897) Again, the court reserved ruling until their offering during trial. (TR 898)

Trial Proceedings:

In opening statements, defense counsel conceded all of the allegations against Lenard Philmore but for the element of premeditation as to the charge of first degree murder. (TR 929-937) Counsel asserted that defendant made no conscious decision to shoot Kazue Perron nor did he do so as a consequence of the carjacking of her automobile. (TR 937)

Keyontra Cooper, the initial prosecution witness, testified she was dating defendant at the time in question and she knew codefendant Anthony Spann as a friend of Mr. Philmore. (TR 939-942) Ms. Cooper spent the night prior to the incident in a motel along with Philmore, Spann and a second female, Latoya Stevenson (TR 943-944) The two defendants were utilizing a Subaru motor vehicle and were in possession of two firearms. (TR 944-945) A plan was had whereby the four were going to go out of town the next day. (TR 945-947)

The deceased's husband, Jean Claude Perron, stated that his wife left to visit a friend Atsko LeFeourte in the afternoon of her disappearance. (TR 950-958) She never arrived at her destination. (TR 958-959) Upon leaving the couple's house, Ms. Perron was wearing GAP clothing and driving a gold Lexus. (TR 954-958, 961-962)

Martha Solis, a housekeeper in the development where the LeFeourte's resided, saw two black men near that house on the day in question. (TR 963-966) One was running from the home and the other was operating an older blue motor vehicle. (TR 966-968) The black man running was big, wore a white shirt without sleeves and had a big gold chain on his neck. (TR 966)

Lysle Linsley was living on his boat in an Indiantown marina and while on his way to lunch on the day in question, observed two automobiles pulled over on the side of the road. (TR 973-978) One was a goldish-colored Lexus and the other a bluish older vehicle. (TR 977-983) Later that day, the police had the area where he last saw the blue car barricaded off while investigating the car itself. (TR 979-984)

Gary Bach, a Martin County Deputy Sheriff investigated the Indiantown Bank robbery which he determined from witness interviews happened at 1:58 P.M. on November 14, 1997. (TR 985-989) A photographic lineup displayed to an eyewitness, Sandra Maguire, resulted in her identification of defendant as the bank robber. (TR 989-991) In a subsequent police interview of Lenard Philmore in the presence of Special Agent David Von Hawley of the Federal Bureau of Investigation and Assistant Public Defender John Hetherington, the defendant after *Miranda* warnings admitted participation in the Indiantown Bank robbery. (TR 1026-1031) Defendant said that he "snatched the money off the counter" in concert with co-felon Anthony

Spann. (TR 1032-1033) Lenard Philmore denied at that time any knowledge or involvement in the carjacking or abduction of Kazue Perron. (TR 1032-1037) The defendant appeared docile in his demeanor. (TR 1039)

Indiantown Bank teller, Sandra Maguire, told of performing her teller duties on the day in question and while counting a cash deposit, a person appeared and snatched the money before running from the building. (TR 999-1002) When subsequently shown a photospread, Ms. Maquire selected the image of Lenard Philmore who the witness also identified in court. (TR 1002-1003) The cash loss was $1,100.00 (TR 1004) No weapons were observed by the witness. (TR 1004-1005)

Rosa Quinonez, a then employee at the Indiantown Bank, heard Sandra Macquire's scream and then observed a black male flee the scene in an older model bluish-gray automobile. (TR 1005-1010) No monies or weapons were noticed by the witness. (TR 1011-1012)

Jose Martinez, a teacher at the T&M Ranch for the mentally handicapped, was at the Indiantown Bank with his students when he saw two black men leave the facility in a small blue car. (TR 1012-1019) The witness saw nothing being carried by the man who ran to and entered the vehicle before it drove off. (TR 1019)

Leo Gomez worked in close proximity to the Indiantown Bank and on the day in question watched two black males hurriedly flee the area of the bank in a small

vehicle. (TR 1020-1025) The witness could make no identifications. (TR 1025)

Deputy Steven Winegarden was on routine patrol when he heard a B.O.L.O. (a general alert) for a small grayish or black vehicle containing black males that had just robbed the Indiantown Bank. (TR 1040-1043) The deputy later located the abandoned Subaru automobile at a rural pump station. (TR 1043-1051)

Deputy Bagley also processed the crime scene established at the location where Ms. Perron's body was found in an isolated area of Indiantown. (TR 1311-1315) The decedent was laying in a drainage canal well concealed by shrubbery and vegetation. (TR 1315-1316) Forensic evidence including blood spatter, hair, two .380 shell casings, and a spent projectile recovered from the adjacent dirt roadway. (TR 1316-1327) At the autopsy, a projectile was removed from the decedent's head. (TR 1327-1328)

It was a week after her disappearance that Ms. Perron's remains were found. (TR 1341) The body itself was not capable of a positive identification based on her physical appearance due to postmortem decay from being in the water for such a period of time. (TR 1328-1329) Identification was sought via Ms. Perron's dental records obtained from her dentist. (TR 1329)

The casings and projectiles recovered were submitted for processing. (TR 1328) A crime laboratory examination revealed that they were fired from the .380

caliber Taurus found in the orange grove. (TR 1328) A photograph of the victim's body at the scene (exhibit "B-B") was entered into evidence over defense objection. (TR 1330-1333) Time and distance between the scenes of the abduction, murder, pump station, bank and girlfriend's house were provided. (TR 1335-1340)

Rebecca Bagley, a Martin County Deputy Sheriff, processed the crime scene at the Indiantown Bank as well as the getaway vehicle. (TR 1052-1058) A deposit slip from the bank was found in the Subaru in the amount of $1,100.00 cash. (TR 1058-1061) An altered temporary tag was affixed to the vehicle. (TR 1062-1063) Registration certificates showed the subject automobile to be owned by Folia A. Spann. (TR 1063-1065) A white "T-shirt" collected from the Subaru was sent to the crime lab for analysis of reddish brown stains present thereon. (TR 1058-1059; 1065-1067)

Toya Stevenson was with defendant Philmore, codefendant Spann and Keyontra Cooper at a local motel the night prior to the subject incident. (TR 1068-1071) Transportation was via a gray Subaru and firearms were observed. (TR 1070-1072) The next day, codefendant Spann was operating a gold Lexus automobile in which the four were riding when they were suddenly followed by the police. (TR 1073-1090) After a vehicle chase north on Interstate 95, a tire on the Lexus failed and the four occupants fled on foot. (TR 1080-1081) Philmore and Spann each carried a firearm

as they ran into adjoining orange groves. (TR 1080-1082)

Upon arrival of the police, all were ultimately caught and placed into custody. (TR 1083-1084) Nothing had been discussed regarding a planned bank robbery. (TR 1087-1088)

Willie Thomas, then a police officer with the West Palm Beach Police Department, was working an unrelated undercover police investigation on the day in question when he happened to observe co-felon Anthony Spann drive by in a gold Lexus. (TR 1093-1096) Believing that Spann had an outstanding arrest warrant, police officers attempted to stop the Lexus but it sped off followed by police vehicles. (TR 1095-1098)

Jeffrey Nathanson, also a West Palm Beach police officer, became involved in the pursuit of the Lexus northbound on I-95 at speeds in excess of one-hundred miles per hour. (TR 1099-1103) Sergeant Nathanson lost sight of the suspect's vehicle in northern Palm Beach County. (TR 1104)

Ted Martin was operating his motorcycle northbound on the interstate when the Lexus sped past him in such a manner that he chose to chase the getaway car himself. (TR 1109-1113) A flat tire halted the proceeding whereupon two black males and two black females exited the Lexus and fled into the nearby orange groves. (TR 1114-1115) The witness notified the authorities who ultimately responded. (TR 1115-1126)

John Scarborough was the manager of the Sunrise Citrus Groves in Martin County and while in the groves on the day at issue, came upon two black men running through the trees. (TR 1147-1150) After being confronted, the pair told Mr. Scarborough they were running from the law after sustaining a tire blowout on their car. (TR 1150) A Palm Beach County Sheriff's helicopter appeared and the witness himself sped off after learning that the defendants were armed. (TR 1151-1154) Lenard Philmore was identified as being one of the two men. (TR 1154-1155) Subsequently, both men were captured by the authorities. (TR 1156-1158) With the witness' help, two firearms were thereafter located in a ditch nearby the scene of the confrontation in the grove. (TR 1158-1164)

Lieutenant John Wardle of the Martin County Sheriff's Office supervised the manhunt in the orange grove with his tracking dogs which culminated in the arrest of Philmore and Spann. (TR 1168-1175) Defendant was so identified in court. (TR 1175)

Crime scene detective Deputy Jon Wright of the Martin County Sheriff's Office took possession of the two firearms located by John Scarborough in the latter's orange grove. (TR 1176-1179) No latent fingerprints were obtainable from either the .380 caliber Taurus or the .40 caliber Glock. (TR 1178-1180)

John Cummings, another Martin County Sheriff's Deputy, assisted in the

manhunt and he recovered currency from both Spann and Philmore. (TR 1181-1186) Jewelry was also collected from defendant, including necklaces, bracelet and ring. (TR 1186-1187)

William Bruffey of the Martin County Sheriff's Office processed the Lexus automobile which produced numerous swabs of a reddish substance which were turned over to the crime laboratory. (TR 1181-1196) These included samples both visible to the naked eye and those which were not. (TR 1195-1197)

Thereafter two videotapes dated November 21 and 26, 1997 recording Lenard Philmore's statements to law enforcement were admitted into evidence. (TR 1197-1203) The first was played to the jury through Martin County Sheriff's detective Dennis Fritchie. (TR 1198-1207)

On November 21, 1997, defendant, via his counsel, agreed to show law enforcement where Kazue Perron's body could be found. (TR 1207-1208) After traveling to the remote area outside Indiantown, the decedent's remains were subsequently located in an area covered by significant growth and vegetation. (TR 1208-1211) Back at the Sheriff's department, defendant in the presence of his counsel, Assistant Public Defender John Hetherington, gave a video taped recorded statement. (TR 1211-1213; 1222-1304)

