IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-1036

LENARD JAMES PHILMORE,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

****

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

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Lenard James Philmore, was the defendant at trial and will be referred to as "Philmore". Appellee, State of Florida, will be referred to as the "State". References to the records will be "ROA" for the direct appeal, "PCR" for postconviction record, supplemental records will be designated with an "S", and "IB" will denote Philmore's initial brief. Where appropriate, volume and page number(s) will be given.

STATEMENT OF THE CASE AND FACTS

On December 16, 1997, both Defendant, Lenard James Philmore ("Philmore"), and co-defendant Anthony A. Spann, ("Spann"), were indicted for the November 14, 1997 first-degree murder of Kazue Perron; conspiracy to commit robbery with a deadly weapon (bank robbery); carjacking with a deadly weapon; kidnapping; and robbery with a deadly weapon; and third-degree grand theft. (Indictment). The trials of Philmore and Spann were severed. Philmore's trial commenced January 18, 2000, and resulted in a January 20, 2000 verdict of guilty as charged on all counts. See Philmore v. State, 820 So.2d 919, 925 (Fla. 2002). Between January 24, 2000 and January 28, 2000, the penalty phase was held. The jury's recommendation for death was unanimous (ROA.28 2581-85). On July 18, 2000, a hearing pursuant to Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) was conducted (ROA.28

2592-2673). Sentencing was held July 21, 2000, and a death sentence was imposed based upon the court finding five aggravating factors of (1) prior violent felony;[1] (2) felony murder (kidnapping); (3) avoid arrest; (4) pecuniary gain; and (5) the cold, calculated, and premeditated ("CCP", no statutory mitigation,[2] and eight nonstatutory mitigators of: (1) defendant was victim and witness of physical/verbal abuse by an alcoholic father; (2) history of extensive drug and alcohol abuse; (3) severe emotional trauma and posttraumatic stress; (4) Philmore was molested and/or raped when young; (5) classified as severely emotionally handicapped; (6) ability to form close loving relationships; (7) cooperation with State; and (8) remorse. (ROA.28 2678-81).[3] Philmore, 820 So.2d at 925-26.

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[1] The felonies included the August 22, 1995 battery of a corrections officer in a detention facility, a 1993 robbery, the November, 4, 1997 robbery of a jewelry store and attempted murder of the store's owner, and the November 13, 1995 armed robbery of a pawn shop.

[2] The trial court rejected the alleged mitigation of: "(1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (2) the defendant acted under extreme duress or under the substantial domination of another; (3) 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) defendant's age of 21 at the time of the crime." Philmore v. State, 820 So.2d 919, 926, n.9 (Fla. 2002).

[3] Philmore received 15 years for conspiracy to commit robbery with a deadly weapon, and life for carjacking with a deadly weapon, kidnapping, and robbery with a deadly weapon, and five years for third-degree grand theft. Philmore v. State, 820 So.2d 919, 926, n.10 (Fla. 2002).

On direct appeal, this Court found:

> Philmore, who was twenty-one at the time of the commission of the crimes, was charged and convicted of first-degree murder, conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, kidnapping, robbery with a deadly weapon, and third-degree grand theft based upon the events surrounding the November 14, 1997, abduction and murder of Perron.
>
> The evidence presented at trial revealed the following. Philmore and codefendant Anthony Spann[1] wanted money so they could go to New York. On November 13, 1997, Philmore, Spann, and Sophia Hutchins, with whom Philmore was sometimes living, were involved in a robbery of a pawn shop in the Palm Beach area. However, the robbery was unsuccessful. Consequently, Philmore and Spann decided to rob a bank the following day.
>
> On the evening of November 13, Philmore and Spann picked up their girlfriends, Ketontra "Kiki" Cooper and Toya Stevenson, respectively, in Spann's Subaru and stayed at a hotel for the evening. The following morning, Spann told Philmore that they needed to steal a car as a getaway vehicle in order to facilitate the robbery. Spann told Philmore that they would have to kill the driver of the vehicle they stole.
>
> At approximately 11:30 a.m. on November 14, Philmore and Spann dropped their girlfriends off at their houses, and went in search of a car to steal. Philmore and Spann first looked for a car at the Palm Beach Mall, but were unsuccessful. They then followed a woman to another mall, but by the time they reached her car, she was already outside of her car, making it difficult for them to steal the car. They ultimately spotted Perron driving a gold Lexus in a residential community, and the two followed her.
>
> At approximately 1 p.m., Perron entered the driveway of a friend with whom she intended to run errands. Upon entering the driveway, Spann told Philmore to "get her." Philmore approached the driver's side of the vehicle and asked Perron if he could use her phone. Perron stated that she did not live there, and Philmore took out his gun and told Perron to "scoot

over." Philmore drove Perron's car, with Spann following in his Subaru. During the drive, Perron was crying and told Philmore that she was scared.

Spann flashed his car lights at Philmore, and the two cars pulled over. Spann told Philmore to "take the bitch to the bank." Philmore asked Perron if she had any money, and Perron responded that she did not have any money in the bank, but that he could have the $40 she had on her. Philmore told her to keep the money. Perron took off her rings, and Philmore placed them inside the armrest of the Lexus.[2] Perron asked Philmore if he was going to kill her, and he said "no." She also asked if Spann was going to kill her, and Philmore again said "no."

Philmore and Spann passed a side road in an isolated area in western Martin County, and Spann flashed his lights, indicating that they turn around and head down the road. Philmore chose the place to stop. Philmore ordered Perron out of the vehicle and ordered her to walk towards high vegetation containing maiden cane, which is a tall brush. Perron began "having a fit," and said "no." Philmore then shot her once in the head. Philmore picked up Perron's body and disposed of it in the maiden cane. Spann did not assist in disposing of the body.

Philmore and Spann then drove the two vehicles to Indiantown, where they stopped at a store. Spann pointed out a bank to rob, and Philmore, following Spann, drove to the bank parking lot. Philmore parked the Lexus a short distance from the bank, and got into Spann's Subaru. At approximately 1:58 p.m., Spann drove Philmore to the bank to commit the robbery. Philmore entered the bank while Spann waited in the car. Philmore grabbed approximately $1100 that a teller was counting and ran out of the bank. After robbing the bank, Philmore and Spann returned to the Lexus, and concealed the Subaru. Philmore threw his tank top out of the Lexus by the side of the road after the robbery and wore Spann's tank top. The discarded tank top, which contained Perron's blood, was subsequently recovered by the authorities.

After concealing the Subaru, Philmore and Spann returned to Palm Beach County to pick up Cooper and Stevenson at their houses. They then went to a fast

food restaurant to get food and Cooper's paycheck. Afterwards, Philmore wanted to go to Hutchins' house because he left his shoes there. However, as they approached Hutchins' house, Philmore spotted an undercover police van sitting at a nearby house, and stated that it "looked like trouble." An officer of the West Palm Beach Police Department, who happened to be engaged in a stakeout in the area, observed Spann driving the Lexus and recognized him because there was an outstanding warrant for his arrest on an unrelated matter. Spann sped away and a high-speed chase ensued on Interstate 95.

As the high-speed chase proceeded into Martin County, a tire blew out on the Lexus. Philmore and Spann, followed by Cooper and Stevenson, exited the vehicle and hid in an orange grove. While in the orange grove, Philmore and Spann encountered the manager of the grove, John Scarborough, and his assistant. Although Spann first told Scarborough that they were running from the police because of a speeding incident, when Scarborough expressed his disbelief, Spann said that they were running from the police because of drug-related activities. Spann offered Scarborough money to get them out of the grove, and Scarborough refused. Scarborough drove away and informed the police, who were already searching the grove, where he saw them. Philmore and Spann were apprehended and charged with armed trespass. The authorities recovered firearms from a creek in the orange grove a few days later.

From November 15 through November 26, Philmore gave several statements to the police in which he ultimately confessed that he robbed the bank and abducted and shot Perron. On November 21, Philmore led the police to Perron's body, which was found in the maiden cane. Philmore was charged in a six-count indictment, and the jury found Philmore guilty on all counts.

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[1] Spann's trial was severed from Philmore's trial, and Spann also received the death penalty. Spann's guilt and penalty phases were conducted between Philmore's guilt and penalty phases. Philmore testified at Spann's trial.

> [2] Philmore later threw the rings out the car window because Spann told him that "they will get you in a lot of trouble." The rings were never recovered.

Philmore, 820 So.2d at 923-25 (footnotes 3 - 5 omitted).

Philmore raised eleven issues on direct appeal.[4] (PCR.7 710-902; ROA.8 903-77). This Court affirmed the conviction and sentence. Philmore, 820 So.2d at 923. Of import to the instant appeal are Points I, II, and IX - XI from the direct appeal. This Court analyzed the denial of the motion to suppress Philmore's confession under the Fifth and Sixth Amendments and opined: "[t]urning to the Fifth Amendment issue, we conclude that Philmore's statements were freely and voluntarily given. ... A review of the testimony and evidence presented at the evidentiary hearing in this case supports the trial court's

[4] Philmore raised the following: (I) Philmore's several statements to the police were not "freely and voluntarily given with the advice of a competent and effective counsel" and should have been suppressed; (II) the court erred in allowing the state to peremptorily strike prospective African-American juror Tajuana Holt; (II) error to admit gruesome photograph of victim's face; (IV) the State committed prosecutorial misconduct by virtue of his various comments before the jury; (V) the State committed prosecutorial misconduct during the penalty phase closing; (VI) it was error to compel Philmore to submit to a mental health examination by a State expert; (VII) it was error to find the cold, calculated premeditated aggravator; (VIII) it was error to find the avoid arrest aggravator; (IX) the court erred in rejecting the mitigator of under the influence of extreme mental or emotional disturbance; (X) the court erred in failing to find Philmore was acting under the substantial domination of another person; (XI) the court erred in failing to find Philmore's capacity to conform his conduct to the requirements of law was substantially impaired.

finding that the statements were freely and voluntarily made." Philmore, 820 So.2d at 928. Also, this Court stated: "As for Philmore's ineffective assistance claim under the Sixth Amendment, we decline to review this claim at the direct appeal stage. The claim is denied without prejudice to reraise the claim in a rule 3.850 motion." Id..

In appellate Point II, Philmore asserted it was error to permit the State's peremptory strike of potential African-American juror Tajuana Holt based on Melbourne v. State, 679 So.2d 759 (Fla. 1996). Rejecting the matter, this Court opined:

> We conclude that this claim has been waived because although Philmore objected at the time the State sought to exercise a peremptory strike of Holt, he failed to renew his objection prior to the jury being sworn. ... Moreover, we conclude that even if this claim was not procedurally barred, it has no merit because the State has advanced a facially race-neutral non-pretextual reason for peremptorily challenging Holt. Therefore, we deny Philmore relief on this claim.

Philmore, 820 SO.2d at 930.

Philmore, in appellate Points IX - XI, challenged the rejection of the mitigators of (IX) extreme mental or emotional disturbance; (X) acting under the substantial domination of another person; and (XI) the capacity of Philmore to conform his conduct to the requirements of law was substantially impaired. The rejection of the statutory mitigator of under the influence of extreme mental or emotional disturbance was affirmed upon

this Court's recognition that a trial judge "has broad discretion in determining the applicability of a particular mitigating circumstance, and this Court will uphold the trial court's determination of the applicability of a mitigator when supported by competent substantial evidence." Id. at 936. Further, it was noted that with regard to the issue of expert psychological evaluations of a defendant's mental health, "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Id. This Court quoted the trial court's findings with respect to this mitigator and found such supported by competent, substantial evidence especially in light of the controverted defense expert testimony. Id. at 936-37.

Direct appeal Point X (substantial domination of another) was similarly affirmed. In analyzing the issue, this Court again noted the evidence was conflicting and that the trial judge had "expressly considered all of the evidence presented as reflected in the sentencing order." Id. at 938.

The direct appeal issue, Point XI, challenged the rejection of the mitigator of Philmore's inability to conform his conduct to the requirements of law was substantially impaired. This Court stated:

> We conclude that the trial court's rejection of this statutory mitigator is supported by competent substantial evidence. As noted in the previous two claims, Dr. Berland's testimony was substantially refuted by the State, both through cross-examination, and through the testimony of Dr. Landrum. Therefore, we affirm the trial court's rejection of this statutory mitigator.

Id. at 939.

On July 5, 2002, Philmore filed his petition for writ of certiorari with the United States Supreme Court. (PCR.8 978-1015). Following the State's response in opposition (PCR.8 1016-47), on October 7, 2002, certiorari was denied. Philmore v. Florida, 537 U.S. 895 (2002).

Philmore filed his 3.851 Motion for Postconviction Relief on September 16, 2003 in which he raised ten claims with sub-claims.[5] The State responded by agreeing to an evidentiary

[5] Claim I was amended, see note 5. The balance of the claims are: (II) counsel was ineffective: (A) for failing to investigate Philmore's case before advising Philmore to give incriminating statements to the police; (B) allowing Philmore to give incriminating statements to the police even after counsel knew Philmore would implicate himself in the murder; (C) for failing to be present with Philmore during the police statements; and (d) for failing to secure a plea agreement before allowing Philmore to give incriminating statements; (III) penalty phase counsel was ineffective: (A) for failure to present mitigation evidence ; (B) for failure to provide Philmore's mental health expert with adequate background information to permit a meaningful evaluation for the presence of mitigation of intoxication and/or drug abuse; (C) for failure to provide the expert with adequate background information to permit a meaningful evaluation that Philmore was under the influence of extreme mental or emotional disturbance at the time of the offense; (D) for failure to argue in closing the presence of brain damage to support the extreme mental or emotional

hearing on Claims I(B), II, III, and V. (PCR.6-9 593-1120). Following the January 15, 2004 Case Management Hearing, Philmore was allowed to amend Claim I[6] and the State was given an opportunity to respond. (PCR.9 1133-52, 1158-80, Appendix A). At the Case Management Hearing, Philmore agreed that an evidentiary hearing was not necessary on his postconviction Claims IV, and VI - X (Appendix A at 9). An evidentiary hearing was held on March 30 through April 1, 2004 on postconviction Claims I - III and V. At the evidentiary hearing, Philmore

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disturbance mitigator; (E) for failure to provide the expert with adequate background information to permit a meaningful evaluation that Philmore was acting under the substantial domination of another at the time of the offense; and (F) for failure to present expert testimony to explain the presence of organic brain damage to support mitigation that Philmore was under the influence of extreme mental or emotional disturbance; (IV) Philmore's death sentence is unconstitutional because the sentencing court ignored the testimony of an expert who, if considered, would have established statutory mitigation; (V) counsel was ineffective in failing to subject the State's case to a meaningful adversarial testing by conceding guilt without consulting Philmore; (VI) guilt and penalty phase counsel were ineffective for failing to object to instances of prosecutorial misconduct; (VII) the cumulative errors deprived Philmore of a fair trial; (VIII) Florida's capital sentencing is unconstitutional under Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) and Ring v. Arizona, 122 S.Ct 2428 (2002); (IX) Section 921.141, Florida Statutes is under Caldwell v. Mississippi, 472 U.S. 320 (1985); and (X) Philmore may be incompetent to be executed. (PCR.6 501-81).

