IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1036

Lenard James Philmore

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT FOR MARTIN COUNTY,
STATE OF FLORIDA

AMENDED REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This reply brief addresses arguments I, II, and IV of Mr. Philmore’s initial brief. As to all other issues, Mr. Philmore stands on the previously filed initial brief and Habeas Corpus Petition.

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REPLY TO APPELLEE’S ANSWER TO ARGUMENT I

POSTCONVICTION RELIEF WAS DENIED PROPERLY AS PHILMORE FAILED TO PROVE INEFFECTIVE ASSISTANCE ARISING FROM THE COMPLETENESS OF COUNSEL’S OBJECTION TO THE STATE’S PEREMPTORY STRIKE OF POTENTIAL AFRICAN AMERICAN JUROR HOLT (restated by Appellee)

On page 36 of Appellee’s answer brief, the statement that “Philmore presented no evidence the strike was pretextual and this Court had previously rejected the challenge to the peremptory strike,” is a misapprehension of fact. Actually, the State attempted to peremptorily strike Juror Holt from the onset of jury selection. This is supported by the trial record:

> MR. BAKKEDAHL: Judge, just a note. I want to bring it to the Court’s attention so it’s on the record. Ms. Holt is in seat 11, and I meant to raise this after lunch yesterday, I didn’t get around to it and they didn’t come back up, was sleeping for a good portion of yesterday’s jury selection. I would just ask the Court to keep an eye on her.
>
> THE COURT: I will certainly do that sir. Thank you.
>
> (TR Vol. VI-476).

The State then attempted to strike Juror Holt for cause and the following took place:

> MR. COLTON: The State would move to excuse juror in seat number 11, Ms. Holt for cause. I believe that this morning Mr. Bakkedahl

> brought it to the Court's attention that yesterday he noticed that she was sleeping during the proceedings. And I don't know if you had a chance to observe her today, but Mr. Bakkedahl tells me that today, this afternoon, that when he looked over there again, she appeared to be asleep again.
> MR. BAUER: Your Honor –
>
> THE COURT: If I rule in your favor, do you want to be heard?
>
> MR. BAUER: No.
>
> THE COURT: Let me say this. I watched her all day. She actively participated in the questioning. She was shaking her head when questions were asked of other people. And after he mentioned it to me, I really watched her. And she may have looked as though she were sleeping from where Mr. Bakkedahl was sitting, but she was not. So that motion for cause is denied. (TR Vol. VIII-836)

It is clear that the only member of Mr. Philmore's race was being targeted by the State for removal as a juror. The State then attempted to strike Ms. Holt peremptorily by alleging a discrepancy between her questionnaire and her answers in court:

> That this juror in questioning – in filling out her questionnaire, Your Honor, in regard to the death penalty questions, said that, "I feel that people shouldn't get the death penalty. Just let them stay in prison for the rest of their lives." And to the question, "Do you think it should always be imposed in cases of murder?" "Let them stay in prison for the rest of their lives." Today she gave answers that were quite different than that. And our concern is,

whether or not we can rely on what she put in the questionnaire, or whether we can rely on what she said in Court today. (TR Vol. VIII-845)

Regarding the in court statements by Ms. Holt, it is clear that the State had rehabilitated Ms. Holt rather than defense counsel:

THE COURT: Mr. Colton.
MR. COLTON: Yes, ma'am?
THE COURT: I believe that Ms. Holt's mother is the managing clerk in my division; is that correct, ma'am? Is Rosa your mom?
MS. HOLT (Nods head).
THE COURT: Yes.
MR. COLTON: Okay. Having established that, does that cause you any problem with serving on the jury?
MS. HOLT: No.
MR. COLTON: have you discussed this case with her?
MS. HOLT: No.
MR. COLTON: Do you ever discuss with her her duties here at the courthouse?
MS. HOLT: No.
MR. COLTON: Okay. You just don't really care, do you? Getting onto the questions regarding the death penalty. If your answer – you said you feel people shouldn't get the death penalty, they should just stay in prison for the rest of their lives. That was your feelings yesterday when you were filling out this questionnaire. Can you either expand on that or tell me if your feelings have changed since you've been in the courtroom?
MS. HOLT: Well, I think they should get it, but I think it should be other, you know, decisions too.
MR. COLTON: You think it should – that the death penalty shouldn't be the only thing,

> is that what you're saying?
> MS. HOLT: (Nods head.)
> MR. COLTON: But do you feel there should be cases where the death penalty is the proper penalty?
> MS. HOLT: Yes.
> MR. COLTON: Okay. You said in answer to that second death penalty question that, "let them stay in prison for the rest of their lives." Again, that's an alternative or something that could be done in some cases, or do you feel that that should be in all cases?
> MS. HOLT: No, in some cases. (TR Vol. VI-508-9).

