

IN THE SUPREME COURT OF FLORIDA

LENARD PHILMORE,

SC00-1706

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

Reply Brief of Appellant

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PRELIMINARY STATEMENT

The preliminary statement is the same as set forth in the appellant's Initial Brief with an additional designation of the State's Answer Brief by the symbol "St.Br." followed by the appropriate page number.

STATEMENT OF THE CASE

The Statement of the Case is the same as in the appellant's Initial Brief.

STATEMENT OF THE FACTS

The Statement of the Facts is the same as in the appellant's Initial Brief.

SUMMARY OF THE ARGUMENT

The Summary of the Argument is the same as in the appellant's Initial Brief.

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.

In its answer brief, the state asserts that Lenard Philmore's claim of ineffectiveness of his counsel is not reviewable in this direct appeal even though the lower court's order specifically dealt with the merits of the issue. (SB 16) This argument is misplaced, however, since "the deficient performance of counsel and the prejudice to the defendant are apparent on the face of the record". *Burgess v. State*, So.2d (Fla. 4th DCA 2001) *citing Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla.

1987) *see also Reaves v. State*, 669 So.2d 352 n. 1 (Fla. 4th DCA 1996)(claim of ineffective assistance of counsel would be clear on the face of the record for defense counsel's failure to object when the defendant's statement was introduced at trial) *citing Gordon v. State*, 469 So.2d 795 (Fla. 4th DCA) *rev. denied*, 480 So.2d 1296 (Fla. 1985); *Johnson v. State*, 796 So.2d 1227, 1228 (Fla. 4th DCA 2001)(ineffective assistance of counsel appeared on the face of the record and the standards of *Strickland* were met where counsel failed to file a motion to dismiss drug trafficking charge when there was a recognized conflict in the districts, one district had concluded that the trafficking charge must be dismissed and the present district had not decided the issue); *Fones v. State*, 765 So.2d 849, 850 (Fla. 4th DCA 2000)(holding that ineffective assistance of counsel may be considered for the first time on appeal if facts giving rise to the claim are apparent on the face of the record) The ineffectiveness of defendant's counsel in advising him to confess to capital murder was fully set forth in his motion to suppress, litigated at an evidentiary hearing and specifically ruled upon by the trial court. (R 243-245; 948, 952-954) Accordingly, it is a proper subject for review at this time.

Next, the state argues that it is entirely appropriate as a matter of law for defense counsel to advise a client to confess to first degree murder based on defense counsel's statement that it was "not his duty to stop a client from implicating himself

in a murder”. (SB 18-21) No legal authorities are provided for this proposition and one would be hard pressed to find an experienced capital trial lawyer who would agree. A “defendant’s confession is usually the most devastating evidence” against him as noted in *Arizona v. Fulminante*, 499 U.S. 279, 295-296 (1991):

A confession is like no other evidence. Indeed, “the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him...The admissions of a defendant come from the actor himself, the most knowledgeable and impeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” *Bruton v. United States*, 391 U.S. at 139-140(White, J., dissenting) See also *Cruz v. New York*, 481 U.S. at 195 (White, J. dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Consequently, the legal principle has evolved that the giving of such advice to confess in the absence of an overwhelming prosecution case against the accused can constitute ineffective assistance of counsel. *e.g. United States v. Raaluhi*, 54 M.J. 181 (2000)(accused received ineffective assistance of counsel when his military defense counsel advised him to speak to a government psychologist where he confessed to committing the charged crimes)

Lenard Philmore acknowledges that it is not the role of the judiciary to interfere with defense counsel's legal and tactical conduct. *see Downs v. State*, 453 So.2d 1102, 1104 (Fla. 1984) Nevertheless, competent counsel's actions or omissions can be justified as the product of strategic considerations only if reasonable "under prevailing professional norms...considering all the circumstances". 453 So.2d at 1106-1107; *Meeks v. State*, 382 So.2d 673, 674- 675 (Fla. 1980) Even a single error by defense counsel can render assistance ineffective. *see Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979)

Although "establishing the appropriate test or standard for determining reasonably effective assistance of counsel has been considered by some as a bramble bush thicket", the action in the instant case of defense counsel allowing Lenard Philmore to confess to capital murder clearly was a "substantial and serious deficiency measurably below that of competent counsel". *Knight v. State*, 394 So.2d 997, 1000-1001 (Fla. 1981) A fair reading of the record supports a conclusion that Lenard Philmore's trial counsel was "ineffective as a matter of law and that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different". *Ragsdale v. State*, ___ So.2d ___ (Fla. 2001)(counsel's failure to adequately investigate defendant's background and present a large amount of mitigation evidence then available concerning defendant's childhood riddled with

abuse along with head trauma rendered counsel's representation ineffective); *see also Arizona v. Fulminante, supra* at 309 (certain structural defects in the constitution of the trial mechanism are not subject to harmless error analysis because prejudice is presumed under *Strickland*) Simply put, defense counsel's advice to Lenard Philmore to confess to a first degree murder was "bad advice". *Akins v. State*, ___ So.2d ___ (Fla. 4th DCA 2001)