This statement included Lenard Philmore's request for a lawyer which was

provided by the state in the person of attorney John Hetherington. (TR 1224) Defendant then recited the night prior where, at a motel in the company of codefendant Anthony Spann and their respective girlfriends, the men discussed robbing a bank. (TR 1225) The need for a getaway car was fulfilled by traveling to Palm Beach County where Spann carjacked Kazue Perron's gold Lexus at gunpoint. (TR 1226-1232) After driving to a secluded area near Indiantown, codefendant Spann shot Ms. Perron twice. (TR 1232-1236) The pair then robbed the Indiantown Bank using Spann's Subaru which they later abandoned in favor of the stolen Lexus. (TR 1236-1241)

After picking up their girlfriends they found themselves being followed by police which resulted in a high speed chase into Martin county, a flat tire and ultimate capture while attempting to hide in the orange grove. (TR 1241-1250) Lenard Philmore insisted he had no part in the physical abduction of Kazue Perron or her shooting death. (TR 1259-1262)

Detective Fritchie then engaged in an extensive and extended interrogation of defendant which indicated law enforcement's skepticism of Lenard Philmore's claim that co-felon Spann was either the abductor or killer of Ms. Perron. (TR 1263-1283) Defendant's version contradicted witness accounts as well as his own prior statements. (TR 1255, 1264, 1268-1269, 1271, 1273-1285, 1289, 1292-1300) Attorney

Hetherington expressed his advice to defendant that he now clarify all matters "including things about Sophia, things about the guns, things about the actual kidnaping and who was present". (TR 1289-1290) Even Lenard Philmore realized that "it may seem like [he] might lie..." . (TR 1290)

John Williams, a forensic dentist, conducted an investigation as to identification of the decedent through her dental records as compared to post-mortem x-rays. (TR 1347-1351) The remains were of Kazue Perron. (TR 1352)

Earl Ritzline, a criminalist at the Florida Regional Crime Laboratory conducted deoxyribonucleic analysis of the blood of the decedent and samples collected from the shooting scene of the Lexus, including the white "T-shirt". (TR 1353-1374) All were consistent. (TR 1374-1377)

Dr. Frederick Hobin, the area medical examiner, received Ms. Perron's body for autopsy and x-rays were taken so as to locate a projectile in her skull. (TR 1381-1383) In a proffer as to the need for contested photograph state's exhibit "B-L", the doctor stated it would make his testimony "realistic". (TR 1384) This image depicted Ms. Perron's face with its attendant decay and gunshot wound damage and it had been previously described by the prosecutor as a "gruesome" photograph. (TR 887-895) Dr. Hobin conceded he would not be "inhibited" in his expert testimony if the subject photograph was cropped below the forehead which was the location of the gunshot

wound. (TR 1383-1385)

The trial judge permitted the subject photograph since it showed the entry wound including its "nature" and "location" and because it bore "on the 'intent' of the defendant which has become a key issue in this case". (TR 1392-1393)

Before the jury Dr. Hobin testified he first viewed Ms. Perron's body in the setting where it was found and thereafter at the medical examiner's office. (TR 1396-1402) The body had undergone "significant decomposition", was undergoing "putrefaction" and had sustained "vermin injury". (TR 1403-1406, 1416) Ms. Perron "died as a result of a single gunshot injury...to the upper, middle part of her head". (TR 1404)

The subject photograph (now state's exhibit 64) showed decomposition and vermin injury to such a degree that Dr. Hobin had to point out the location of the decedent's facial features which from looking at the image, were unobservable. (TR 1405-1406) The angle of the single projectile's path was demonstrated through the display of x-rays taken of the decedent's skull. (TR 1408-1412) The bullet passed in a downward direction but it was impossible for Dr. Hobin to say "what position anybody occupied in space". (TR 1412-1415)

Death was most probably instantaneous. (TR 1413, 1415) The decay and vermin damage came after death. (TR 1417)

Finally, so as to present Lenard Philmore's November 26, 1997 police video taped interview, sheriff's deputy Dennis Fritchie was recalled. (TR 1418-1420) In this session the defendant stated he was invoking his right to have an attorney present and again the state provided counsel in the person of Assistant Public Defender John Hetherington. (TR 1421-1423) Indeed, attorney Hetherington advised Detective Fritchie that he "agreed with everything" that the police were doing. (TR 1423-1424)

Once again Lenard Philmore told of the night in the motel and plans for a bank robbery with its attendant need for a getaway car. (TR 1424-1426) Each was armed as they went to Palm Beach County, followed Ms. Perron and carjacked her gold Lexus by abducting her at gunpoint. (TR 1427-1439) Defendant Philmore drove Ms. Perron in her Lexus to a remote area outside Indiantown where he shot her in the presence of co-felon Anthony Spann. (TR 1439-1447) The defendant put the body in the canal before going into Indiantown where an armed Lenard Philmore robbed the bank. (TR 1448-1454)

After dumping Spann's Subaru, the pair fled in the gold Lexus where they picked up their girlfriends en route to New York. (TR 1434, 1454-1457) When the four made a brief stop to pick up defendant's shoes from a friend's house, an undercover police officer recognized co-felon Spann as a fugitive and the police chase ensued. (TR 1458-1459) A flat tire led to their capture in the orange groves. (TR

1458-1461)

Lenard Philmore's explanation for shooting Kazue Perron was "stupid old me did it" at the request of co-felon Anthony Spann who told defendant to "trust me [Spann] on this...I know what I'm doin". (TR 1435, 1444, 1463, 1469)

Lastly, Detective Fritchie recited several questions posed to Lenard Philmore in his grand jury appearance and his answers thereto. (TR 1482-1483) Included therein was defendant's statement that he took Ms. Perron's rings but later, on co-felon Spann's advice, threw them away. (TR 1483)

At all times during each of his several statements, Lenard Philmore was docile and somber. (TR 1484) The defendant appeared sad and remorseful and at times he cried. (TR 1484-1485) Lenard Philmore just kept talking to law enforcement even after numerous consultations with his lawyer wherein he finally gave a confession the police believed to be truthful. (TR 1485) The defendant was basically responsible for the recovery of Ms. Perron's body. (TR 1486) Lenard Philmore's grand jury appearance and confession was certainly "unusual". (TR 1487)

This completed the prosecution's proof. (TR 1489) Defendant's motion for a judgment of acquittal as to each charge was denied. (TR 1497-1498)

The defense rested without the presentation of witnesses or the introduction of evidence. (TR 1527-1528, 1535) A renewed motion for judgment of acquittal on all

counts was denied. (TR 1528)

Closing Arguments:

In his closing argument, defense counsel for Lenard Philmore did not take issue with the factual evidence presented by the prosecution but rather he contested only what appropriate conclusion was to be drawn therefrom. (TR 1536-1537) As he advised the jury in opening statements, the sole issue for their consideration was the defendant's intent at the time of the shooting of Kazue Perron - whether or not Lenard Philmore premeditated the act. (TR 1548) Defense counsel argued that the shooting could not otherwise be a felony murder since it did not occur as a necessary consequence of the carjacking, robbery, or kidnaping. (TR 1548-1549) Defendant's trial lawyer argued that the proof suggested a murder in the second degree. (TR 1549, 1582)

The prosecutor, in his closing argument, stressed the "tenuous grasp" that individuals have on life because of the ability of others to exercise their "free will". (TR 1550-1551, 1577) In reciting defendant's initial failed carjacking on North Lake Boulevard, the prosecutor noted that had it been fulfilled, it would be a different family sitting in the courtroom rather than Ms. Perron's husband. (TR 1551-1552) He, of course, made reference to the "gruesome" photograph depicting the unrecognizable face of Kazue Perron upon the discovery of her body in the water

seven days following her death. (TR 1553)

Verdict:

Less than two hours following the start of their deliberations, the jury returned verdicts of guilty as charged on all counts. (TR 1627, 1637-1641) Penalty phase proceedings were scheduled for the following week. (TR 1641)

Penalty Phase Proceedings:

Prior to proceeding, defense counsel stipulated to certain prior convictions of Lenard Philmore as to paper judgments and sentences only. These included a battery in a detention facility, attempted first degree murder, armed robbery, attempted robbery and robbery. (TR 1703-1705)

Before the jury Randy Podswell testified that he was a corrections officer at the Palm Beach County Jail when he was hit in the face by Lenard Philmore who was subsequently convicted of battery in a detention facility. (TR 1767-1778) Michael Buss recited that he owned a pawn shop where he was robbed at gunpoint by Lenard Philmore who was thereafter convicted of attempted first degree murder with a firearm, robbery with a firearm, and burglary of an occupied structure. (TR 1792) Saul Brito testified that he was a watch maker and jewelry store owner at which time he was accosted by a gun wielding Lenard Philmore who was later convicted of attempted first degree murder and armed burglary of an occupied structure. (TR

1793-1803) Another robbery offense and subsequent conviction of Lenard Philmore was entered without witness corroboration. (TR 1803-1804)

Victim impact evidence was provided by the decedent's husband Jean Claude Perron who described his late wife as a talented, educated, caring and loving person who loved animals and all people. (TR 1808-1811) Additional victim impact testimony came from Chandra Bill Rabinacker who observed that Ms. Perron was always serving others both physically and spiritually and who had unabridged love of her husband. (TR 1814-1818) This constituted the state's penalty phase case in chief.