Mr. Philmore respectfully contends that the State feigning concern over the rehabilitation which they caused was pretextual in itself and that the State was acutely aware of this when they added:

> Your Honor, I would also point out that during the day today, members of our staff spoke to that – this prospective juror's mother, who is a member of the clerk's office, without going into great detail of the questions and answers that were asked of the prospective juror, but she advised that we ...
>
> MR. GARLAND: I'm going to object. This is hearsay.
>
> MR. COLTON: Your Honor, this goes to our reasons and whether our reasons are genuine.
>
> THE COURT: Overruled.
>
> MR. COLTON: That her mother – her own mother advised us that we would do better not to have her daughter on the jury. And I would

state to the Court that there is nothing improper about talking to people who know the prospective jurors. It's done all the time. This is a person who obviously knows the prospective juror. And without going into detail, and without her going into detail, she advised us that we would be better off without her daughter on the jury.

THE COURT: Did you wish to be heard further, Mr. Garland?

MR BAKKEDAHL: I'm sorry, Your Honor?

THE COURT: Did you wish to be heard further, sir?

MR. GARLAND: Yes, Your Honor. Note for the record that she's the only black member of the panel that's being bumped for – excuse me, a peremptory is being exercised. The other two, Mr. Haston was excused for medical reasons, and Ms. Page was excused because of pretrial publicity that she had learned of, both through the newspapers, television and also as a resident of Indiantown. She had indicated because of not only living in the area, she had read and heard about it, that she could not be fair and impartial, she could not set it aside. The grounds state so far by the government, the State, do not constitute sufficient grounds. And the only basis at this point is because she's an African-American woman.

MR. COLTON: Your Honor, if I may be heard? I resent the fact that we're be accused of excusing a juror for racial reasons, number one. Number two, the case law says that the Court is to determine whether or not the reason for the strike is genuine, whether or not we really intend it for the purposes we say, rather than whether it is a reasonable

> reason. Whether or not Mr. Garland agrees with our reasons for excusing this juror, or even whether the Court agrees with our reasons for not wanting this juror, the only question under Melbourne is whether or not our request for excusal is genuine. I submit to the Court that it is. (TR Vol.VIII 845-47).

The amended claim in the 3.851 hearing was an ineffective assistance of counsel claim. Defense counsel was cowed by the State with their blustering indignation in response to a legitimate Neil/Slappy inquiry. The prosecutor did not say with specificity the reason his peremptory strike was genuine, rather, he was evasive in his answer ("without going into detail, and without her going into detail")in essence, the genuineness that the strike was not racially motivated was merely indignantly stated - but not proven by fact. Trial counsel should have "held the State's feet to the fire" by asking why did they question only relatives of the sole African-American prospective juror. Given the unfounded accusation that Ms. Holt was sleeping when she was not, and the concern over the rehabilitation of Ms. Holt, a discriminatory intent was inherent in the prosecutor's explanation. Trial counsel, although invited to do so by the trial court, failed to adequately assess the credibility of the prosecutor. Due to trial counsel's ineffectiveness, the trial court had no choice but to accept the

unchallenged submission that the reason for the strike was genuine.

Appellee’s contention on page 39 of the Answer Brief that “Philmore merely questioned Thomas Garland (“Garland”) about his actions (PCR.1 19-23). Philmore presented nothing to establish that the peremptory strike was a pretext.” is vitiated by subsequent questioning of Garland by post-conviction counsel:

> Q. (BY MR. KILEY) Counsel, you were just showed a trial record – actually, it was a trial record, page 845 to 846, and were asked if you recognized what was refreshed your recollection of the incident. I would show that now, sir. And ask you to read it.
>
> A. Read what? Oh. “Mr. Colton: Your Honor, I would also point out that during the day today members of our staff spoke to that – this prospective juror’s mother, who is a member of the Clerk’s office. Without going into great detail of the questions and answers that were asked with respect to the juror, but she advised that we – “Mr. Garland: I’m going to object. This is hearsay. “Mr. Colton: Your Honor, this goes to our reasons and whether our reasons are genuine. “The Court: Overruled. “Mr. Colton: That her mother, her own mother advised us that we would do better not to have her daughter on the jury. And I would state to the Court that it’s nothing improper about talking to people who know the prospective jurors. It’s done all the time. This is a person who obviously knows the prospective juror. And without going into detail and without her going into detail, she advised us that we would be better off without her daughter on the jury. “The Court: Do you wish to be heard further, Mr. Garland?”

Q. Thank you, sir. Obviously, would you submit that you had some problems with the State doing this? Correct, sir?

MR. MIRMAN: I'm going to object. I believe this is the same thing he was asked about before. To be fair to the witness, he said it didn't refresh his recollection, point where it's fair to ask him questions about it.

THE COURT: Overruled.