[6] (I) guilt and sentencing counsel were ineffective: (A) for failure to challenge the State's contention that its strike of potential African-American juror Holt was not pretextual; (B) for failing to empanel an impartial jury; and (C) for failing to preserve for appeal the issue of striking the only potential African-American juror and failing to preserve for appeal the issue of failing to question jurors about racial bias.

called Thomas Garland, Esq., his penalty phase counsel, Dr. Maher, a mental health expert, John Hetherington, Esq., who represented Philmore pre-trial, and Kathleen Laverne Miller, Philmore's mother.

During the evidentiary hearing, Thomas Garland ("Garland") explained he had been licensed since 1990, is Board Certified in criminal trials and procedure, and is certified to conduct capital punishment trials. He conducted between 70 and 80 criminal jury trials, between 10 and 20 non-capital murder trials, and four death penalty trials. (PCR.1 13-14). He has taken the "life-over-death" seminars offered by the Public Defender's Association (PCR.1 45).

With respect to the claim of ineffectiveness during voir dire, Garland testified that he recognized and strategized that the defense would want African-Americans on the jury, but knew that such population was small in Martin County (PCR.1 18-19). Garland vaguely recalled the circumstances regarding his challenge to the striking of potential juror, Tijuana Holt ("Holt"), but was not disputing the trial record (PCR.1 20-23, 39-42). He conceded the State's strike of Holt was not racially motivated (PCR.1 40). When questioned why he did not delve further into the State's reason for striking Holt, Garland offered that he must have been satisfied he preserved the issue - he had objected, it was overruled and "we moved on." (PCR.1

42-43). He saw no pattern emerging from the State's striking of Holt (PCR.1 44). When objecting to the strike, Garland was aware of State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla.1988); and Melbourne v. State, 679 So.2d 759 (Fla. 1996) and their discussions of a challenge to a juror on racial basis. Garland made the objection on this ground, however, he was overruled. He agreed the record would reflect Holt's juror questionnaire (PCR.1 62-63).

Garland testified that given Philmore's confession, and his own experience with penalty phases, he and co-counsel, Chip Bauer ("Bauer"), who is "a very good lawyer," agreed the guilt phase would be done by Bauer, and Garland would do the penalty phase. (PCR.1 16) According to Garland, "given that we already had a confession, we did our best to overturn that with a motion to suppress. That was denied. And given that the evidence was coming in, we had to deal with that." (PCR.1 16-17). In developing a strategy, Garland and Bauer spoke to Philmore many times about the strategy and confession. Counsel and client:

> discussed the fact that given the -- I can't remember if it was one or two prior statements before the final confession, given that it was videotaped, given that his lawyer was there, given it was audiotaped, given that police officers were there and the State Attorney, given that he was clearly advised of his Miranda rights, given that he didn't appear to be coerced or under duress or under the influence of any drugs or alcohol, there was a very good chance that that statement was going to come in, unless we could find some sort of evidence of brain damage or anything

that might have affected his ability to comprehend and make a knowing, voluntary waiver of his rights.

(PCR.1 6-18). On cross-examination the following occurred:

> Q. Okay. With regard to Mr. Bauer, you were asked some questions regarding meetings you may have had with Mr. Bauer regarding trial strategy. Were you involved in the decision-making with regard to the guilt phase, as far as what the strategy would be to argue for second-degree murder, what to concede, and so forth?
>
> A. Yes. We -- Mr. Bauer and myself both were, yes. And we discussed that with Mr. Philmore, yes.
>
> Q. Okay. Now, did Mr. Philmore agree during those conversations that Mr. Bauer would concede the existence of the robbery, the kidnapping; but as to the first-degree murder, that Mr. -- that Mr. Bauer would argue that this was second-degree murder and not first-degree murder, that that was the hope during the guilt phase, that the jury would come back with second degree?
>
> A. Yes.
>
> ...
>
> Q. (BY MR. MIRMAN) Were you present when Mr. Bauer or yourself explained to Mr. Philmore that there would be a concession as to the underlying felonies of robbery and kidnapping, I believe, in this case?
>
> A. Yes. And if I may explain, besides this case, he also had cases in West Palm pending. And I -- in fact, I believe by the time we actually went to trial, he had actually been sentenced on one. And we knew he was getting life. And the issue was could we save his life. And that was our primary goal. Given the confession, given the evidence against him, given pending charges and sentences against him, we were trying to get a life sentence, hopefully concurrent; but we were trying to do that, yes.
>
> Q. And was that explained to him?

A. Yes.

Q. Did he consent to that?

A. Yes.

(PCR.1 56-57). Garland averred both counsel and client participated in the strategy sessions and Philmore was aware of and agreed with the strategy, although such was not memorialized.[7] (PCR.1 64-65).

With respect to penalty phase preparation, Garland testified he had taken the Public Defender's course regarding capital cases and knew he needed to present statutory and non-statutory mitigation. Because non-statutory factors are of less weight, Garland tried to find as many as possible. (PCR.1 28-29 45). He investigated the case, utilized a private investigator, spoke to family members, consulted with Philmore, procured records from Philmore's schools and jail, knew Philmore had been Baker-Acted, and hired two highly recommended mental health professionals, Dr. Berland (psychologist) and Dr. Maher (psychiatrist). Later, he had Dr. Woods review and testify

[7] Although declining to withdraw this claim at the evidentiary hearing, Philmore's postconviction counsel conceded that the evidence is against him and that his client agreed to the defense strategy followed at trial. Counsel stated "I am not going to prevail for the simple reason that the attorneys did -- there is -- there is evidence that the attorneys did discuss a concession of guilt. And that is all the State needs to vitiate a Nixon [v. State, 857 So.2d 172 (Fla. 2003)] claim." (PCR.5 489).

about Philmore's PET scan because Drs. Berland and Maher reported suspecting organic brain damage. While counsel looked for employment records, Philmore "[d]idn't really have an employment history of any kind." (PCR.1 25-33, 53). Garland spoke to Philmore about alcohol and drug usage and learned that while Philmore had been using these substances from an early age, he was not using them on the day of the crimes (PCR.1 24-25). Also considered and investigated was Spann's influence over Philmore in an attempt to support the statutory mitigator of "under the substantial domination of another" (PCR.1 34-36).

It was Garland's strategy to present family members to support non-statutory mitigation and to corroborate events in Philmore's life which would lend credence to Dr. Berland's finding of organic brain disorder, post-traumatic stress, and substantial domination of another. (PCR.1 46, 49, 51). Specifically, Garland called family members to report: (1) Philmore was the son of a young mother who was unprepared for a child; (2) father was a drinker; (3) father abused mother and children physically and mentally; (4) Philmore tried to protect others from father; (5) head injuries suffered by Philmore as a child to support later organic brain disorder diagnosis; (6) Philmore's belief the bullet which killed his niece was meant for him resulting in post-traumatic stress disorder; (7) Philmore used drugs and alcohol at an early age; (8) Philmore

was in prison from early age to show more traumatic experiences; (9) helped blind and handicapped children in school and protected sister from violent boyfriend; (10) Philmore drank a lot more after niece's death to show post-traumatic stress; (11) Philmore was nervous in Spann's presence in order to show Spann's dominance of Philmore; (12) Spann was the "idea" man; (13) Spann always carried drugs. (PCR.1 46-51; ROA.21 1835-53, 1864-75, 1880-91, 1899-1908).

Garland recalled, and also relied on the trial record, that Dr. Berland testified in the penalty phase reporting Philmore was severely psychotic, had a low IQ which showed organic brain damage, experienced hallucinations, manic depressive episodes and paranoia (PCR.1 51-52; ROA.23 2120-22, 2126). Dr. Berland found the statutory mitigators of extreme mental or emotional disturbance at the time of the offense due to psychosis, his capacity to conform his conduct to the requirements of the law was substantially impaired, and Philmore was under the domination of Spann (PCR.1 52-53). The doctor also found post-traumatic stress disorder due to the death of Philmore's niece, that he had been Baker-Acted, and had been raped at the age of eight or nine (PCR.1 51-54). Garland considered through whom he should present the rape evidence, ultimately deciding to go with Dr. Berland because he was a good witness. Also, Garland argued for mitigation in the form of cooperation with the police.

(PCR.1 54). He had no recollection of Philmore stating he was a homosexual or transvestite (PCR.1 63).

In the evidentiary hearing, Dr. Maher testified he had evaluated Philmore in 1999 with regard to this case and again in March 2004 for the postconviction litigation (PCR.2 91). Before meeting with Philmore, Dr. Maher reviewed the police statements, relied on Dr. Berland's report to a lesser extent, Department of Corrections ("DOC") records, and the fact Philmore had been Baker-Acted, (PCR.2 91-94). Dr. Maher had not completed his work on the case at the time of his December 21, 1999 deposition (PCR.2 94-94). However, before the penalty phase, Dr. Maher had reviewed the results of Philmore's PET scan and determined there was a "non-specific abnormality" in the **frontal lobe**[8] which controls how one perceives, processes, filters information (PCR.2 96-98). The abnormality identified, was interpreted as causing Philmore to be more impulsive. (PCR.2 98-99). Based upon the PET scan and reports of head injuries, Dr. Maher concluded Philmore had organic brain damage. (PCR.2 99-101). However, Dr. Maher was not familiar with Dr. Mayberg's trial testimony that all of the PET images showed normal metabolism,

[8] At trial, Dr. Woods reported that the PET scan showed a brain injury in the angular gyrus region - left posterior brain injury (ROA.22 1971-73); State expert, Dr. Mayberg reported that the PET scan slides offered were of the high area of the parietal area, not the posterior region Dr. Wood noted (ROA.26 2437-54).

(PCR.2 129-31). Philmore's drug and alcohol use exacerbated the organic brain damage by making Philmore less aware of the consequences of his actions - less impulse control (PCR.2 105-10). Dr. Maher opined that Philmore's capacity to appreciate the criminality of his conduct was substantially impaired. (PCR.2 109-10, 1121-23). The organic brain damage was also exacerbated by Philmore's post-traumatic stress disorder due to his niece's murder (PCR.2 110-14).

While Spann was seen by Dr. Maher as the one who initiated the activities he and Philmore conducted, Philmore was not particularly afraid of Spann. However, Philmore's brain damage would make him easily led (PCR.2 114-16). When the dominant force in the relationship is removed, such as when Spann and Philmore were separated, Philmore would look for a new lead and could be led by an attorney or police officer. (PCR.2 116-17). While Dr. Maher would say S[pann had "psychological influence" over Philmore, that influence **did not** rise to the level of the statutory mitigation of substantial domination (PCR.2 126).

Dr. Maher claimed that he had not found Philmore to have an antisocial personality disorder, but that he was disturbed and suffering from extreme mental and emotional disturbance at the time of the crime (PCR.2 118-23). Based on his March, 2004 re-evaluation, Dr. Maher reconfirmed his original findings and

noted Philmore could adapt to prison life. Also, Philmore was remorseful (PCR.2 127-28).

When testifying in capital postconviction cases, Dr. Maher testifies almost exclusively for the defense (PCR.2 129). He admitted that in his 1999 deposition, he opined that Philmore had an antisocial personality disorder, but now, he rejects that conclusion given Philmore's adjustment to prison and PET scan results. (PCR.2 134). Dr. Maher agreed that the circumstances of the two robberies in Palm Beach County prior to the instant crimes showed a degree of Philmore being able to think independently (PCR.2 135-37; ROA.20 1778-1803). He agreed he had described Philmore in the deposition as: "You might say one of this guy's strengths is he's a good salesman. Put him in a good suit in a furniture store and teach him a little bit about furniture, this guy can get people to like him and to trust him and he can sell stuff." This was consistent with a prong of the antisocial personality disorder. (PCR.2 140-41) Dr. Maher also characterized Philmore as a willing participant in the crimes with Spann and that Philmore was not drunk during the criminal episode (PCR.2 141-42). A review of the deposition reveals Dr. Maher had opined Philmore had a "mixed personality disorder" with antisocial traits (PCR.2 142). Garland testified that he decided not to call Dr. Maher after reviewing his report and deposition and having several consultations with the doctor

because “I just didn't think that he was going to add anything to our case.” (PCR.1 37, 55).

John Hetherington (“Hetherington”) represented Philmore pre-indictment. Hetherington’s decisions throughout his contact with Philmore were to minimize his exposure to criminal charges. The initial strategy was to convince the police Philmore was not involved in the crimes against Mrs. Perron. This strategy included taking a polygraph in order to substantiate the original exculpatory statement. Both the November 18, 1997 statement and November 20, 1997 polygraph were freely performed by Philmore, and approved by Hetherington, based upon Philmore’s assurances he was telling his counsel the truth about his non-involvement in the crime. Hetherington confirmed with Philmore that he understood the importance and dangers of talking to the police, and that he was freely giving the statement and taking the polygraph, knowing and agreeing that Hetherington would not be in the polygraph room. As Hetherington explained under questioning by the State:

> A. [Mr. Hetherington] We had many discussions about the entire case.
>
> Q. [Mr. Mirman] He wanted to tell the police he had nothing to do with that abduction, and you were there helping him make the decision as far as whether he should communicate that to the police on that day.
>
> A. Yes.

Q. Okay. And over the next few days you spoke to him several times about whether he should speak to the police and communicate his innocence with regard to the missing woman.

A. We met several times, I'm sure.

Q. And because he was swearing to you that he had nothing to do with the abduction whatsoever, you both agreed that there would be no harm in communicating that to the police. Correct?

A. That's correct.

Q. And the two of you discussed whether he should do that, whether he should communicate that to the police. But, ultimately, it was his decision, not yours, to actually speak to the police.

A. Yes.

Q. And he clearly communicated to you his desire to communicate the fact of his innocence to the police.

A. I believe so.

Q. Okay. I'd like to ask you about his decision to speak to the police -- some more questions about his decision to speak to the police on November 18th and proclaim his innocence.

Obviously, at that time that was not a difficult decision to advise him whether it was okay for him to communicate to the police that he had absolutely nothing to do with the abduction, because he would not be incriminating himself. Correct?

A. Absolutely.

Q. And so on November 18th, he spoke to the police with you present, and you told them just that, that he had nothing to do with the abduction of Miss Perron. Correct?

A. That's correct. Yes.

Q. And during that interview, you had asked some questions of him. At any time during that interview or any other interview, did you seek -- did you seek to help the police to the detriment of Mr. Philmore?

A. Absolutely not.

Q. As you testified to, your questions were meant to clarify Mr. Philmore's cooperation and thereby assist your defense position. Is that correct?

A. Yes.

Q. Is it accurate to allege that you used interrogation tactics to get Mr. Philmore to confess? Is that an accurate statement?

A. No.

Q. After he gave that statement on November 18th, the police then requested that he take a polygraph to confirm the truthfulness of this statement that he had nothing to do with the abduction whatsoever. Is that correct?

A. That's correct.

Q. And then -- you then met with him to decide whether he should take a polygraph to confirm his truthfulness of the November 18th statement. Correct?

A. That's correct.

Q. And the benefit of him taking a polygraph test would be to convince the police of his innocence and thereby minimize the possibility of a false charge being leveled against him by the police who were assuming his guilt or had suspicions about his guilt. Is that correct?

A. That was our objective.

...

Q. Yeah. Let me rephrase it. That is, if the police were convinced of Mr. Philmore's guilt, despite having evidence of it, they would be in a position to be susceptible to believe a co-defendant like Mr. Spann who might talk to the police and say, "No, he did it."

