IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1036

Lenard James Philmore

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Philmore lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Philmore accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

STATEMENT OF THE FACTS

On November 14, 1997, Lenard Philmore and codefendant Anthony Spann were arrested by the Martin County Sheriff=s Department for the offense of Armed Trespass on Posted Land. Also, on November 14, 1997, Ms. Kazue Perron was reported missing. Ms. Peron was the owner of an automobile observed being driven by Lenard Philmore prior to his arrest on November 14, 1997. Law enforcement knew that a bank in Indiantown had been robbed and suspected Mr. Philmore. Law enforcement had no other evidence that Lenard Philmore was involved in the disappearance of Perron. Codefendant Anthony Spann had given no statements to law enforcement.

The same day of his arrest on November 14, 1997, Lenard Philmore was contacted by Detective Gary Bach. (TR 1038) Mr. Philmore was without counsel. Mr. Philmore briefly discussed with Detective Bach the Indiantown Bank robbery, during which discussion Mr. Philmore admitted his participation. (SR 27-29) Mr. Philmore, when asked about the disappearance of Perron, denied any knowledge of her disappearance. (R. 792-795) Mr. Philmore asked to speak with an attorney.

As of November 15, 1997, Mr. Philmore was appointed Assistant Public Defender John Hetherington. (R. 790-791) Hetherington was appointed to represent Mr. Philmore on the Martin County armed trespass charge and the Indiantown bank robbery offense. (R. 790-791) Hetherington was aware from his conversations with Mr. Philmore that the police had already attempted to question him regarding a missing female out of Palm Beach County. (R. 792-793) Mr. Philmore told Hetherington that he had no knowledge or involvement in the disappearance of Perron. Hetherington, as of November 15, 1997, had not conducted discovery or investigation.

On November 18, 1997, upon the advice and with the approval of Hetherington, Mr. Philmore gave the first of a series of statements to law enforcement. The meeting was arranged by Hetherington and the State. Present at the November 18, 1997

taped statement were Agent David Von Holle, Detective Gary Bach, Mr. Philmore, and his attorney, John Hetherington. During the statement, Mr. Philmore continuously denied any involvement in the abduction of Perron. (SR. 34) Mr. Philmore did admit to an uncharged and unsolved robbery out of Palm Beach County.

As of November 18, 1997, law enforcement had no further evidence on the disappearance of Perron and the search for her continued. (SR. 39)

On November 20, 1997, a polygraph examination was performed on Mr. Philmore. (SR 43) The stated purpose of the polygraph was to ascertain the truthfulness of Mr. Philmore=s statements given on November 18, 1997. (SR 44) The polygraph was permitted with Hetherington=s approval. Hetherington was not permitted in the polygraph room during the examination. (SR. 45, 48-49) During the pre-test interview, Mr. Philmore changed his statement and admitted that he was present during the car jacking but was not present during the homicide nor was he the shooter. (SR 51-52, 55) The interviewing officer, Detective Dennis Fritchie, notified attorney Hetherington that Philmore had changed his version of what had transpired. (SR 52) Attorney Hetherington terminated the polygraph examination and appeared to be surprised that Philmore had not been totally honest. (SR 55, 86) Another police interrogation was scheduled for November 21,

1997. (SR 52)

On November 21, 1997, Mr. Philmore gave another statement to police. Detective Fritchie was told by attorney Hetherington that Philmore wished to give a tape-recorded video statement. (SR 53) The statement was initiated by Hetherington. (SR 58) Present at the statement were Detective Dennis Fritchie, Lenard Philmore, attorney John Hetherington, State Attorney Bruce Colton, and Assistant State Attorney Tom Bakkedahl. (SR 56) At the November 21, 1997 statement, Mr. Philmore gave additional information that he was present when the shooting took place and that he did not want to see the shooting so he turned his head and heard two shots. Mr. Philmore told the State where the body could be found and he led them to the body. (See PCR. Vol. IV p.313) Mr. Philmore continued to maintain he was not the shooter. (SR 60) Another polygraph examination was scheduled for November 23, 1999. (SR 61)

On November 23, 1997, Mr. Philmore gave law enforcement an additional statement upon advice and with approval of Hetherington. Another polygraph examination was conducted wherein Hetherington was not permitted in the examination room. (SR 61) The stated purpose of the examination was to ascertain whether Mr. Philmore was the shooter. (SR 63) Mr. Philmore denied he was the shooter. (SR 63) Attorney Hetherington was

told that Mr. Philmore admitted to being the actual gunman. (SR 66) However, the transcript of the polygraph examination contains no reference to Mr. Philmore admitting that he was the shooter. Hetherington was told that Mr. Philmore admitted he was the shooter and the interview was terminated (SR 83) Another statement was scheduled for November 26, 1997. (SR 83)

On November 26, 1997, Mr. Philmore gave a final statement. (SR 68) Present at the final statement were Mr. Philmore, attorney John Hetherington, Deputy Dennis Fritchie and Assistant State Attorney Thomas Bakkedahl. (SR 68-69) At this interview, Philmore acknowledged that it was he who shot the victim. (SR 71)

On February 24, 1998, a written plea of not guilty was filed by Attorney Hetherington for the murder of Kazue Perron. (FSC ROA Vol. I-27).

On October 13, 1998, Attorney Hetherington filed a MOTION TO DETERMINE STATUS OF ATTORNEY. (FSC ROA Vol. I-68).

On December 17, 1998, the trial court ordered the appointment of special public defenders Thomas Garland and Sherwood Bauer. (FSC ROA Vol. I-76).

Philmore discharged attorney Hetherington and the trial court appointed independent counsel who prepared and argued Mr. Philmore:s motion to suppress was denied by the trial court. The

case proceeded to trial.

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

Various pretrial motions were filed and heard by the trial court, including Lenard Philmore=s AMotion To Suppress Statements Of Defendant And Admission Of Evidence Obtained From Statement.@ This motion was denied and Lenard Philmore=s statements were admitted at trial over objection.

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

A *Spencer* hearing was held thereafter and memorandum from counsel reviewed by the trial court. In addition, a presentence investigation report was ordered and received by the trial judge. At sentencing, Lenard Philmore received the death penalty for his conviction of first degree murder and prison

sentences for his non-capital felony convictions. Lenard Philmore=s judgments, convictions and sentences including the sentence of death were affirmed in Philmore v. State, 820 So.2d 919 (Fla. 2002).

On March 30-April 1 2004, an evidentiary hearing was conducted on Mr. Philmore=s 3.851 motion for post conviction relief. At the evidentiary hearing, the trial court heard testimony relating to Claims I, II, III, and V of the Defendant=s motions.

Claim IA was defendant=s contention that trial counsel was ineffective in failing to challenge the State=s contention that the striking of the prospective African-American juror, Tajuana Holt, was not pretextual. Testimony from Thomas Garland, the trial attorney was taken regarding this claim.

Claim II encompassed four ineffective assistance of counsel issues surrounding statements given by the Defendant to law enforcement during the time that he was represented by attorney John Hetherington. The primary witness in support of this claim was attorney John Hetherington.

Claim III was a penalty phase claim which alleged ineffective assistance of counsel in that trial counsel failed to adequately challenge the State=s case. The primary witness in support of this claim was Dr. Michael Maher.

Claim V was a Aconcession of guilt without consultation@ claim. The primary witness in support of this claim was Thomas Garland.

The trial court denied relief in a written order dated May 12, 2004. This appeal followed.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF THOMAS GARLAND

Thomas Garland testified in Mr. Philmore=s evidentiary hearing. Mr. Garland testified that he was certified by the Florida Bar as an expert in criminal trial and criminal procedure. (See PCR. Vol.I p. 13). Mr. Garland was appointed by the court to represent Mr. Philmore and he assumed the duties of penalty phase counsel. (See PCR. Vol I p.14). The circumstances of Garland=s appointment were noteworthy in that Mr. Garland testified:

> John Hetherington was the primary defense counsel. And at some point during the initial process after his arrest and before we were appointed, there were, apparently, several statements that Mr. Philmore gave to the police and investigating authorities. And, basically, when we got in the case, there was a full confession, videotape, audiotapes, and I think in front of an audience of about five or six law enforcement officials, including Bruce Colton, himself. At that point I believe a conflict was between Mr. Hetherington, Mr. Philmore. The Public Defender=s Office

> withdrew. I was appointed And then, subsequently, Mr. Bauer was appointed to help out. (PCR Vol. I p. 15).

Mr. Garland testified that due to the confession, the trial team of Garland and Bauer was basically handed a case wherein Mr. Philmore had fully confessed to his involvement and that the State had two suspects. The State had no body and therefore, the State had no proof that a murder even occurred until Mr. Philmore gave his confession. (See PCR. Vol.I P. 15-16). Mr. Garland also testified that he conducted the voir dire of the jury. (See PCR Vol. I p.17). Regarding the demographic makeup of the venire, Mr. Garland testified that prospective jurors would come from one of the higher per capita income areas in the State of Florida. Prospective jurors in this jurisdiction tend to be older, more conservative and that the jurisdiction was highly Republican with a very small, relatively, African-American, black population in this county. (See PCR Vol.I p.19).

Regarding AMENDED CLAIM I OF 3.851 MOTION FOR POSTCONVICTION RELIEF, A. Trial counsel was ineffective in failing to challenge the State=s contention that the striking of prospective juror Holt was not pretextual, the following testimony was elicited:

> Q. (BY MR. KILEY) Counsel, you were just showed a trial record - actually, it was a

trial record, page 845 to 846, and were asked if you recognized what was refreshed your recollection of the incident.
A. Read what?
Oh. AMr. Colton: Your Honor, I would also point out that during the day today members of our staff spoke to that-this prospective juror=s mother, who is a member of the Clerk=s office. Without going into great detail of the questions and answers that were asked with respect to the juror, but she advised that we -
AMr. Garland: I=m going to object. This is hearsay.
AMr. Colton: Your Honor, this goes to our reasons and whether our reasons are genuine.
ATHE COURT: Overruled.
AMr. Colton: That her mother, her own mother advised us that we would do better not to have her daughter on the jury. And I would state to the Court that it=s nothing improper about talking to people who know the prospective jurors. It=s done all the time. This is a person who obviously knows the prospective juror. And without going into detail and without her going into detail, she advised us that we would be better off without her daughter on the jury.
ATHE COURT: Do you wish to be heard further, Mr. Garland?@
Q. Thank you, sir. Obviously, would you submit that you had some problems with the State doing this? Correct, sir?
MR.MIRMAN: I=m going to object. I believe this is the same thing he was asked about before. To be fair to the witness, he said it didn=t refresh his recollection, point where it=s fair to ask him questions about it.
THE COURT: Overruled.
Q. (BY MR. KILEY) Sir, you can answer.
A. Sure. Yes. I mean,-
Q. Is it safe to assume, sir, if you did not have a problem with this colloquy, you would not have made the correct objection? Right?