The state, in its argument below and in this court, insists that defense counsel's advice was justified and appropriate based on defendant's initial denial of involvement and his subsequent denial of being the actual gunman. (SB19-20) This argument misses the point inasmuch as competent counsel would surely have invoked his client's right to remain silent once the defendant's "story" started to change whereby he "kept incriminating himself a little bit, inching himself closer and closer to the actual events of the homicide...". (R 818-820) Attorney Hetherington's "reservations" about his client's insistence that he was involved in the robbery and nothing else should have been more than sufficient for counsel to advise defendant to stop talking rather than "just letting him tell the story". (R 812-814) As acknowledged by counsel, criminal defendants cannot be relied upon to tell their lawyers the truth. (R 813-814) Competent counsel begin their representation of a client believing the worst. *e.g. Trease v. State*, 768 So.2d 1050 (Fla. 2000)(defense

counsel's impression that most of his clients were guilty did not support a finding of incompetence) Defense counsel always, regardless of their client's statements, have "a degree of independent responsibility to act in the best interest of a client..." *Blanco v. Wainwright, supra* at 1832

There can be no dispute that Lenard Philmore's full confession and the evidence uncovered as a result thereof, was a substantial part of the prosecutor's case. (TR 1590-1595) Accordingly, defense counsel's performance was constitutionally deficient because the error committed was so serious that Lenard Philmore was not afforded competent counsel as guaranteed by the Sixth Amendment and this deficient conduct of counsel "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)

Reversal 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.

Contrary to the state's assertion of lack of preservation, the peremptory challenge by the prosecution of prospective juror Tajuana Holt was timely and properly objected to as a discriminatory use of a peremptory challenge. Defense objection was timely because an objection to the discriminatory use of peremptory challenges raised during the voir dire or selection process is timely in the trial court if made at any time before the jury is sworn. *Foster v. State*, 767 So.2d 525 (Fla. 4th DCA 2000); *see Fernandez v. State*, 746 So.2d 516 (Fla. 3d DCA 1999)(and citations

therein)

Defense objection to the state's peremptory excusal of prospective juror Holt was proper because there was nothing in the record to support the prosecutor's disputed explanation that the juror's mother had advised the state attorney's office that her daughter would be a bad juror for the prosecution. (R 846) The state's argument in its brief that the prosecutor's statements themselves were elevated to the level of record proof that the juror's mother, Rosa Holt, had a out-of-court discussion with an unnamed State Attorney's representative regarding her daughter's fitness to serve is without any legal foundation. (SB 31-32) Although the explanation from the proponent of a strike does not have to be persuasive, or even plausible, it still has to have record support. *see Burris v. State*, 748 So.2d 332 (Fla. 4th DCA 2000)

Nor was the prosecutor's assertion that Ms. Holt couldn't make up her mind regarding her position on the death penalty borne out by 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. *see Castro v. State*, 644 So.2d 987 (Fla. 1994) The fact that many prospective jurors come to court with reasonable misunderstandings as to the appropriate punishment in a first-degree

murder case was recently addressed in *Overton v. State*, ___ So.2d ___ (Fla. 2001)

as follows:

Our reasoning in *Castro* was based on an observation we find ever present in many death penalty cases. That is, the average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings. They are overwhelmingly unaware of the existence of the bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty. They similarly do not possess the requisite familiarity with the necessary balancing scheme whereby aggravating and mitigating factors are weighed against each other in an effort to produce a proportionate sentence.

Id. at

Similar observations were made in *Johnson v. State*, 660 So.2d 637 (Fla. 1995) where this Court noted that prospective jurors are brought into an arena where they face a “confusing array of procedures and terminology they may little understand” which may “elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law.” *Id.* at 644; *see also Reaves v. State*, 639 So.2d 1 (Fla. 1994)(jurors, after hearing an explanation of the process of weighing aggravating and mitigating circumstances, then acknowledged that they were capable of reviewing all the evidence and following the court’s

instructions in considering a proper punishment.) If an unsupported reason is provided, as was the case here, there exists the possibility that the prosecutor used the challenge to “mask a strike actually motivated” by an improper reason. *John v. State*, 741 So.2d 550 (Fla. 4th DCA 1999)(Warner, J., concurring specially); *see also Blackshear v. State*, 774 So.2d 893 (Fla. 4th DCA 2001)(prosecutor’s attempt to exercise a peremptory challenge on a black female, when he had no race neutral reason, was not only unprofessional, but would have, if allowed, violated the juror’s constitutional right to serve on a jury); *Suggs v. State*, 624 So.2d 833, 836 (Fla. 5th DCA 1993)(a “bad feeling” about a prospective juror is not sufficient to withstand a *Neil* inquiry because it would be too easy to mask a racially motivated or other improper basis for exercising a peremptory challenge)