Q. (BY MR. KILEY) Sir, you can answer.
A. Sure. Yes. I mean –
Q. Is it safe to assume, sir, if you did not have a problem with this colloquy, you would not have made the correct objection? Right?
A. Okay. Sure. Yes.
Q. Did you then ask that this prospective juror's mother, who worked in the Clerk's office, be questioned by the Court?
A. I don't recall, but I don't believe so.
Q. Did you consider, sir, – I mean, if one looks at the statement, without going into great details of the questions and answers that were asked of the prospective juror, did you consider that a reason to exclude this woman from testifying?
A. I wasn't racially-motivated. And as far as I know, the standard that goes to the genuineness, I think they were exercising a peremptory. I'm not sure. I –
Q. Well, what about pretextual? What is a pretextual reason, sir? As an attorney, you must have heard the term.
A. I heard of pretextual stops.
Q. How about a pretextual reasons?
A. Sure, we all have pretextual reasons. What's the question?
Q. What is a pretextual stop?

MR. MIRMAN: I'm going to object to the relevance of that question.

MR. KILEY: I'll tie it up.

THE COURT: Overruled.

A. Police officer may think he did something wrong, but he stops and makes up a reason for the stop. Taillight was out.
Q. (BY MR. KILEY) I would agree. Now, sir, carrying it – that reasoning that they made up a reason to mask a ge4nuine concern, would you or would you not contend that this reason, we talked to her mother and, without getting into detail, we want to strike her peremptorily, does that sound pretextual to you, or does it sound like a genuine reason? Or does it sound like any reason at all?
A. ***It sounds like it could be construed any way you want, counselor.*** (Emphasis added).
Q. Okay. Did you take the opportunity – do you recall the Court asking you if you wished to be heard further on this matter, Mr. Garland?
A. I think that's what the transcript says.
Q. Do you recall asking the Court to bring this juror's mother up so you could question her?
A. I don't recall.
Q. Well, if the record says you did not, would you dispute the record?
A. How can I dispute the record?
Q. Did you ask – do you recall asking the State Attorney who questioned this woman's mother, Tajuana Holt's mother, do you recall asking the State Attorney that?
A. I don't recall.
Q. Well, if the record disputes that you did not, would you have any reason to dispute the accuracy of the trial record?
A. No.
Q. Do you recall demanding that the State go into detail as to why they were excluding this juror?
A. I don't recall.
Q. If the record says you did not, would you

have any reason to dispute the accuracy of the trial record?
A. No.
Q. Why didn't you do that, sir? Why didn't you inquire further when given the opportunity by this Court to do so?
A. I guess we were satisfied at that point. And we moved on.
Q. You were satisfied–
A. I made my objection. I was overruled.
Q. Okay. You were satisfied that this reason was a genuine reason?
A. ***No. I – what I'm saying is I made my objection. It was overruled. The objection's on the record. So we moved on.*** (Emphasis added).
Q. And did you have a tactical reason for not pursuing this further, or did you just forget?
A. I don't recall.
Q. You don't recall the reasons you didn't question the witness further?
A. Well, you're asking me a compound question.
Q. Okay.
A. What I'm saying is, I noted my objection and we moved on. It was overruled.
Q. Did you inquire if members of the State's attorney's Office had talked to mothers of any white jurors?
A. I don't recall. I don't think I did.
Q. Did you ever talk to Rosa Holt?
A. I don't have any recollection. So I don't believe so. I don't know who Rosa Holt is.

THE COURT: I didn't hear you, Mr. Garland.

THE WITNESS: I don't know who Rosa Holt is.

Q (BY MR. KILEY) The mother of Tajuana Holt. Right?
A. Okay.
Q. Well, you were aware that Miss Tajuana Holt was African-American?
A. That appears to be correct.

> Q. And you did not see a pattern emerging from the State's efforts to get Miss Holt off the jury?
> A. No.
> Q. You don't recall that the State accused Miss Holt of sleeping during voir dire?
> A. I think I've answered that. I vaguely remember some issue of that coming up.
> Q. Okay.
> A. I don't recall which juror it was.
> Q. Well, you did not inquire which State Attorney investigator had spoken to the mother of Tajuana Holt?
> A. I don't recall. Apparently not.
> Q. And you did not inquire how many other mothers of prospective jurors of the white race that this member of the State's Attorney's staff had allegedly talked to.
> A. Who happened to be clerks in the courthouse, no, I don't recall. (PCR Vol. I 38-45).

The pretextual nature of the strike had been raised at the evidentiary hearing along with counsel's ineffectiveness in failing to develop it at trial.

Appellee's contention that Mr. Philmore had failed to show prejudice flies in the face of established case law. Mr. Philmore was prejudiced by the striking of prospective juror Holt because "there is a reasonable probability that [she] would have struck a different balance." Wiggins v. Smith, 123 S.Ct. 2527, 2531 (U.S. 2003). In Bertolotti v. Dugger, 883 F.2d 1503, 1519 (C.A. 11 (Fla.), 1989) the court rejected the argument that analysis of the "reasonable probability" of a different verdict

should vary according to the number of jurors voting to impose the death penalty: if there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation. It matters not how many jurors voted for death over life, only a reasonable probability that one juror would change her vote. Ms. Holt remaining on the panel, would have been the only member of Philmore's race to help and provide input regarding a life recommendation.