A. Okay. Sure. Yes.
Q. Did you then ask that this prospective juror=s mother, who worked in the Clerk=s office, be questioned by the Court?
A. I don=t recall, but I don=t believe so.
Q. Did you consider sir, - I mean, if one looks at the statement, without going into great details of the questions and answers that were asked of the prospective juror, did you consider that a reason to exclude this woman from testifying?
A. I wasn=t racially-motivated. And as far as I know, the standard that goes to the genuineness, I think they were exercising a peremptory. I=m not sure. I -
Q. Well, what about pretextual? What is a pretextual reason, sir? As an attorney you must have heard the term.
A. I heard of pretextual stops.
Q. How about a pretextual reasons?
A. Sure, we all have pretextual reasons. What=s the question?
Q. What is a pretextual stop?
MR. MIRMAN: I=m going to object to the relevance of that question.
MR. KILEY: I=ll tie it up.
THE COURT: Overruled.
A. Police officer may think he did something wrong, but he stops and makes up a reason for the stop. Taillight was out.
Q. (BY MR. KILEY) I would agree. Now sir, carrying - that reasoning that they make up a reason to mask a genuine concern, would you or could you not contend that this reason, we talked to her mother and, without getting into detail, we want to strike her peremptorily, does that sound pretextual to you, or does it sound like a genuine reason? Or does it sound like any reason at all?
A. It sounds like it could be construed any way you want, counselor.
Q. Okay. Did you take the opportunity - do you recall the Court asking you if you wished to be heard further on this matter, Mr. Garland?
A. I think that=s what the transcript says.

Q. Do you recall asking the Court to bring this juror:s mother up so you could question her?
A. I don:t recall.
Q. Well, if the record says you did not, would you dispute the record?
A. How can I dispute the record?
Q. Did you ask - do you recall asking the State Attorney who questioned this woman:s mother, Tajuana Holt:s mother, do you recall asking the State Attorney that?
A. I don:t recall.
Q. Well, if the record disputes that you did not would you have any reason to dispute the accuracy of the trial record?
A. No.
Q. Do you recall demanding that the State go into detail as to why they were excluding this juror?
A. I don:t recall.
Q. If the record says you did not, would you have any reason to dispute the accuracy of the trial record?
A. No.
Q. Why didn:t you do that, sir? Why didn:t you inquire further when given the opportunity by this Court to do so?
A. I guess we were satisfied at that point. And we moved on.
Q. You were satisfied -
A. I make my objection. I was overruled.
Q. Okay. You were satisfied that this reason was a genuine reason?
A. No. I - what I:m saying is I make my objection. It was overruled. The objection:s on the record. So we moved on.
Q. And did you have a tactical reason for not pursuing this further, or did you just forget?
A. I don:t recall.
Q. You don:t recall the reasons you didn:t question the witness further?
A. Well, you:re asking me a compound question.
Q. Okay.
A. What I:m saying is, I noted my objection

and we moved on. It was overruled.
Q. Did you inquire if members of the State=s Attorney=s Office had talked to mothers of any white jurors?
A. I don=t recall. I don=t think I did.
Q. Did you ever talk to Rosa Holt?
A. I don=t have any recollection. So I don=t believe so. I don=t know who Rosa Holt is.
THE COURT: I didn=t hear you, Mr. Garland.
THE WITNESS: I don=t know who Rosa Holt is
Q. (BY MR. KILEY) The mother of Tajuana Holt. Right?
A. Okay.
Q. Well, you were aware that Miss Tajuana Holt was African-American?
A. That appears to be correct.
Q. And you did not see a pattern emerging from the State=s efforts to get Miss Holt off the jury?
A. No.
Q. You don=t recall that the State accused Miss Holt of sleeping during voir dire?
A. I think I=ve answered that. I vaguely remember some issue of that coming up.
Q. Okay.
A. I don=t recall which juror it was.
Q. Well you did not inquire how many other mothers of prospective jurors of the white race that this member of the State=s Attorney=s staff had allegedly talked to.
A. Who happened to be clerks in the courthouse, no I don=t recall.
MR.KILEY: Thank you. I have nothing further.
(PCR Vol.I p.38-45).

Mr. Garland also testified as to the preparation of the penalty phase of the trial. Mr. Garland had retained the services of Dr. Berland and Dr. Maher because both came highly recommended. (PCR. Vol.I p.26). Mr. Garland also obtained an investigator to explore mitigation issues and to aid his experts. School records, jail records, employment histories and family

interviews were conducted and supplied to Maher and Berland. (PCR. Vol.I p. 27-28). Both doctors indicated there may be some evidence of some brain damage so Garland retained Dr. Frank Wood to perform a PET scan on Mr. Philmore. (PCR. Vol.I p.29). Mr. Garland was not satisfied with Dr. Berland=s testimony as Berland was cross examined by the State and upon cross examination, it was discovered that Dr. Berland gave an outdated version of the MMPI. (PCR. Vol.I p.32). Dr. Landrum testified in rebuttal to Dr. Berland. (PCR. Vol.I p.36).

Regarding Dr. Maher, the following testimony was elicited by Mr. Viggiano:

> Q. Did - now, you had Dr. Maher retained, but you had not called Dr. Maher. Correct?
> A. Yeah. That was a decision that Mr. Bauer and I made primarily myself. I just didn=t think that he was going to add anything to our case.
> Q. Do you know what specialty Dr. Maher was?
> A. I can=t recall.
> Q. You had taken his deposition. Correct?
> A. Yes. We were all over in Tampa. Took his deposition at his office.
> Q. Do you recall if he rendered an opinion with respect to any mitigation that might be presented?
> A. I can=t recall right now.
> Q. You had him listed as a witness, potential witness. Correct?
> A. Okay.
> Q. Okay.
> A. We had to list him in order to take his depo.
> Q. You never called Dr. Maher in rebuttal of the State=s experts. Correct?

A. Correct. (PCR. Vol.I p.37)

Regarding CLAIM V, MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. TRIAL COUNSEL FAILED TO SUBJECT THE PROSECUTION=S CASE TO MEANINGFUL ADVERSARIAL TESTING IN THE GUILT PHASE OF MR. PHILMORE=S TRIAL BY CONCEDING GUILT WITHOUT CONSULTATION.

The following testimony was elicited:

> Q. Sir, this conversation where you sat down with Mr. Philmore and Mr. Bauer went and discussed conceding all the crimes and conceding guilt and guilt phase, where did that take place?
> A. I don=t recall. Probably at Martin County jail.
> Q. And who was there?
> A. It would have been the three of us.
> Q. Just the three of yous. Okay. And who**B** did you memorialize that? I mean, did he sign**B** how did **B** how did he agree sir? What did he say? Did he nod his head? Did he write out a form? Did he say, AYeah, you-anything you guys say is fine with me?@ Or do you recall him agreeing?
> A. Oh, I recall him agreeing, being aware that what our strategy was. Was it memorialized, I don=t recall. Mr. Bauer was doing the guilt phase. If-
> Q. You didn=t make the opening, did you?
> A. I don=t think I ever said I did.
> Q. I know. You did not make the opening statement.
> A. Okay.
> Q. And you - is it - was it your testimony several moments ago that you were not responsible for guilt phase?
> A. Well,-
> Q. Did you, or did you not?

A. Mr. Bauer handled the trial phase. The guilt phase of the trial.
Q. So, I guess, sir, a better indicator of what happened regarding guilt phase issues would be to talk to Mr. Bauer and not yourself, sir?
A. That:s your opinion, okay.
Q. Okay. Well, do you think his memory might be a little better than yours or not?
A. Want me to speculate?
Q. Yeah.
A. I:m not sure. (PCR. Vol.I p.64-65).

Garland and Bauer were not the original attorneys on the case. (PCR. Vol.I p.66). Regarding the initial pre-trial, pre-indictment representation of Mr. Philmore, the following testimony was elicited:

Q. As an experienced criminal defense attorney, do you advise your clients when you are initially appointed to represent the, to cooperate fully with law enforcement?
A. Normally we have them - we have a notice of representation, similar form. And I tell my clients to keep their yap shut and not even to talk to anybody in the jail about the facts of the case. They can talk about sports, women, anything they wanted to. But they don:t want to talk about the facts of this case, especially to police and/or inmates.
Q. So you would not have brought your client and urged him to cooperate with law enforcement in discussing this case.
A. Not unless there was a written plea agreement stating the State would come off the death penalty if he agreed to testify truthfully.
Q. And sir, counsel for Sovereign testified or asked you about the evidence that actually linked Mr. Philmore to the crime. Do you remember him asking you about that, sir?