A. That's correct.

Q. And thereby falsely charge Mr. Philmore.

A. That's correct.

Q. So when you discussed the potential for taking a polygraph test with Mr. Philmore, you emphasized that it not only made sense if his story was the truth, that -- I'm sorry, that it only made sense to take the polygraph test if his story was truthful. Correct?

A. Sure.

Q. And there was a great risk if he was lying. Correct?

A. He was fully advised.

Q. In your words, there would be serious consequences, or there could be serious consequences if he was not being truthful in the November 18th statement.

A. Yes.

Q. And he responded to you by telling you that he was completely innocent. Correct?

A. He had nothing to do with that.

Q. He told you that he was telling you the truth.

A. Absolutely.

Q. Correct? And, therefore, it made sense to take the polygraph test, pass it, and convince the police of his innocence so that there would be less of

a chance of them believing a liar, like Anthony Spann, who might falsely implicate him. Correct?

A. That was the goal, yes.

Q. And you knew you would not be present at the polygraph test, because that was the standard operating procedure. Correct?

A. Yes.

Q. You had been told that by the police?

A. Absolutely.

Q. And not only did you know that, but you communicated that to Mr. Philmore. Mr. Philmore was certainly aware that you would not be present during the polygraph test.

A. Absolutely.

Q. And the two of you discussed the reality that he would be on his own with regard to the polygraph test.

A. Yes.

Q. Correct? And he reassured you not to be concerned about that, because he was telling you the truth and he would pass the polygraph test.

A. Absolutely.

Q. And once again, during that time, he was swearing to you up and down he had nothing to do with the abduction and the murder of Miss Perron.

A. That's correct.

Q. He had no concerns about being on his own during the polygraph test?

A. None.

Q. And so he consented, he agreed to take the polygraph test knowing full well that you would not be present. Correct?

A. Absolutely.

Q. And you had no concern about him changing his story, because he had reassured you upon your inquiry that he was being truthful with you and with the police regarding his story about not being present at the abduction, having nothing to do with the abduction of Miss Perron. Correct?

A. That's why we went ahead with the test itself.

Q. At that time could you foresee somehow that he would change his story when he would speak to the police during the polygraph procedure?

A. No.

(PCR.4 353-60).

Hetherington's next consultation with Philmore came on November 20, 1997, the day of the first attempted polygraph. Even before the polygraph could begin, Philmore informed Detective Fritchie ("Fritchie") that he was involved in Perron's abduction. As a professional courtesy, Fritchie notified Hetherington, and the polygraph was stopped. (PCR.4 360-61). Hetherington had cautioned Philmore not to go through with the polygraph if he were not going to say what he had told the police initially (PCR.4 361-63). Following this, Philmore and Hetherington spoke. Hetherington asked Philmore to be truthful so he could help him, and reaffirmed that he impressed upon Philmore to be truthful to his lawyer, and not talk to the

police if he were lying. (PCR.4 360-70). In spite of these warnings, Philmore agreed to take the polygraph on November 20, 1997 in order to confirm the veracity of his November 18th statement, and then told the detective he was involved in the abduction. (ROA.13 801-06, 870-74; PCR.4 360-70).

Following the November 20th polygraph attempt, Hetherington obtained assurances from Philmore that he was not involved in the shooting of Perron although he was involved in the abduction. (PCR.4 364). Because this was Hetherington's first indication that Philmore was not being truthful with his attorney, Hetherington had to recalculate his decision to permit Philmore to have further contact with the police. It was Hetherington's recollection that Philmore explained he had gone to Indiantown with Spann, that Spann had left with Perron, and when Spann returned in Perron's car, she was gone. Based upon Philmore's assurances he was not the shooter, the choice was between Philmore being the non-shooter co-operating defendant or the non-cooperating principal to felony murder. Also, taken into consideration by Hetherington was Philmore's good family and Spann's known violent history, which led Hetherington to believe Philmore, even though he had not been truthful initially. for giving the police another suspect to focus upon (PCR.4 364-68). Hetherington's strategy and dilemma were explained:

Q. [By Mr. Mirman] Okay. But, of significance, you knew that at this point Mr. Philmore was heavily implicated with regard to felony murder, kidnapping -- kidnapping and felony murder of Miss Perron.

A. [By Mr. Hetherington] As a principal, yes.

Q. Okay. But he was swearing to you at this point he was not the shooter.

A. Throughout the -- until the very end he was --

Q. Okay.

A. That was the case.

Q. Now, the two of you had to decide whether he should cooperate with the police in order to get a benefit for himself; namely, being mitigation, of cooperation. Correct?

A. Correct.

Q. And you felt at that time that you had sufficient information with regard to the facts of the case, the overall circumstances to help him make the decision of whether he should decide to cooperate with the police and thereby gain mitigation by his cooperation.

A. I'm sure we had ongoing discussions about the nature of this case and the information that I had throughout the entire case when I received that information.

Q. But with regard to making this decision, as far as whether to cooperate at that time, you would have had sufficient information to feel that the State would be able to convict him, and it was a question of saving his life at that point.

A. We were moving in that direction very quickly.

Q. You had information regarding Mr. Spann being a known killer at that point?

A. I did.

Q. And where did you receive that information?

A. Well, for one thing, I believe that there was a warrant for his arrest for a murder in Tallahassee that I became aware of. West Palm Beach police, I believe, at some point told me that he was a known murderer down in West Palm Beach.

Q. You had testified to already receiving information from law enforcement agencies, and you testified pretty extensively about that. Correct?

A. Yes.

Q. With regard to the evidence that -- the information, excuse me, that you were given, did you ever learn that any of that information was not accurate, that they were lying to you, trying to deceive you?

A. No.

Q. Is it accurate to suggest that you advised Mr. Philmore to confess before any investigation or discovery was conducted by you?

A. No.

Q. And at one point you stated you drove down to West Palm Beach to speak to the Defendant's mother. Correct?

A. Yes.

Q. And how did that impact upon you regarding whether you believe Mr. Philmore's assertion to you that he was not, in fact, the shooter of Miss Perron?

A. I took that visit in conjunction with the totality of the other evidence that was now coming into the case and applied it to do I believe him.

Q. And you had consulted with Mark Harllee, the Chief Assistant Public Defender; is that correct?

A. I did.

Q. Did you at any point confer with the lawyers who represented Mr. Philmore on his charges in West Palm Beach, which I would assume are the robbery charges? And correct me if I'm incorrect.

A. I believe I did. But I'm not sure of the chronology on that. I remember his first name is Robert. And that's all I remember about his name. I don't recall the chronology, speaking with him on the -- his case in West Palm.

Q. Do you recall just generally even what timeframe it would have been?

A. I'm sorry, I can't.

Q. Okay. And, obviously, there were considerations in favor of cooperation with the police after he was caught lying. Correct?

A. Yes.

Q. And you agreed that it would be good for him to corroborate with the police and give his story because, number one, you knew that the State's case circumstantially would be a strong case. Correct?

A. It was overwhelming.

Q. And, number two, you've testified life was the baseline. And by that, I assume you mean he was facing life charges on very serious cases elsewhere; and it looked like he was, in fact, going to be convicted of those. Correct?

A. Yes.

Q. And he did, in fact, get convicted of those, even prior to this trial. Is that correct?

A. I believe so.

Q. And receive a life sentence.

A. I believe he did.

(PCR.4 365-69).

Hetherington reasoned that mitigation is necessary in a death penalty case, and that cooperation with the police and the status as a non-shooter would help save Philmore's life. (PCR.4 370, 372). This strategy was being developed after the police discovered Philmore had lied in the November 18th statement, but since then, Philmore was assuring Hetherington the he was not the shooter. Until the end, Philmore professed he was not the shooter. (PCR.4 370-72). Hetherington emphasized to Philmore that if he were the shooter, that he should say nothing to the police and all cooperation would end (PCR.4 371). Only Philmore knew at that juncture the identity of the shooter; Philmore had been advised not to talk to the police if he were the shooter, yet he disregarded that advice and communicated with the authorities. (PCR.4 371-72).

Also in the vein of seeking mitigation, Philmore decided to help the police locate Perron's body. This was prompted by Philmore's viewing of a television news piece. While the decision to assist with recovering the body was made with Hetherington's approval, it was done with the understanding Philmore was not the shooter. (PCR.4 372-73). Philmore's reaction to the news led Hetherington to conclude he was a

soulful person and thereby developed another mitigator of remorse. (PCR.4 374).

Philmore proceeded to help the police locate the body. As done before, the police asked Philmore to confirm the veracity of the statement via a polygraph. Once again, Hetherington discussed the advantage of passing the polygraph to prove Philmore was not the shooter, and to preclude the argument that Philmore had lied before, and may be lying still, thereby, negating any prior cooperation. (PCR.4 375). However, again Hetherington stressed to Philmore the importance of being truthful. Unwaveringly, Philmore asserted he was not the shooter. (PCR.4 375-76).

As with the November 20th polygraph, Philmore knew and was counseled on the fact Hetherington would not be present in the room during the November 23, 1997 polygraph (PCR.4 376-77). Philmore freely and willingly agreed to take the polygraph, knowing full well Hetherington would not be present. Hetherington felt comfortable with this situation based on Philmore's reassurances he was being truthful with the police and Hetherington. (PCR.4 377).

The polygraph was administered on November 23rd by Detective Fritchie. Throughout the examination, Philmore continued to deny being the shooter, however, upon its conclusion, he made admission to Fritchie that he indeed was the

shooter. (ROA.13 806-08, 848-49; ROA.14 872-74, 879-81; SROA.1 66; PCR.4 377-79). Hetherington was shocked and acknowledged that Philmore's continued untruths to his attorney undermined completely Hetherington's strategy of portraying him as the cooperating, non-shooter, and gutted the rather powerful mitigation of putting the victim's family at ease by returning Perron's body, remorse for the death, and cooperating with the police. (PCR.4 379-80).

Following the November 23rd polygraph examination, Hetherington noted he faced mounting evidence against Philmore, who had lied to his lawyer and the police, and now was not only involved as a principal to felony murder, but was in fact the shooter. Hetherington discussed with Philmore his option to continue to cooperate with the police and retain the mitigation developed to date, or to be a lying non-cooperating shooter, and lose that mitigation. (PCR.4 381-83). The decision, with Philmore's full agreement was to remain cooperative and salvage what could be salvaged. (PCR.4 382-83).

It was Hetherington's counsel to his client not to talk to the police if he were the shooter. (PCR.4 383). Hetherington confirmed he never advised Philmore that if he were the shooter he should still talk to the police and lie (PCR.4 383-84). Philmore's subsequent cooperation, his November 26th videotaped statement and December 16th grand jury testimony were made with

Hetherington's counsel, with Philmore's best interest at the forefront. (ROA.13 798-811, 848-49, 859-62; ROA.14 870-74, 979-81; PCR.4 384-85).

Philmore's final evidentiary hearing witness, his mother, Kathleen Laverne Miller ("Miller"), explained she was unable to testify in the penalty phase due to a nervous breakdown and back problem. She had a nervous breakdown after Philmore confessed to being the shooter. Because of he depression and back problems, her doctor advised Miller she "would not be in any condition, physically or mentally, to testify at that time." (PCR.5 483-84).

Following the evidentiary hearing, on May 12, 2004, the trial court resolved all of the postconviction claims against Philmore. (PCR.10 1334-63). This appeal follows.

Simultaneously with the filing of the initial brief in this appeal, Philmore filed a petition for writ of habeas corpus in case number SC05-250.

SUMMARY OF THE ARGUMENT

Point I - Philmore's assertion counsel was ineffective for not having preserved for appeal the challenge to the peremptory strike against African-American juror Holt is procedurally barred, as this Court reviewed the matter and found the strike was not pretextual, in spite of the lack of preservation. Philmore should not be permitted to recast the issue as one of ineffectiveness to gain a second appeal. Moreover, no deficiency or prejudice can be found as this Court has determined the strike was not pretextual.

Point II - Pre-indictment counsel, Hetherington, rendered effective assistance under Strickland, related to Philmore's decision to talk to the police. This Court should reject Philmore's suggestion of a *per se* ineffectiveness finding whenever a defendant represented by counsel, gives an interview to the police and confesses. Moreover, the decisions made by Hetherington, reviewed from counsel's perspective at the time, show that he advised Philmore to be honest with counsel, that there were serious risks when untruthful, and not to talk to the police if he were involved in the abduction and murder of Perron. Nonetheless, Philmore was untruthful with counsel in denying his participation, disregarded counsel's advice, and spoke to the police. Counsel may not be deemed ineffective based on Philmore's intentional misleading of counsel.

Point III - The court's rejection of the claim of ineffectiveness of penalty phase counsel is supported by the facts and law. Philmore has not established that counsel's decision not to present an additional mental health expert, Dr. Maher, made after consultation with the doctor and review of the evidence was either deficient or prejudicial. This is based on the fact the doctor would be offing testimony that Philmore had an anti-social personality disorder and only cumulative evidence offered by other defense doctors. Also, Dr. Maher would have conflicted with the other defense expert who offered Philmore the statutory mitigator of under the substantial domination of another. There is no evidence the result of the trial would have been different had Dr. Maher testified.

Point IV - The court's factual finding of a agreement by counsel and client to the strategy on conceding to **second-degree murder** and the underlying felonies is supported by competent, substantial evidence. Moreover, such strategy was sound in light of Philmore's prior violent felony conviction and full, detailed police statement confessing to the abduction and murder of Kazue Perron. The strategy of trying to obtain a life sentence was reasonable and Philmore has not shown that there is a reasonable probability he would have received a life sentence absent the concession. Such decision comports with Florida v. Nixon, 125 S.Ct. 551 (2004).

ARGUMENT

POINT 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)

As he did in Amended Postconviction Claim IA, (PCR.9 1134-42; PCR.10 1282-87), Philmore asserts that the State's use of a peremptory strike against potential African-American juror Holt ("Holt") was pretextual and in violation of Melbourne v. State, 679 So.2d 759 (Fla. 1996) and Slappy v. State, 522 So.2d 18 (Fla. 1988). While the defense objected, Philmore asserts that counsel should have asked further questions to establish the pretextual nature of the strike and that the State's allegedly "vague" reasons for the strike "indicate that this strike was used under pretext." (IB 55-56). Failure to inquire further, permitted the striking of the juror. This, Philmore points to as prejudicing him. He asserts that had Holt been on the jury she "could have swayed" the jury to vote for life. (IB 56).

Contrary to Philmore's position, relief is not required. Philmore presented no evidence the strike was pretextual and this Court had previously rejected the challenge to the peremptory strike. Ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) has not been

proven. The court's rejection of this claim after an evidentiary hearing must be affirmed.

The standard of review of claims of ineffective assistance following an evidentiary hearing under Strickland v. Washington, 466 U.S. 668 (1984), is *de novo*, with deference given the court's factual findings. This Court recently stated:

> ... we review the deficiency and prejudice prongs [of *Strickland*] as "mixed questions of law and fact subject to a *de novo* review standard but ... the trial court's factual findings are to be given deference. So long as the [trial court's] decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence." *Sochor v. State*, 883 So.2d 766, 781 (Fla. 2004) (quoting *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001)) (emphasis omitted).

Arbelaez v. State, 30 Fla. L. Weekly S65, S66 (Fla. Jan. 27, 2005). See Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring *de novo* review of ineffective assistance of counsel); Sims v. State, 754 So.2d 657, 670 (Fla. 2000).