The United States Supreme Court recently addressed the issue of discriminatory jury selection in Miller-El v. Dretke, 2005 WL 1383365, *1 (U.S.) (2006) stating:

> "[T]his Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." Georgia v. McCollum, 505 U.S. 42, 44. The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences. The *Batson* Court held that a defendant can make out a prima facie case of discriminatory jury selection by "the totality of the relevant facts" about a prosecutor's conduct during the defendant's own trial. 476 U.S., at 94. Once that showing is made, the burden shifts to the State to come forward with a neutral explanation, id., at 97, and the trial court must determine if the defendant has shown "purposeful discrimination," id., at 98, in light of "all relevant circumstances," id.,

at 96-97.

In Mr. Philmore's case, there were no representatives of his race in this cross-racial murder. Race played a part in the prosecutor's decision to ensure that Ms Holt was stricken from the panel. There was a racially discriminatory motive and the State's proffered race-neutral justifications for striking Ms. Holt were mere pretexts for unconstitutional discrimination. The State targeted Ms. Holt for removal and when a strike for cause was denied, they used a pretextual reason to disguise their true motive - getting all African American prospective jurors off the panel. Relief is proper.

REPLY TO APPELLEE'S ANSWER TO ARGUMENT II

In answer to Mr. Philmore's argument two, Appellee is incorrect on points of fact and law. Appellee seeks to recast Mr. Philmore's argument by saying that Mr. Philmore is asking this Court to find *per se* ineffectiveness when counsel does not prohibit his client from talking to police. That is not what Mr. Philmore is arguing. Trial counsel Hetherington completely abdicated his responsibility to Mr. Philmore by encouraging him to give multiple statements to law enforcement before even a modicum of investigation was done. The reckless actions of counsel led to Mr. Philmore's conviction and sentence of death.

Trial counsel's representation of Mr. Philmore fell below the standards set in Cronic v. United States, 466 U.S. 648 (1984) and Strickland v. Washington, 466 U.S. 436 (1966). Mr. Philmore's point is that trial counsel's representation was so deficient that it went beyond the standard set in Strickland and fell to the level of the representation as in Cronic. In Mr. Philmore's case, there was a "fail[ure] to subject the prosecution's case to meaningful adversarial testing." Cronic at 659. Even under the standard in Strickland, trial counsel's (1) representation fell below an objective standard of reasonableness, by making errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland at 687-89. Applying the standard in either Cronic or Strickland would entitle Mr. Philmore to relief.

Appellee seeks to absolve trial counsel of substandard legal representation by shifting the responsibility to Mr. Philmore for the multiple statements given to law enforcement. Appellee says at page 46 of the Answer Brief, "[a]ny miscue in talking to the police lies squarely upon the shoulders of

Philmore who conversed with law enforcement, in spite of counsel's warning of the dangers of doing so and advice not to give a statement if he were involved in Perron's abduction and shooting." In making this argument Appellee ignores or disregards facts in the record which show that the fault for the multiple statements to the police rests on the shoulders of trial counsel Hetherington and not Mr. Philmore.

The record shows that as the statements evolved from the first uncounseled statement by Mr. Philmore on November 14, 1997 and the full confession on November 26, 1997 - a mere 12 days - Mr. Philmore was incrementally incriminating himself. When Hetherington realized that Mr. Philmore was not giving him the full story about the abduction, Hetherington should have been alerted that something was amiss. This realization would have come as early as the November 18, 1997 statement when Mr. Philmore admitted some involvement in the abduction. Clearly, all further statements should have ceased at that point. Any competent and experienced defense lawyer would have realized the prudence of slowing down and conducting investigation and discovery. Surely no competent lawyer would send his client in for further interrogation by the police under the circumstances.

Appellee makes brief mention that it was Mr. Philmore who

terminated the first interview on November 14, 1997 when the questioning led from the armed trespass to the Indiantown Bank robbery. Mr. Philmore ended that interview and requested counsel. (See PCR. Vol. IV p.315). Obviously, Mr. Philmore was reluctant to speak and knew that he needed counsel for legal advice as he was under investigation for committing crimes. Appellee fails to fully address the reasons why Mr. Philmore went from invoking his right to remain silent to giving a series of statements which led to a full confession and conviction for first degree murder. Furthermore, Appellee fails to address the events which took place between Hetherington's appointment to represent Mr. Philmore on November 15, 1997 and the full confession given on November 26, 1997. Examination of those events illustrate how Hetherington veritably betrayed his client.