A. Yes.
Q. And do you remember, sir, if that evidence would have conclusively proved which man was the shooter?
A. I think - if I recall, that was unclear as to who was the shooter.
Q. So, sir, -
A. That was -
Q. -without this confession, is it safe to assume the State would be faced with two men who were essentially doing this?
MR. KILEY: Judge, may the record reflect counsel:s standing there with his arms crossed and fingers pointed in two different directions?
A. You:re indicating they would be pointing the fingers at each other.
Q. (BY MR. KILEY) Exactly, sir.
A. Clearly. I would think so, yes.
Q. And that would be an important - in your experience, as a criminal defense attorney who has worked on capital cases and non-capital cases and felonies and probably misdemeanors, interned, like I did, you probably started with misdemeanors.
A. Obviously.
Q. That the identity of the actual shooter of Miss Peron was a very important issue in this case. Would you not concede that, sir?
A. I would agree. And I would add further that it:s my experience, when you have two people who are accused of similar - the same crime, the State quite often looks at the two defendants and will often make a decision as to going for the death penalty on one of them instead of both. To insure one. And I think it was our feeling that if he had not - if Mr. Philmore had not made a statement, they would have decided that Mr. Spann was the greater evil of the two.
Q. Why do you think they would have decided that, sir?
MR. MIRMAN: I:m going to object to speculation. Obviously, he doesn:t make that decision.
MR. KILEY: Judge, I:m **B**

> THE COURT: Give me a minute, please. Just rephrase, please. What are you getting at? Are you asking him the reason for his response just now?
> MR. KILEY: I'm a little confused. I'll rephrase the whole thing, Judge.
> Q. (BY MR. KILEY) Would the fact that Mr. Spann had a worse record that Mr. Philmore did, would that lead you to believe that without the confession you could have arranged a life sentence for Mr. Phiilmore?
> A. Yes.
> Q. Without the confession, who in your opinion would be more likely the shooter?
> A. Knowing what I know now about the two men, Mr. Spann.
> Q. Sir, so would you concede that as an experienced trial attorney, you would have never removed the reasonable doubt as who was the shooter of Miss Peron by having your client confess, would you?
> A. Never. (PCR. Vol.I p.67-70).

B. TESTIMONY OF DR. MICHAEL MAHER

Dr. Michael Maher is a medical doctor, board-certified in psychiatry and in forensic psychiatry. (PCR. Vol.II p.87). Dr. Maher was tendered and accepted by the 3.851 court as an expert in the area of forensic psychiatry. (PCR. Vol.II p. 88). Dr. Maher testified that he had met Mr. Philmore in 1999 when his original case was pending and had also recently met with Philmore in March of 2004. Before Dr. Maher actually met Mr. Philmore, he had familiarized himself with his case. This was done by reviewing Mr. Philmore's interview with the police, reports from the Department of Corrections regarding Mr. Philmore's prior incarceration, Mr. Philmore's Baker Act

information, and the report of Dr. Robert Berland. Dr. Maher relied on Berland=s report only to a minimal degree. Dr. Berland=s report merely confirmed Maher=s ultimate opinion on the case. Dr. Maher was deposed on December 21, 1999. The deposition was entered into evidence at the 3.851 hearing as Defense Exhibit 3. (PCR. Vol.II p. 91-95).

At the 3.851 hearing, Maher explained that a PET scan was done on Mr. Philmore subsequent to the deposition. He testified as to how a PET scan works, his training as to the reading of the PET scan data, and what the PET scan revealed regarding the abnormality of Mr. Philmore=s brain. (PCR. Vol.II p. 95-98). Prior to Maher=s examination of the PET scan, Maher had formed an opinion that there was a high probability that Mr. Philmore was suffering from organic brain damage. (PCR. Vol.II p. 99).

At the 3.851 hearing the following testimony was elicited:

> Q. Sir, is someone who has brain injury, suffers from poor impulse control, is addicted to drugs and alcohol more easily led than someone without those issues?
> A. In general, they are, yes.
> Q. Okay. Now, in a leader/follower relationship such as this one, what happens to the follower when he=s permanently separated from the leader?
> A. He looks for a new leader. He looks for someone else with a strong personality and strong ideas to follow.
> Q. Does he become - before he finds this new leader, does he become lost and confused?
> A. I would say generally an individual with

> this type of personality pattern and brain problems will become indecisive, unable to follow through in a consistent way with their own ideas, unable to make plans and follow through with those plans.
> Q. Does he seek out a strong personality? Will he latch onto someone who has a strong personality?
> A. Generally yes.
> Q. How about - do you think Mr. Philmore could have been easily led by police officers who were interrogating him?
> A. Yes.
> Q. How about his public defender?
> A. Yes, he could be led by his public defender.
> Q. Do you think it's significant that one person is supposed to be on his side and one person who appears to help him, that he could easily manipulate Mr. Philmore?
> A. Yes. The problem is that under any circumstances of - of a high level of emotional intensity, it's difficult for Mr. Philmore to make independent judgments, to think for himself simply. So under any circumstance where there is something at stake, he's going to be inhibited, impaired, in thinking for himself and, therefore, likely to substitute or accept someone else's judgment or decisions and adopt them as his own. (PCR. Vol.II p. 116-117).

Regarding the mitigation obtained by Dr. Maher at the time of the deposition and prior to the trial of Mr. Philmore, the following testimony was elicited:

> Q. All right. Doctor, can we say at the time of the crime that Mr. Philmore was suffering from a mental disturbance or an emotional disturbance or both?
> A. I would say mental and emotional disturbance. And I would distinguish them as describing the emotional disturbance being more in the psychological realm; that

is, of thinking and feeling, and the mental disturbance as being more in the neurological realm of basic neurological processing.
Q. The psychological realm would be emotional**B**
A. Yes.
Q. **B** and that would mean thinking and feeling. A. Yes.
Q. The mental disturbance is **B**
A. The underlying basic neurological processing.
Q. To wit, the brain injury?
A. That=s right.
Q. All right. Okay. Now, if a child had exhibited all the symptoms that you stated Mr. Philmore has, and you were explaining to that child=s parent why the child behaved this way, would you be comfortable in saying that this is- this man was suffering from an extreme mental or emotional disturbance?
A. Yes.
Q. Why would you be comfortable in saying that?
A. Because it conveys the clear meaning that expecting him to function normally in a normal environment is not reasonable. And in conveying the gravity and the seriousness of his problems and abnormalities in that situation I would want to be very clear that this was not a condition that could be ignored or disregarded.
Q. It was noticeable.
A. Pardon me?
Q. It was noticeable. Right? All through his life this was there.
A. The - the manifestations of it were noticeable. You know, when you say noticeable, it wasn=t noticeable the way a broken arm that=s sticking through the skin is noticeable as an obvious physical abnormality.
Q. But his behavior patterns were noticeable would you not say that, sir?
A. Yes.
Q. Now, being that he was under extreme

mental or emotional disturbance at the time of the crime, could you say within a reasonable degree of medical certainty that Mr. Philmore=s capacity to appreciate the criminality of his conduct was substantially impaired?
A. Yes.
Q. Okay. Doctor, at this time I would call your attention to deposition - to your deposition of December 21st , 1999 on pages - page 53, lines 15 through 20. Did you not opine, quote, ACombinations of factors that I=ve described as mitigatior reduced his capacity to understand the horror of what he was doing, to understand on a human level what the nature was and the consequences of his behavior was and what the raw points of his behavior was.@
A. Yes.
Q. Did you say that?
A. Yes, I did.
Q. Well, Doctor, nobody asked you if you could - if Mr. Philmore could appreciate if he had - a capacity to appreciate the criminality of his conduct and was that impaired. But isn=t that - if you substitute the word Acriminality@ for Ahorror@, isn=t that a mitigation factor in this case?
A. In my judgment, those - the way that I described it is essentially the same as what you have characterized in the language of specific mitigators.
Q. So you were prepared to testify to that at the deposition - in fact, you did testify to that at the deposition. Correct, sir?
A. Yes.
Q. Right? And you also opined that his capacity to appreciate the criminality of his conduct was substantially impaired. Did you not say that, sir?
A. In effect, yes.
Q. Is that your opinion on December 21st, 1999 in that deposition?
A. I need to provide a brief explanation to that, rather than give you a yes/no answer.
Q. Okay.

A. In my deposition, I make those statements, and I wouldn:t retract or limit any of those statements.
Q. Okay.
A. But I also said in my deposition - I used the word at one point in talking about the mitigators that there was - that they were on the edge, or some word to that effect. And I used that word because I didn:t have the confirmation of the PET scan at that time to conform my clinical impressions of his illness and brain damage. And I was just slightly hesitant to offer those conclusions with the emphatic tone that you have described, because I didn:t have that confirmation at the time of the deposition.
Q. But subsequent to that, you did get the confirmation; correct, sir?
A. Yes, I did.
Q. All right. In your deposition, on page 8, line 6 and 7, you stated that you find evidence to support mitigation arguments with regards to the death sentence. However, sir, without the dubious benefit of a law degree, is it safe or assume that you had no idea which mitigation was statutory or non-statutory?
A. I don:t think I was particularly thinking about that distinction at the time. That:s correct. But I couldn:t enumerate all the statutory mitigators.
Q. You couldn:t?
A. No, I don:t think so. I:d have to check a reference.
Q. That:s because you:re not a lawyer. Huh?
A. I don:t know if all lawyers can do that.
Q. And you:re not anti-social, huh? And you:re not narcissistic. Doctor, the trial in this case was held on January of 2000. Had you completed work on the case by then?
A. Yes.
Q. Were you prepared to testify for the defense?
A. I was prepared to testify, yes.
Q. Do you remember is your testimony would

have deviated in any substantial was from the - from the testimony in the deposition that you gave on December 21st?
A. Only in that I would have been more definite and clear about my opinions and findings because of the confirmation of the PET scan. That's the only thing in looking back over these files and this case that I have done in the last several months and re-examining Mr. Philmore that I would say would be different..
Q. Now that you know the legal definition of these terms, you were prepared, were you not, to offer the defense not one, but two statutory mitigators?
A. I would say that both the impairment and understanding the nature and consequences of his actions and in understanding - and also impairment and understanding the wrongfulness of those actions were both my opinions that I held at that time.
Q. And do I hear three? Do I hear substantial domination of another?
A. I don't think that I would say that there was substantial domination of another, as I understand that in the law. I think there was psychological influence that was substantial and that was significant. I'm not sure that I understand that term well enough to say yes or no that was there.
Q. So no matter how much I pay you or threaten you, you're not going to say he was under the substantial domination of another.
A. What you pay me or what you say to me is not going to affect my opinion, that's right.
Q. Doctor, you know why you weren't called to testify?
A. No, I don't.
Q. Did the defense counsel call you and say, Doc, we're not calling you as a witness because blah, blah, blah, blah, blah?
MR. MIRMAN: Object. He just answered the question.
THE COURT: Sustained.
Q. (BY MR. KILEY) Nobody called you.
A. That's correct.