For the defense, Dr. Frank Wood, a professor of neurology at Wake Forest University, testified he specialized in the field of neuroscience and neuropsychology which is the study of the relationship between brain damage and behavior and the clinical discipline of diagnosing that brain damage and its cause. (TR 1939-1940) The witness had a particular expertise in the area of brain imaging as a measure of brain damage and neuropsychological testing as evidence of brain damage. (TR 1944)

Brain imaging is done via a electroencephalogram (E.E.G.), magnetic resonance imaging (M.R.I.) and by positron emission tomography (P.E.T.). (TR 1944-1946) The latter is a three dimensional imaging of the actual metabolic activity of the brain. (TR 1946)

Upon his appointment by the trial court, Dr. Wood conducted a brain imaging

P.E.T. scan of the brain of Lenard Philmore and examined his school history, all in order to determine any evidence of brain damage. (TR 1949-1950) These techniques are widely accepted in the scientific community for measuring brain function and dysfunction. (TR 1952)

Lenard Philmore's school records revealed extremely serious behavioral and psychological problems after age nine where none previously existed. (TR 1953-1959) Wechsler Intelligence Scale for Children, Revised test results set forth by the school psychologist showed defendant to be in the average to low average range but with an extremely poor performance on one particular subject of rearrangements of abstract designs. (TR 1959-1963; 2049-2050) This psychologist, Ms. Beverly Van Meter noted her observations of possible neurological impairment. (TR 1962-1963) Subsequent school intelligence quotient testing several years thereafter revealed scores one would expect from somebody with a brain injury. (TR 1964-1969) All of this data indicated a child with a traumatic brain injury who should have been referred for remedial services including medical treatment and appropriate medication. (TR 1969) Despite repeated school history entries of violence towards himself or others, no professional assistance was provided. (TR 1970)

Dr. Wood diagnosed Lenard Philmore to suffer from a left posterior brain abnormality which was vividly apparent in the images taken at Jacksonville Memorial

Hospital P.E.T. Scan Center. (TR 1973-1979) An additional review of the P.E.T. scans by Dr. John Burdette, a neuroradiologist at Wake Forest University, confirmed the existence of a brain abnormality most likely consistent with a head injury. (TR 1979-1986, 1990-1993) Based on the defendant's school records, the witness felt that such an injury took place around age eight. (TR 2039-2040)

Dr. Wood was satisfied to a clinical and scientific certainty based on the school history and P.E.T. scan evidence that Lenard Philmore suffered from brain injury. (TR 1995, 2036-2037) As such, it was a contributing cause of defendant's abnormal behavior. (TR 1995-1996)

Next testifying was Dr. Robert Berland, a forensic psychologist, who had a private practice but was formerly a senior forensic psychologist at Florida State Hospital. (TR 2073-2076) As part of his work at the Chattahochee state mental facility, the witness developed a system of analysis to determine patients who were malingerers and only pretended to have a mental health disorder. (TR 2076) Dr. Berland was board certified by the American Board of Professional Psychology. (TR 2077-2078)

An examination, testing and evaluation of Lenard Philmore along with a review of various records and witness interviews was employed in a determination of the presence of any mental illness. (TR 2084-2086) No evidence of malingering was

found. (TR 2086, 2103-2104) Psychological testing included the Minnesota Multi-phasic Personality Inventory (MMPI) and the Wechsler Adult Intelligence Scale (WAIS) and a review of prior public school psychological testing. (TR 2086-2087) Testing via MMPI results in a "demonstrative profile" that has a practical application. (TR 2092) If anything, defendant made a modest attempt to minimize his mental illness. (TR 2104)

Lenard Philmore showed signs of psychotic disturbance including paranoia, depression, mania, hallucinations and delusional paranoid thinking. (TR 2105 - 2107) The defendant's profile was one of a "chronic biological mental illness". (TR 2107)

WAIS test results, which are very reliable indicators of impairment from brain injury, revealed clinical and statistical likelihood of impairment due to a brain injury. (TR 2108-2112, 2246-2248, 2275-2276) Past testing by way of WAIS at age nine also showed impairment most likely from brain injury. (TR 2112-2114) Lenard Philmore had an I.Q. of 98. (TR 2235-2237) Dr. Berland's clinical interview of Lenard Philmore revealed hallucinations, both audio, visual and tactical, delusional thinking, depression and mania. (TR 2116-2128) Lay witness interviews were corroborative as were defendant's school records. (TR 2127-2131, 2273) Severe blows to the head of Lenard Philmore were reported by family members. (TR 2131-2136)

Mitigating circumstances that Dr. Berman found applicable to defendant included his "extreme mental or emotional disturbance at the time of the offense", his "inability to conform his conduct to the requirements of law", his "substantial domination" by his co-felon, his post-traumatic stress syndrome as a result of witnessing the shotgun murder of his niece, his prior involuntary civil mental health commitment, his subjection to physical abuse as a child, his history of extensive drug and alcohol abuse, his ability to form loving relationships, his subjection to sexual abuse as a child and his classification as a severely emotionally handicapped student, yet with an interest in learning. (TR 2137-2141, 2145-2156)

The defendant's half-sister, Yolanda Ulysse, was raised in the same household and she described her step-father, Willy Philmore, as a physically abusive drunk. (TR 1834-1837) Defendant's father would hit his wife and when Lenard Philmore tried to protect her, he too would be hit, one time in the head with a glass ashtray. (TR 1837-1840) Lenard Philmore had to flee to the Safe Harbor runaway shelter. (TR 1840-1841)

Ms. Ulysse recited another instance of head injury when defendant was forced into a concrete wall. (TR 1841-1842) The witness' daughter, then age three, was murdered in front of defendant by a gunshot meant for him. (TR 1843-1846) Lenard Philmore was then age thirteen and was greatly affected by the incident. (TR 1845-

1849)

Her brother expressed discomfort about his association with co-felon Anthony Spann. (TR 1850) Lenard Philmore always protected his sister in what the witness described as a very bad childhood. (TR 1851-1853)

A second sister, Lashonda Philmore, had a close relationship with her brother in a household where their father was very abusive, both verbally and physically. (TR 1863-1871) She was present with Lenard Philmore when their niece was gunned down in front of the house. (TR 1871-1873) Because her brother felt responsible, his behavior changed and he started drinking alcohol. (TR 1872-1873)

Ms. Philmore also recalled her father hitting defendant in the head with an ashtray which caused her brother to seek refuge in a runaway shelter. (TR 1873-1874) In a childhood incident, the witness struck her brother in the head with a hammer. (TR 1874-1875)

Raymond Philmore, defendant's brother, also grew up in the same household and he recalled the violence imposed by his father upon the family. (TR 1880-1882; 1884-1885) The witness also told of the head injury sustained by his brother when knocked into a brick wall and on another occasion when hit by a rock. (TR 1882-1884) Lenard Philmore fled to a runaway safe house after an incident where he was struck in the head with an ashtray by their father. (TR 1884-1885)

The witness described how defendant befriended a blind boy in the neighborhood and protected another handicapped youth from local bullies. (TR 1885-1887) After the murder of their niece, defendant started abusing alcohol and became withdrawn. (TR 1887-1891) At school, Lenard Philmore was placed in classes for the emotionally handicapped. (TR 1895-1896)

Frankie Miller, a cousin of defendant, recited the regularity of Willy Philmore's violence towards other family members, both verbal and physical. (TR 1898-1901) After defendant's release from an earlier prison sentence, he abused both drugs and alcohol. (TR 1902-1904) Although his cousin associated with co-felon Anthony Spann, it appeared to be an unfriendly relationship. (TR 1904-1908)

This completed the defense presentation of penalty phase mitigation evidence. (TR 2281, 2285) Lenard Philmore chose not to become a witness on his own behalf. (TR 2281-2284)

In rebuttal, the state presented clinical psychologist Dr. Gregory Landrum who had evaluated defendant after the guilt phase of the proceedings. (TR 2285-2289) His review of the relevant records and statements, included defendant's "polygraph examinations". (TR 2289-2290) Dr. Landrum disagreed with any conclusion that defendant suffered from psychosis or brain damage, although there was a clearly identifiable "weakness in terms of his abilities". (TR 2291-2292, 2309) Dr. Landrum

was of the opinion that Lenard Philmore had in the past suffered from a "conduct disorder" and at present met the criteria for an "antisocial personality disorder". (TR 2311-2313) In other words, defendant was "a person with criminal thinking". (TR 2313)

The witness acknowledged that several mitigating circumstances were applicable to Lenard Philmore including a history of substance abuse, post-traumatic stress disorder as a result of his niece's murder, physical abuse at the hand of his father and an ability to form loving relationships. (TR 2314-2315)

Lastly, the state called professor of psychiatry, Dr. Helen Mayberg who specialized in the study of behavioral psychiatric disorders utilizing brain imaging. (TR 2370-2376) It was the opinion of the witness that P.E.T. scan imaging was not generally recognized as a method of identifying, in and of itself, brain damage. (TR 2381-2390) Although the prosecutor suggested that someone could manipulate the scan image to create an area of hypometabalism, Dr. Mayberg questioned why someone would want to create an impression of a lesion in someone's brain. (TR 2409) She believed, however, that defense expert Dr. Wood mistakenly identified an area as hypometabolism when it was not. (TR 2426-2456)

This concluded all the penalty phase evidence. (TR 2469 -2471) Following closing arguments by respective counsel, the jury deliberated for approximately an

hour before returning a unanimous advisory sentence of death. (TR 2567, 2582-2585) Both a presentence investigation report and sentencing memorandum were ordered by the court to be prepared prior to a sentencing hearing. (TR 2586-2588)

Spencer Hearing:

Upon receipt of a presentence investigation report, a guideline score sheet and sentencing memorandums from counsel for the respective parties, the trial court conducted a sentencing hearing. (TR 2591-2592) Legal argument from the state was had but no additional evidence presented. (TR 2592-2646)

After the penalty phase verdict and prior to the instant proceeding, Lenard Philmore testified for the prosecution in the trial of co-felon Anthony Spann. (TR 2646-2647) The state conceded that during that court testimony, Lenard Philmore expressed remorse for the death of Kazue Perron to the extent that it should be accorded "some weight" by the court in its sentencing decision. (TR 2645-2647)

Although the defense had no additional evidence to present at the sentencing hearing, Lenard Philmore did address the court. (TR 2666) The defendant recited his background which produced by his own admission, "a very disturbed person". (TR 2667) Nothing seemed to go right and in fact a lot went wrong including his being raped by a man at a tender age and his witnessing his niece's murder at age thirteen. (TR 2667-2668) Lenard Philmore said he was mentally disturbed and easily pressured

into doing things. (TR 2668) He said he was scared of co-felon Anthony Spann. (TR 2668-2670)

Lenard Philmore expressed his daily remorse for his actions that resulted in Ms. Perron's death. (TR 2671-2672) In conclusion defendant asked that his life be spared. (TR 2673)

Sentencing:

After a review of sentencing memorandums and a presentence investigation report as to the non-capital felony convictions, the trial court proceeded to sentence. (R 1202; TR 2677) Lenard Philmore was sentenced to death for his first degree murder conviction and imprisonment on the remaining felony convictions. (R 1203-1239, TR 2680-2682)

In imposing a sentence of death, the trial judge noted the jury's unanimous verdict that the death sentence be imposed and she found the following aggravating circumstances to exist: (1) that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, (2) that the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, or flight after committing or attempting to commit, kidnaping, (3) that the capital felony was committed for the

purposes of avoiding or preventing a lawful arrest or detection for the crimes for which the defendant was ultimately convicted, (4) that the capital felony was committed for pecuniary gain, and (5) that the capital felony was a homicide and was committed in a cold, calculated and premeditated matter without any pretense of moral or legal justification. (R 1223-1228)