As of November 15, 1997, Hetherington was appointed to represent Mr. Philmore on only the armed trespass charge. Hetherington was not appointed to represent Mr. Philmore on the bank robbery or the murder of Perron. (See PCR. Vol. II p. 147, 148) In fact, Mr. Philmore was not charged with the bank robbery and murder of Perron until weeks later. Any advice Hetherington gave to Mr. Philmore was advice on a case for which Hetherington

was not yet appointed as counsel. Since Hetherington was appointed to represent Mr. Philmore on only the trespass, and not the murder, Hetherington should have proceeded cautiously - if at all - on the murder. Instead, Hetherington was giving advice to Mr. Philmore on a case for which he was not yet appointed. Even though he was not appointed, Hetherington led Mr. Philmore to believe that if he gave statements to law enforcement he would receive a life sentence for the murder of Perron. (ROA. Vol. V p. 863, 867, 870). Hetherington then arranged for Mr. Philmore to give statements to law enforcement culminating in a full confession with no concessions in return from the State. Hetherington acted rashly and recklessly to the detriment of Mr. Philmore's case.

Appellee suggests that Hetherington warned Mr. Philmore of the dangers of speaking to law enforcement if he were involved in the abduction and shooting of Perron. However, it was Hetherington that coaxed and cajoled Mr. Philmore to speak with the police. In the Answer Brief at page 49, Appellee simply makes a bald assertion that "Hetherington's advice to Philmore was clear, do not talk to law enforcement if you are involved in the crimes." This is belied by the record wherein several exchanges show that Mr. Philmore was reluctant to speak and that

the State and Hetherington were pressuring Mr. Philmore to speak.

Appellee, in the Answer Brief, does not mention the exchange where, as his own attorney, in the same room, sits idly by, Mr. Philmore unequivocally tries to cease the November 18, 1997 interrogation by law enforcement. During that exchange Detective Bach said: "Okay. Where did you get the guns?" and Mr. Philmore responded, "I cannot say at this time. I take the fifth on that statement there." (PCR. Exhibit 4). Mr. Philmore's desire to "take the fifth" and his reluctance to speak was completely lost on Attorney Hetherington as the questioning continued. Attorney Hetherington neither ceased the questioning nor did he even speak up or object. This is record evidence that it was actually Hetherington who pushed Mr. Philmore to speak with law enforcement and not Mr. Philmore insisting that the statements be given as suggested by the State in the Answer Brief.

Appellee focuses on what Mr. Philmore initially told trial counsel about any involvement in the abduction of Perron. Appellee attempts to cast blame on Mr. Philmore for disregarding Hetherington's purported advice not to speak with law enforcement if he was involved in the crime. Appellee fails to

acknowledge that Hetherington, as an experienced assistant public defender, should have known that criminal clients during the early stages of representation are reluctant to speak candidly to their own attorneys about their cases. The lack of candor by criminal clients results from distrust, fear, and feelings of isolation. Experienced attorneys know this and understand why investigation and discovery of the facts of a case are necessary before any conclusions are drawn or action taken based on a clients version of the alleged crime. A criminal defense attorney cannot rely on his or her own client's version of the facts before discovery is done to corroborate. Appellee totally fails to address this in the Answer Brief.

Appellee does not address both Hetherington's and the State's urging, bordering on an outright promise, that Mr. Philmore cooperate with law enforcement to gain a benefit. Appellee argues that Hetherington warned Mr. Philmore of the dangers of speaking to law enforcement. However, the record belies this version of discussion between Hetherington and Mr. Philmore. What actually happened, and Appellee fails to address this in the answer brief, is that Mr. Philmore was led to believe that if he testified to law enforcement, he would receive a life sentence. (ROA. Vol. V p. 863, 867, 870). The

record supports this conclusion.

Initially, Mr. Philmore terminated the first November 14, 1997 statement where no counsel was present. Mr. Philmore was reticent and aware of the danger to his case if he continued to speak to law enforcement. He then requested an attorney. Mr. Philmore testified that Hetherington led him to believe that he would receive a life sentence if he cooperated with law enforcement. (ROA. Vol. V p. 863). Hetherington testified that he told Mr. Philmore that there was a better chance for him to receive a life sentence if he cooperated with law enforcement if he were not involved or not the shooter. Even law enforcement, during interrogations of Mr. Philmore, made statements leading Mr. Philmore to believe that he would receive the benefit of cooperation when they said:

> DETECTIVE VON HOLLE: ... that. And with ... with the one little exception of what you told us here, that it could very well have happened than the way that you're tellin' us and you ... you know, that he had this car and ... and ... and whatnot, uh, but there are just some, uh, discrepancies here that I'm finding difficult to accept the whole thing. And I ... I want to ... **I wanna see you get the benefit that comes along with cooperating.** Alright, I'm caught, I'll tell you what it is; I'll cooperate. You know, I'm-sorry, you know, or ... or ... or whatever.
> (Emphasis added)
> (PCR. Defense Exhibit 4 - November 18, 1997

statement - p. 46)

Again, later during the same interview, Detective Von Holle suggested that Mr. Philmore could benefit from cooperation, and the following exchange took place:

> LENARD PHILMORE: If she's ... if she find ... if she comes up ... I mean, you know, dead, you know, okay, I'm sayin' I'm tryin' to let you ... you know ... let you ... I know ... I ... I don't know nothin' of her. But when she be found or whatnot, you know, they gonna still come after me 'cause what ... I was in her car. I used her car as a getaway. Know what I'm sayin'? That still ties me in with this lady. You know what I'm sayin'? I know I'm still lookin' at life for that there. So I know I have no life left. You know what I'm sayin'? If I can help you, I would help you. You know what I'm sayin'? But ...
> DETECTIVE VON HOLLE: **If we could give you somethin' that would ... would do you any good, you'd help us?**
>
> LENARD PHILMORE: No. I'm not lookin' for no handout.
>
> DETECTIVE VON HOLLE: Well, I mean, let's look at this some. Life is ... is made up of you provide one thing and somebody else gives somethin' back. You know? Uh, who knows. **Maybe somethin' could happen to where, uh, you could see that it would be to your benefit. Let me ask you that. Would you be willing, uh, to be a little bit more talkative if ... if you saw it was to your benefit**?
>
> LENARD PHILMORE: I can't say that because I've been tryin' to tell you what I know.

(Emphasis added) (PCR. Exhibit 4 - p. 72)

Again, later during the same interview, Detective Von Holle suggested that Mr. Philmore could benefit from cooperation, and the following exchange took place:

> LENARD PHILMORE: If she's ... if she find ... if she comes up ... I mean, you know, dead, you know, okay, I'm sayin' I'm tryin' to let you ... you know ... let you ... I know ... I ... I don't know nothin' of her. But when she be found or whatnot, you know, they gonna still come after me 'cause what ... I was in her car. I used her car as a getaway. Know what I'm sayin'? That still ties me in with this lady. You know what I'm sayin'? I know I'm still lookin' at life for that there. So I know I have no life left. You know what I'm sayin'? If I can help you, I would help you. You know what I'm sayin'? But ...
>
> DETECTIVE VON HOLLE: **If we could give you somethin' that would ... would do you any good, you'd help us?**
> LENARD PHILMORE: No. I'm not lookin' for no handout.
>
> DETECTIVE VON HOLLE: Well, I mean, let's look at this some. Life is ... is made up of you provide one thing and somebody else gives somethin' back. You know? Uh, who knows. **Maybe somethin' could happen to where, uh, you could see that it would**
>
> LENARD PHILMORE: No. I'm not lookin' for no handout.
>
> DETECTIVE VON HOLLE: Well, I mean, let's look at this some. Life is ... is made up of you provide one thing and somebody else gives somethin' back. You know? Uh, who

> knows. **Maybe somethin' could happen to where, uh, you could see that it would be to your benefit. Let me ask you that. Would you be willing, uh, to be a little bit more talkative if ... if you saw it was to your benefit**?
>
> LENARD PHILMORE: I can't say that because
>
> I've been tryin' to tell you what I know.

(Emphasis added) (PCR. Exhibit 4 - p. 72)

The above exchanges between Detective Von Holle and Mr. Philmore show how Mr. Philmore was being worked over by the State. Although no formal or overt promises were made to Mr. Philmore in exchange for his cooperation, clearly he was led to believe that he would not get the death penalty if he cooperated. The suggestion that he would benefit from cooperating was subtle, but it was a suggestion nonetheless. Mr. Philmore was induced by both his own attorney and law enforcement to provide cooperation.

Appellee did not mention or acknowledge the following exchange wherein Attorney Hetherington, in the presence of law enforcement, spoke to Mr. Philmore more like a cop than a lawyer when he said:

> DETECTIVE FRITCHIE: Okay. Now I'm gonna ask you one more time with your lawyer present. Is there anything else that you are forgetting to tell me? That you can ... that ... you know, neglecting to tell me, or

whatever word you wanna use that ...

Okay?

LENARD PHILMORE: That’s what I probably still ... I was scared of, ‘cause, you know, that’s enough there to just convict me. You know?

JOHN HETHERINGTON: Okay. That’s fair.

LENARD PHILMORE: That’s all I really wanna say.

JOHN HETHERINGTON: But, you know, that’s fair to be scared. On the other hand, it’s important that ... that we know exactly, you know, for your protection right now that ... is there anything else you wanna clarify that you’re scared of, too, including things about Sophia, things about the guns, things about the actual kidnapping and who was present?

LENARD PHILMORE: No, it was just me and Spann present.

JOHN HETHERINGTON: Okay. And you’re not ... you’re not scared about that either, like you were scared about tellin’ Det. Fritcie about ...

LENARD PHILMORE: Mm ...

JOHN HETHERINGTON: ... handling ...

LENARD PHILMORE: Sophia, ya’ll please, you know, it may seem like I might lie on some ... you know, it’s not that I’m lyin’. It’s just I’m not sayin’ it, but you know, I’m sayin’ to you Sophia, Frankie ...