Q. Nobody sent you a letter?
A. Not to come to court, no.
Q. Did they pay your bill?
A. Yes. (PCR. Vol.II p. 120-127)

C. TESTIMONY OF ATTORNEY JOHN HETHERINGTON

Attorney Hetherington, a public defender with fourteen years experience, was appointed to represent Mr. Philmore on November 15, 1997 for the charges of armed trespass and robbery of an Indiantown Bank. (PCR Vol.II p. 148-9). Before Attorney Hetherington was appointed, Mr.Philmore gave a brief statement about an Indiantown bank robbery, terminated that statement, and requested a lawyer. (PCR Vol. IV p. 315). Because of the nature of the case, Attorney Hetherington became involved very quickly. (PCR Vol.II p.149).

Attorney Hetherington received a flood of information from multiple law enforcement agencies including West Palm Beach detectives, Royal Palm Beach FBI, and MCSO. (PCR Vol. II p. 150). Attorney Hetherington learned that Mr. Philmore fled from Perron=s Lexus automobile, an abduction took place about 1 o=clock in the afternoon in North Palm Beach, a bank robbery took place in Indiantown about 2 o=clock, and the Lexus was pursued at 3 o=clock. (PCR Vol. II p. 156). Information about a crime spree in West Palm Beach over the course of a two or three day period was provided to Attorney Hetherington. (PCR Vol. II p.169). No fingerprints or other physical evidence was recovered from the

Lexus. (PCR Vol. II p. 157).

Attorney Hetherington testified that he was being provided information about Mr. Philmore=s case within hours of being appointed to Mr. Philmore=s case and that it would not be unusual for law enforcement to provide him this information, and that law enforcement was sometimes trying to help him. (PCR Vol. II p. 158,159). Attorney Hetherington saw nothing unusual about this type of arrangement with law enforcement. (PCR Vol. II p. 160). He did acknowledge that law enforcement could possibly be contacting him so that he could assist them in their case and that law enforcement could have a self interest in the arrangement. (PCR Vol.II p.163). He also acknowledged that the law enforcement agencies investigating Mr. Philmore=s case were providing him information for their own self interest and that they wanted to clear the case. (PCR Vol. II p. 165, 175).

During the first 24 hours of representation, Attorney Hetherington met with Mr. Philmore probably twice. (PCR. Vol. II p. 165). During this time information from law enforcement agencies continued to come in about the Indiantown bank robbery, the trespass, and the Lexus, however Attorney Hetherington did not do any witness interviews or challenge witness identifications of Mr. Philmore. (PCR Vol. II p. 166). He did not speak with any of the witnesses that allegedly saw Mr.

Philmore commit the Indiantown bank robbery. (PCR Vol. II p. 173). Attorney Hetherington was operating completely off of what law enforcement was telling him about the Indiantown robbery. (PCR Vol.II p.174.

Before November 18, 1997, Attorney Hetherington had information from law enforcement about the Indiantown bank robbery, the abduction of Perron, the Lexus automobile, and the West Palm Beach robberies. (PCR Vol.III p.213). He made no attempt to independently corroborate what law enforcement was telling him regarding the crimes. (PCR Vol.II p.180). During the initial day or two of representation, a torrent of information in volumes was coming into Attorney Hetherington. (PCR Vol.II p.174). The most damaging piece of evidence against Mr. Philmore was the time line of events that Attorney Hetherington formulated. (PCR Vol.II p.177). The body of Perron had not been recovered. (PCR VOL.II p.178).

Mr. Philmore initially had spoken to law enforcement about the trespass and Indiantown robbery but terminated the interview at a point where questioning was addressed to the Lexus and the abduction. (PCR Vol.II p.167).

Based upon the West Palm Beach cases, Attorney Hetherington believed that Mr. Philmore faced life in prison, that live was the baseline, and this was a life case. (PCR Vol.II p.176).

The issue in the case was either life or death. (PCR Vol.II p.176).

Mr. Philmore gave numerous statements to law enforcement, the first of which after being appointed Mr. Hetherington as counsel, was given on November 18, 1997, four days after the abduction. (PCR Vol.II p.181,182).

Attorney Hetherington testified that being a triggerman in any murder is of significance. (PCR Vol.II p.182). Where two individuals were involved in a murder case, the person who was the triggerman might be in a more difficult situation. (PCR Vol.II p. 183). The person who was not the triggerman might enjoy three possible benefits. One, the jury might give consideration to the party that was not the triggerman. Two, the Florida Supreme Court would do a proportionality analysis. Three, possibly the State Attorney would offer a deal or elect not pursue the death penalty. (PCR Vol.II p.183). Being the shooter and not being the shooter was crucial in Mr. Philmore:s case. (PCR Vol.II p. 186). Attorney Hetherington believed that Mr Philmore was not the shooter. (PCR Vol.II p.187). He also found out that the co-defendant, Anthony Spann, was almost a contract killer down in West Palm Beach for a drug gang. (PCR Vol.II p.188).

Mr. Philmore gave law enforcement a statement on November

18, 1997 and before that statement he told Attorney Hetherington that he was not the shooter of Perron. (PCR Vol.II p.192). Attorney Hetherington testified that had Mr. Philmore told him that he did shoot Perron, Hetherington would not have allowed Mr. Philmore to give the November 18, 1997 statement to law enforcement because that would have been just too powerful a case for the jury to hear. (PCR Vol.II p.193). Attorney Hetherington would have not allowed Mr. Philmore to give the statement and would have taken his chances with the jury. (PCR Vol.II p.194). As a trial attorney, he would have preferred to go to trial without the confession than with the confession. (PCR Vol.II p.195). Mr. Philmore=s version of his involvement progressed from his assertion that he was not involved in the abduction, to Spann leaving with Perron for a short period of time between the abduction and the bank robbery and coming back without her, to his being present at the abduction. (PCR Vol.II p.197). Attorney Hetherington testified that he sometimes will believe or disbelieve his clients. (PCR Vol. III p. 220).

Before the statement given on November 18, 1997, Attorney Hetherington said that he met with Mr. Philmore=s mother in the evening, sometime between November 15 and November 18, 1997. (PCR Vol. III p. 221). Attorney Hetherington stated that the conversation with Mr. Philmore=s mother may have come after the

18th or before the 18th. However, at the time Attorney Hetherington spoke to Mr. Philmore=s mother, Hetherington knew about the abduction of Perron. (PCR Vol. III p. 222).

As of November 18, 1997, Mr. Philmore continued to deny his involvement in the abduction of Perron. Atorney Hetherington took Mr. Philmore at his word and believed him. (PCR Vol. III p.227). It did concern Attorney Hetherington that Mr. Philmore said he had no involvement in the abduction yet law enforcement said that an abduction of Perron had taken place. (PCR Vol.III p.228).

At the November 18, 1997 statement, Mr. Philmore, when being asked about the origin of the guns, refused to answer, and personally invoked his Fifth Amendment rights against self incrimination. (PCR Vol.III p.230). Attorney Hetherington said he allowed Mr. Philmore to give the November 18, 1997 statement so that he could clear his name about any possible abduction. (PCR Vol.III p. 237). Attorney Hetherington saw no risk in allowing his client to talking about the bank robbery so he could clear his name on the abduction. (PCR Vol.III p.237).

During the November 18, 1997 statement, the detectives were concerned about how Spann could have gotten both the Lexus and Subaru cars to the bank by himself and were having difficulty accepting the whole thing. (PCR Vol.III p.240,246). Mr.

Philmore said he didn=t know and that he had discussed this with his lawyer and that there could have been a third or fourth party involved. (PCR Vol.III p.240). Mr. Philmore denied any knowledge of the origin of the Lexus. (PCR Vol.III p.245).

Attorney Hetherington was not concerned about a possible third or fourth party involved in the case, he believed Mr. Philmore that he had no involvement in the abduction, and he didn=t focus on the discrepancies in Philmore=s story. (PCR Vol.III p. 242,245,246).

During the interview, Detective Von Holle said, Aand I ..want to .. I wanna see you get the benefit that comes along with cooperating.@ (PCR Vol.III p.246). Mr. Philmore then said he would cooperate. (PCR Vol. III p.247). Mr. Philmore told Detective Von Holle about a West Palm Beach robbery that he committed and which would later be used as an aggravator in the murder trial. (PCR Vol. III p.257). Attorney Hetherington admitted that implicating himself in the West Palm Beach robbery was a risk involved in allowing his client to testify to law enforcement during an investigation. (PCR Vol. III p.258).

Attorney Hetherington testified that if there were any benefit to be derived for the cooperation, it would be that Mr. Philmore cleared his name. (PCR Vol. III p.248). Mr. Philmore received no consideration or benefit for his cooperation in

giving a statement on November 18, 1997. (PCR Vol.III p.254). Attorney Hetherington did not request that the State offer Mr. Philmore any consideration for the statement. (PCR Vol. III p.255).

Attorney Hetherington allowed Mr Philmore to give another statement on November 20, 1997. (PCR Vol.III p.260). The purpose of the statement was to corroborate that Mr. Philmore had no part of the abduction. Attorney Hetherington acknowledged that polygraph examinations are used by law enforcement as an investigative tool. (PCR Vol.III p.260). Attorney Hetherington was not present at the statement during the pre-test. (PCR Vol. III p.269,274). There was risk in allowing Mr. Philmore to be questioned outside the presence of his lawyer. (PCR Vol. III p.276). Mr. Philmore continued to tell Attorney Hetherington that he had no involvement in the abduction. (PCR Vol.III p.261). Attorney Hetherington believed Mr. Philmore but had concerns about his version of facts. (PCR Vol.III p.262). Mr. Philmore was facing life in prison as of November 20, 1997 and Mr. Philmore was doing the calculations during the November 20, 1997 statement. (PCR Vol.III p.266).

At the November 20, 1997 interview, Mr. Philmore admitted that he drove the Lexus and implicated himself as being present. (PCR Vol.III p.276). Attorney Hetherington said that it was

clear from the face of the interview and what he found out that Mr. Philmore was not being candid with him. (PCR Vol.III p.278). Mr.Philmore continued to tell Attorney Hetherington that he was not the shooter of Perron. (PCR Vol.III p.279). After November 20, 1997, Attorney Hetherington knew that Mr. Philmore had lied to him about the facts of the case. (PCR Vol.IV p.307).