No statutory mitigating factors were found to have been established by the evidence although three were proposed by the defense, discussed by the trial judge and rejected, including: (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (2) that the defendant acted under extreme duress or under the substantial domination of another person, (3) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and (4) the age of the defendant at the time of the crime. (R 1228-1233) Non-statutory mitigating circumstances were found to exist at least to some degree as follows: (1) that the defendant was both the victim and witness of physical and verbal abuse by an alcoholic father, (2) that the defendant has a history of extensive drug and alcohol abuse, (3) that the defendant has suffered from severe emotional trauma and subsequent post-traumatic stress, (4) that the defendant was molested and/or raped at a young age, (5) that the defendant was classified as severely emotionally

handicapped, (6) that the defendant has exhibited the ability to form close loving relationships, (7) that defendant has shown cooperation with the state, and (8) that the defendant has expressed remorse for causing the death of Kazue Perron. (R 1233-1236) The trial judge rejected, after discussion, the non-statutory mitigating factors that (1) defendant suffered brain damage at an early age, and (2) that a death sentence would not be proportional. (R 1233-1237)

In a conclusionary note, the trial judge indicated she assigned great weight to each and every statutory aggravating circumstance in that they were "appalling". (R 1237) Based upon her finding that the aggravating circumstances "greatly" outweighed the mitigating circumstances, the trial judge imposed a sentence of death on defendant, Lenard Philmore. (R 1238-1239)

SUMMARY OF ARGUMENT

Point I All pretrial statements provided by Lenard Philmore to law enforcement should have been excluded from use as evidence at trial. Defendant's confessions of November 18, 21 and 26, 1997 and his grand jury testimony of December 16, 1997, were given only after defendant invoked his constitutional right to the assistance of a lawyer. Thereafter, defendant's appointed counsel subjected him to a series of police interrogations which culminated in defendant not only admitting to the shooting death of Kazue Perron but also leading the authorities to her body. Lenard Philmore's counsel was ineffective in advising his client to cooperate with the authorities on the premise that his cooperation would save him from the death penalty. Under the circumstances as presented, competent counsel would have invoked the client's right to remain silent and protect him not only from the forces of government but also from his own ignorance. Reversal for a new trial is appropriate.

Point II Prospective juror Tajuana Holt was peremptorily excused by the state based solely on her minority status as an African-American. After unsuccessfully attempting to have this juror dismissed for cause, the prosecutor gave a purported 'death penalty' explanation that had no record support and therefore could not be

considered genuine. Lenard Philmore was entitled to a fair trial before an impartial jury that had not been excised of an identifiable minority by the prosecution. Reversal for a new trial is appropriate.

Point III A gruesome photograph of the decedent's face after a week of decomposition and vermin damage should have been excluded from use as evidence. There was no issue during trial as to the fact of death, cause of death or identity of the decedent and the medical examiner stated he wouldn't be inhibited in his expert testimony should the photograph be cropped. Because the subject image did not prove or tend to prove any material issue and no necessity was demonstrated by the prosecution, it should have been disallowed.

Point IV Various comments of the prosecutor during the guilt phase of the trial deprived Lenard Philmore of a fair trial. Personal opinions of the prosecutor, appeals to the conscious or emotions of the community, and stereotyping the accused are prohibited. Reversal for a new trial is appropriate.

Point V During the penalty phase and related proceedings, the prosecutor committed misconduct by misinforming the jurors about their ability to dispense mercy, denigrating the defense expert mental health testimony, eliciting a reference to defendant's polygraph examination which had been suppressed, and improperly vouching for the credibility of his expert witness. Reversal for new penalty phase

proceedings is appropriate.

Point VI A compelled mental health examination required Lenard Philmore to incriminate himself in violation of his constitutional privilege not to do so. A statement given by defendant to the prosecution's psychologist was subsequently used by the trial court to defeat a proposed statutory mitigating circumstance. This incriminating statement by defendant should have been excluded from use as evidence. Reversal for a new penalty phase proceeding is appropriate.

Point VII The trial judge improperly found the existence of the statutory aggravating circumstance that the murder was cold, calculated, and premeditated. Lenard Philmore's mental and emotional impairment was not indicative of someone who could carefully plan and prearrange a killing but rather was comparable to one merely following the instructions of his co-felon, Anthony Spann. Reversal for a new sentencing is appropriate.

Point VIII The trial court improperly found that the murder was committed for the purpose of avoiding or preventing a lawful arrest or detention. Because of Lenard Philmore's chronic biological mental illness and his domination by co-felon Anthony Spann, defendant did not possess the requisite "mens rea" required for a determination of this statutory aggravating circumstance. Reversal for a new sentencing is appropriate.

Point IX The trial court improperly failed to find that the murder was committed while Lenard Philmore was under the influence of extreme mental or emotional disturbance. Testimony of two psychologists, various family members and a review of defendant's public school records, revealed a defendant with a "chronic biological mental illness" who had previously been involuntarily hospitalized. The trial judge improperly attributed the careful, well thought out plan of co-felon Spann to defendant Philmore in rejecting this statutory mitigating circumstance. Reversal for a new sentencing is appropriate.

Point X The trial court improperly failed to find that Lenard Philmore was acting under the substantial domination of another person at the time of the offense. Despite noting that it was co-felon Spann who initiated the planning of the carjacking, abduction and murder, the trial judge chose to ignore testimony regarding the relationship between the pair which indicated a mentally and emotionally impaired Lenard Philmore who always complied with his co-felon's wishes. This statutory mitigating circumstance was properly established. Reversal with instructions for resentencing is appropriate.

Point XI The trial court improperly failed to find that the capacity of Lenard Philmore to conform his conduct to the requirements of law was substantially impaired. Expert psychological testimony found this statutory mitigating

circumstance applicable to defendant as a result of his ongoing psychotic disturbance, his post-traumatic stress disorder, his recent drug use that was having a kindling effect, all of which put pressure on him that he could not control. This mitigating circumstance was established by the evidence. Reversal for resentencing is appropriate.

POINT I ON APPEAL

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS HIS NUMEROUS CUSTODIAL STATEMENTS TO LAW ENFORCEMENT; THE PROSECUTION FAILED TO MEET ITS BURDEN OF PROVING THAT LENARD PHILMORE'S CONFESSIONS WERE FREELY AND VOLUNTARILY GIVEN WITH THE ADVICE OF A COMPETENT AND EFFECTIVE COUNSEL.

On the first night of his incarceration following the manhunt and capture in the orange groves, defendant was visited by lead detective, Gary Bach. (TR 1028) After briefly speaking only about the Indiantown Bank robbery, Lenard Philmore invoked his constitutional right to the assistance of counsel. (TR 1038) *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

Based on defendant's request for an attorney, the state provided Assistant Public Defender John Hetherington. (R 790-791) This was in accord with Florida law. *see Peoples v. State*, 612 So.2d 555, 556 (Fla. 1992)(the right to trial counsel under Article I, section 16 of the Florida Constitution attaches at the earliest of three

points set out in Florida Rules of Criminal Procedure 3.111(a), one of which is as soon as feasible after custodial restraint); *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963)(an indigent accused is entitled to appointed counsel by virtue of the Sixth Amendment to the Constitution of the United States as made obligatory upon the States by the Fourteenth Amendment) If counsel is not provided after a request for same during a custodial interrogation, a subsequent statement by an accused must be excluded from use as evidence. *see Kyser v. State*, 533 So.2d 285, 287 (Fla. 1988)(the admission of the defendant's statements made after the request for counsel violates his right against self incrimination) *citing Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490 (1984), *Edwards v. Arizona*, 452 U.S. 973, 101 S.Ct. 3128 (1981) and *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980)

Because Lenard Philmore was entitled to counsel during his interrogation by law enforcement, he was entitled to effective assistance of counsel. In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), the United States Supreme Court held that in a state prosecution involving the possibility of imposition of a penalty of death, due process requires the provision of *effective*, as opposed to merely formal, representation by legal counsel. *see McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441 (1970)(the accused in a state prosecution is entitled to the effective assistance of counsel) *see also Vagner v. Wainwright*, 398 So.2d 448 (Fla. 1981)(claims of denial of effective

assistance of counsel based on inadequacy or incompetency of counsel, either appointed or retained, are cognizable as grounds for challenging convictions on appeal and collaterally; the standard is not "sham and mockery" but whether counsel was "reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances"); *Meeks v. State*, 382 So.2d 673 (Fla. 1980)(same)

Lenard Philmore's motion to suppress his numerous statements to law enforcement centered around the advice he received from his appointed counsel that he speak with the authorities. (R 243-245) Defendant asserted that given the circumstances as they existed, it was ineffective assistance of counsel when his defense lawyer advised him to confess to the police his involvement in the abduction and murder of Kazue Perron[2]. Clearly, the giving of such advice in the absence of an overwhelming prosecution case against the accused can constitute ineffective assistance of counsel. *e.g. United States v. Paaluhi*, 54 M.J. 181 (2000)(accused received ineffective assistance of counsel when his military defense counsel advised

[2] Although a claim of ineffectiveness of trial counsel is customarily handled via a Florida Rule of Criminal Procedure 3.850 hearing, it may be raised on direct appeal where it is preserved and the ineffectiveness is apparent on the face of the record. *Owens v. State*, 560 So.2d 207, 212 (Fla. 1990); *Sobel v. State*, 437 So.2d 144, 145 (Fla. 1983); *Valle v. State*, 394 So.2d 1004, 1005 (Fla. 1981) The issue of counsel's ineffectiveness was set forth in defendant's motion to suppress his numerous statements to law enforcement and it was fully litigated at the evidentiary hearing thereon. (R243-245, 782-956) *see Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000)(there are circumstances where appellate counsel may successfully raise the issue of ineffectiveness of trial counsel on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue)

him to speak to a government psychologist where he confessed to committing the charged offenses); *cf. Smith v. Rogerson*, 171 F.3d 569 (8th Cir. 1999)(not ineffective assistance to advise defendant to make statement to police where there existed so much other damaging evidence against him)

At trial, the prosecution presented two of Lenard Philmore's statements to law enforcement along with a portion of his grand jury testimony. (TR 1197-1203, 1482-1483) Contemporaneous objections as to their admission were noted by the trial judge and overruled. (TR 878, 883, 893, 899-900, 1029, 1203) As summarized by trial counsel, defendant's statements not only consisted of his confession to the crimes charged, but they led to much of the forensic evidence produced against defendant at trial. (TR 1590-1593, 2661-2666) *see Almedia v. State*, 737 So.2d 520, 525 (Fla. 1999)(custodial interrogation is an extraordinary useful and important practice that can make or break a trial prior to the trial's inception)

When appointed counsel initially consulted with his new client, Lenard Philmore, he was well aware of the two general overriding principles, one legal and one practical, that govern the advice given a criminal accused under the circumstances. The first is that such defendants cannot be believed and secondly, they need not cooperate with law enforcement. (R 813-814, 816)

From the onset, counsel suspected as did the police, that Lenard Philmore was

involved with the abduction and possible murder of Kazue Perron. (R 812-817) Experienced and competent criminal defense lawyers fully appreciate their obligation to not only protect their clients from the forces of government, but also to protect them from their own ignorance. Appointed counsel's explanation that he was "just letting him [Lenard Philmore] tell the story" is in legal reality no explanation at all.