For a defendant to prevail on an ineffective assistance of counsel claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. 688-89. This Court has explained:

> First, the defendant must show that counsel's performance was deficient. This requires showing that

> counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Valle v. State, 778 So.2d 960, 965 (Fla. 2001) (quoting Strickland, 466 U.S. at 687). In assessing an ineffectiveness claim, the Court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. "Judicial scrutiny of counsel's performance must be highly deferential" and "the distorting effects of hindsight" must be eliminated and a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" must be employed. Strickland, 466 U.S. at 689 (citation omitted).

During the Case Management Hearing, the court ruled that Philmore could present evidence on his amended Claim IA (PCR.1 9-10). Based upon the pleadings and evidentiary development, the court concluded:

> This claim is legally insufficient and procedurally barred. First, the Defendant has failed to allege any facts demonstrating that the strike was pretextual. Additionally, the issue of the State's exercise of a peremptory challenge against this juror was raised on

> appeal. Claims previously raised on direct appeal cannot be raised under the guise of ineffective assistance of counsel in collateral proceedings. *Sireci v. State*, 469 So.2d 119 (Fla. 1985), *cert. denied*, 478 U.S. 1010, 106 3308, 92 L.Ed.2d 721 (1986).

(PCR.10 1337-38). With respect to Claim IC, wherein Philmore was asserting counsel was ineffective for failing to preserve this issue for appeal, the court concluded:

> As to counsel's failure to preserve for appeal the issue of striking the only potential African-American juror, this claim fails as the Defendant cannot demonstrate that he was prejudiced. The Florida Supreme Court reviewed the issue, even without it being preserved, and found that the claim was without merit because the State advanced "a facially race-neutral non-pretextual reason for peremptorially challenging Holt." *Philmore* at 930.

(PCR.10 1338). The record and case law support these findings and conclusions.

In Philmore's amended Claim IA, he pointed to the trial record and asserted that the State's reasons for striking Holt were pretextual and counsel should have taken the opportunity to rebut the State's claim that the reasons were not race-based. (PCR.9 1136-37). However, in the evidentiary hearing, 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. As such, the court accurately found Philmore had not demonstrated there had been a pretextual strike. (PCR.10 1338). Cf. Freeman v. State, 761 So. 2d 1055,

1061 (Fla. 2000) (opining "[the] defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden."); Ragsdale v. State, 720 So. 2d 203, 207 (Fla. 1998) (stating that although courts are encouraged to conduct evidentiary hearings, a summary/conclusory claim "is insufficient to allow the trial court to examine the specific allegations against the record").

Moreover, as pointed out in the State's initial responses to this claim, and in its written closing, the matter is procedurally barred. (PCR.6 609-13; PCR.9 1162-69; 1225-26). On direct appeal, Philmore asserted that the peremptory strike of Holt was pretextual. This Court rejected the matter finding: "[m]oreover, we conclude that even if this claim was not procedurally barred, it has no merit because the State has advanced a facially race-neutral non-pretextual reason for peremptorily challenging Holt." Philmore, 820 So.2d at 930. It is inappropriate to use a different argument, such as ineffectiveness of counsel, to re-litigate the same issue. State v. Riechmann 777 So.2d 342, 353 n.14 (Fla. 2000) (finding claims procedurally barred because defendant was couching them in terms of ineffective assistance when they had been raised and rejected on direct appeal).

Although an ineffective assistance claim normally is cognizable in postconviction, presentation of the claim is not valid when used to relitigate an issue that was previously raised and rejected on appeal. Brown v. State, 775 So. 2d 616, 621 n.7 (Fla. 2000) (precluding attempts to relitigate claim that defendant was entitled to additional peremptory challenges by couching issue as a claim of ineffective assistance of counsel). Philmore is not permitted to recast a direct appeal claim as one of ineffective assistance of counsel and obtain a second review. See Rivera v. State, 717 So. 2d 477, 480 n.2 (Fla. 1998) (finding it impermissible to recast claim which could have or was raised on appeal as one of ineffective assistance in order to overcome the procedural bar or to relitigate and issue considered on direct appeal); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995) (opining "[t]o counter the procedural bar to some of these issues, Cherry has [impermissibly] couched his claim on appeal, in the alternative, in terms of ineffective assistance of counsel in failing to preserve or raise those claims").

Furthermore, Philmore has not carried his burden of proving both deficient performance and prejudice under Strickland because he failed to bring forth any evidence that the strike was a pretext. During the evidentiary hearing, Garland noted he acknowledged the defense would want African-Americans on the

jury, but was realistic about the possibilities given that the population was small in the county (PCR.1 18-19). Garland, did not dispute the trial record, and vaguely recalled the circumstances regarding his challenge to the striking of Holt (PCR.1 18-23, 39-42). He conceded the State's strike of Holt was not racially motivated (PCR.1 40). When questioned why he did not delve further into the State's reason for striking Holt, Garland offered that he must have been satisfied - he had objected, it was overruled and he "moved on.". In fact, in response to the questions regarding his failure to inquire into how many other "mothers of prospective juror of the white race" that the State staff interviewed, Garland made note that Holt's mother was a clerk in the courthouse. (PCR.1 44). He saw no pattern emerging from the State's striking of Holt (PCR.1 42-44). When objecting to the strike, Garland was aware of State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Slappy, 522 So.2d 18 (Fla. 1988); and Melbourne v. State, 679 So.2d 759 (Fla. 1996) and their discussions of a challenge to a juror on a racial basis. He objected to the strike on those grounds, but was overruled. Garland relied on the record with regard to Holt's juror questionnaire (PCR.1 62-63).

The trial record establishes that voir dire commenced with the court inquiring about strongly held beliefs regarding the death penalty, ability to weigh sentencing factors, personal

hardships, and knowledge of the case, parties, and/or witnesses (ROA.9 186, 218-43). Holt did not respond to these questions, and at commencement of the second day of voir dire, the State noted Holt had been sleeping[9] (ROA.11 476).

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

The defense objected when the State sought to use a peremptory strike for Holt. In response, the State Attorney pointed out Holt had vacillated in her opinion about the death penalty; on the questionnaire, she indicated she was against it, but in court, she said it may be appropriate. The State was uncertain upon which answer to rely. Further, Rosa Holt had indicated to State staff members that it would be better if her daughter did not sit on the jury. The Assistant State Attorney

[9] The State sought Holt's excusal for cause on the basis she had been sleeping. In denying the challenge, the court agreed that from the State's angle of view, it may have looked as though Holt were sleeping, but she was awake.

reminded the court Holt had been sleeping. The variance between Holt's written and verbal answers, was found by the court to be a race-neutral basis for the strike, and from the totality of the circumstances, the reason was not a pretense, but was genuine, and that the State's "other basis" was genuine (ROA.13 836, 844-49). The court reasoned:

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

(ROA.13 848-49).

Deficient performance has not been shown. Counsel objected to the strike of Holt. See Neil; Slappy; Melbourne. In response, the State Attorney pointed out Holt had wavered in her opinion about the death penalty; on the questionnaire she indicated she was against it, but in court, she said it may be appropriate. The State was uncertain upon which answer to rely. The other reason was that Rosa Holt had indicated it would be

better if her daughter did not sit on the jury. This court contemplated the variance between Holt's written and verbal answers, found such was a race-neutral basis for the strike, and from the totality of the circumstances, the reason was not a pretense, but was genuine as was the State's "other basis." (ROA 836, 844-49). This ruling was affirmed on appeal. Philmore, 820 So.2d at 930. Philmore has not presented any evidence that Rosa Holt's statement was false or that the State misrepresented it in any way. As such, he has failed to carry his burden of proving deficient performance. Rivera, 717 So.2d at 486 (finding where defendant fails to present evidence supporting claim, relief must be denied).

Furthermore, no prejudice can be shown as this Court has reviewed the record and determined that the State's strike was "facially race-neutral and non-pretextual." Philmore, 820 So.2d at 930. Based upon this, it cannot be said that, but for counsel's alleged error, the result of the proceeding would have been changed. Relief must be denied. Cf. White v. State, 559 So.2d 1097, 1099-1100 (Fla. 1990) (rejecting ineffectiveness claim regarding failure to preserve issues for appeal based upon direct appeal conclusion that unpreserved alleged errors would not constitute fundamental error).

POINT II

PRE-INDICTMENT DEFENSE COUNSEL RENDERED EFFECTIVE ASSISTANCE WHILE CONTENDING WITH A CLIENT WHO ACTIVELY LIED TO COUNSEL AND CONCEALED THE FULL EXTENT OF HIS PERSONAL INVOLVEMENT IN THE CRIMES UNDER INVESTIGATION (restated)

Pointing to Cronic v. United States, 466 U.S. 648 (1984) and Watts v. Indiana, 338 U.S. 49 (1947), Philmore asks this Court to find *per se* ineffectiveness when counsel does not prohibit his client from talking to the police. He also suggests that his counsel, John Hetherington ("Hetherington"), was working for the State by questioning his client in front of the police. Further, it is Philmore's position; Hetherington had an obligation to conduct a full scale investigation of the case and to obtain a plea agreement before allowing his client to be questioned by law enforcement. Such is not the appropriate standard. Instead, the matter is governed by Strickland. See Florida v. Nixon, 125 S.Ct. 551 (2004) (refusing to expand the narrow exception recognized in Cronic to instances where counsel concedes his client's guilt at trial without an express agreement and noting that a presumption of prejudice only applies where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing").

Any 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. Supported by substantial, competent evidence and appropriate legal analysis are the trial court's post-evidentiary hearing findings that counsel rendered effective assistance in light of Philmore's admitted lies[10] to his attorney and voluntary discussions with the police.[11] This Court should affirm.

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[10] Hetherington's advice to Philmore was clear, do not talk to law enforcement if you are involved in the crimes. Philmore ignored that advice, and now blames Hetherington for the fact the police obtained a full confession.

[11] Philmore was not arrested until December 17, 1997 upon his December 16, 1997 indictment. He was not entitled to an attorney under the Sixth Amendment until then. Hetherington's assistance to Philmore before that date was pursuant to the Fifth Amendment as outlined in Miranda v. Arizona, 384 U.S. 436 (1966). This Court should find the Sixth Amendment right to counsel as described in Strickland v. Washington, 466 U.S. 688 (1984), is not available to Philmore in this context. The Sixth Amendment right to counsel is offense-specific. McNeil v. Wisconsin, 501 U.S. 171 (1991); Taylor v. State, 596 So.2d 957, 968-70 (Fla. 1992)(holding Florida's counter-part to the Sixth Amendment, Article I, Section 16 right to counsel, is charge specific and "invocation of the right on one offense imposes no restrictions on police inquiry into other charges for which the right has not been invoked" - the right to counsel attaches "at the earliest of the following points: when [the defendant] is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance"); Owen v. State, 596 So.2d 985 (Fla. 1992). See also Chavez v. State, 832 So.2d 730, 758 (Fla. 2002). But see U.S. v. Wade, 388 U.S. 218 (1967) (the federal Sixth Amendment right to counsel attaches at indictment). Should this Court find Philmore had the right to counsel under Strickland, neither the record, evidentiary hearing, nor case law support a claim of ineffective assistance.

The standard of review of claims of ineffective assistance following an evidentiary hearing under Strickland, is *de novo*, with deference given the court's factual findings. Arbelaez, 30 Fla. L. Weekly at S66; Stephens, 748 So.2d at 1028; Sims, 754 So.2d at 670.

For a defendant to prevail on an ineffective assistance of counsel claim, he must establish (1) counsel's representation fell below an objective standard of reasonableness, by making errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant 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, 466 U.S. 687-89. See Valle, 778 So.2d at 965. In assessing an ineffectiveness claim, the court must start from a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. "Judicial scrutiny of counsel's performance must be highly deferential" and "the distorting effects of hindsight" must be eliminated and a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" must be employed. Strickland, 466 U.S. at 689 (citation omitted).

Upon the above standard, the court assessed the evidence presented, applied Strickland and its progeny to these findings,

and denied relief. The court found Philmore was not truthful with Hetherington until the final polygraph examination, that at the time strategy was formed, and decisions made, only Philmore knew the extent of his involvement in the crimes, and that Hetherington advised his client not to talk to law enforcement if he were involved in the abduction and murder of Perron. In spite of these warnings, and after giving Hetherington specific assurances that he was not involved in the abduction or shooting, Philmore gave various police statements, eventually implicating himself fully in the carjacking and murder of Perron. Hetherington's advice to Philmore was clear, do not talk to law enforcement if you are involved in the crimes. Philmore ignored that advice, and only upon Philmore's assurances he was not involved did the interviews go forward. As the court found, blaming Hetherington for Philmore's own actions, does not establish ineffective assistance of counsel. (PCR.10 1340-49).

In denying relief, the court ruled as follows:

> ... The Defendant was arrested on November 14, 1997 and was initially charged with the crimes of armed trespass and robbery of the Indiantown Bank. Before counsel was appointed, Mr. Philmore gave a statement to law enforcement with regards to his involvement in the robbery. Upon asking for an attorney, the interview was terminated and Mr. Hetherington was appointed as Mr. Philmore's counsel on November 15, 1997.

Mr. Hetherington testified both at the hearing on the 3.851 Motion (EH at 149-152) and at the hearing on the Motion to Suppress (TR 812-827), that he had a lot of information given to him within a very short period of time after being appointed to represent the Defendant. ... The Defendant had maintained that his Co-Defendant had disappeared for a time and reappeared at some point after the bank robbery with the gold Lexus (EH at 197, 365).

In the February 8, 2000 hearing on the Motion to Suppress, both the Defendant and Mr. Hetherington testified that the Defendant advised Mr. Hetherington that he had nothing to do with the abduction of the driver of the Lexus and wanted to make a statement to law enforcement to that effect (TR at 793-795; 813, 842, 856-857). It is clear from the testimony at the Motion to Suppress Hearing (TR at 838, 840-842), as well as the testimony at the evidentiary hearing on the 3.851 Motion, that Mr. Hetherington made it very clear to the Defendant that he had to tell Mr. Hetherington the truth, and if he did not, there would be serious consequences in making a statement to law enforcement (EH at 357-358). It is clear from the Defendant's own testimony at the Suppression Hearing that up until the statement made on November 18, 1997, he had told Mr. Hetherington that he had nothing to do with the abduction of the owner of the Lexus, Kazue Perron, and that he wanted to give a statement to law enforcement. As reflected on pages 57, 59 and 61 of the transcript of the Suppression Hearing, the Defendant testified that he told Mr. Hetherington that he didn't know anything about the abduction. This was reflected in the statement given by the Defendant on November 18, 1997, in the presence of his attorney, in which the Defendant completely denied any knowledge of the abduction of the owner of the Lexus (Def. Ex. 4, at pages 54-56; 71-73). On page 75 of this statement, law enforcement asked the Defendant if he wanted to take a lie detector test to confirm the statement to which the Defendant replied in the affirmative.