JOHN HETHERINGTON: Okay.

LENARD PHILMORE: ... nobody else was present on that day.

JOHN HETHERINGTON: Okay.

LENARD PHILMORE: And we didn’t even see ... I didn’t even see them on Friday.

JOHN HETHERINGTON: And Sunday we’re gonna examine that further, and that’s okay with you? Okay. (Phone ringing)

DETECTIVE FRITCHIE: Is it, uh, is it safe to say that when you walked up to Mrs. Perron, in your opinion, she was dead at that time? I mean, is that safe ... your opinion? I don’t know if that’s even a fair question, but I mean ...

LENARD PHILMORE: She was dead because the wound was to the head. So I would say she was dead.

DETECTIVE FRITCHIE: Okay.

JOHN HETHERINGTON: Did you see more than one wound?

LENARD PHILMORE: Huh?

JOHN HETHERINGTON: Did you see more than one wound, or two?

LENARD PHILMORE: I didn’t really see the wound. I just seen ... you know, I seen like a little spot of blood on her head and, you know, and the blood that’s on the ground.

DETECTIVE FRITCHIE: Okay. You ... do you believe, based on what ... the last things you saw with Mrs. Perron, that the wounds were to the back of the head or to the front of the head?
...

Attorney Hetherington actively participated in the interrogation of his client, coaxed Mr. Philmore to answer questions, didn't cease the questioning when it became evident that Mr. Philmore didn't want to say anymore, and prodded Mr. Philmore for clarification about the case - all in front of Detective Fritchie. Questioning a client regarding a kidnapping and murder in front of an FBI agent, on tape, is hardly the time or place to discover about the case. Not knowing what will come out and the consequences of admissions on a later trial is the type of risk involved in allowing a criminal client to speak to police. Such risks are why "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1347 (1949). Appellee fails to acknowledge that Hetherington did assist law enforcement in interrogating his own client.

Curiously, the exchanges between Detective Von Holle and Mr. Philmore were mentioned neither by the trial court in the order denying Mr. Philmore relief nor by Appellee in the answer brief. Evidently, these exchanges are an impediment to one seeking a preordained conclusion that Mr. Philmore was not being led to believe he would receive a life sentence if he cooperated

with law enforcement, and thus were ignored by the trial court and Appellee. These exchanges are clear evidence that promises were being made to Mr. Philmore to coax him to give statements to police.

Appellee cites at page 56 of the Answer Brief to the circuit court order regarding the spontaneous nature of the statements made by Mr. Philmore to the police. The circuit court said, "[f]urther, there is no evidence in the record that, given the spontaneous nature of the Defendant's statements, Mr. Hetherington could have stopped the Defendant from making incriminating statements even had he been there. (emphasis in original) However, the reason the statements could not be stopped is because trial counsel placed Mr. Philmore in a position where spontaneous statements could not be protected against. It was Hetherington, an attorney, who allowed Mr. Philmore, his client, to go into a polygraph exam and speak to law enforcement without the aid of counsel.

Appellee cites at page 55 of the Answer Brief to the circuit court order wherein the court states, "[c]learly had the defendant been honest with his attorney at any stage prior to his full confession, Mr. Hetherington would not have advised the Defendant to make any statements to law enforcement." This is an

incorrect statement of fact relied upon by the court to deny Mr. Philmore relief. Actually, Hetherington was aware that Mr. Philmore was the shooter after the November 23, 1997 statement and prior to the full confession on November 26, 1997. (See PCR. Vol. IV p.332) Even with knowledge that Mr. Philmore was the shooter, Hetherington allowed Mr. Philmore to give the full confession.

The Appellee also relied upon the court's order on page 55 of the Answer Brief wherein the court said, "[c]ounsel's decision regarding the statements were strategic, made after he had obtained adequate information, and were based on the Defendant's representations that he was innocent." However, counsel's decisions cannot be deemed strategic because counsel had not obtained adequate information. Counsel had not done investigation or discovery. Counsel did not know how much or how little information the State knew about the case. Counsel acted solely upon what his client told him - and acted rashly at that. Counsel was operating at a disadvantage and it cannot be said that counsel's decisions were strategic.

To argue that Hetherington had a first strategy based on no involvement in the abduction, to a second strategy of cooperating non-shooter, to third strategy as a cooperating

shooter is only an attempt to legitimize an example of reckless and incompetent lawyering.

Actually, Attorney Hetherington had no real interest in providing zealous advocacy to Mr. Philmore. As a result of Hetherington's lack of interest in Mr. Philmore's case, the State's case was not subjected to a serious adversarial testing which inured to the detriment of Mr. Philmore. Unfortunately for Mr. Philmore, his attorney never had an interest in testing the State's case because his attorney never wanted to go to trial. Attorney Hetherington testified at the evidentiary hearing that he "handled" about ten or eleven murder trials, none of which went to trial as "he got off of the cases for one reason or another." (See PCR. Vol. II p. 147-148) Mr. Philmore's case was no exception. Hetherington, from the moment he was appointed to Mr. Philmore's trespass case, was predisposed to getting relieved of the burden of representing Mr. Philmore at the murder trial. Hetherington did anything and everything he could to ensure that he would not have to represent Mr. Philmore at trial.