The state’s peremptory challenge of venire member Tajuana Holt was without an adequate record supported race neutral reason. Consequently, Lenard Philmore’s constitutional right to an impartial jury was defeated. *e.g. Baber v. State*, 776 So.2d 309 (Fla. 4th DCA 2000)(the striking of even one African-American member of the venire for racial reasons is a constitutional violation) Reversal with instructions 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.

The state asserts that the subject photograph (identification exhibit "B-L"; #64) was relevant and admissible despite the fact that it was gruesome and despite the fact that the medical examiner acknowledged "he could describe these things using a photo with the victim's feature below the eyebrows covered". (SB 33-34) Not addressed by the state is the trial judge's inclination to exclude the subject photograph if defense counsel would stipulate in front of the jury that Lenard Philmore shot and killed Kazue Perron. (TR 887-893) It was only after counsel declined the court's offer of such a stipulation that the disputed photograph became admissible as showing the

gunshot entry wound. (TR 1392-1393)

While it is true that a photograph of a victim depicting relevant injuries is generally admissible, there are limits to a court's discretion in admitting such images. A photograph, such as the one at issue, which has as its primary effect the inflammation of natural passions of ordinary persons to the extent that they would likely interfere with a dispassionate evaluation of the evidence should not be allowed. *see Jackson v. State*, 359 So.2d 1190, 1192 (Fla. 1978)(the admission of gruesome photographs must have some relevancy, either independently or as corroborative of other evidence)

The depiction of Kazue Perron's severely decayed and animal-ravaged facial area was one from which ordinary jurors can surely be expected to have recoiled. When the image was so graphic and chilling that the medical examiner had to point to the places where the victim's facial features once were, any relevance was easily outweighed by its prejudicial nature. *e.g. Pottgen v. State*, 589 So.2d 390, 391 (Fla. 1st DCA 1991)(introduction of video-tape showing decaying, animal-ravaged remains of body constituted error due to its highly inflammatory nature)

Because the purpose of legitimate photographic evidence is to assist the prosecution in presenting its case to the jury, such physical evidence should not be allowed to detract the triers of fact from the issues by inflaming the jury against the accused. In his expert pathological testimony, Dr. Hobin used the subject photograph

to advise the jurors that he determined that Ms. Perron was the victim of a single gunshot injury to her forehead which was not a contact wound. (TR 1404-1408) Since none of this was at issue or in any way contested by the defense, introduction of the admittedly “gruesome” photograph “added little to the evidence but unfair prejudice”. *Bryan v. State*, 533 So.2d 744, 747 (Fla. 1988)

Nothing in the state’s argument satisfies a showing of necessity for the subject photograph. Consequently, its admission was prejudicial error. Reversal for 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.

The state dismisses the prosecutor's various guilt phase remarks regarding "how lucky" an unknown targeted woman was, how the investigating detectives "didn't believe" Lenard Philmore's statements to them and how defendant carried the "great equalizer" as harmless statements not amounting to misconduct. (SB 40-48) Comments personalizing the prosecution are described by the state as merely "conversational". (SB 49)

Florida appellate courts have repeatedly stressed the need of prosecutors to refrain from making improper comments. *e.g. Thomas v. State*, 748 So.2d 970, 985 (Fla. 1999) (we again reiterate our close scrutiny upon prosecutor's comments during

closing arguments and our continuing firm stance that improper comments by prosecutors will not be tolerated) The prosecutor appealed to the conscious of the community and the juror's emotions, personalized the prosecution with the jury, offered law enforcement's opinion of defendant's guilt and stereotyped the accused. (Initial Brief, pgs 76-77)

While it is true that most, if not all, of the improper remarks of the prosecutor went without proper and timely defense objection, relief is still available. If the improper comments of the prosecutor rise to the level of fundamental error, then multiple objections are not necessary since the integrity of judicial process has been compromised and the resulting convictions and sentences irreparably tainted. *Ruiz v. State*, 743 So.2d 1, 7 (Fla. 1999); *see Barnes v. State*, 743 So.2d 1105, 1108 (Fla. 1999)(and extensive citations therein) *see also Urbin v. State*, 714 So.2d 411, 418 n. 8 (Fla. 1998)

The cumulative effect of all the improper prosecutorial remarks as detailed in the initial brief deprived Lenard Philmore of a fair trial. Reversal with instructions to try defendant anew 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.