During the Suppression Hearing, at page 15, lines 11 through 24, Mr. Hetherington testified that during the course of his conversations with the Defendant prior to the scheduled polygraph on November 20, 1997, there were ongoing discussions between himself and the

Defendant regarding the importance of telling Mr. Hetherington the truth. Mr. Hetherington testified that he again made it very clear to the Defendant that if he did not tell Mr. Hetherington exactly what was the truth and what was not, there would be serious consequences to him taking the polygraph. Mr. Hetherington testified in the 3.851 Hearing (EH at 149-152) that it made sense for the Defendant to take the polygraph if he was telling Mr. Hetherington the truth, and that he communicated the importance of telling Mr. Hetherington the truth to him to the Defendant. (sic) He testified that he told the Defendant that it only made sense for him to take the polygraph if he were telling the truth and that there was a great risk to him if he were not. He told the Defendant that if he were involved, do not go and take the polygraph; that he would not have an attorney there to stop the interview. However, the Defendant reassured him that he would pass the polygraph and that he was telling the truth. Mr. Hetherington also testified that the purpose of taking the test was to confirm the Defendant's innocence to avoid the Co-Defendant's (sic) pointing a finger at him and having him falsely charged. He also testified that the Defendant knew he was going to be on his own with the detective without his attorney being present during the test, based on the standard operating procedures for administering the test and that the Defendant had agreed to this (EH at 356-359). Notwithstanding these discussions, the Defendant continued to maintain his innocence with regards to the abduction of the owner of the Lexus. At the time of the November 20, 1997, pre-interview for the polygraph the Defendant indicated that he was there on his own free will and he knew he could leave at any time (Def. Ex. 5, at page 4). He further stated that he knew that the topic of the polygraph was to talk about the carjacking (page 6) and indicated during the statement that his greatest ambition in life was to get the nightmare behind him; further stating that is all he ever thinks about (page 27). During the polygraph test on November 20, 1997, the Defendant admitted to being present and involved in abducting the driver of the Lexus. When asked if he knew what happened to the driver after the abduction he maintained that he had no knowledge of her whereabouts (page 51)....

It was both the testimony of Mr. Hetherington and the Defendant that it was not until after the November 20, 1997 statement was concluded that Mr. Hetherington first learned that Kazue Perron had been murdered and he first realized that the Defendant was now involved in carjacking and felony murder (TR at 799-800). Mr. Hetherington testified that at this point it was clear that a life sentence was the base line. Mr. Hetherington testified, both at the 3.851 Hearing and the Suppression Hearing, that at this point he and the Defendant discussed the fact that further cooperation with law enforcement might be in his best interest, provided he was not the shooter. Mr. Hetherington also testified that he advised the Defendant that he did not have to give any further statements if he did not want to and impressed upon the Defendant the importance of telling him the truth (TR at 801-802). On November 21, 1997, the Defendant gave another statement to law enforcement based on the discussion and joint decision between he (sic) and Mr. Hetherington that, at this juncture, further cooperation with law enforcement would be in his best interest, provided he was not the shooter in the murder. The record reflects that during the first part of the statement on November 21, 1997, the Defendant acknowledged that he was present during the murder of Kuzue Perron but denied being the shooter (Def. Ex.6, part 1, pages 8-9). During the second part of the statement, after a discussion with counsel, he described how the body was disposed of (Def. Ex. 6, part 2, page 43).

At the conclusion of this statement it was discussed and understood that the Defendant would have to undergo a polygraph examination in an effort to determine the truthfulness of his November 21, 1997 statement. Mr. Hetherington testified that at this point he had discussion with the Defendant with regards (sic) to a further polygraph examination, and impressed upon him the importance of telling him the truth. He indicated to the Defendant that he did not have to undergo the polygraph examination. However, Mr. Hetherington testified that without a polygraph to confirm the Defendant’s statement at this juncture, the State could avoid mitigation that could be gained by the Defendant coming forward and telling the truth since the Defendant had previously lied (EH at 375-

377). Mr. Hetherington testified that he weighed the benefit of the Defendant now giving a truthful statement based on the Defendant's insistence that he was not the shooter. Mr. Hetherington testified that he advised the Defendant that if he was the shooter he should say nothing else and end all cooperation. (EH at 371, 378-380). The Defendant, however, knowing that he was the shooter, lied to Mr. Hetherington and again wanted to speak to law enforcement. He agreed to and participated in the polygraph, knowing that he could not be truthful.

At this juncture, other than the Co-Defendant, the Defendant was the only other one that knew he was the shooter in the homicide. At the time of the actual polygraph on November 23, 1997, the Defendant acknowledged that he was the shooter, which according to the testimony of Mr. Hetherington, came as a complete and total shock to defense counsel (EH at 378-379). The lie which the Defendant told to his defense counsel undermined counsel's mitigation strategy of the Defendant being a cooperating non-shooter who actively participated in easing the family's distress by finding the body. The Defendant's own continued lies to his attorney did away with what defense counsel testified would have been compelling mitigation of truthful cooperation. The strategic choices available to defense counsel at this juncture were limited to whether the Defendant would be a lying and uncooperative shooter or a truthful cooperative shooter. Both the Defendant and Mr. Hetherington agreed that it would be better to give truthful statements to law enforcement and before the grand jury, thereby gaining the possible mitigation of his being a truthful and cooperating shooter. The Defendant gave another statement to law enforcement and to the grand jury (EH at 381-384).

The evidence is uncontroverted that the Defendant Lenard Philmore was not honest with his lawyer at any point until the polygraph examination administered on November 23, 1997. This is reflected in the testimony of the Defendant during the Suppression Hearing.... Prior to making statement to law enforcement on November 18, 1997, November 20, 1997, November 21, 1997 and November 23, 1997, Mr. Hetherington advised the Defendant repeatedly not to speak with law

enforcement if he was not telling Mr. Hetherington the truth and advised him of the great risk he would be exposing himself to if he were not.

The statement made by the Defendant on November 18, 1997, was made in the presence of Mr. Hetherington at the request, if not the insistence of the Defendant, in order to clear his name. The evidence is uncontroverted that at the time the Defendant made the statement, he told Mr. Hetherington that he didn't know anything about the abduction of Kazue Perron (EH at 354-355). Prior to this polygraph examination Mr. Hetherington repeatedly advised the Defendant that if he was not telling the truth he should not submit to the polygraph examination and that if he was not being truthful there would be serious consequences (EH at 356-359). Mr. Hetherington did not advise or permit the Defendant to give incriminating statements as argued by the defense. He repeatedly and consistently told the Defendant not to speak with law enforcement if he was not telling Mr. Hetherington the truth. As reflected in the November 20, 1997, statement, Mr. Philmore acknowledged that he was there on his own free will and he knew he could leave at any time and he once again stated that his greatest ambition in life was to get the nightmare behind him, with this being his motivation for giving the statement (Def. Ex. 5, at pages 4, 27). Unfortunately for the Defendant, at the time he gave the November 20, 1997 statement he had not been truthful with his lawyer and during that statement, he admitted to being present at the time of the abduction of Kazue Perron. Between this time and the following day when Mr. Hetherington learned that Kazue Perron had been murdered, the Defendant adamantly advised Mr. Hetherington that the Co-Defendant, Anthony Spann, was the shooter (EH at 374-376).

At this point the Defendant and Mr. Hetherington knew that the Defendant was absolutely facing felony murder for which the death penalty could be imposed. At that time, Mr. Hetherington testified that he discussed mitigation with Mr. Philmore and advised him that if and only if he was not the shooter, cooperating with law enforcement at that juncture could be a mitigating factor (EH at 371-380). The testimony was that during the discussion, it was the

Defendant who precipitated helping law enforcement find Ms. Perron's body, based upon his insistence that he was not the shooter (RH at 372-374).

After the November 21, 1997 statement, based on the knowledge that Mr. Hetherington had at the time, which he obtained from a number of different sources, strategic decisions were made in an effort to essentially save Mr. Philmore's life. This was confirmed by Mr. Philmore at the time of the hearing on the Motion to Suppress (TR at 868) wherein he testified that Mr. Hetherington wanted him to cooperate so he would not get the death penalty and admitted that Mr. Hetherington was trying to save his life. The Defendant also confirmed at the Motion to Suppress hearing (TR at 876) that until after the November 23, 1997 polygraph, he had lied to Mr. Hetherington.

Whether or not to recommend that a criminal defendant make a statement is a strategic decision of defense counsel which is only deficient if it is unreasonable from counsel's perspective at the time he made the recommendation. *Smith v. Rogerson*, 171 F.3d 569, 572-73 (8th Cir. 1999), citing *Strickland*, 466 U.S. at 689. Claim II of the motion boils down to a complaint that Mr. Hetherington was ineffective in his handling of the Defendant's lies. Clearly 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. Counsel's decision regarding the statements were strategic, made after he had obtained adequate information, and were based on the Defendant's representations that the was innocent. Furthermore, for the most part, the Defendant himself insisted on speaking to law enforcement and he made the decision to do so after Mr. Hetherington had advised him repeatedly of the risk of doing so if he was not being honest with his lawyer and that he should remain silent if he were not innocent of first, the abduction, and later the shooting.

With regards (sic) to the claim that Mr. Hetherington should not have consented to the Defendant meeting with law enforcement to give statements outside of his presence, this was clearly

based on the Defendant's representations that he was innocent and the Defendant's understanding and agreement that counsel not be present. Further, 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. The spontaneous nature of Mr. Philmore's incriminating statements also prevented Mr. Hetherington from exploring the possibility of securing a plea agreement in exchange for the statements.

Based on the testimony that this Court heard in the 3.851 Hearing, Motion to Suppress Hearing and totality of the entire file, the Court finds that when Mr. Hetherington spoke with his client, his client denied being involved in the abduction and the murder, and later denied being the shooter. Upon consideration of the information Mr. Hetherington obtained concerning the events surrounding the crimes, the fact that the Co-Defendant had been charged with an unrelated murder in Tallahassee, the laws that pertain to felony murder, as well as the laws that pertain to mitigation in death penalty cases, Mr. Hetherington, conceding to the wishes of his client and in reliance on statements made to him by his client, allowed him to give statements to law enforcement. Mr. Hetherington can not be deemed ineffective for relying on the statements made to him by Mr. Philmore which he had no reason to doubt. Nor can he be deemed ineffective for honoring his client's wishes. *Fotopoulous v. State*, 838 So.2d 1122 (Fla. 2002). Mr. Hetherington's actions in this regard were informed, strategic choices, based on the information that Mr. Hetherington had at the time, which were substantially influenced by the Defendant's own statements and wishes, which seemed reasonable in consideration of all the facts and circumstances know to Mr. Hetherington at the time each statement was made. This Court finds that Mr. Hetherington's decision to allow the Defendant to make each respective statement was, at the time, strategically sound and that his decisions were clearly based upon representations by the Defendant that he was innocent and that the Defendant himself was insistent on speaking to law enforcement after counsel advised him

> of the risk. This Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Here, the Defendant has not overcome the presumption that, under these circumstances, allowing the Defendant to make statements on each of the respective dates discussed above might be considered sound trial strategy. Accordingly, this Court is unable to find that in light of all the circumstances, counsel's actions were outside the wide range of professional competent assistance as contemplated by the law.

(PCR.10 1340-49) (footnotes omitted). These factual findings are supported by substantial, competent evidence and the legal conclusions comport with the law.

Philmore suggests that merely by allowing the confession to take place, *per se* ineffective assistance was rendered under Cronic. As recognized in Cronic, as well as in Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000) (recognizing there are no "mechanical rules" for effective assistance), there is no *per se* rule, which requires counsel to prevent his client from confessing. The recent decision of Florida v. Nixon, 125 S.Ct. 551 (2004) supports this. In Florida v. Nixon, the Supreme Court reviewed a claim of ineffective assistance where counsel conceded his client's guilt without obtaining an express agreement from his client. While Cronic suggests narrow circumstances where a presumption of prejudice may apply, namely, "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing", the Court

rejected such an application there even where counsel conceded his clients guilt to the crimes charged. The Court noted Bell v. Cone, 535 U.S. 685, 696-97 (2002) wherein it had held that for the Cronic presumption to apply, counsel's "failure must be complete." Florida v. Nixon, 125 S.Ct. at 562. It then reasoned hat a concession of guilt was not a complete failure to function as the prosecution's adversary in part because the State still was required to prove its case at the guilt and penalty phases, and counsel's actions could not be constrained by a client's unresponsiveness to counsel's discussions about strategy. Florida v. Nixon, 125 S.Ct. at 562.

Here, Hetherington gave sound advice to his client: Philmore should not talk to the police if he is involved in the crimes. (ROA.13 793-811; SROA.1 14-15, 56-57, 62, 71, 95; PCR.4 354-60, 363-76, 383-84) Philmore chose to disregard that advice. Philmore's decision does not establish a "complete" failure on counsel's part. As such, a *per se* rule cannot be applied. Instead, Hetherington's representation must be viewed under the Strickland standard for reasonableness and prejudice.

Hetherington's effectiveness under a Strickland standard, as the trial court reasoned, must be reviewed at each juncture of his three part strategy in representing Philmore, while always bearing in mind that it was Philmore who deceived and misled counsel about his true involvement in the murder. The

deception perpetrated by Philmore caused Hetherington to make decisions and give advice based on what Philmore knew to be prevarications. (ROA.13 792-98 800-01, 852, 858; PCR.4 353-60) Hetherington's first strategy was based upon Philmore informing counsel that he was not involved in the crimes, beyond the bank robbery. (ROA.13 792-98, 856, 858-59; PCR.4 353-60) Once Philmore admitted to the abduction in the November 20, 1997 polygraph interview, but denied being the shooter, felony murder had to be considered, thus forcing Hetherington to develop a new strategy. (ROA.13 798-800, 859-68; PCR.4 353-60; 370-75).

That second strategy was to present Philmore as a cooperating non-shooter, minor party in felony murder. (ROA.13 801-06; roa.14 870-74; PCR.4 364-70, 373-75)[12] Eventually,

[12] Having admitted to the abduction of Perron, Philmore was facing a murder charge under the felony murder theory, with life being the minimum sentence. Being the non-shooter where there is more than one principal is a sentencing factor and could make the difference between a life and death sentence. See, Kormondy v. State, 845 So.2d 41, 47 -48 (Fla. 2003); Cole v. State, 841 So.2d 409, 427-28 (Fla. 2003) (recognizing direct appeal ruling "[w]ith respect to the disparate treatment, we agree with the trial court's conclusion that since Cole was the dominant actor and the one who committed the actual murder, the codefendant's life sentence was not a mitigating factor." (quoting Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Shere v. Moore, 830 So.2d 56, 65-66 (Fla. 2002) (discussing relative culpability between con-defendants as sentencing consideration). Also, cooperation with the police is a recognized mitigator. See Anderson v. State, 863 So.2d 169, 176, n.6 (Fla. 2003); Nelson v. State, 850 So.2d 514, 533 (Fla. 2003); Alston v. State, 723 So.2d 148 (Fla. 1998); Jennings v. State, 718 So.2d 144 (Fla. 1998). Given this recognized mitigator, Hetherington was not ineffective in considering this factor when advising Philmore

Hetherington had to develop another strategy following the November 23, 1997 polygraph. This was required because Philmore made admissions, both by his questions to Detective Fritchie and non-verbal responses, that he had lied in the polygraph and was the shooter (ROA.13 806-08, 848-49; roa.14 872-74, 879-81; SROA. 66; PCR.4 377-79).