Appellee erroneously disputes that Attorney Hetherington was ineffective in that he was assisting the State in its interrogation and that Hetherington used the "Christian burial

speech” on Mr. Philmore. Hetherington did both assist the State in interrogating Mr. Philmore and he used the “Christian burial speech” on Mr. Philmore. At the evidentiary hearing Hetherington said:

> Q. And so –so you did – wait a minute. The body is found when, after the incident – the 20th? The incident – the 20th?
> A. It’s either the 20th or the 21st, I think.
> Q. Okay. And at that time you had taken Mr. Philmore privately and indicated to Mr. Philmore that, perhaps, it would be best for everyone if there was closure and that woman’s body was found. Correct, sir?
> A. That was part of our discussion.
> Q. Also part of the discussion was –
> A. And I’m not sure who initiated that statement. It was either Philmore or myself.
> Q. And – but did you or did you not indicate that the family would really like – and it would be beneficial if the family could find their loved one and bury their loved one in a civilized manner, instead of wondering where this body was?
> A. We may have discussed that in the context of mitigation.
> Q. Isn’t that the old Christian burial routine?
> A. No.
> Q. No?
> A. No.
> Q. You know what the old Christian burial routine is?
> A. Yes.
> Q. What is the old Christian?
> A. That with the two cops in the car and talking to the guy in the back seat. It’s an old – 30 year old case.
> Q. It’s a 30-year-old case where the police say, gee, sure would be nice if the family had a Christian burial.

> A. Yeah. I’m familiar.
> Q. Okay. Well, that’s a police interrogation technique, right?
> A. No.
> Q. No? It’s not?
> A. Well, they did it. We were talking about it.
> Q. They did it. And you did it, didn’t you?
> A. Yeah.
> Q. Okay.
> A. They used the word. I used the word. I’m not a cop.
> Q. Christian burial, right. I mean, they used that technique and you used that technique, didn’t you? Didn’t you?
> A. We talked about it. (See PCR. Vol V p. 446-448).

Neither the circuit court nor Appellee address that a polygraph exam is truly not a lie detector test but is actually an investigative tool used by law enforcement in securing confessions.[1] Polygraph exams are scientifically unreliable and thus inadmissible in Florida. Kaminski v. State, 63 So.2d 339

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[1] In spite of decades of extensive use in the United States, by federal agencies and local law enforcement, as we have seen, no scientifically acceptable assessment of CQT validity has yet been published. This is due in part to the fact that the real value of the polygraph in criminal investigation is as an interrogation tool, an inducer of confessions, rather than as a decision-making tool or test. Post-test interrogations that elicit a confession necessarily confirm the CQT result that prompted the interrogation. In absence of systematic evidence concerning the accuracy of CQT results that do not lead to confessions, examiners have been able to sustain the belief that all their diagnosis are extremely accurate. David Faigman, et.al. Modern Scientific Evidence: The Law And Science Of Expert

(Fla. 1952); Perry v. State, 395 So.2d 170 (Fla.1980). In Florida, the view is that, "the validity of the polygraph test and the reliability of testimony dealing therewith is still dependent upon too large a number of variable factors impossible of resolution." State v. Curtis, 281 So.2d 514, 515 (Fla. 3d DCA 1973), cert. Denied, 290 So.2d 493 (Fla. 1974). Polygraphs do not pass the test in Frye v. United States, 395 So.2d 170 (Fla. 1980). Polygraphs simply are nothing more than an investigative tool used by the State to elicit confessions. Attorney Hetherington should never had subjected Mr. Philmore to the State's investigation thereby giving the State an opportunity to resolve an unsolved crime. Appellee refuses to acknowledge that Attorney Hetherington was party to a ruse - in the form of a "lie detector test" - played on Mr. Philmore by law enforcement.

Appellee has made mistakes as to fact and law in arguing that Mr. Philmore is not entitled to relief. Attorney Hetherington should not have subjected Mr. Philmore to police investigation and interrogation. Attorney Hetherington should have conducted his own investigation and done at least some discovery before taking any action on Mr. Philmore's case. The advice and actions taken by Attorney Hetherington ensured a

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Testimony, 2 MODSCIEVID § 19-3.2

conviction and death sentence for Mr. Philmore. Since Hetherington was not acting as attorney for Mr. Philmore, relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, and the arguments in Mr. Philmore's Initial Brief, the lower court improperly denied Lenard Philmore's Motion for Rule 3.851 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 15th day of July, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Amended Reply Brief of Appellant, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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