By his own acknowledgment defense counsel realized that his client "kept incriminating himself a little bit, inching himself closer and closer to the actual events of the homicide [in] an incremental process". (R 818-820) Despite this obvious indication that he should halt defendant's repeated and almost daily statements to law enforcement, counsel continued to make his client available for interrogation. (R 820-821) Time and again, Lenard Philmore contradicted prior statements and increasingly incriminated himself to the point where he finally admitted to being the one who shot and killed Ms. Perron. (R 821-823)

Although defense counsel fully understood that his client was involved in a murder case with a preliminary "compilation of statutory aggravators" that would warrant a sentence of death, he advised defendant that disclosing the location of Ms. Perron's body was the right thing to do despite its obvious deleterious evidentiary considerations. (R 825-830) Throughout the series of Lenard Philmore's police statements, it was law enforcement who repeatedly cautioned defense counsel that his

client's "story" kept changing and thus another consultation was in order. (R 798, 805-807) Although counsel knew that his client's denial of being the actual shooter was probably false, as was the opinion of the police, he stayed the course of cooperation with its increasingly hazardous results on the belief that "defendant's cooperation might be in his best interest". (R 802)

Appointed counsel's sole reasoning and rational for allowing his client to slowly confess to the crimes for which he was charged was that such cooperation would likely result in an avoidance of the death penalty. (TR 823-824) As the facts unfolded, defense counsel knew he had to halt his client's damaging admissions to law enforcement but he did not in hope that the "usual" protocol in Martin County would prevail and that Lenard Philmore would reap a benefit for confessing to first degree murder. (R 820-821, 823-824, 829-830, 832-833) Because the whole basis of defendant's cooperation with the authorities was so that "he could avoid the death penalty", Lenard Philmore was advised by counsel accordingly. (R 879-882)

Lenard Philmore followed his counsel's advice to cooperate with the police, including the disclosure of Ms. Perron's body. (R 836-838, 844-845, 847, 850-852, 862-864, 867-870, 876-878) Prior to the appointment of counsel, Lenard Philmore spoke to law enforcement only about the Indiantown Bank robbery. (R 853-856) After receiving the benefit of the advice of counsel, Lenard Philmore confessed to the

capital murder of Kazue Perron. (R 855-859)

The right to effective assistance of counsel "is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process". *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986) It was at this pretrial police interrogation stage of the proceedings when competent legal aid and advice were most critical to Lenard Philmore. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. _1199 (1964) What happened during defendant's various police interviews would "affect the whole trial" and his right to remain silent, if not then and there asserted, would be "irretrievably lost". *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050 (1963); *see also Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000)(the disadvantage of the required *Miranda* warnings is that upon invocation, a guilty defendant may go free; nevertheless, *Miranda* announced a constitutional rule that may not be superceded legislatively.)

This court has "recognized the important role that confessions play in the crime-solving process and the great benefit they provide...because of the tremendous weight accorded confessions by our courts..." *Traylor v. State*, 596 So.2d 957, 964 (Fla. 1992) Consequently, affording counsel to suspects during police interrogations is constitutionally required even though it may "diminish significantly" the number of

confessions obtained since "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances". *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964), *quoting Watts v. Indiana*, 338 U.S. 49, 59, 69 S.Ct. 1347 (1949)(Jackson, J., concurring in part and dissenting in part)

Based on the police information provided to defense counsel and his own instinct that Lenard Philmore was involved in the abduction and murder of Kazue Perron, defense counsel had every duty and obligation to prevent his client from providing the prosecution's proof. This he did not do.

Ineffectiveness assistance of counsel claims are governed by a two tiered standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984) First, the defendant must demonstrate that counsel's performance was deficient which requires a showing that counsel made errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment to the Constitution of the United States. The undisputed testimony at the motion to suppress hearing was that defense counsel allowed his client to confess to a greatly aggravated capital murder with no agreement as to punishment. It is submitted that the record clearly shows deficient attorney performance, not reasonable defense tactics. *cf. United States v. Thompson*, 51 M.J. 431 (1999)(defense counsel made reasonable tactical decision not to have his client

speak to government psychologist because of self-incrimination problems)

To satisfy the second prong of *Strickland*, the defendant must show that the deficient performance prejudiced the defense so as to deprive him of a fair trial, a trial whose result is reliable. 466 U.S. at 687. It is only necessary that defendant demonstrate "a probability sufficient to undermine confidence in the outcome". *Robinson v. State*, 770 So.2d 1167, 1172 (Fla. 2000)(Anstead, J., specially concurring) *quoting Young v. Catoe*, 205 F.3d 750, 759 (4th Cir. 2000) Because Lenard Philmore's two videotaped confessions and the forensic fruits thereof constituted the bulk of the guilt phase evidence against him as well as proof of four aggravating circumstances recited in the trial judge's sentencing order, the question of the outcome's reliability is apparent.

Lastly, the defendant challenged the admissibility of his pretrial statements as not being freely and voluntarily given in that Lenard Philmore believed that if he gave a full account of his activities, he would not be subject to the death penalty. (R 244) To be admissible into evidence at trial, the state must demonstrate that a confession was voluntarily given. *see DeConingh v. State*, 433 So.2d 501, 503 (Fla. 1983) The burden is on the prosecution to establish by a preponderance of the evidence that a police statement by the accused was freely and voluntarily given based upon the totality of the circumstances. *see Escobar v. State*, 699 So.2d 988, 994 (Fla. 1997) A

confession cannot be obtained through direct or implied promises but rather it must be the result of a free and rational choice without a direct or implied promise of benefit or leniency. *see Johnson v. State*, 696 So.2d 326, 329 (Fla. 1997)

In the present case, Lenard Philmore's court appointed counsel represented to him that he could avoid the death penalty by fully cooperating with law enforcement. (R 882) It was this legal advice that defendant relied upon when providing his numerous statements to law enforcement - that his cooperation would be his mitigation that would allow him to avoid the death penalty. (R 851-852, 862-864, 867-870, 876-878) Under the particular facts and circumstances, this legal advice by defense counsel was reckless and inappropriate.

It is submitted that Lenard Philmore's pretrial statements to law enforcement were improperly admitted into evidence against him. Reversal with instructions for a new trial is appropriate.

POINT II ON APPEAL

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PEREMPTORILY STRIKE PROSPECTIVE JUROR TAJUANA HOLT; THIS JUROR WAS EXCUSED SOLELY BECAUSE OF HER RACE SINCE THE PROSECUTOR'S EXPLANATION FOR HIS CHALLENGE WAS NEITHER GENUINE NOR SUPPORTED BY THE RECORD.

Prospective juror Tajuana Holt was one of only three African-Americans on the entire venire of seventy-five Martin County citizens. (TR 181-189; 846; SR 94-134) Although she had lived in the county her entire life, she had never before been summoned for jury duty and accordingly, was more than willing to serve. (TR 507) Ms. Holt was employed by Publix and her mother, coincidently, was a deputy court clerk in the Martin County courthouse and supervised Judge Angelos' felony division. (TR 507-508) Despite the mother's employment, Rosa Holt and her daughter never discussed the former's duties at the courthouse. (TR 508)

On her juror questionnaire, Ms. Holt stated that her initial preference as to a sentence in a capital murder was to "let them stay in prison for the rest of their lives". (TR 508-509) When clarification was sought by the prosecutor, the prospective juror

after having been explained the process in capital murder cases, indicated she could vote for a death sentence if proven aggravating circumstances were not outweighed by mitigating circumstances. (TR 513) Ms. Holt stated that the death penalty had its place and she could 'look this man in the eye and say...I voted for death' if the circumstances warranted such a punishment. (TR 508-509, 513)

The prospective juror was adamant in her ability to be fair to both the prosecution and the accused and she could, without hesitation, vote the defendant guilty should the evidence prove him so. (TR 513) On the other hand, Ms. Holt stated that if the prosecution demonstrated only that a horrible crime had taken place but not that the person on trial committed it, she would vote to acquit. (TR 513)

There was nothing in any of Ms. Holt's answers in voir dire that would disqualify her from jury service. (TR 513-514) She could be fair to both sides in the proceeding. (TR 512) Prior to appearing for jury service, the prospective juror had not heard or read anything about the case to be tried. (TR 509-510) Ms. Holt was willing to serve on Lenard Philmore's petit jury. (TR 507)

Even before the exercise of peremptory challenges, the prosecution accused potential juror Tajuana Holt of "sleeping for a good portion" of the day's jury selection process. (TR 476) This state allegation of the prospective juror's dozing continued through the two days of voir dire. (TR 836) Because the trial judge had

"watched her all day" as the prospective juror "actively participated in the questioning", the state's request that Ms. Holt be excused for cause was denied. (TR 836) The judge even noted that the court's clerk who had been requested to observe the prospective juror, concurred that Ms. Holt was not sleeping. (TR 843) In rejecting the state's cause excusal, the trial court stopped short of saying that it was "contrived". (TR 843)

Immediately thereafter, the state announced prospective juror Tajuana Holt as its first peremptory excusal which request was immediately challenged by defense counsel. (TR 844) Ms. Holt was the only remaining African-American on the panel as a result of cause excusals of her only two fellow black prospective jurors. (TR 844-846) Henry Haston was released for cause on medical grounds at the state's request. (TR 404-416) Lois Page was similarly excused for cause upon the state's request based on her familiarity with codefendant Anthony Spann's family which caught her attention from media accounts of the homicide. (TR 453-457) Thus, the excusal of Tajuana Holt would necessarily result in all white jury.