In its answer brief, the state asserts that it was entirely proper for the prosecutor to advise the prospective jurors that “if at the conclusion of that deliberative process you determine that the aggravating circumstances outweigh the mitigating circumstances, then legally the law says your recommendation should be one for death”. (SB 52-53) No legal authority is offered for such an assertion.

Lenard Philmore’s jurors were affirmatively misled by the prosecutor as to their legal authority to exercise reasoned judgment in reducing defendant’s sentence to life imprisonment, even if the factual situation warranted the death penalty. (TR 626-627)

A trial jury is not prohibited, in a factual situation that may warrant the death penalty, from exercising its reasoned judgment in reducing the sentence to life imprisonment. *see Henyard v. State*, 689 So.2d 239, 249 (Fla. 1996) Recently, in *Franqui v. State*, ___ So.2d ___ (Fla. 2001) this court addressed the issue as follows:

Next, Franqui argues that the trial court erred in instructing and permitting the jury to be instructed by the State during voir dire that it was required to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances. During its opening remarks to the initial venire, the trial court stated, “If you believe that the aggravating factors outweigh the mitigating factors, then the law requires that you recommend a sentence of death.” (Emphasis added)

...

In *Henyard v. State*, 680 So.2d 239 (Fla. 1996), we considered whether a prosecutor’s comments during voir dire that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances misstated the law. *See id.* at 249-50. We held that the prosecutor’s comments were misstatements of law because “a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors”. *Id.*; *see also Brooks v. State* 762 So.2d 879, 902 (Fla. 2000)(stating that prosecutor misstated the law in commenting that jurors must recommend a death sentence unless the aggravating circumstances are outweighed by the mitigating circumstances); *cf. Garron v. State*, 528 So.2d 353, 359 & n.7 (Fla. 1988)(finding that it was a misstatement of the law to argue that “when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty”). For the same reasons expressed in *Henyard*, we agree with Franqui that the trial court’s comment that the law required jurors to recommend the death sentence if the aggravating

circumstances outweighed the mitigating circumstances
misstated the law.

Additional prosecutorial misconduct included denigrating the defense mental health testimony, eliciting the fact that defendant took a polygraph examination and vouching for the credibility of prosecution experts with non-record evidence. (Initial Brief, pgs. 79 - 81) All of the above instances of misconduct by the prosecutor denied Lenard Philmore a fair and reliable sentencing decision. Reversal for 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

The state asserts that the issue of Lenard Philmore’s compelled mental health examination was not properly preserved for review in this court. (SB 65-67) This argument is without merit inasmuch as defendant filed a detailed motion challenging the constitutionality of Florida Rule of Criminal Procedure 3.202 as violative 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) After a hearing thereon, the motion was denied by the trial court. (R 604, TR 121-124) The notation by the trial judge that it was “without prejudice” doesn’t change the fact that it was presented and denied. Notwithstanding the state’s argument of waiver, the defendant never retreated from his position other than to agree to “reasonable” scheduling. (TR 1642-1644)

“A defendant puts on mitigating evidence because the United States Supreme Court precedent provides the defendant with that right...” *Ford v. State* ____ So.2d ____ (Fla. 2001)(Pariente, J. concurring) As a direct result of Lenard Philmore’s exercise of his constitutional right to present mental health mitigating evidence, he was forced to submit to a psychological evaluation by the prosecutions’ own mental health expert. (TR 1717) It was a statement made by defendant to the state’s psychologist concerning his relationship with co-felon Anthony Spann that the trial judge used to defeat the proposed statutory mitigating circumstance that defendant was under the substantial domination of his co-felon at the time of the crime. (TR 1717, 2285-2292, 2309-2310) The trial judge found that defendant could not have been under the substantial domination of his co-felon if he had previously confronted him in a dispute over narcotics. (R 1230)

Lenard Philmore should not have been forced to give up his privilege against self incrimination in order to exercise his right to present mitigation evidence to his penalty phase jury, both rights of which he is guaranteed by the United States and Florida Constitutions. His pretrial motion to prevent such a compelled mental health examination was improperly denied. (R 400-405, TR 121-124, R 604)