Attorney Hetherington believed that there was risk to allowing Mr. Philmore to give another statement. (PCR Vol.III p.281). The fact that he was the shooter or not would be very crucial to his case. (PCR.Vol.III p.282) The jury would give Mr. Philmore greater consideration if he were not the shooter than if he were the shooter. (PCR Vol.III p.282). Even though Mr. Philmore had not been forthcoming, Attorney Hetherington suggested that another statement be given. (PCR Vol. III p.282). Attorney Hetherington said that he would rather go to trial without his client having given a full confession as opposed to remaining silent on incriminating issues. (PCR Vol.III p.294). He would also prefer to go to trial without a corpus delecti. (PCR Vol.IV p.299).

Although there was no urgency or rush, another statement was given on November 21, 1997. (PCR Vol.III p.283). Perron=s body still had not been recovered. (PCR Vol.III p.284, 289, Vol.IV

p.298). The first time Attorney Hetherington heard about where the body was located was in private with Mr. Philmore. (PCR Vol.IV p.301). The body was in a remote area not likely to be easily found. (PCR Vol.IV p.301,302). Law enforcement agencies and the family of the deceased would have a great interest in locating the body. (PCR Vol.IV p.299). Mr. Philmore had not admitted to being the shooter of Perron. (PCR Vol.IV p.298). Regarding the discovery of the body, the following testimony was elicited at the 3.851 hearing:

> Q. (BY MR. VIGGIANO) Mr. Hetherington, before the break you testified or you agreed that you would prefer to go to trial in Mr. Philmore=s case-
> A. I would - pardon me?
> Q. You would prefer to go to trial on Mr. Philmore=s case without a full-blown confession as opposed to going to trial in his case with a full-blown confession. Correct?
> A. In a perfect world, sure.
> Q. Yes. In this case you also discussed with Mr. Philmore the location of the body. Correct?
> A. Yes.
> Q. And you discussed with him the location of the body in the privacy of an interview room with just you and him. Correct?
> A. I believe so.
> Q. And to that point, law enforcement did not know the location of the body. Correct?
> A. No.
> Q. In fact, to that point, law enforcement had told you about the things you already testified to, that Mr. Philmore was involved in the Indiantown robbery, that there was some connection there between Mr. Philmore and the Lexus and the abduction, and that he

was a suspect in the robberies at West Palm. Correct?
A. Possibly by that time, sure.
Q. And, of course, they had no statement that he was the shooter of Mess Peron. Correct?
A. Sure.
Q. And they had no idea where the body was, or whether or not if she was still alive. Correct?
A. That's - that's true.
Q. Would you agree that in Mr. Philmore's particular case, as a criminal defense attorney, that you would prefer to go to trial in a case where there's no body as opposed to where there is a body?
A. That would be a fair statement.
Q. Or a corpus delecti. There would be no corpus delecti. Correct?
A. That's always best.
Q. And you would agree that the law enforcement agencies investigating this case would have a very great interest in locating the body. Correct?
A. They would.
Q. And you would agree that family members of Miss Peron would have a very great interest in locating the body.
A. They would.
Q. In fact, law enforcement and the family would want to know if she was even dead.
A. They would. (PCR Vol.IV p.297-299).

Regarding the circumstances concerning the discovery of the corpus delecti, the following testimony was elicited at the 3.851 evidentiary hearing:

(By Mr. Kiley)

Q. And so - so you did - wait a minute. The body is found when, after the incident - the 20th ?The incident - the 20th?
A. It's either the 20th or the 21st , I think.
Q. Okay. And at that time you had taken Mr. Philmore privately and indicated to Mr.

Philmore that, perhaps, it would be best for everyone if there was closure and that woman=s body was found. Correct, sir?
A. That was part of our discussion.
Q. Also part of the discussion was -
A. And I=m not sure who initiated that statement. It was either Philmore or myself.
Q. And - but did you or did you not indicate that the family would really like - and it would be beneficial if the family could find their loved one and bury their loved one in a civilized manner, instead of wondering where this body was?
A. We may have discussed that in the context of mitigation.
Q. Isn=t that the old Christian burial routine?
A. No.
Q. No?
A. No.
Q. You know what the old Christian burial routine is?
A. Yes.
Q. What is the old Christian?
A. That with the two cops in the car and talking to the guy in the back seat. It=s an old - 30 year old case.
Q. It=s a 30 - year - old case where the police say, gee sure would be nice if the family had a Christian burial.
A. Yeah. I=m familiar.
Q. Okay. Well, that=s a police interrogation technique, right?
A. No.
Q. No? It=s not?
A. Well, they did it. We were talking about it.
Q. They did it. And you did it, didn=t you?
A. Yeah.
Q. Okay.
A. They used the word. I used the word. I=m not a cop.
Q. Christian burial, right. I mean, they used that technique and you used that technique, didn=t you? Didn=t you?
A. We talked about it. (PCR Vol.V p.446-

448).

Attorney Hetherington did not secure any agreement or any consideration in exchange for Mr. Philmore leading authorities to the body. (PCR Vol.IV p.303) At the statement of November 21, 1997, Mr. Philmore told the authorities where the body could be found and he led them to the body. (PCR Vol.IV p.313). With a corpus delicti, the case got worse. (PCR Vol.IV p.314).

Attorney Hetherington admitted that the case got worse by virtue of his advice that Mr. Philmore tell law enforcement that he had been driving the Lexus. (PCR Vol.IV p.304). Based upon his knowledge and experience, Attorney Hetherington knew that defendants, for various reason, are reluctant to tell the whole story and truth about crimes that they may have committed. (PCR Vol.IV p.305). Typically, a criminal defense attorney would tell their clients not to speak to anyone about their case because any statements made could later be used against the client. (PCR Vol.IV p.306). It would be most appropriate to question a client about facts and circumstances of the case, of which the answer is unknown, in private, without law enforcement present. (PCR Vol.IV p.309,310).

At the November 21, 1997 statement, Attorney Hetherington was actively questioning Mr. Philmore with law enforcement present. (PCR Vol.IV p.318-321). Regarding the questioning of

Mr. Philmore by Attorney Hetherington while law enforcement was present at the November 21,1997 statement the following testimony was elicited at the 3.851 hearing:

> Q. (BY MR. VIGGIANO) Okay. Mr. Hetherington, there was another statement given by Mr. Philmore on November 21st , 1997. This one later in the day,7:05 p.m. And at the interview was Detective Fritchie, Lenard Philmore, **B**
> A. Yes.
> Q. **B** you, Mr. Colton, and Mr. Bakkendahl. Correct?
> A. That=s correct.
> Q. Now, at that meeting **B** and I refer you to page 6 **B**
> A. I=m there.
> Q. Okay. **B** Detective Fritchie was speaking to Mr. Philmore about the case.
> A. Uh-huh.
> Q. And he said, AOkay. Now I=m gonna ask you one more time with your lawyer present. Is there anything else that you are forgetting to tell me? That you can ...that ... you know, neglecting to tell me or whatever word you wanna use that...
>
> AMr. Hetherington: Lenard, you and I just had a talk while the detective and the other witnesses were in this court...or in this, uh, interview room. I emphasized to you that it=s important for you to clarify right now, not two days from now, anything including what we just talked about now that you...you=ve, uh, amended your account of what happened just now with respect to your helping, uh, Spann throw her in the water. Okay?@
>
> ALenard Philmore: That=s what I probably still...I was scared of, >cause, you know, that=s enough there to just convict me. You know?@
>
> AMr. Hetherington: Okay. That=s fair.@
>
> ALenard Philmore: That=s all I really wanna say.@

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

ALenard Philmore: Mm.@

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

AOkay.@

ALenard Philmore: ...Nobody else was present that day.@

AMr. Hetherington: Okay.@

ALenard Philmore@ And we didn=t even see... I didn=t even see them on Friday.@

ADetective Fritchie: Is it, uh, is it safe to say that when you walked up to Mr. Peron, in your opinion, she was dead at that time? I mean, is that safe...your opinion? I don=t know if that=s even a fair question, but, I mean...@

ALenard Philmore: She was dead because the wound was to the head. So I would say she was dead.@

ADetective Fritchie: Okay.@

AMr. Hetherington: Did you see more than one wound?@

ALenard Philmore: Huh?@

AMr. Hetherington: Did you see more than one wound or two?@

ALenard Philmore: I didn=t really see the wound. I just seen... you know, I seen like a little spot of blood on her head and, you know, and the blood that=s on the ground.@

A. Okay.

Q. Mr. Hetherington, do you think that that was the appropriate forum to be asking your client these questions?

A. I think that these are things that I was clarifying that he already discussed.

Q. Mr. **B** your client was very scared. Correct? He evidently was scared.
A. Okay.
Q. And he really didn=t want to talk, did he?
A. Obviously, he did.
Q. You think **B**you think **B** he knew that there was enough there to convict him.
A. He knew that long before then. That wasn=t certainly the turning point in this case.
Q. But you brought him in there to ask these questions. Correct?
A. No. I didn=t bring hm in to ask any questions.
Q. You ended up asking these questions. Correct?
A. I did, to clarify things.
Q. Were you working for the State or for Mr. Philmore when you were trying to clarify things?
A. I was working for Lenard, of course.
Q. Do you **B** I mean, if **B** if it didn=t show that you were asking these questions, Mr. Hetherington, if it didn=t indicate Mr. Hetherington asking these questions, would you not agree that you sounded like a detective yourself, as you=re asking these questions?
A. No, I don=t agree with that.
Q. You don=t agree with that?
A. No.
Q. You don=t feel that you were in that room pressuring your own client to give information about the details of this case with law enforcement in the same room?
A. No.
Q. You don=t think that that reflects that kind of **B**
A. No.
Q. **B**scenario?
A. No, I don=t at all. I think it clarifies what Lenard and I already talked about prior to this whole interview.
Q. What protection were you seeking to obtain for Lenard when you told him this

whole thing was for his own protection? What protection were you seeking to get?

MR. MIRMAN: I=m going to object. The question assumes facts not in evidence.

THE COURT: Are you referring to some thing in the transcript, please?

MR. VIGGIANO: Yes. The section **B**second line on page 7.

A. Okay. Okay.

Q. (BY MR. VIGGIANO) You were suggesting to Mr. Philmore that this information would be for his own protection. What were you referring to?