With Philmore's admission of guilt, Hetherington had to salvage what he could by the development of the third strategy of having Philmore be the cooperating shooter. As a result, the November 26, 1997 statement was provided with Philmore's full knowledge and agreement with the strategy. (ROA.13 808-11; ROA.14, 876; PCR.4 379, 381-85). Cf. Rivera v. State, 717 So. 2d 477, 485 (Fla. 1998) (opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."); Rose v. State, 617 So.2d 291, 294 (Fla. 1993) (finding no claim of ineffectiveness can be made where client preempts his attorney's strategy) (quoting Mitchell v. Kempt, 762 F.2d 886, 889 (11th Cir. 1985). The issue is not whether a confession was provided ultimately, but whether counsel's performance, "without the distorting effects of hindsight", was within professional norms. State v. Riechmann, 777 So.2d 342, 358 (Fla. 2000). At each

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about cooperating with the police as the non-shooter is mitigation to help save his life. (PCR.4 370, 372).

step of this process, Hetherington considered the evidence against his client, his client's representations, and the need to protect Philmore's at the same time as he was gathering mitigation evidence. Hetherington made reasoned, informed decisions at the time. He did not render ineffective assistance. See State v. Bolender, 503 So.2d 1247, 1250 (Fla.1987) (opining "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected").

The United States Supreme Court has consistently refused to "impose mechanical rules on counsel--even when those rules might lead to better representation--not simply out of deference to counsel's strategic choices, but because the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation--but rather simply to ensure that criminal defendants receive a fair trial." Flores-Ortega, 528 U.S. at 481. However, Philmore would have this Court impose the *per se* rule of ineffectiveness when a counsel permits his client to confess to the police. This argument, Philmore bases on the reference that "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, 387 U.S. 478 (1964); Moran v. Burbine, 475 U.S. 412 (1986); Watts, 338 U.S. at 59 (IB 59, 72, 74). Again, there are

no mechanical rules imposing such a prohibition nor should there be, as talking to the police, especially where co-defendants are involved, has been recognized as reasonable strategy.

Initially, Hetherington was attempting to divert police attention away from Philmore. As reasoned by counsel, Spann was the likely shooter given his violent criminal history. Hetherington was assured by Philmore that he was not involved. It is permissible for counsel to rely upon his client's protestations of innocence in advising him to talk to the police. See Barnes v Thompson, 58 F.3d 971, 979 (4th Cir. 1995). As such, it was sound strategy to inform the police of this, confirm it with a polygraph, and have the police focus their attention elsewhere. See Smith v. Rogerson, 171 F.3d 569, 572-573 (8th Cir. 1999). "A tactical decision amounts to ineffective assistance of counsel only if it was so patently unreasonable that no competent attorney would have chosen it." Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988). People v. Frazier, 2000 Mich. App. LEXIS 1818, 9-13 (Mich. Ct. App., 2000) (unpublished opinion - copy attached Appendix B) is also instructive.[13] Any flaw in this strategy should be placed

[13] In People v. Frazier, 2000 Mich. App. LEXIS 1818, 9-13 (Mich. Ct. App., 2000), the defendant argued counsel was ineffective for advising him to make incriminating statements to the police. The appellate court relied upon Strickland v. Washington, 466 U.S. 668 (1984) and reasoned:

squarely where it belongs, namely, at Philmore's feet as he refused to tell his lawyer the truth about his involvement in the carjacking and murder of Perron, and forced Hetherington to agree with the decision to talk to the police on inaccurate

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> Advising a client to cooperate with law enforcement does not, as a matter of law, constitute ineffective assistance of counsel. ... That counsel's strategy proved unsuccessful is not dispositive. ... Rather, we examine the evidence in the record to ascertain whether counsel's action was reasonable. ... A defendant's statements to counsel and other information supplied by him are important factors in making this determination. ...
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> Trial counsel also permissibly relied on defendant's truthfulness regarding his innocence in advising him to cooperate with the police. ... That defendant's statements to the police revealed extensive involvement in the crime is of no moment because we evaluate counsel's action from his perspective at the time he made the decision. ... In this case, the record contains no evidence that suggests that counsel should have doubted defendant's veracity during their initial meeting.
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> Under these circumstances, we cannot conclude that counsel's strategy to cooperate in the hope of leniency and a future plea agreement was unreasonable. ... If defendant's statements to the police had comported with his statements to counsel, he would not have inculpated himself in the crime. ... Here, counsel, acting in reliance on defendant's assertions of innocence, reasonably advised defendant to cooperate with the police in an effort to obtain a plea agreement....

People v. Frazier, 2000 Mich. App. LEXIS 1818, 9-13 (Mich. Ct. App., 2000) (unpublished opinion - copy attached Appendix B) (footnotes omitted - emphasis supplied)

information. It cannot be stressed enough, Philmore should not be able to blame Hetherington for the decisions made, when it was Philmore who perpetrated a canard upon his counsel. Hetherington informed Philmore not to talk to the police if he were involved in the crimes. Philmore, knowing his involvement, misrepresented the facts to Hetherington, and disregarded counsel's advice. Hetherington gave Philmore the advice Philmore now asserts "any lawyer worth his salt" should have given, yet Philmore has only himself to blame for not following that advice. Hetherington's actions do not constitute ineffectiveness under Strickland.

It is also Philmore's complaint that counsel was ineffective in that he was assisting the State in its interrogation and that Hetherington used the decried "Christian burial speech." The record does not support this allegation. Rather, the record shows that it was Philmore who decided to help the police locate Perron's body. This was prompted by Philmore's viewing of a television news piece. In the Suppression hearing, Hetherington explained that Philmore "was watching the news and started crying when Perron's husband came on. I remember this vividly." (ROA.13 828). The record shows Hetherington questioned Philmore merely to help clarify the defense position; Hetherington did not use interrogation techniques against his client. (PCR.4 353-60). Hetherington's

gentle questioning to further the defense position is far from the "Christian burial speech" delivered by a law enforcement official to a defendant isolated from counsel. Reliance upon Brewer v. Williams, 430 U.S. 387 (1977) is misplaced.

While the decision to assist with the recovery of Perron's body was made with Hetherington's approval, it was done with the understanding Philmore was not the shooter. (PCR.4 372-73). Philmore's reaction to the news led Hetherington to conclude he was a soulful person and thereby developed another mitigator of remorse. (PCR.4 374) See Zakrzewski v. State, 866 So.2d 688, 691, n.2 (Fla. 2003) (noting remorse found as mitigator); Ault v. State, 866 So.2d 674, 679 (Fla. 2003). Given Hetherington's strategy, based upon Philmore's assurance he was not the shooter (PCR.4 373-75), non-statutory mitigation was developed.

Philmore proceeded to help the police locate the body and, as they had done before, they asked to confirm the veracity of the statement through a polygraph. Again Hetherington discussed the advantage of passing the polygraph to prove he was not the shooter, and to preclude the argument that Philmore had lied before, so he may be lying still, thereby negating any prior cooperation. (PCR.4 375). However, again Hetherington stressed to Philmore the importance of being truthful to him. Unwaveringly, Philmore asserted he was not the shooter. (PCR.4 375-76). Clearly, Hetherington's advice was reasonable in light

of the circumstances, and the less-than-forthright client he was representing. Strickland, 466 U.S. at 688-89, requires that counsel's actions be viewed from counsel's perspective at the time of the representation, not in hindsight. Under these circumstances, Hetherington was not ineffective.

Philmore also challenges Hetherington for not conducting a full investigation before allowing the police interviews. It must be remembered that the extent of the investigation is constrained in part by what the defendant is disclosing to his counsel. A more limited investigation, such as when advising a client to talk to the police or not, is professional when based upon the defendant's representation of non-involvement and/or non-responsibility for the death. See Barnes, 58 F.3d at 979. As noted in Chandler v. U.S., 218 F.3d 1305, 1318 (11th Cir. 2000), "...counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. See Strickland, [466 U.S. 690-91] ("Strategic choices made after less than complete investigation are reasonable precisely to the extent the reasonable professional judgments support the limitations on investigation.")". Cf. Wiggins v. Smith, 539 U.S. 510, 533 (2003) (emphasizing "that Strickland does not require counsel to investigate every

conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case.") The record reveals, Hetherington was making decisions based upon Philmore's representations, Hetherington's contact with Philmore's family, and knowledge that Spann was the more violent and likely person to have committed the murder. As such, Hetherington was not making decisions in a vacuum, but had a rational basis for believing Philmore and developing a strategy from there. Such supports the trial court's findings on this point. See Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988); Occhicone v. State, 768 So.2d 1037, 1048 (Fla. 2000) (holding strategic decisions do not constitute ineffectiveness if other courses have been analyzed and discarded and counsel's decision was reasonable under the norms of professional conduct).

With respect to Philmore's claim that counsel should have secured a plea deal before agreeing to the interviews, the court found that it was Philmore's prevarications and spontaneous statements which precluded Hetherington obtaining a plea agreement. The court found: "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.

The spontaneous nature of Mr. Philmore's incriminating statements also prevented Mr. Hetherington from exploring the possibility of securing a plea agreement in exchange for the statements." (PCR.10 1348) (emphasis in original). As the record of the interviews establishes, Philmore would assure counsel of his limited involvement, then tell law enforcement a more incriminating version. Hetherington cannot be deemed ineffective based on his client's actions which constrained counsel's options. Cherry v. State, 781 So.2d 1049, 1050 (Fla. 2001) (rejecting ineffectiveness claim where defendant's actions constrained counsel's performance as "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Cf. Rivera, 717 So.2d at 485 (opining, "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.").

To the extent Philmore suggests that he was prejudiced by Hetherington's failure to stop him from confessing, Philmore's premise is unsupportable. If the suggested *per se* rule is taken to its logical conclusion, an absurd result is obtained, namely, any time a defendant confesses to a crime while accompanied by counsel, his confession must be suppressed based upon ineffective assistance. Such proposition is entirely unrealistic and has no basis in law. Moreover, Philmore cannot

say, nor has he demonstrated that he would not have faced the death penalty absent Hetherington's counsel. Philmore cannot show he would not have confessed absent counsel's input especially given Philmore's testimony that he wanted to get the incident behind him and was there of his own free will. (Defense evidentiary hearing exhibit 5 at 4). Further, Philmore has not shown that the police would not have been able to make a case without the confession of that he would not have faced the death penalty.[14]

The testimony revealed the police had Philmore's confession, eye-witness testimony, and cash linking him to the bank robbery, knew Philmore was involved in Perron's disappearance based on eye-witness accounts and his possession of the Lexus, and investigations were proceeding and would have continued absent a confession. In fact, before his confession,

[14] In sentencing Philmore, the court found five aggravtors: (1) prior violent felony (including a battery on a corrections officer and two robberies from 1993 and 1995); (2) felony murder (kidnapping); (3) avoid arrest; (4) pecuniary gain; and cold, calculated ("CCP"), and premeditated; no statutory mitigation, and seven non-statutory mitigators of little to moderate weight. Philmore v. State, 820 So.2d 919, 925, n.8 (Fla. 2002). Even if the avoid arrest and CCP aggravators were not considered as they could be considered as originating from Philmore's confess (however the State does not concede this point), the death sentence would remain proportional. See Pope v. State, 679 So.2d 710 (Fla. 1996) (finding sentence proportional based on pecuniary gain and prior violent felony outweighing two statutory mental mitigating circumstances and several nonstatutory mitigators); Melton v. State, 638 So.2d 927 (Fla. 1994); Heath v. State, 648 So.2d 660 (Fla. 1994).

the police had the Subaru, the Lexus, and Philmore's bloody shirt. Both the shirt and Lexus contained Perron's blood. The guns recovered from the orange grove had been taken in the prior robbery/attempted homicide cases; and statements from witnesses who placed Philmore at both the scene of Perron's abduction and Indiantown bank robbery had been secured. Thus, to say the outcome of the trial would have been different without the confession is unreasonable in light of the amount of evidence collected to that point. In addition, it is far too speculative. Cf. Nix v. Williams, 467 U.S. 431, 446-447 (1984) (holding inevitable discovery exception to exclusionary rule applies to Sixth Amendment right to counsel violations and permits introduction of evidence of location, condition of victim's body where it would have been discovered, even if defendant had not shown police, despite fact statement was result of post-arrest interrogation in violation of right of counsel). For these reasons, Philmore has failed to demonstrate prejudice under Strickland and the denial of postconviction relief was proper.

All of Philmore's challenges to the court's order circle around the court refusing to absolve Philmore of his voluntary actions of being untruthful with Hetherington, disregarding Hetherington's advice not to talk to the police if Philmore was involved in the abduction and later murder, and willingly, if

not insistently seeking to talk to law enforcement. Philmore asserts that trial court erred in: (1) not addressing "the initial decision to let Mr. Philmore speak to police" (IB 76); (2) not mentioning Hetherington's acknowledgment that clients are often untruthful with their attorneys (IB 77); resting the denial of relief in part on a finding Philmore made spontaneous comments to the police which Hetherington could not have stopped (IB 78); and (4) finding Hetherington had a strategy when Philmore asserts such was based on ignorance. (IB 78).

The record refutes Philmore's challenge to the court's findings, that it did not address the initial decision to allow Philmore to talk to the police. (IB 76). The court discussed Hetherington's representation from the time of his appointment on November 15, 1997, and noted the Hetherington informed Philmore of the serious consequences of not being truthful to counsel. (PCR.4 357-58). Also, Philmore's Suppression hearing testimony confirms, as the court found, that Philmore "had told Mr. Hetherington that he had nothing to do with the abduction of the owner of the Lexus, Kazue Perron, and that he wanted to give a statement to law enforcement." (PCR.10 1341). Hetherington also knew Spann, apprehended with Philmore, was wanted for a Tallahassee murder. (PCR.10 1340-41). Clearly, such refutes Philmore's unfounded complaint that the court did not address the representation prior to the November 18, 1997 interview.

Irrespective of whether Hetherington, or other parties, believes criminal clients are untruthful about their version of events, Hetherington had rational reasons to believe his client. As the record reflects, and the court found, Hetherington was making decisions based upon Philmore's representations, Hetherington's contact with Philmore's family, and knowledge that Spann was the more violent and likely person to have committed the murder. The court's order is clear on this point, Hetherington had reason to believe his client and form strategies based on his client's representations.

The trial judge properly rested her analysis of Hetherington's representation on the fact Philmore gave his counsel no warning before making admissions to law enforcement, with or without Hetherington in the room. Prior to giving incriminating statements, Philmore adamantly denied involvement in the abduction and then the murder of Perron. Either by blurting out admissions, or by his non-verbal responses, Philmore surprised Hetherington. Philmore again tries to avoid responsibility, by claiming Hetherington should not have exposed him to police interrogation. (IB 78). However, as noted several time above, Philmore knew his true involvement, and has only himself to blame for not following Hetherington's advise not to talk to the police. Philmore has not shown where the court's factual findings or legal analysis is erroneous in this respect.

There is no merit to Philmore's assertion that Hetherington was uninformed through some error of his own, nor has he shown that the trial court determination that Hetherington had a strategy was improper. The State relies upon its analysis of the facts above to support the reasonableness of Hetherington's investigation and the strategy developed based upon recognition mitigation evidence would be required, known facts, and Philmore's representations.