When asked for the basis of his challenge, the prosecutor stated it was twofold: first that Ms. Holt couldn't "make up her mind as to how she feels about the death penalty" and secondly, that the prospective juror's mother "advised us that we would do better not to have her daughter on the jury". (TR 845-848) Although neither reason

had record support, the trial judge ruled that the prosecutor's explanation was "facially race neutral", not a "pretense" and therefore "genuine". (TR 848-849) Accordingly, Ms. Holt was excused peremptorily over defense objection. (TR 849)

A timely objection to the dismissal of prospective juror Tajuana Holt was lodged with a request for a race-neutral reason for the state's peremptory challenge. *see Melbourne v. State*, 679 So.2d 759, 764 (Fla. 1996) The required race-neutral explanation given by the prosecution could not satisfy the requirement that it be "genuine" as required by *Melbourne*, since it was not supported by the record. *see Floyd v. State*, 569 So.2d 1225, 1229-1230 (Fla.), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2912 (1990)(it is the state's obligation to advance a facially race-neutral reason supported by the record); *see also Bullock v. State*, 670 So.2d 1171, 1172 (Fla. 3rd DCA 1996)(prosecutor's conclusion that prospective juror was reluctant or non-responsive was not supported by the record); *Warren v. State*, 632 So.2d 204, 206 (Fla. 1st DCA 1994)(prospective jurors inattentiveness not supported by the record)

The prosecutor's explanation that Ms. Holt couldn't make up her mind regarding her position on the death penalty is simply not borne out in the record. Regardless of the prospective juror's initial questionnaire answers about her preference for a life sentence in a capital case, once she was provided with some guidance as to a juror's responsibility for weighing aggravating and mitigating

circumstances, her responses were not only more illuminating, but were in accord with the law. This is the same background addressed by this court in *Castro v. State*, 644 So.2d 987 (Fla. 1994) where some jurors expressed strong views in favor of the death penalty prior to being advised on the mechanics of capital sentencing. It was observed that, "not surprisingly", prospective jurors with "no grounding in the intricacies of capital sentencing" come to court with a "reasonable misunderstanding" of the presumed sentence for first degree murder. Consequently, it is the prospective juror's answers after being properly informed of the capital sentencing scheme as to their ability to follow the law that must govern. 644 So.2d at 990. In the instant case, there is not a single answer of Ms. Holt during voir dire that would support in any fashion the prosecutor's explanation that "she couldn't make up her mind regarding her position on the death penalty". *see also Johnson, supra* at 332 (the simple act of a juror, in unfamiliar surroundings, solidifying his reasoning through the course of questioning, cannot be labeled equivocation)

As to the second reason advanced by the state, that Ms. Holt's mother said she would not be a good juror for the prosecution, there is a total lack of record support. Defense counsel objected to the prosecutor reciting some hearsay statement purportedly made by the mother, Rosa Holt, to a state attorney staff member. (TR 845-846) Therefore, no record support existed for the prosecutor's explanation of his

peremptory challenge of prospective juror Tajuana Holt.

Every person charged with a crime is entitled to a fair trial before an impartial jury chosen from a venire which represents a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975) Accordingly, the right to peremptory challenges is to "aid and assist" in the selection of an impartial jury and is not to be used "as a scalpel to excise" an identifiable group from a representative cross-section of society for to do so would "encroach upon the constitutional guarantee of an impartial jury." *State v. Neil*, 457 So.2d 481, 486 (Fla. 1984) The appearance of discrimination in court proceedings "is especially reprehensible since it is the complete antithesis of the court's reason for being - to ensure equality of treatment and evenhanded justice". *State v. Slappy*, 522 So.2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873 (1988)

It is submitted that the state's peremptory challenge of venire member Tajuana Holt violated Lenard Philmore's constitutional right to trial by an impartial jury. *see generally Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S.Ct. 1712, 1722-1724 (1986); *Wright v. State*, 586 So.2d 1024, 1029 n. 7 (Fla. 1991)(state's improper challenge of a single juror was dispositive); *Thompson v. State*, 548 So.2d 198, 202 n. 4 (Fla. 1989)(no requirement of a showing of systematic racial discrimination; the issue is not whether several jurors were excused because of their race, but whether any juror has

been so excused, independent of any other) Reversal for a new trial is appropriate.

POINT III ON APPEAL

THE TRIAL COURT ERRED IN ADMITTING A PHOTOGRAPH DEPICTING THE VICTIM'S FACE AFTER A WEEK OF DECOMPOSITION AND VERMIN DAMAGE; THIS IMAGE WAS UNDULY PREJUDICIAL COMPARED TO ITS PROBATIVE VALUE AND NO SHOWING OF NECESSITY WAS MADE BY THE PROSECUTION.

In a motion to exclude the subject photograph (state's exhibit "B-L"), the defendant asserted that the danger of unfair prejudice to Lenard Philmore far outweighed the probative value of the image and that the state had failed to show the necessity for its admission. (TR 885-886) This photograph depicted a single gunshot wound to the victim's forehead but because her body had been exposed to the elements for one week and had suffered vermin damage, it was as the prosecutor noted, "very gruesome". (TR 887-895; SR170-171) When defense counsel advised the trial court that there would be no issue as to fact of death, cause of death or identity of the decedent, the trial judge sought a stipulation in front of the jury that Lenard Philmore shot and killed Kazue Perron. (TR 887-893) When counsel

declined, the trial court permitted the subject photograph since it showed the gunshot entry wound including its "nature" and "location" and because it bore "on the intent" of the defendant. (TR 1392-1393)

No real necessity had been demonstrated since the medical examiner stated he would not be "inhibited" in his expert testimony should the photograph be cropped below the forehead which was the location of the gunshot. (TR 1383-1385) In fact, the subject photograph depicted such decomposition and vermin injury to the victim's face that the pathologist had to point out to the jury the location of the decedent's facial features which, from looking at the image, were unobservable. (TR 1405-1406)

When the medical examiner spoke to the issue of the projectile's path through the victim's skull, he did so through the display of x-rays taken at his office. (TR 1408-1412) The pathologist could not, even with the objectionable photograph, position anyone in space at the time of the gunshot which brought about almost instantaneous death. (TR 1412, 1415, 1417) In his proffer outside the presence of the jury, the medical examiner stated that the real purpose for use of the photograph was to make his testimony "realistic". (TR 1384)

While each case requires an independent judgment of the images submitted, the general rule governing the introduction of photographs of the deceased in a homicide case is that such photographs should serve to illustrate, explain or clarify an issue or

conflict in the evidence and if they do not do this, they should be disallowed. *see Williams v. State*, 228 So.2d 377, 378 (Fla. 1969); *Blake v. State*, 156 So. 2d 511, 512 (Fla. 1963) A photograph of the type involved here, gruesome by the prosecutor's own characterization, should be received in evidence with great caution and should not be permitted unless it proves or tends to prove some material issue in the trial of the cause. *see Brooks v. State*, 117 So.2d 482, 485 (Fla. 1960)

The defendant concedes, as he must, that the trial court has the discretion to admit relevant photographic evidence, and the fact that the subject images are "gruesome" does not render the admission an abuse of discretion. *see Kearse v. State*, 770 So.2d 1119, 1131-1132 (Fla. 2000) Here, however, no issue was proven, explained or clarified by the single facial photograph. The question of the decedent's identity or that she died from a gunshot wound to the forehead was not in any way disputed or otherwise put in issue by defendant and, to the contrary, was so stipulated by defense counsel. (TR 887-890) This was not sufficient, however, for the trial judge who insisted upon a stipulation in front of the jury that Lenard Philmore shot and killed Ms. Perron. (TR 889-893) Such a judicial demand was unwarranted given the circumstances. Admitting the photograph so as to render the medical examiner's testimony "realistic" was simply not necessary. *see Czubak v. State*, 570 So.2d 925, 928 (Fla. 1990)(photographs are admissible if they are relevant and "not so shocking"

in nature as to defeat the value of their relevance)

When, as here, the cause of death had been established and there was no fact or circumstance in issue which necessitated or justified the introduction of the severely decayed and vermin damaged face of the decedent, reversal for a new trial is warranted. *see Reddish v. State*, 167 So.2d 858, 863 (Fla. 1964); *see also Jackson v. State*, 359 So.2d 1190, 1192-1193 (Fla. 1978)(gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction); *Hoffert v. State*, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990)(where medical examiner could have testified regarding head injuries without reference to the photograph, the danger of unfair prejudice far outweighed the probative value of the photograph and necessity was not shown)

It is submitted that under the particular facts and circumstances presented below, the trial judge's ruling admitting the subject photograph (state's "B-L"; 64) was an abuse of discretion. Reversal with instructions to afford Lenard Philmore a new trial is appropriate.

POINT IV ON APPEAL

THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS VARIOUS COMMENTS BEFORE THE JURY; THESE NUMEROUS IMPROPER AND HIGHLY PREJUDICIAL STATEMENTS DENIED LENARD PHILMORE A FAIR TRIAL.