A. I was probably referring to the information that he told me prior to having this information relayed to law enforcement.

Q. How would he be protected by giving this type of information?

A. Repeat, please.

Q. (BY MR. VIGGIANO) To the extent that the case was not turned **B**no turn back case, it wa based upon the advice that you gave Mr. Philmore to give statements where he inculpated himself, specifically regarding his connection to the abduction, the Lexus, and his knowledge of the location of the body.

A. Okay.

Q. All this came while you were representing Mr. Philmore. Correct?

A. Yes.

Q. So to the extent that the case became a no turn back case, it was occurring while you were representing him.

A. Yes.

Q. And this all occurred, you agree, within the first week of your representation.

A. Yes.

Q. And you acknowledge that everything that came out that I just recited, the abduction, the statement about the body, the corpus delicti, driving the Lexus, is all information that you prefer to go to trial without.

A Absolutely.

Q. So at the point of the **B** the November

> 21st statement after the second statement that day, aB at that point the outstanding issue, so to speak, was whether or not Mr. Philmore was, in fact, the shooter.
> A. Yes. (PCR Vol.IV p.318-326)

Another statement was scheduled for November 23, 1997. (PCR Vol. IV p. 327). Counsel was not present for the statement on November 23, 1997. (PCR Vol. IV p.328). Attorney Hetherington agreed to allow Mr. Philmore to give a statement in the presence of law enforcement that could be admissible in court even though counsel was not present. (PCR Vol.IV p.339). Whether Mr. Philmore was or was not the shooter was unknown as of November 23, 1997. (PCR Vol. IV p.326). Mr. Philmore continued to maintain that he was not the shooter. (PCR Vol.IV p.326). Attorney Hetherington knew that Mr. Philmore had not been forthcoming with him regarding other issues in the case. (PCR Vol.IV p.326). The November 23, 1997 statement was terminated. (PCR Vol.IV p.331). Mr. Philmore did not admit at the November 23, 1997 statement that he was the shooter. (PCR Vol. IV p.345). At some point after November 23, 1997, Mr. Philmore acknowledged in confidence to Attorney Hetherington that he was the shooter. (PCR Vol.IV p.332).

Another statement was scheduled nor November 26, 1997. (PCR Vol.IV p.334). At that statement, Mr. Philmore admitted he was the shooter. (PCR Vol.IV p.336).

Regarding the sequence of events and the length and quality of the representation of Mr. Philmore by Hetherington, the following testimony was elicited at the 3.851 hearing:

> (By Mr. Kiley)
> Q. Very well, sir. Okay. So **B** okay. So we have, pursuant to your advice of counsel, acting upon the information you received from law enforcement **B**
> A. Right.
> Q. **B** from the time of Mr. Philmore=s arrest, till right before Thanksgiving, you have Mr. Philmore admitting that he was the shooter, did you not, sir?
> A. I did.
> Q. So safe to assume, sir, when you got the case on the 15th, you had a client that didn=t want to talk to law enforcement. Correct, sir? Nobody **B** correct, sir? A reasonable doubt as to who or who was not the shooter of Miss Peron, correct, sir?
> A. Oh, yes.
> Q. And by the 26th, in twelve days of your representation of this man, you had essentially cleared this case for law enforcement.
> A. Turned out that way.
> Q. It turned out that way? All before Thanksgiving.
> MR. MIRMAN: Objection, cumulative.
> THE COURT: As to all before Thanksgiving? Overruled as to the question asked.
> Q. (BY MR. KILEY) All before Thanksgiving.
> A. It=s that time span you said.
> Q. Within a twelve-day period of time.
> A. Yes.
> Q. Without doing any depositions.
> A. Correct.
> Q. Without checking out this witness that saw two black men allegedly abduct Miss Peron.
> A. Well, I don=t know about checking out. I had information.

Q. You had information?
A. Yeah.
Q. Did you interview that witness, sir, **B**
A. No.
Q. **B** to see they had the right black men?
A. No.
Q. No. All of this was done in a twelve-day period of time.
A. Yes.
MR.MIRMAN: Objection, cumulative asked and answered.
THE COURT: Sustained. Sustained.
Q. (BY MR. KILEY) When you were responsible for the representation of this man.
A. Yes. (PCR Vol. V p.453-55)

Attorney Hetherington was asked if he had exerted any improper pressure on Mr. Philmore and Hetherington responded in the negative. (PCR Vol. V p.455). Attorney Hetherington claimed that he had an initial meeting with Mr. Philmore=s mother before the 20th of November. (PCR Vol. V p.463). When questioned further regarding the issue of improper pressure, Hetherington was evasive. At the 3.851 hearing the following testimony was elicited:

(By Mr. Kiley)
Q. Your Honor **B** rather counsel, prosecutor here asked you if you exerted any improper pressure on Mr. Philmore. And you said no.
A. That=s true.
Q. Well, what is improper pressure? What would you consider to be improper pressure?
A. Improper pressure from a lawyer would be to take a position that=s adverse to your client=s interest.
Q. Improper pressure would be **B** hum. Taking the position that=s adverse to your client=s best interests?

A. Yes.
Q. And providing the police with statutory aggravators would be beneficial to your client?
A. That=s why we=re here, I guess, you **B**
Q. Okay.
A. That=s why we=re here.
Q. And having your client lead the police to the body would be beneficial to your client?
A. Ultimately, a judge or another panel of judges will make this decision.
Q. And have you **B** and having it remove all reasonable doubt from your client=s case would be beneficial to your client? Same answer, would you say, sir?
A. Ultimately.
Q. I=ll take it. Prosecutor said that in your mind did you think the statement made by Detective Fritchie that Philmore made an admission was going to be admissible in court?
A. Yes.
Q. But you read the transcript **B**
A. Yes.
Q. It wasn=t in there.
A. That=s correct.
Q. So it is possible **B** in fact, I would submit to you, sir, that it is probable it was not a verbal admission at all. It was possibly or probably a nod of the head.
A. I don=t recall.
Q. You don=t recall?
A. No.
Q. Well, you don=t know. Right?
A. No. (PCR Vol. V p.467-69).

Regarding the circumstances of the termination of Attorney Hetherington=s representation of Mr. Philmore, the following testimony was elicited at the 3.851 hearing:

(By Mr. Kiley)
Q. Do you recall if during Mr. Philmore=s trial Detective Fritchie came in and said,

yeah, he admitted to me.
A. I wasn:t trial counsel.
Q. You weren:t trial counsel. When did you cease to be trial counsel, sir?
A. I don:t recall.
Q. You don:t recall?
A. No.
Q. Well, was it before the motion to suppress?
A. I:m sure it was. I:m sure **B**
Q. Why **B** why were you not trial counsel?
A. I think there was **B** I think there was a motion and order in there that would be definitive of that. There:s probably a motion in the court file somewhere. I don:t recall the **B**
Q. You don:t recall why?
A. I think it was a conflict possibly.
Q. Isn:t it true this man fired you?
A. That could be the case. I don:t recall.

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

MR. KILEY: Judge, I:m trying to establish whether this man knew what evidence would be admissible at trial and how long his representation lasted of this man.

THE COURT: The objection:s overruled, but **B**

MR. KILEY: I will tread lightly.

THE COURT: Well, does counsel know the answer to the question?

MR. KILEY: Of the **B**

THE COURT: Why he wasn:t counsel **B**

MR. KILEY: Yeah.

THE COURT: And **B**

MR. KILEY: Yes.

THE COURT: Proceed.

Q. (BY MR. KILEY) Isn:t it true Mr. Philmore filed a pro se motion to fire you?
A. He may have.
Q. He may have.
A. I don:t recall, sir.
Q. And isn:t it true the Court, maybe not necessarily this Court, but a Court of equal dignity appointed Mr. Bauer and Mr. Garland

to represent Mr. Philmore?
A. Yes.
Q. And isn't it true that in Mr. Philmore's pro se motion to fire you he stated he wasn't represent **B** you weren't representing his interests, sir?
A. I don't recall the motion.
Q. Well, isn't that why you are not **B** were not trial counsel?
A. I suspect so.
Q. And isn't that why you don't know what went on in the trial? Correct, sir?
A. No.
Q. Okay. So in your mind, what was admissible **B** is it possible, sir, that in your mind what was admissible was not, in fact, admissible?
A. It's possible.
Q. Is it possible, sir, that when Detective Fritchie said he admitted to it, Detective Fritchie was referring to a nod of the head, rather than a verbal admission?
A. I don't know.
Q. Is it possible, though?
A. It's possible, sure.
Q. Okay. Now, you testified **B**
MR. KILEY: I have nothing further. (PCR Vol. V p.469-72).

At the 3.851 hearing, the following testimony was elicited:

Q. How about capital cases, how many of those have you hand-?
A. Including capital sexual battery or just murder?
Q. Murder case.
A. Where death was being sought or just first degree?
Q. Start off with death being sought.
A. *I've been at the beginning of those cases. Usually I get off them for one reason or another. Not many.*
Q. How many cases have you handled that went to verdict?
A. In that death?

Q. Death case, yes.
A. None. (Emphasis added) (PCR Vol. II p. 147-8).

Hetherington also testified that he was aware that the primary concern of law enforcement in providing him with information was for law enforcement to Aclear@ or solve the case. (PCR Vol.IIp.175). Hetherington had testified that he, in light of his experience, knew that criminal defendants are reluctant to tell the whole story and truth about crimes that they may have committed. (PCR Vol.IVp.305). Hetherington, after talking to Mr. Philmore=s mother, believed that Mr. Philmore was not involved in the abduction of Ms. Perron. (PCR Vol.III p.223). Attorney Hetherington was made aware that an abduction had taken place on November 14th between the dates of November 15th and November 18th. (PCR Vol.III p.223).