Philmore concludes his challenge to the court's order with the statement that had "Hetherington told Mr. Philmore not to speak about the case to the police, other inmates, friends, or family members, none of the problems that Hetherington encountered would have come to pass." However, as outlined above, the decisions made by Hetherington were based on the information available at the time, and the undiscovered intentional prevarications of Philmore. Moreover, Philmore ignores the fact that Hetherington told him not to talk to the police if he were involved in the abduction and murder, and only Philmore and Spann knew at that time whether Philmore was involved or not. (ROA.13 793-95, 801-02, 813, 838-42, 859-57; SROA.1 15, 93; PCR.2 149-52; PCR.4 356-59, 371-80; Defense exhibit 5, p) As the court found, it was up to Philmore to exercise his right not to talk to the police, not Hetherington's duty to stop Philmore. The fact that Philmore ignored the

advice of counsel does not establish ineffective assistance when the result in not to Philmore's liking. This Court must affirm the denial of postconviction relief.

POINT III

PHILMORE DID NOT PROVE INEFFECTIVENESS OF PENALTY PHASE COUNSEL FOR FAILING TO PRESENT EXPERT TESTIMONY TO EXPLAIN THE PRESENCE OF ORGANIC BRAIN DAMAGE TO SUPPORT THE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE MITIGATOR (restated)

In the heading to this issue, Philmore maintains the court erred in rejecting his claim of ineffectiveness of penalty phase counsel for not presenting an expert to explain the presence of organic brain damage in support of the mitigator of "under the influence of extreme mental or emotional disturbance." (IB 80). However, in the body of the issue, Philmore alleges it was deficient performance for counsel not to have presented Dr. Maher to support "statutory mitigation." (IB 80-81). The State suggests that this claim is insufficiently pled to the extent that it is ambiguous which statutory mitigation Philmore is addressing. Further, if the challenge encompasses the "impairment of capacity to appreciate criminality of conduct", that matter is not preserved and should be deemed waived. Nonetheless, if this Court determines otherwise, the denial of relief was proper. Philmore failed to show deficient performance and prejudice.

It is unclear from Philmore's appellate pleading which statutory mental mitigator he is addressing, either extreme mental/emotional distress or impairment of capacity to appreciate criminality of conduct to the requirements of law.[15] This ambiguity establishes a pleading deficiency necessitating that any challenge to the "capacity to appreciate criminality of conduct" be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Similarly, with respect to the "capacity to conform conduct" mitigator, this matter was not presented to the trial court as it was not included in the postconviction motion.[16] The

[15] Because Philmore is referencing Dr. Maher's testimony in support of this claim, and Dr. Maher refused to find the statutory mitigator of "under the substantial domination of another" (PCR.2 126), the State assumes that Philmore's "statutory mitigation" does not include this mitigator and will not address that factor.

[16] In his written presentation of **Postconviction Claim III**, Philmore alleged ineffective assistance of penalty phase counsel based on counsel's: (A) failure to call certain family members to discuss his childhood (PCR.6 529-31); (B) failure to supply the mental health experts with information regarding intoxication/drug addiction (PCR.6 531-36); (C) failure to provide the expert with background information involving sexual

matter is unpreserved. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). However, in the event this Court finds the matter sufficiently pled and preserved, the State submits the court properly determined there was no ineffectiveness of penalty phase counsel.

The standard of review of claims of ineffective assistance following an evidentiary hearing under Strickland, is *de novo*, with deference given the court's factual findings. Arbelaez, 30 Fla. L. Weekly at S66; Stephens, 748 So.2d at 1028; Sims, 754 So.2d at 670.

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abuse as a child, transvestitism, and homosexuality to support the "under the influence of extreme mental or emotional disturbance" mitigator (PCR.6 536-38); (D) failure to argue in closing Dr. Wood's testimony regarding brain damage to support "under extreme mental or emotional disturbance" (PCR.6 539-39); (E) failure to provide information to the expert in support of "acting under the substantial domination of another" mitigator (PCR.6 539-43); and (F) failure to present Dr. Maher to explain the presence of organic brain damage to support the mitigation of "under the influence of extreme mental or emotional disturbance." (PCR.6 543-44). In Philmore's simultaneously filed written closing argument, quoted those portions of Dr. Maher's testimony where the doctor opined that Philmore: (1) had a brain injury, with a high probability of organic brain damage; (2) was a follower; (3) with a mental and emotional disturbance at the time of the crime; and (4) given the extreme mental or emotional disturbance, Philmore's capacity to appreciate the criminality of his conduct was substantially impaired (PCR.10 1292-96). Philmore ended with the conclusory statement that Dr. Maher provided statutory and non-statutory mitigation independent of the defense penalty phase doctor and that it was ineffective assistance of counsel not to have presented Dr. Maher at the penalty phase. (PCR.10 1297). In denying relief, the court addressed each of Philmore's claims **as presented in his postconviction motion**. (PCR.10 1350-56).

In resolving the allegation that counsel was ineffective for not presenting Dr. Maher to discuss organic brain damage in support of the extreme mental or emotional disturbance statutory mitigator, the trial court found:

> In Claim III(F), the Defendant argues that trial counsel was ineffective for failing to present expert testimony to explain the presence of organic brain damage in support of mitigation that the Defendant was under the influence of extreme mental or emotional disturbance. Specifically, the Defendant asserts that trial counsel was ineffective in failing to present the expert testimony of Dr. Michael Maher.
>
> Thomas Garland testified at the evidentiary hearing that he did not call Dr. Maher because he did not believe that Dr. Maher would add anything additional to the case. He spoke to Dr. Maher on several occasions, reviewed Dr. Maher's deposition and his report and made the decision not to call Dr. Maher as a witness.
>
> Dr. Maher testified at the evidentiary hearing that he had been retained by the defense and initially interviewed the Defendant in 1999; that he did not render a strong opinion as to mitigating factors as the time of his deposition because he had not reviewed the result of the PET scan; that he was prepared to testify at trial and would have been more definite concerning his findings after his review of the PET scan; that he knows how to read a PET scan to a very limited extent; that he does not read PET scans as part of his general practice; that upon review of the Defendant's PET scan, he observed low activity in the frontal lobes which he believed led the Defendant to be more impulsive and less thoughtful in his behavior; and that the PET scan confirmed that there was an organic brain injury.
>
> At the time of his deposition on December 21, 1999, Dr. Maher testified that he found evidence to support mitigation "focused on the pattern of impulsive behavior most likely associated with what is sometimes thought of as a subtle but is actually very

> powerful and significant brain injury." Dr. Maher inferred as his deposition that the Defendant's lack of impulse control was due to damage to the frontal lobe of the Defendant's brain. Additionally, Dr. Maher testified that he would diagnose the Defendant with mixed personality disorder with antisocial, narcissistic and dependent traits. The testimony of Dr. Maher at the evidentiary hearing, as well as his inference during his deposition, that the organic brain injury was in the frontal lobe of the Defendant's brain is inconsistent with the other expert testimony. Dr. Frank Wood, the defense expert retained to perform the PET scan, testified at trial that the area of the brain abnormality was to the back left side of the Defendant's head, which he identified as the angular gyrus. Additionally, Dr. Maher's testimony at the evidentiary hearing that he could not offer an opinion that the Defendant was under the substantial domination of another would have undermined the testimony of Dr. Berland that the Defendant was under the substantial domination of the co-defendant, Anthony Spann.
>
> Thus, the Defendant has failed to overcome the presumption that his attorney's actions under the circumstances were sound strategy. *See Strickland*, 466 U.S. 689. Furthermore, the Defendant has failed to demonstrate that he was prejudiced.

(PCR.10 1355-56) (internal record citations omitted).

The court's factual finding that Garland considered Dr. Maher's report and opinion before deciding not to call him is supported by the record. The legal conclusions flowing from that factual determination are correct. This is based on the facts Dr. Maher would not add any mitigation not already before the jury, in fact, at that time, Dr. Maher had noted Philmore was an antisocial personality and that he was **not** under the

substantial domination of Spann, thus reducing a mitigator found by other defense experts.

Garland's evidentiary hearing testimony was that he decided not to call Dr. Maher after reviewing his report and deposition and consulting with him several times because "I just didn't think that he was going to add anything to our case." (PCR.1 37, 55). "[C]ounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.'" Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (quoting Darden v. Wainwright, 477 U.S. 168 (1986). Based upon the following, there is no evidence of ineffective assistance.

Dr. Maher's pre-trial deposition included a diagnosis of antisocial personality disorder,[17] a preliminary determination of

[17] Dr. Maher admitted he had opined in 1999 that Philmore had an anti-social personality disorder, but **now**, he rejects that conclusion given Philmore's adjustment to prison and PET scan results. (PCR.2 134-37, 140-42). This Court has acknowledged that antisocial personality disorder is "a trait most jurors tend to look disfavorably upon." Freeman v. State, 858 So.2d 319, 327 (Fla. 2003). See Burger v. Kemp 483 U.S. 638, 792 (1987)(finding reasonable counsel's decision not to present defendant or psychologist for fear of very negative evidence on cross-examination); Davis v. Singletary, 119 F.3d 1471, 1476 (11th Cir. 1997)(rejecting claim of ineffectiveness as decision not to pursue expert because state would "slaughter" witness on cross was reasonable); Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994)(finding counsel's decision whether to present certain evidence based on attorney's perception of how evidence would be viewed by jury is judgment call entitled to deference). As such, on this basis alone, the decision not to call Dr. Maher was within the professional norm.

organic brain damage, and statutory mitigation of extreme mental/emotional disturbance and inability to conform conduct to requirements of the law. With the exception of a change in his diagnosis of antisocial personality and his claimed intent to be able to make a more forceful opinion, Dr. Maher's testimony is identical to his 1999 position and cumulative to that of Dr. Berland and Wood in these areas.[18] Deciding to forego presentation of cumulative evidence does not establish ineffective assistance of counsel. See Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding counsel was not ineffective for failing to present evidence in mitigation cumulative to that which was already presented); Maharaj v. State, 778 So.2d 944, 957 (Fla. 2000) (noting "[f]ailure to present cumulative evidence is not ineffective assistance of

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Moreover, merely because a doctor changes his opinion years after the trial, does not establish ineffective assistance for not having presented the doctor earlier. See Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (reasoning "counsel conducted a reasonable investigation into mental health mitigation evidence, which is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable mental health expert.").

[18] This Court affirmed the trial court's rejection of each of the three statutory mental mitigators based not only on the conflicting testimony of the State's expert, Dr. Landrum, but Philmore's actions during the criminal episode. See Philmore, 820 So.2d at 935-39. Remaining valid are the testimony of Dr. Landrum disagreeing with the statutory mitigation offered by Philmore's experts, and the testimony of State expert Dr. Mayberg, who refuted the claim of organic brain damage given her determination the PET scan was normal.

counsel."); Valle v. State, 705 So.2d 1331, 1334-35 (Fla. 1997) (affirming summary denial of ineffectiveness claim based on allegation counsel failed to present cumulative evidence).

Also, Dr. Maher's evidentiary hearing testimony conflicts with another defense expert, Dr. Berland, who testified in the penalty phase, in that Dr. Maher would **not** give the statutory mitigator of substantial domination by another. Further, Dr. Maher admits that he has very limited knowledge of PET scans and does not read/use them as a general practice (PCR.2 91, 124-25, 96-101). The State's expert, Dr. Mayberg, testified in the penalty phase and established that the changes made to the PET scan[19] films by defense experts allowed Dr. Wood to mis-identify the area of Philmore's brain offered as injured. Dr. Wood erroneously identified the scan as one of the angular gyrus, when it was actually very high in the parietal lobe. Dr. Maher, whose experience with PET scans is limited, also mis-identified the area of interest. He thought it was the frontal lobe. Further, Dr. Maher was unaware Dr. Mayberg had determined that

[19] The State's expert disputed the technique, testing methods, and findings Dr. Wood developed from the PET scan. (ROA.26 2370-2466). Not only did Dr. fail to identify properly the part of the brain allegedly injured, but the PET scans showed normal metabolism - the PET scans were normal. Further, Dr. Wood did not have Philmore undergo the required MRI or other tests which should have been given at the same time as the PET scan in order to develop a proper diagnosis (ROA.26 2401-04, 2454-56, 2459-60).

Philmore's PET scan was normal; all of the PET images showed normal metabolism, (PCR.2 129-31, ROA. 26 2442-60). The finding of a normal PET scan undermines completely the claim of organic brain damage and likewise dismantles the mitigator of extreme mental/emotional disturbance with or without Dr. Maher.

In the penalty phase, Dr. Berland offered testimony in support of the statutory mitigator acting under extreme duress or substantial domination of another person (Spann) (ROA.22 1957-95; ROA.23 2081-2277, ROA.23 2137-41). As noted above, Dr. Maher's 1999 deposition and his evidentiary hearing testimony confirmed that he could not find this mitigator. Counsel is neither deficient for choosing to go with an expert who gave more mitigating circumstances, nor is such decision prejudicial. It cannot be said that absent Dr. Maher's testimony where less mitigation is offered, that the result of the proceedings would have been different.

Clearly, Garland's assessment of Dr. Maher's testimony was reasonable. Not calling Dr. Maher allowed the defense to avoid a finding of antisocial personality disorder and present a united defense offering of the "substantial domination of another" mitigator. Also, even without Dr. Maher, the defense was able to present the claims of organic brain damage in support of the extreme mental/emotional disturbance mitigator which then supported the related mitigator of impaired ability

to conform conduct to requirements of the law. Without Dr. Maher, the defense could offer more mitigation and avoid the detrimental effects of an antisocial personality diagnosis. Clearly, the trial court's determination of a reasoned tactical decision without prejudicial[20] effect is proper under Strickland and should be affirmed.

POINT IV

THE COURT CORRECTLY REJECTED THE CLAIM OF INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL BASED UPON THE FACTUALLY SUPPORTED FINDING DEFENSE COUNSEL DID NOT CONCEDE PHILMORE'S GUILT WITHOUT CONSULTATION (restated)

It is Philmore's position that counsel rendered ineffective assistance by conceding guilt and that the trial court erred in rejecting this claim. Philmore maintains that the State failed to call the guilt phase counsel who made the alleged concession and that the record of any agreement to such strategy is lacking. Contrary to Philmore's position, the trial court's

[20] Because Philmore has not shown that Dr. Maher would add anything to that which was not already presented, he cannot show prejudice. This Court found five aggravating factors. See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (noting HAC, felony murder, and prior violent felony aggravators are weighty circumstances); Asay v. Moore, 828 So.2d 985, 992 (Fla. 2002); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (recognizing CCP and prior violent felony are weight aggravation. Any bolstering of record evidence Philmore could hope to have accomplished with Dr. Maher would not have undermined the Court's findings that the criminal facts refuted the statutory mitigation. The result of the sentencing would not have been different had Dr. Maher testified.

factual finding of a agreement by counsel and client to the strategy on conceding to **second-degree murder** and the underlying felonies is supported by competent, substantial evidence. Moreover, such strategy was sound in light of Philmore's prior violent felony conviction and full, detailed police statement confessing to the abduction and murder of Kazue Perron. The strategy of trying to obtain a life sentence was reasonable and Philmore has not shown that there is a reasonable probability he would have received a life sentence absent the concession. This Court must affirm.

The standard of review of claims of ineffective assistance of counsel following an evidentiary hearing under Strickland v. Washington, 466 U.S. 668 (1984), is *de novo*, with deference is given the court's factual findings. Arbelaez, 30 Fla. L. Weekly at S66; Stephens, 748 So.2d at 1028; Sims, 754 So.2d at 670.