Reversal for a new penalty phase proceeding 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 state acknowledges that co-felon Anthony Spann “conceived the criminal plan” which ultimately led to the death of Kazue Perron. (SB 73) A well planned carjacking and abduction by co-felon Anthony Spann does not equate to a carefully planned and prearranged killing by Lenard Philmore. *see e.g. Guzman v. State*, 721 So.2d 1155, 1161 (Fla. 1998); *Pomeranz v. State*, 703 So.2d 465 (Fla. 1997); *Barwick v. State*, 660 So.2d 685, 696 (Fla. 1995)

Because the instant case was more of a well planned robbery/kidnapping by co-felon Spann that resulted in an unplanned killing by a mentally ill Lenard Philmore, the statutory aggravating circumstance of cold, calculated premeditation was improperly found by the trial court. Reversal 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 its brief, the state points to Lenard Philmore's confession which "revealed that he knew [co-felon] Spann previously had carjacked several vehicles and killed their owners". (SB 83) It was Spann, however, who first brought up the subject of the victim's death which act was later described by defendant as being done at his co-felon's request by "stupid old me". (TR 1434-1435)

A fair review of Lenard Philmore's statement regarding the shooting death of Kazue Perron fails to show that it was a product of his own independent decision to silence the only witness to the carjacking. Defendant's explanation for his actions which the prosecution presented via his confessions was that he acted as he did at the request of co-felon Spann who convinced defendant to "trust" him. (TR 1435, 1444,

1463, 1469, 2107) Lenard Philmore was not shown to have the requisite intent necessary to establish this statutory aggravating circumstance of witness elimination. *compare Hitchcock v. State*, 413 So.2d 741 (Fla. 1982); *Lopez v. State*, 536 So.2d 226 (Fla. 1988); *Remeta v. State*, 522 So.2d 825 (Fla. 1988); *Amazon v. State*, 487 So.2d 8 (Fla. 1986) 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.

The state asserts that the trial judge was justified in her rejection of the extreme mental or emotional disturbance mitigator on behalf of Lenard Philmore. (SB 88-90) The record reveals otherwise.

Despite expert psychological testimony of Lenard Philmore's mental illness which was substantially corroborated by defendant's family members and public school records, the trial judge merely noted that "the defendant has experienced some difficulties in his life". (R 1229) It was the "coherent well thought out plan" of co-felon Spann that the trial court relied upon in rejecting the statutory mitigating circumstance that defendant committed the capital felony while under the influence

of extreme mental or emotional disturbance. (R 1229)

In essence, the trial judge applied the co-felon's superior mental abilities vicariously to Lenard Philmore as rebuttal to defendant's claim of limited mental faculties due to a chronic mental illness. This is akin to applying a statutory aggravating circumstance applicable to one defendant vicariously to a co-defendant, which, of course, is not permitted. *e.g. Williams v. State*, 622 So.2d 456, 463-464 (Fla. 1993); *Archer v. State*, 613 So.2d 446, 448 (Fla. 1993); *Omelus v. State*, 584 So.2d 563, 566 (Fla. 1991); *see also Messer v. State*, 757 So.2d 526 (Fla. 4th DCA 2000)(defendant could not be given a departure sentence based on his co-defendant's actions)

The trial court should have found that the capital felony was committed while Lenard Philmore was under the influence 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.

In its brief, the state acknowledges that the trial court made a factual finding that co-felon Anthony Spann “initiated the planning of the crimes”. (SB 92) In ruling that Lenard Philmore was not acting under the substantial domination of another person at the time of the offense, the trial judge ignored defense expert psychological opinion as well as lay testimony, both of which described defendant as being compliant with whatever co-felon Spann told him to do. (TR 1850, 1904-1908, 2139-2141) In that there was no evidence that Lenard Philmore was anything other than weak and easily dominated, this statutory mitigating circumstance should have been found to exist. 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.

The state argues that the trial judge correctly rejected yet another proposed mental health mitigating circumstance on behalf of defendant. (SB 94-97) Despite substantial, competent mental health testimony supported by educational records that Lenard Philmore suffered from a chronic biological mental illness, the trial court rejected this statutory mitigating circumstance. (R 1231-1232; TR 2107) The trial judge found that defendant’s mental illness only “pushed him into the situation” rather than “made him do it”. (R 1232) A fair examination of the record suggests that this mitigating circumstances was established by a preponderance of the evidence. *see Jackson v. State*, 704 So.2d 500 (Fla. 1997); *Larkins v. State*, 655 So.2d 95 (Fla. 1995) Reversal for resentencing is appropriate.

CONCLUSION

Based on the foregoing arguments and citations of authority, it is requested that Lenard Philmore's conviction and sentences be vacated with appropriate instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply 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 11 day of January 2001.

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