D. TESTIMONY OF KATHLEEN LAVERNE MILLER

Kathleen Laverne Miller is Mr. Philmore=s mother and heard about his arrest through a friend of Lenard. (PCR Vol.V p.477). Ms. Miller testified that a couple of days after Lenard was arrested, she received a phone call from Attorney Hetherington who represented to Ms. Miller that he was the attorney who would be handling Mr. Philmore=s case. (PCR Vol.V p.479). She also testified that in the original conversation, Hetherington did not think things looked too good for Mr. Philmore and that he

would rather not talk to her about the case until after the Thanksgiving holiday. (PCR Vol.V p.480-81). Attorney Hetherington did meet with Ms. Miller after the Thanksgiving holiday,(PCR Vol.V p.482)but by then Hetherington had already Acleared the case@ for the police. **E. THE LOWER COURT=S ORDER**

In its ORDER DENYING MOTION FOR POSTCONVICTION RELIEF dated May 12, 2004, the lower court denied all relief after the evidentiary hearing. In the order, the court stated that it will address the claims in the order presented in the Motion.

CLAIM I

MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE AND SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. PHILMORE=S CONVICTION AND DEATH SENTENCE ARE UNRELIABLE.

In Claim **I(A)**, the Defendant contends that trial counsel

was ineffective in failing to challenge the State=s contention that the striking of the prospective African-American juror, Tajuana Holt, was not pretextual. The 3.851 court held: AThis claim is legally insufficient and procedurally barred.@

CLAIM II

COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE MR. PHILMORE=S CASE BEFORE ADVISING THAT MR. PHILMORE GIVE INCRIMINATING STATEMENTS TO LAW ENFORCEMENT, BY FAILING TO BE PRESENT WITH MR. PHILMORE DURING STATEMENTS GIVEN TO LAW ENFORCEMENT, AND BY FAILING TO SECURE A PLEA AGREEMENT PRIOR TO ALLOWING MR. PHILMORE TO GIVE INCRIMINATING STATEMENTS TO LAW ENFORCEMENT. MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND AS A RESULT, MR. PHILMORE=S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

The Defendant=s second claim encompasses four ineffective assistance of counsel issues surrounding statements given by the Defendant to law enforcement during the time that he was represented by attorney John Hetherington. The 3.851 court held:

AHere, 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.@

CLAIM III

MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE=S CASE, AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

The Defendant=s third ground encompasses six claims of ineffective assistance of trial counsel during the penalty phase of the Defendant=s trial.

In Claim III(A), the 3.851 court held: AThis claim is without merit. Moreover, this claim is insufficiently pled.@

In Claim III(B), the Defendant asserts that trial counsel was ineffective for failing to provide the Defendant=s mental health expert with adequate background information to permit a meaningful evaluation of the Defendant for the presence of mitigation of intoxication and/or drug abuse. The 3.851 court held:@This claim is without merit.@

In Claim III(C), the Defendant argues that trial counsel was ineffective for failing to provide the Defendant=s mental health expert with adequate background information to permit a

meaningful evaluation of the Defendant for the presence of mitigation of under the influence of extreme mental or emotional disturbance at the time of the offense. The 3.851 court held:@Since no testimony was offered at the evidentiary hearing in support of this claim, the Defendant has failed to establish that trial counsel was deficient.@

In Claim III(D), the Defendant contends that trial counsel was ineffective for failing to argue in closing the presence of objective and scientific evidence of brain damage in support of the statutory mitigation that the Defendant was under the influence of extreme mental and emotional disturbance at the time of the offense. The 3.851 court held: AAs such, the failure to argue Dr. Wood=s testimony in closing argument was reasonable under the circumstances.@

In Claim III(E), the Defendant asserts that trial counsel was ineffective for failing to provide the Defendant=s mental health expert with adequate background information to permit a meaningful evaluation of the Defendant for the presence of mitigation that the Defendant was acting under the substantial domination of another at the time of the offense. The 3.851 court held:@Defendant has failed to establish this claim.@

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. The 3.851 court held: ADefendant has failed to overcome the presumption that his attorney=s actions under the circumstances were sound trial strategy. Furthermore, the Defendant has failed to demonstrate that he was prejudiced.@

CLAIM IV

MR. PHILMORE=S SENTENCE OF DEATH UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION IS INVALID BECAUSE THE SENTENCING COURT IGNORED THE TESTIMONY OF AN EXPERT WITNESS WHICH, IF CONSIDERED, WOULD HAVE ESTABLISHED STATUTORY MITIGATION.

The Defendant contends that the Defendant=s sentence of death is invalid because the trial court ignored the testimony of an expert witness which, if considered, would have established statutory mitigation and refused to instruct the jury on statutory mental mitigation. The 3.851 court held: @This issue is procedurally barred.@

CLAIM V

MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF

THE CONSTITUTION OF THE UNITED STATES. TRIAL COUNSEL FAILED TO SUBJECT THE PROSECUTION TO A MEANINGFUL ADVERSARIAL TESTING IN THE GUILT PHASE OF MR. PHILMORE=S TRIAL BY CONCEDING GUILT WITHOUT CONSULTATION.

The Defendant asserts that trial counsel was ineffective for failing to subject the prosecution to a meaningful adversarial testing in the guilt phase of the trial by conceding guilt without consultation. The 3.851 court held:@[T]he 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.@

CLAIM VI

COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT DURING MR.PHILMORE=S TRIAL. THIS RENDERED MR. PHILMORE=S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Defendant contends that counsel was ineffective for failing to object to improper prosecutorial commentary and remarks during the Defendant=s trial. The 3.851 court held: AThis issue is procedurally barred as the challenged comments were addressed on appeal.@

CLAIM VII

MR. PHILMORE=S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The Defendant contends that the trial court proceedings were fraught with procedural and substantive errors, which when viewed as a whole, deprived him of a fundamentally fair trial. The 3.851 court held:@[T]he Florida Supreme Court found no prejudicial errors and this Court has denied each claim of the Defendant=s motion, as such, the Defendant has suffered no cumulative effect.@

CLAIM VIII

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Defendant argues that Florida=s death sentencing statute is unconstitutional as applied. The 3.851 court held:@The Defendant=s claim is without merit.@

CLAIM IX

FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. PHILMORE=S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

The Defendant asserts that the jury=s sense of responsibility was diminished by the instructions regarding the jury=s role in violation of the Eighth Amendment to the United States Constitution. The 3.851 court held: @This issue is procedurally barred.@

CLAIM X

DEFENDANT=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

The Defendant asserts that his Eighth Amendment right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution. The 3.851 court held:@The Defendant concedes that this issue is not ripe for consideration, but raises it in order to preserve the issue for future review. This claim is legally insufficient.@

SUMMARY OF THE ARGUMENTS

(1)The 3.851 court erred in its denial of claim IA. The State=s reasons for striking juror Holt were pretextual and trial counsel was ineffective for not attacking the alleged genuineness of the strike.

(2)The 3.851 court erred in its denial of claim II in Mr. Philmore=s motion. Attorney Hetherington=s actions were outside the wide range of professional competent assistance as contemplated by Strickland and Cronic. Heterington failed to investigate the case, acted as an agent for law enforcement, cleared the case for law enforcement in twelve days, and, as a careful review of the post conviction record will demonstrate, never intended to take the case to trial in the first place.

(3)The 3.851 court erred in its denial of claim III of Mr. Philmore=s motion. Trial counsel was ineffective in failing to call Dr. Maher to rebut the State=s experts. Dr. Maher had been deposed and had provided the necessary statutory mitigators.

(4) The 3.851 court erred in the denial of claim V. There was insufficient evidence that Philmore consented to concession of guilt without consultation.

ARGUMENT I

THE LOWER COURT ERRED IN HOLDING THAT THE STRIKING OF JUROR HOLT WAS NOT PRETEXTUAL, TRIAL COUNSEL WAS INEFFECTIVE IN NOT ATTACKING THE GENUINENESS OF THE STRIKE.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v.State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE PRETEXTUAL NATURE OF THE STRIKE

The State=s reason for striking prospective juror Holt were vague and pretextual. The State=s reluctance to disclose to the trial court the questions asked and the answers given by Rosa Holt left the trial court with no insight as to whether or not the reasons for the strike were indeed genuine. The only conclusion that the trial court could possibly make from the information given by the State was that Rosa Holt was as African American as her daughter.

In Melbourne v. State, 679 So.2d 759 (Fla. 1996)the Florida Supreme Court addressed the issue of race neutral/ pretextual strikes as outlined in Slappy v. State, 522 So.2d 18 (Fla. 1988). This Court held:

> We also required that in step 2 the proponent of the strike demonstrate Aa >clear

> and reasonably specific: racially neutral explanation of legitimate reasons: for the [strike].@ and that in step 3 the judge must decide whether the proffered reasons are Afirst, neutral and reasonable and, second, not a pretext.@ ***Slappy,*** 522 So.2d at 22. Id. at 763.

A similar issue regarding pretextual strikes was addressed in Green v. State, 572 So.2d 543 (Fla. 2nd DCA 1990). The Green court held:

> The only basis given by the state for its challenge prior to the trial court:s overruling of defendant:s objection was insufficient to establish a racially neutral reason for the challenge. That basis was given in the following colloquy between the court and counsel for the State:@ What:s your reason for striking this juror...?@ AJudge, I just don:t like his answers to his responses to my questions. I:m not striking him based on race.@ ADo you have any specifics?@ ANothing specifically, Judge. I would only add that I:m not going to strike the other black juror.@ ***See Slappy,*** 522 So.2d at 22 (when state has the burden to show that its peremptory challenge was not racially motivated, in order to carry that burden the state:s reason for the challenge must be Aa ›clear and reasonably specific: racially neutral explanation@) (quoting ***Batson v. Kentucky,*** 476 U.S. 79, 96-98 & n.20, 106 S.Ct. 1712, 1722-24 & n. 20, 90 L.Ed.2d 69, 87-88 & n. 20 (1986)). Id at 546.

In Mr. Philmore:s case, the State could not provide a clear and reasonably specific racially neutral explanation regarding the prospective juror:s responses,and the State could not provide

a clear and reasonably specific racially neutral explanation regarding questions posed to the prospective juror=s mother. Mr. Philmore contends that the lack of specific reasons indicate that this strike was used under pretext.

INEFFECTIVE ASSISTANCE OF COUNSEL AND PREJUDICE

Trial counsel was given an opportunity by the trial court to inquire about the questions asked of Rosa Holt by members of the State=s Attorney Office. Trial counsel was also able to inquire whether the State had questioned any family member of any prospective white jurors. This would have further established the pretextual nature of the strike. Trial counsel chose not to pursue this issue at the expense of his client.