Following the evidentiary hearing, the court denied relief. (PCR.10 1357-58). After noting that only Thomas Garland ("Garland"), penalty phase counsel, testified regarding the alleged concession, the court outlined counsel's experiences, including his admission to the Bar in 1990, certification in criminal law by the Florida Bar, certification to conduct capital cases, experience with 70 to 80 jury trials, and attendance at the Life-Over-Death seminar. (PCR.10 1358). The trial court reasoned:

> Mr. Garland testified that by the time he was appointed to the case the Defendant had confessed to the crimes charged (EH at 15-16). He had moved to suppress the confession, but the motion was denied (EH at 16-17). By the time of trial, the Defendant had been sentenced to life imprisonment in an unrelated case (EH at 57). Taking these factors into consideration, counsel testified that the strategy was to try for a concurrent life sentence in this case (EH at 57). He discussed with the Defendant the strategy of conceding to the robbery, kidnapping and to the lesser offense of second degree murder in an attempt to get a life sentence (EH at 57, 64). According to trial counsel, the Defendant consented to this strategy (EH at 57, 64). Based upon these facts, the Court determines that trial counsel's decision of conceding to the crimes charged or to a lesser offense was a reasonable trial tactic predicated on his experience, his assessment of the case and the Defendant's affirmative and explicit consent to this strategy. *See Nixon v. State*, 857 So.2d 172 (Fla. 2003).[21]

(PCR.10 1358).

The trial court correctly found that there was an express agreement to concede guilt to a lesser degree of murder and to the underlying felonies.[22] Philmore has not come forward with

[21] The United States Supreme Court, in Florida v. Nixon, 125 S.Ct. 551, 555 (2004), recently overruled Nixon v. State, 857 So.2d 172 (Fla. 2003) based upon this Court's application of an incorrect standard when evaluating concessions of guilt. The Supreme Court explicitly rejected that a presumption of deficient performance and prejudice existed when the defendant gave no express consent to the strategy even after consultation with counsel.

[22] Following the evidentiary hearing, Philmore's postconviction counsel admitted that Philmore agreed to the defense strategy of conceding guilt as offered at trial. Counsel stated "there is evidence that the attorneys did discuss a concession of guilt. And that is all the State needs to vitiate a Nixon claim." (PCR.5 489).

any evidence,[23] which is his burden to carry under Strickland, establishing that there was no consent to counsel's strategy or that such strategy was not sound under the circumstances of this case even absent an express agreement. Garland's un-refuted evidentiary hearing testimony and trial records, satisfy Florida v. Nixon, 125 S.Ct. 551 (2004); Gamble v. State, 877 So.2d 706, 714 (Fla. 2004); McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984),[24] and establish counsel was not ineffective. This Court must affirm.

At trial, the record reflects that in opening statement, the defense acknowledged Philmore's police confession, but noted the evidence would show Philmore was under Spann's influence and did whatever anyone told him to do, whether it be Spann to go

[23] Philmore did not testify at the evidentiary hearing, nor did he call Chip Bauer, his trial counsel, to testify. Under Strickland, it is the defendant's burden to prove counsel's actions were "unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision" and that prejudice resulted. Strickland v. Washington, 466 U.S. 668, 688-89 (1984); Orme v. State, 896 So.2d 725, 741 (Fla. 2005); Gamble v. State, 877 So.2d 706, 711 (Fla. 2004).

[24] The Court in McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984) opined:

> An attorney's strategy may bind his client even when made without consultation. *Thomas v. Zant*, 697 F.2d 977, 987 (11th Cir. 1983). In light of the overwhelming evidence against him, it cannot be said that the defense strategy of suggesting manslaughter instead of first degree murder was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel.

along with the crimes, counsel Hetherington to confess to the police, the police who asked about the events, or the State Attorney who requested he testify before the Grand Jury. (ROA.14 930-34). The pith of the defense argument was that premeditation, proof of intent to kill could not be shown. Philmore had "limited mental capacity" and "he's not capable of forming that legally necessary intent to kill." (ROA.14 935-36). The jury was told the defense was challenging premeditation as well as felony murder. It was counsel's argument the facts would show that the death did not occur as a consequence of the carjacking, but was separate, thus, felony murder did not apply (PCR.14 936-37). "[W]hat the Defense believes you will determine from the facts is that [the murder] wasn't done with, according to Mr. Philmore, with premeditation, with a conscious decision to do so. Nor was it done as a consequence of the carjacking and what was done." (ROA.14 937). The defense closing argument followed the same vein noting Philmore was "simpleminded" and one who followed the lead of others to the point that he could not form the intent necessary for first-degree murder. The killing was merely second-degree. Also, counsel explained how the felony murder theory should not be applied as the homicide did not take place during the commission of the underlying felonies. (ROA.18 1537-43, 1546-49, 1579-80, 1582-86, 1595).

On direct examination during the postconviction evidentiary hearing, Garland testified that Philmore's confession was found to be admissible, he and Bauer had to develop a strategy for dealing with the evidence (PCR.1 16-17). Gardner and Bauer spoke to Philmore many times about the strategy and confession. On cross-examination the following exchange took place:

> Q. Okay. With regard to Mr. Bauer, you were asked some questions regarding meetings you may have had with Mr. Bauer regarding trial strategy. Were you involved in the decision-making with regard to the guilt phase, as far as what the strategy would be to argue for second-degree murder, what to concede, and so forth?
>
> A. Yes. We -- Mr. Bauer and myself both were, yes. And we discussed that with Mr. Philmore, yes.
>
> Q. Okay. Now, did Mr. Philmore agree during those conversations that Mr. Bauer would concede the existence of the robbery, the kidnapping; but as to the first-degree murder, that Mr. -- that Mr. Bauer would argue that this was second-degree murder and not first-degree murder, that that was the hope during the guilt phase, that the jury would come back with second degree?
>
> A. Yes.
>
> ...
>
> Q. (BY MR. MIRMAN) Were you present when Mr. Bauer or yourself explained to Mr. Philmore that there would be a concession as to the underlying felonies of robbery and kidnapping, I believe, in this case?
>
> A. Yes. And if I may explain, besides this case, he also had cases in West Palm pending. And I -- in fact, I believe by the time we actually went to trial, he had actually been sentenced on one. And we knew he was getting life. And the issue was could we save his life. And that was our primary goal. Given

> the confession, given the evidence against him, given pending charges and sentences against him, we were trying to get a life sentence, hopefully concurrent; but we were trying to do that, yes.
>
> Q. And was that explained to him?
>
> A. Yes.
>
> Q. Did he consent to that?
>
> A. Yes.

(PCR.1 56-57). Garland averred that both counsel and client engaged in the strategy sessions and Philmore was aware of and agreed with the strategy, although not memorialized (PCR.1 64-65). Clearly, Philmore agreed to the strategy of counsel conceding the underlying felonies and arguing for second degree murder based upon a lack of premeditation and rejection of felony murder on the basis the murder was not a continuation of the felonies (PCR.1 56-57).

Contrary to Philmore's assertion, these facts establish there is substantial, competent evidence supporting the court's factual finding that Philmore gave his express agreement to the strategy to concede guilt of the underlying felonies and to the lesser crime of second-degree murder. See Gamble, 877 So.2d at 714 (finding that no merit to claim of ineffective assistance where the defendant consents to the strategy in spite of his later claim he did not understand the consequences of his agreement). Moreover, it is well recognized that the concession

to a lesser crime is sound strategy, with or without the client's agreement. See State v. Duncan 894 So.2d 817, 826-27, n.7 (Fla. 2004) (rejecting ineffectiveness claim as concession was to lesser crime and sound strategy given the strength of the state's evidence); Stewart v. Crosby, 880 So.2d 529, 532-33 (Fla. 2004) (distinguishing ineffectiveness claim from Nixon v. Singletary, 758 So.2d 618, 630 (Fla. 2000) because there was no concession to the crime charged, merely to a lesser crime); Griffin v. State, 866 So.2d 1, 6 (Fla. 2003) (concluding that conceding guilt to lesser crime is counsel's strategy which may bind a client even when done without consultation); Jones v. State, 845 So.2d 55, 70 (Fla. 2003) (same); Atwater v. State, 788 So.2d 223, 231 (Fla. 2001) (noting even if defendant did not consent to counsel's strategy of conceding guilt to lesser charge, the concession was legitimate strategy to save defendant's life, and was necessary in light of overwhelming evidence of guilt).

Given the record evidence, Philmore's reliance upon Nixon v. State, 857 So.2d 172 (Fla. 2003) and Harvey v. State, 28 Fla. L. Weekly S513 (Fla. Jul 13, 2003) to suggest there was no substantial, competent evidence of a agreement to the defense strategy and the mere fact the police confession was admissible would not support finding counsel effective absent an express concession is not well taken. Here, there was an express

agreement and the concession was to a lesser crime. Moreover, while Harvey remains on rehearing, Nixon v. State has been overruled. The United States Supreme Court, in Florida v. Nixon, 125 S.Ct. 551 (2004), rejected this Court's presumption of ineffective assistance of counsel where there had been a concession of guilt to the crime charged and no express agreement by the defendant. Such likewise undermines this Court's analysis in Harvey.

Although Florida v. Nixon involved a situation where there was no express agreement, it is instructive.

> The Florida Supreme Court, as just observed, *see supra*, at 559, required Nixon's "affirmative, explicit acceptance" of Corin's strategy because it deemed Corin's statements to the jury "the functional equivalent of a guilty plea." *Nixon* II, 758 So.2d, at 624. We disagree with that assessment.
>
> [5] Despite Corin's concession, Nixon retained the rights accorded a defendant in a criminal trial. Cf. *Boykin*, 395 U.S., at 242-243, and n. 4, 89 S.Ct. 1709 (a guilty plea is "more than a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecution need be advanced"). The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged. That aggressive evidence would thus be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors. *See supra*, at 557, 558. Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as Corin did, to exclude prejudicial evidence. *See supra*, at 558. In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal.

...

> Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon. *See supra*, at 557, 559. Given Nixon's constant resistance to answering inquiries put to him by counsel and court, *see Nixon III*, 857 So.2d, at 187-188 (Wells, J., dissenting), Corin was not additionally required to gain express consent before conceding Nixon's guilt. The two evidentiary hearings conducted by the Florida trial court demonstrate beyond doubt that Corin fulfilled his duty of consultation by informing Nixon of counsel's proposed strategy and its potential benefits. Nixon's characteristic silence each time information was conveyed to him, in sum, did not suffice to render unreasonable Corin's decision to concede guilt and to home in, instead, on the life or death penalty issue.

Florida v. Nixon, 125 S.Ct. at 560-61. The Court summarized:

> in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Florida v. Nixon, 125 S.Ct. at 562.

Furthermore, if there were no express agreement by Philmore and the concession was to the crimes as charged, counsel was not ineffective. The court had denied Philmore’s motion to suppress his confession, thus, counsel had to develop a strategy to maintain credibility with the jury while trying to prevent the

imposition of the death penalty. (PCR.1 16-17). According to Garland, the defense strategy of making a limited concession of guilt evolved based upon: "...we knew he was getting life [for a prior violent felony]. And the issue was could we save his life. And that was our primary goal. Given the confession, given the evidence against him, given pending charges and sentences against him, we were trying to get a life sentence...." (PCR.1 56-57).

As this Court has recognized, a prior violent felony aggravator is weighty. See Rivera v. State, 859 So.2d 495, 505 (Fla. 2003) (finding prior violent felony to be weighty aggravator); Porter v. State, 788 So.2d 917, 925 (Fla. 2001) (same). As such, the fact Philmore had a prior violent felony conviction (robbery), it was correct for counsel to be concerned and develop a defense strategy with that aggravator in mind.

It cannot be refuted that Philmore's confession was full and detailed, outlining each aspect of his involvement in the initial felonies and culminating in homicide. Philmore confessed to the planning of the crimes, the hunting for a female victim, and her carjacking, abduction, robbery, and murder. (ROA.17 1421-69; ROA.20 1790-91).[25] The forensic and

[25] Philmore's November 26, 1997 videotaped confession establishes that the day before the murder, he and Spann discussed robbing a bank and that the following day Spann noted that they needed to obtain a car for the robbery and their trip

eye-witness accounts corroborated Philmore's statement.[26] Under such circumstances, the strategy of admitting to those facts which could not be refuted is a recognized tactic. See Florida

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to New York. Philmore agreed and the co-defendant's searched the West Palm Beach area for a female driving a nice car. Spann and Philmore carried a .38 caliber weapon and a .40 caliber Glock. (ROA.17 1424-30, 1441). During the search, Spann and Philmore discussed killing the victim to facilitate their escape to New York. (ROA.17 - 1430-35). When the victim, Perron, was selected, Philmore, approached, pulled his gun, ordered her to the passenger seat, entered her car, and drove away with Spann following. (ROA.17 1435-38). At a remote location, Spann signaled for Philmore to stop and told him to take the victim to the bank at which point, Perron offered the $40 dollars she had with her. (ROA.17 1438-40). Philmore confessed he knew what had to be done; as he drove out to Indiantown, he knew he would have to kill Perron. When Spann flashed his lights, Philmore drove into a "little cut", a dirt road where the killing would be done. When they stopped, Perron exited the car and Philmore, with the .38 caliber weapon in hand, directed her to walk toward the cane, and he shot her. Philmore got blood on his shirt and in the car from throwing Perron's body into the canal. Following this, the co-defendants robbed an bank (ROA.17 - 1443-54, 1462-64).

[26] Philmore led the police to Perron's body. (ROA.16 1207-11). On the day of the murder, a man fitting his stature and dress, along with a man fitting Spann's stature and complexion driving a blue car (Spann's Subaru was blue) were seen in the area of Perron's abduction. Later that day, Philmore's shirt, containing Perron's blood, was recovered after he discarded it near the scene of the bank robbery and dumping of Spann's Subaru. Philmore, 820 So.2d at 924. (ROA.14 963-73; ROA.15 1059, 1065-67; ROA.17 1365-78) The Lexus and Subaru vehicle were seen together shortly after the bank robbery, and the Subaru was recovered near the scene. (ROA.14 983; ROA.15 1061-65). On November 14, 1997, Spann was seen by the police driving Perron's Lexus which precipitated a high speed chase, following which, Spann and Philmore were arrested in an orange grove. (ROA.15 1074-84, 1094-98, 1100-08, 1111-26; ROA.16 1149, 1157, 1172-75). Philmore carried the guns which were recovered later from the grove. One was the murder weapon (ROA.16 1148-55, 1158-62; ROA.17 1326-29, 1351-52). Perron's blood was discovered in the Lexus. (ROA.16 1190-96; ROA.17 1365-78).

v. Nixon, 125 S.Ct. at 563 (noting myriad of cases and studies, including Clarence Darrow's representation of Richard Loeb and Nathan Leopold where there was a concession of guilt in order to attempt to save the defendant's life); Reed v State, 875 So.2d 415, 433-34 (Fla. 2004) (noting reasonableness of counsel's conceding guilt to some charges is good trial strategy in order to gain credibility and acceptance with jury). Given these facts, even absent Philmore's express agreement, the tactic taken by counsel after reasoned consideration was sound under Florida v. Nixon. There was no ineffective assistance as defined by Strickland.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Richard E. Kiley, Esq. and James V. Viggiano, Esq., Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, FL 33619 on May 16, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on May 16, 2005.

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LESLIE T. CAMPBELL