It is the duty of a prosecuting attorney in a trial to refrain from committing acts that would or might tend to effect the fair and impartial trial to which the defendant is entitled. *Stewart v. State*, 51 So.2d 494, 495 (Fla. 1951) "The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for. Cases brought on behalf of the State of Florida should be conducted with dignity worthy of the client." *Kirk v. State*, 227 So.2d 40, 43 (Fla. 4th DCA 1969)

During the course of the trial proceedings the prosecutor made references to

"how lucky" an unknown woman was when she walked away from her automobile prior to defendants entering into the parking lot with a design to steal her vehicle and kill her. (TR 913-914; 1551-1552; 2503-2504) The prosecutor referred to the personal opinions of the investigating detectives whom he said "didn't believe what he [Lenard Philmore] was saying". (TR 928, 1040) Defendant was stereotyped by the prosecutor as an arrogant criminal in "his white tank top and his gold necklaces" carrying "the great equalizer", a firearm. (TR 1553)

The prosecutor attempted to personalize the prosecution as a joint effort between law enforcement and the community with references such as "luckily for us", Officer Thomas was there; "we determined" what evidence existed against defendant; "I'm not running from the law"; "we know he's [defendant] lying to us"; and "we can accept it...when an accident occurs". (TR 1556-1558, 1569, 1573, 1577) The state insisted on letting the jury know that the prosecution was presented by "their state attorney". (TR 1579)

Attempts by prosecutors to instill emotional fear in the jurors or appeal to their sympathy are prohibited. *See Urbin v. State*, 714 So.2d 411, 420 n. 9 (Fla. 1998); *Campbell v. State*, 679 So.2d 720, 723-725 (Fla. 1996); *King v. State*, 623 So.2d 486, 488 (Fla. 1993); *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985) Statements as to law enforcement's belief in a defendant's guilt are personal opinions outside the

record and are similarly condemned. *see Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994); *Grant v. State*, 171 So.2d 361, 365 (Fla. 1965); *Cochran v. State*, 711 So.2d 1159, 1162 (Fla. 4th DCA 1998)(and citations therein); *Knight v. State*, 672 So.2d 590, 591 (Fla. 4th DCA 1996) Characterizations of an accused in a stereotyped fashion are not allowed. *see Barnes v. State*, 743 So.2d 1105, 1114 n 5 (Fla. 4th DCA 1999) An attempt by the prosecutor to ingratiate himself with the jurors is prohibited. *see Ruiz v. State*, 743 So.2d 1, 6-7 (Fla. 1999)

The above improper remarks deprived Lenard Philmore of a fair trial. Reversal for a new trial is appropriate.

POINT V ON APPEAL

THE PROSECUTOR COMMITTED INTENTIONAL MISCONDUCT BY VIRTUE OF HIS VARIOUS COMMENTS DURING THE PENALTY PHASE PROCEEDINGS; THESE IMPROPER AND PREJUDICIAL STATEMENTS DENIED LENARD PHILMORE A FAIR AND RELIABLE SENTENCING DECISION.

During jury selection, the prosecutor advised the panel members that the law required a death sentence recommendation if a juror determines that the aggravating circumstances outweigh the mitigating circumstances. (TR 626-627) This was an incorrect statement inasmuch as a trial jury is always permitted to exercise its reasoned judgment in reducing the sentence to life imprisonment, even if the factual situation warranted the death penalty. *Henyard v. State*, 689 So.2d 239, 249 (Fla. 1996) In *Henyard* the prosecutor instructed prospective jurors that "if the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death". *Id.* This court found such a comment to be a misstatement of law by noting:

> In *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226

(1976), we stated:

> Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

See also Gregg v. Georgia, 428 U.S. 153, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976)(stating that jury can constitutionally dispense mercy in case deserving of death penalty). Thus, a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.

> In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law.

689 at 249

Accordingly, the prosecutor's statement to Lenard Philmore's prospective and later selected jurors regarding their inability to dispense mercy was wrong. The death recommendation subsequently returned cannot be considered reliable.

Continuing, the prosecutor denigrated the defense mental health testimony and psychologist himself with questions that were opinionated, sarcastic and rude such as asking if defendant's brain damage was in "the murder center of the brain...or the

kidnaping center of the brain". (TR 2256) There were others. (TR 2197-2198, 2202, 2215, 2223-2224, 2226, 2230-2231, 2234, 2264, 2266)

On rebuttal, and in direct response to a question of the prosecutor as to what documents were utilized, the state's expert psychologist, Dr. Gregory Landrum, testified he reviewed, among other things, defendant's "taped statement of polygraph examinations" of which "there were two". (TR 2285, 2289) Of course, absent a written stipulation, polygraph test results or even testimony to the effect that a test was taken are inadmissible. *see 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) Of importance in the instant case is the fact that these very statements were the subject matter of a pretrial motion to suppress. (R 243-245) In her ruling, the trial judge excluded from use as evidence any of defendant's statements made to law enforcement while in the polygraph room since they were outside the presence of counsel which right had been invoked. (R 566, 953-954) No appeal of this ruling was taken by the State.

Finally, the prosecutor advised the jury that the only expert testimony that they should accept regarding the brain imaging was from his witnesses who were participating "on behalf of the people of the State of Florida" with "no interest other than an interest in making sure that the science...is properly represented to the public".

(TR 2458, 2510, 2513) This latter comment caused the trial judge to interrupt the prosecutor's closing where, at a bench conference, he was told not to make such characterizations to the jury regarding the witnesses' testimony. (TR 2513-2514) *see State v. Ramos*, 579 So.2d 360, 362 (Fla. 4th DCA 1991)(the prosecutor improperly expressed his personal belief as to the witness's credibility and the defendant's guilt); *Pacifico v. State*, 642 So.2d 1178, 1183-1184 (Fla. 1st DCA 1994)(same); *Sinclair v. State,* 717 So.2d 99, 100 (Fla. 4th DCA 1998)(improper for prosecutor to attempt to bolster witness's testimony by reference to matters outside the record); *see also Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994)(same)

All of the above mentioned instances of misconduct take on added significance in a penalty phase proceeding because of the importance of the jury's sentencing determination. *see e.g. Ruiz v. State*, 743 So.2d 1, 8-9 (Fla. 1999)(the "record shows that this trial was permeated by egregious and inexcusable prosecutorial misconduct..." in an attempt to "...tilt the playing field and obtain a conviction and death sentence in a number of improper ways".); *Garcia v. State*, 622 So.2d 1325, 1332 (Fla. 1993)("Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved..."); *Nowitzke v. State*, 572 So.2d 1346, 1356 (Fla. 1990)(the lack of propriety and restraint exhibited in the overzealous prosecution of capital cases cannot be condoned); *Garron v. State*, 528 So.2d 353, 359

(Fla. 1988)(prosecutorial misconduct in penalty phase proceeding is unacceptable) The prosecutors in the present case had an obligation beyond merely 'winning' a death recommendation. *see Urbin v. State*, 714 So.2d 411, 422 (Fla. 1998)(prosecutors in capital cases have a duty to seek justice, not merely 'win a death recommendation'); *Campbell v. State*, 679 So.2d 720 (Fla. 1996)(reversing death sentence due to prosecutorial misconduct); *King v. State*, 623 So.2d 486 (Fla. 1993)(reversing death sentence due to prosecutorial misconduct) "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office." *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985) Reversal with instructions to conduct a new penalty phase proceeding is appropriate.

POINT VI ON APPEAL

THE TRIAL COURT ERRED IN COMPELLING A MENTAL HEALTH EXAMINATION OF DEFENDANT BY A PROSECUTION EXPERT WITNESS.

In a pretrial motion, the defendant sought to have *Florida Rule of Criminal Procedure 3.202* declared unconstitutional as volative of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, section 9, of the Florida Constitution. (R 400-405) Upon hearing, the trial court denied the motion. (TR 121-124; R 604)

Following defendant's guilty verdict, he was examined by a psychologist retained by the prosecution, Dr. Gregory Landum. (TR 1717) Thereafter, in rebuttal to defendant's mental health testimony, Dr. Landrum testified about his evaluation and testing of Lenard Philmore between the guilt and penalty phases of the trial. (TR 2285-2292) As a result of this compulsory mental health examination, the state's psychologist had some opinions different than defense mental health experts. (TR

2291-2309)

Included in his testimony was a recitation attributed to defendant concerning an incident in the past, unrelated to the present case, where defendant Philmore held co-felon Anthony Spann at gunpoint over the theft of drugs. (TR 2309-2310) It was this self-incriminating statement that the trial judge cited in her sentencing order finding that Lenard Philmore was not under the substantial domination of co-felon Anthony Spann which then resulted in a rejection of the statutory mitigating circumstance that defendant acted under the substantial domination of another person. (R 1230)

The presentation of mitigating evidence in the penalty phase of capital case enjoys wide latitude. A state may not limit the introduction of evidence in mitigation of sentence by way of the express wording of a statute, by restricted interpretations of statutes that allow such evidence on their face, by evidentiary rule, by jury verdict form, or even by failure of the sentencer to give independent weight to circumstances that are presented. *e.g. Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978); *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989); *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150 (1979); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869

(1982) Florida has by its concept of compelled mental health evaluations required a defendant to either forego his right to present mitigating evidence or forego his constitutional right not to be a witness against himself. *United States Constitution,* Fifth Amendment*; Florida Constitution,* Article I, Section 9.

In the present case, Lenard Philmore gave up his constitutional right against self incrimination in order to present his mental health mitigation. *see Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981)(the constitutional protection against self incrimination applies to defendants facing penalty phase proceedings) The trial court should have excluded Lenard Philmore's self-incriminating statement from the penalty phase proceedings and was in error to utilize it in her sentencing order to defeat a statutory mitigating circumstance of acting under the substantial domination of another person. Reversal with instructions to conduct a new penalty phase proceeding and/or resentencing is appropriate.

POINT VII ON APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS AGGRAVATED BY THE FACTOR OF COLD, CALCULATED PREMEDITATION.

The trial judge found that the murder of Kazue Perron was aggravated by the fact that it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification as set forth in *Florida Statute 921.141(5)(i)*. (R 1223-1228) Only the defendants were witnesses to the shooting and only Lenard Philmore's statement was presented by the state. A review of defendant's recitation of events shows no proof on his part of the careful plan or prearranged design required by *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). In *Rogers* this court found "an utter absence of any evidence that Rodgers "had a careful plan or prearranged design to kill anyone during the robbery". *see also Shere v. State*, 579 So.2d 86, 95 (Fla. 1991)(the aggravating circumstance of cold, calculated, and premeditated requires proof beyond a reasonable doubt that the

defendant planned or arranged to commit murder before the crime began)

Lenard Philmore's mental and emotional impairment was well documented in the penalty phase proceeding through the testimony of psychologist, Dr. Robert Berland and neuropsychologist Dr. Frank Wood. Together, the evidence revealed a brain damaged defendant who exhibited signs of psychotic disturbance including paranoia, depression, mania, hallucinations, and delusional paranoid thinking. (TR 1939-2156)

This evidence is hardly suggestive of a person capable of carefully planning and prearranging a killing. Rather, Lenard Philmore's explanation that it was "stupid old me [that] did it [the shooting]" at the request of co-felon Anthony Spann who told defendant to "trust me [Spann] on this...I know what I'm doin'..." is more indicative of an individual with a "chronic biological mental illness". (TR 1435, 1444, 1463, 1469, 2107) As such, the trial judge was incorrect in finding that Lenard Philmore committed the murder in a cold, calculated, and premeditated manner. *see Jackson v. State*, 648 So.2d 85 (Fla. 1994) The instant case really was more of a well planned robbery/kidnaping by co-felon Anthony Spann that resulted in an unplanned murder by defendant Philmore. *see Valdez v. State*, 626 So.2d 1316 (Fla. 1993)(a well planned escape resulted in an unplanned murder); *see also Spencer v. State*, *supra* (mental mitigation found to negate aggravating circumstance of cold calculated and

premeditated); *Maulden v. State*, 617 So.2d 298 (Fla. 1993)(emotional stress and mental illness negated aggravating circumstance of cold, calculated and premeditated)

Reversal with instructions for resentencing is appropriate.

POINT VIII ON APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING LAWFUL ARREST OR DETENTION.

In order to establish the aggravating circumstance that the capital murder was committed for the purpose of avoiding or preventing a lawful arrest or detention for the crimes for which defendant was ultimately convicted, the state must prove that the killing of the victim was the dominant motive. *Florida Statute 921.141(5)(e)*; *e.g. Bates v. State*, 465 So.2d 490 (Fla. 1985)(mere fact of death is not enough to invoke this factor when the victim is not a law enforcement officer; proof of the requisite intent to avoid arrest must be very strong in the case) *see also Thompson v. State*, 647 So.2d 824 (Fla. 1994)(when the victim is not a law enforcement officer, avoiding arrest must be the sole or dominant motive for the killing to establish this aggravating factor)

As previously set forth, Lenard Philmore suffered from a chronic mental illness

and because of it, he was acting under the domination of his co-felon, Anthony Spann. (Point VII above) It was solely at the urging and insistence of Spann that defendant Philmore shot Kazue Perron. While it is true that the existence of this aggravating circumstance may be proven by circumstantial evidence without direct evidence of the defendant's thought process, the available evidence herein shows defendant's conduct to be more the result of his relationship with co-felon Spann rather than a product of his own independent decision to silence the sole witness to the carjacking. *cf. Cave v. State*, 476 So.2d 180, 188 (Fla. 1985); *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992)

In *Walls v. State*, 641 So.2d 381 (Fla. 1984), this court held that the defendant's own words may supply the factual basis for a finding of the witness elimination aggravator. Here, the words of Lenard Philmore relate more to the basis regarding co-felon Spann than himself. Defendant's various confessions might have reflected the requisite "mens rea" but his obvious mental defects lessened to a significant degree the weight of the heightened intent aggravator. *see Santos v. State*, 591 So.2d 160, 163 (Fla. 1991)(in the penalty phase of a capital trial, mental derangement may be relevant if it lessens or eliminates the weight of the heightened intent aggravators, which themselves gauge a kind of heightened "mens rea")

It is submitted that the trial court improperly found the witness elimination

aggravator to exist. Reversal with instructions for resentencing is appropriate.

POINT IX ON APPEAL

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

In the proportionality section of her sentencing order, the trial judge acknowledged that the planning aspects of the crime were thought out by co-felon Anthony Spann. (R 1236) Such a conclusion is in line with defense expert testimony of psychologist Dr. Robert Berland and neuropsychologist Dr. Frank Wood. The former was of the opinion that the murder was committed by Lenard Philmore while he was under the influence of extreme mental or emotional disturbance. (TR 2137-2141, 2145-2156) Dr. Berland had reviewed defendant's school and Department of Corrections records. He also had interviewed various family members and the defendant himself who was administered psychological and intelligence tests in the form of the MMPI and WAIS respectively.

According to Dr. Berland, Lenard Philmore showed signs of psychotic disturbance including paranoia, depression, mania, hallucinations and delusional paranoid thinking, all of which demonstrated a profile of a "chronic biological mental illness". (TR 2073-2107) There was, according to the psychologist, reliable indicators both clinical and statistical, of mental impairment due to brain injury. (TR 2108-2114, 2246-2248, 2275-2276) No evidence of malingering was found and defendant's public school records and reports of family members were corroborative of these mental health conclusions. (TR 2084-2086, 2103-2104, 2112-2114, 2127-2136, 2273) Numerous relatives of Lenard Philmore, including those who grew up in the same household, described several instances where defendant suffered head injuries as a child. (TR 1834-1842, 1873-1875, 1882-1885)

In the public school system, Lenard Philmore was placed in classes for the emotionally handicapped. (TR 1895-1986, 2137-2141, 2145-2156) The defendant was the subject of a prior involuntary civil mental health commitment and suffered from post-traumatic stress syndrome as a result of witnessing the murder of his niece. (TR 2148-2149)

A second mental health expert, Dr. Frank Wood from Wake Forest University, specialized in the area of brain imaging as a measure of brain damage and neuropsychological testing as evidence of brain damage. (TR 1939-1944) His review

of defendant's brain imaging P.E.T. scan and an examination of his public school records suggested the existence of a brain abnormality most likely caused by a head injury. (TR 1949-2040) Such a brain injury would be a contributing cause of Lenard Philmore's abnormal behavior. (TR 1995-1996)

The trial judge dismissed these expert mental health findings with a brief notation that "the defendant has experienced some difficulties in his life". (R 1229) In rejecting the existence of the mitigating circumstance that Lenard Philmore committed the capital felony while under the influence of extreme mental or emotional disturbance - *Florida Statute 921.141(6)(b)* - the trial judge stated that "the facts and circumstances of the homicide indicate a coherent well thought out plan..." (R 1229) Ironically, as the trial judge also observed, the well thought out plan was the product of co-felon Anthony Spann, not defendant Lenard Philmore. (R 1230)

It is submitted that the expert mental health testimony adduced during the penalty phase established by the greater weight of the evidence, that Lenard Philmore suffered from an extreme mental or emotional disturbance at the time of the offense. *see Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993)(when a reasonable quantum of competent, uncontraverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved) *see also Nibert v. State*, 574 So.2d 1059, 1062 (Fla. 1990)(same); *Campbell v. State*, 571 So.2d 415, 419

(Fla. 1990)(the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence)

The sentencing order under review rejected all three statutory mental health mitigating circumstances as set forth in *Florida Statute 921.141(6)(b), (e), and (f)* despite the expert testimony of Dr. Wood and Dr. Berland. Thus, it appears that the order is more a matter of the exercise of discretion rather than a matter of reasoned judgment. *see State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973)

Accordingly, the trial court erred in declining to find the statutory factor of extreme mental or emotional disturbance. Reversal with instructions for resentencing is appropriate.

POINT X ON APPEAL

THE TRIAL COURT ERRED IN FAILING TO FIND THAT DEFENDANT WAS ACTING UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON AT THE TIME OF THE OFFENSE.

Again noting that it was Anthony Spann who "initiated the planning of the carjacking, abduction and murder", the trial judge chose to ignore evidence of the relationship between the two which indicated Lenard Philmore's fear of his co-felon. (R 1230-1231) Psychologist Dr. Berland testified that this statutory mitigating circumstance applied based on information supplied by defendant himself as well as lay witnesses who were familiar with the pair. (TR 2139-2140) In the period leading up to the subject offense, several persons who saw Lenard Philmore frequently, described his as compliant with whatever Anthony Spann told him to do. (TR 2140) Even when defendant expressed a desire to do something to the contrary, he would always go along with whatever his co-felon insisted upon. (TR 2140)

Lenard Philmore explained his behavior as being a result of Spann's reputation

as "crazy, reckless and..." putting little value on human life...since "he was on the run for a crime in Tallahassee". (TR 2140-2141) Consequently, defendant was afraid of Spann and fearful for his own life if he didn't cooperate in his co-felon's planned criminal activities. (TR 1850, 1904-1908, 2141)

Lenard Philmore was never portrayed in the proceedings as having a strong character and not the type to be dominated. *compare Lopez v. State*, 536 So.2d 226, 231 (Fla. 1988); *Groover v. State*, 458 So.2d 226, 229 (Fla. 1984). This is especially true in view of the expert testimony of Dr. Berland and Dr. Wood regarding Lenard Philmore's mental health as recited above. Because the trial judge failed to find this mitigating factor provided by *Florida Statute 921.141(6)(e)*, reversal with instructions for resentencing is appropriate.

POINT XI ON APPEAL

THE TRIAL JUDGE ERRED IN FAILING TO FIND THAT THE CAPACITY OF THE DEFENDANT TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

As initially observed by the trial judge, this mitigating factor as set forth in *Florida Statute 921.141(6)(f)*, "comes into play when a defendant has mental problems that limit his capacity to conform his conduct to the requirements of the law". (R 1231) The mitigating circumstance was found to be applicable to Lenard Philmore according to the expert psychological testimony of Dr. Berland. (TR 2138) This impairment was a result of defendant's "ongoing psychotic disturbance" with "post-traumatic stress disorder", and "recent drug" use that was having a "kindling" effect of intensified psychotic symptoms, all of which put pressure on defendant that he could not control and that helped push him into this situation. (TR 2139)

Based on this conclusion as well as the mental health testimony set forth in Points IX and X on appeal, it is submitted that the trial judge erred in failing to find

the existence of this statutory mitigating circumstance. *see Besaraba v. State*, 656 So.2d 441, 445-446 (Fla. 1995); *Morgan v. State*, 639 So.2d 6 (Fla. 1994); *Rivera v. State*, 561 So.2d 536 (Fla. 1990); *Carter v. State*, 560 So.2d 1166 (Fla. 1990); *Irizarry v. State*, 496 So.2d 822 (Fla. 1986) Reversal with instructions for resentencing is appropriate.

CONCLUSION

Based on the foregoing arguments and citations of authority, it is requested that Lenard Philmore's conviction and/or death sentence be vacated with instructions for a new trial and/or penalty phase proceeding and/or resentencing.

Respectfully submitted,

GLASS & RASTATTER, P.A.
524 So. Andrews Avenue, Ste 301N
Fort Lauderdale, FL 33301
Telephone: (954) 463-2965

_____
PATRICK C. RASTATTER/164634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida, by delivery/US Mail this _____ day of 2000.

_____
PATRICK C. RASTATTER/164634

CERTIFICATE OF SIZE AND STYLE OF TYPE

The Appellant hereby certifies that the size and style of type used is font size Times New Roman - 14.

_____
PATRICK C. RASTATTER/164634