Furthermore, Mr. Philmore was prejudiced by the striking of prospective juror Holt because Athere is a reasonable probability that [she] would have struck a different balance.@ Wiggins v. Smith, 123 S.Ct 2527, 2531 (U.S., 2003). In Bertolotti v. Dugger, 883 F.2d 1503, 1519 (C.A. 11 (Fla.), 1989) the court rejected the argument that analysis of the Areasonable probability@ of a different verdict should vary according to the number of jurors voting to impose the death penalty: if there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation. It matters not how many jurors voted for

death over life, only a reasonable probability that one juror would change her vote. Ms. Holt remaining on the panel could have swayed the entire panel to vote for life, and because she was stricken from the panel Mr. Philmore was prejudiced. Relief is proper.

ARGUMENT II

THE LOWER COURT ERRED IN HOLDING THAT MR. PHILMORE WAS NOT DEPRIVED OF HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS OF THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE PRE TRIAL REPRESENTATION OF MR. PHILMORE FELL FAR BELOW THE STANDARDS SET IN STRICKLAND AND CRONIC.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v.State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

PRE-TRIAL INEFFECTIVE ASSISTANCE OF COUNSEL

The representation of Lenard Philmore amounted to no representation at all. Attorney Hetherington actually assisted law enforcement in solving the murder Ms. Perron. At the time Attorney Hetherington was appointed to represent Mr. Philmore, law enforcement knew only that Perron was missing and did not

know that she had been killed. Law enforcement knew only that Lenard Philmore was involved in a trespass and in the Indiantown bank robbery. Through a series of blunders and sheer ineptitude, Attorney Hetherington ensured Mr. Philmore=s conviction and sentence of death.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court articulated the legal test to be employed in reviewing claims of ineffective assistance counsel in the following way:

> A convicted defendant=s claim that counsel=s assistance was so defective as to require reversal of conviction ... has two components. 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 Acounsel@ 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 ... resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

The representation of Mr. Philmore by Attorney Hetherington was so deficient that counsel=s performance fell below not only the standards in Strickland but further fell below the standard

set

forth in Cronic v. United States, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984). Review of Attorney Hetherington=s representation should be based upon the standard set forth in Cronic and not Strickland. In Cronic, the United States Supreme Court held:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel=s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution=s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

The adversarial testing process broke down from the start of the case upon initial appointment of counsel to Mr. Philmore. Attorney Hetherington, from the beginning of representation, violated a basic precept of responsibility that an attorney has to the client, and not to the State or law enforcement. In Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1347 (1947) the court explained a lawyer=s obligation to the client as opposed to any perceived obligation to society to solve a crime:

> To bring in a lawyer means a real peril to solution of the crime because, under our

> adversary system, he deems that his sole duty is to protect his client - - guilty or innocent - - and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, **any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.** (Emphasis added)

Lenard Philmore would have been better off representing himself than being represented by his appointed counsel. Mr. Philmore would have been better off representing himself because his appointed counsel failed to subject the prosecution=s case to any adversarial testing. In fact, appointed counsel effectively worked as an arm of the State in the prosecution of Mr. Philmore. Mr. Philmore=s counsel ensured his conviction and sentence to death.

Initially, Lenard Philmore was questioned by law enforcement on November 14, 1997 after being arrested for Armed Trespass on Posted Land. (TR 1038) When questioned about the Indiantown Bank robbery, Mr. Philmore admitted his involvement. (SR 27-29) Upon further questioning regarding the disappearance of Perron, Mr. Philmore denied his involvement, and requested to speak to an attorney.

As of November 14, 1997, the only crimes that the State could conceivably pursue against Mr. Philmore was the armed trespass and the Indiantown Bank robbery. No compelling evidence

existed that would warrant the arrest of Mr. Philmore for the murder of Perron. In fact, law enforcement did not even know the whereabouts of Ms. Perron, let alone that she had been killed. When asked about Perron=s whereabouts, Mr. Philmore had the good sense to terminate questioning and request the services of an attorney. Unfortunately for Mr. Philmore, on November 15, 1997, Assistant Public Defender John Hethering was appointed as his lawyer.

As of November 15, 1997, had Attorney Hetherington told Mr. Philmore, **in no uncertain terms to make no statements to police under any circumstances**, the State=s case would have been subject to an adversarial testing resulting in Mr. Philmore avoiding the death penalty. First, the State would have to locate the body of Perron to establish that she had been killed. Considering that her body was located in a drainage canal in a remote, isolated agricultural area, it was not likely that she would easily be found. Second, the state would have to prove who killed Perron. As a matter of fact, Codefendant Spann, from his initial statement to law enforcement through trial, maintained that he had nothing to do with Perron=s abduction. If Mr. Philmore did not give any further statements to law enforcement, the State would have been at a significant disadvantage in both cases, increasing the likelihood of verdict or plea negotiation in

avoidance of the death penalty.

Additionally, Attorney Hetherington would have given himself ample time to conduct independent investigation and discovery with which he could have used to give his client intelligent advice. Instead, Hetherington acted rashly, giving Mr. Philmore foolhardy advice that even a neophyte law student would have sense enough not to give.

Finally, Hetherington squandered a powerful bargaining chip by advising Mr. Philmore to cooperate and give statements to law enforcement without any concessions. Hetherington should have attempted to negotiate something less than a death sentence in exchange for leading law enforcement to the body of Perron. Hetherington could have used as leverage the family=s interest in locating the body in negotiating a life sentence for his client. Instead, Hetherington allowed his client to lead law enforcement to the body for nothing in return.

The State=s suggestion that Hetherington made a strategic decision by allowing Mr. Philmore to give multiple statements to law enforcement is a specious argument. A strategic decision cannot be based on ignorance. Hetherington=s knowledge of the case, in the first few days of representation, was minimal, and his advice to Mr. Philmore was based on ignorance. Furthermore, the suggested benefit (mitigation because Philmore was

cooperative and a non-shooter) derived by cooperating with law enforcement would not be needed had Hetherington advised Mr. Philmore to remain silent. There would be no need for mitigation because the State would not have made their case for first degree murder. The State was only able to make the case based on Mr. Philmore=s statements and assistance.

At the evidentiary hearing, Attorney Hetherington tried to justify his erroneous advice to Mr. Philmore that he cooperate with law enforcement. Hetherington testified that Mr. Philmore denied any knowledge of the abduction of Perron. Armed with Mr. Philmore=s assertion that he had no involvement in the abduction, Hetherington arranged a meeting for November 18, 1997 with law enforcement. The meeting was the first of a series where Mr. Philmore incrementally incriminated himself in first degree murder. The explanations given by Hetherington for allowing Mr. Philmore to speak to law enforcement were not valid for several reasons.

First, as an experienced assistant public defender, Hetherington admitted that he sometimes believes or disbelieves his clients and that he views what clients tell him with a healthy skepticism. Although he spoke with Mr. Philmore and Atried to get a feeling for who Lenard Philmore was,@ (PCR. Vol. III p. 211) Hetherington conducted no independent investigation

to verify what Mr. Philmore said about his lack of knowledge in the abduction. A careful criminal defense attorney would take at least a modicum of time to check what a client says about involvement in criminal allegations. In fact, one reason competent criminal defense attorneys **tell their clients in no uncertain terms not to make any statements to police under any circumstances** is because attorneys know that their clients may not be forthcoming about facts in a case because of fear, shame, guilt, distrust, or desperation. Competent attorneys are cognizant of human frailties that cause clients to withhold crucial information about a case. Attorney Hetherington neither took the time to verify what Mr. Philmore told him, nor did he allow for sufficient time to build rapport and gain the trust of Mr. Philmore. Instead, Hetherington recklessly arranged a taped statement with law enforcement.

Second, Hetherington=s assertion that Mr. Philmore would Aclear his name@ by speaking with law enforcement is a fallacious justification for arranging a meeting with law enforcement. No benefit would inure to Mr. Philmore if he could Aclear his name,@ yet face life imprisonment on the armed robbery of the Indiantown Bank. AClearing his name@ would mean nothing to Mr. Philmore except to expose him to more serious charges and the death penalty.

Additionally, telling an accused that he can Aclear his name@ is a common ploy used by law enforcement to elicit a confession. Hetherington should have known this. The goal of Aclearing his name@ is no good reason to allow Mr. Philmore to give a statement to law enforcement under circumstances where the best Mr. Philmore could do was limit his exposure to what he already faced - a life sentence. Mr. Philmore could realize no tangible or measurable benefit by speaking with law enforcement and Hetherington should never have allowed the November 18, 1997 meeting to take place.

Third, Hetherington said that the purpose of taking the polygraph was to confirm Mr. Philmore=s innocence and to avoid Co-Defendant Spann pointing a finger at him and being falsely charged. However, Spann had already denied knowledge of the abduction in a statement to law enforcement. Mr. Philmore had previously denied knowledge of the abduction when he spoke to law enforcement without counsel and before Hetherington was appointed. So there could be no benefit derived by Mr. Philmore again asserting his lack of knowledge of the abduction to law enforcement. Neither Spann=s nor Mr. Philmore=s positions would have been changed. Any additional statement given by Mr. Philmore would only place him at needless risk.

Additionally, Hetherington should have realized that under

the circumstances, with both Spann and Mr. Philmore denying knowledge of the abuction, he should have never allowed the November 18, 1997 meeting to take place. Either both, one, or neither of them were telling the truth about the abduction. There could be no way to know unless further investigation was done. The denials by both Spann and Mr. Philmore should have alerted Hetherington that investigation was necessary. However, instead of conducting further investigation, Hetherington rushed headlong to allow Mr. Philmore to make his denial to law enforcement - and to what potential benefit. Law enforcement would then have two suspects on the record both denying involvement. Mr. Philmore=s bargaining position would be no better with an on the record denial than if he had remained silent. There could be no benefit to Mr. Philmore by denying knowledge of the abduction to law enforcement.

Hetherington should have kept Mr. Philmore=s statements in confidence. If Hetherington wished to confirm Mr. Philmore=s version, he could have conducted a defense polygraph. Of course, the scientific reliability of the polygraph being questionable, its evidentiary value nil, and its being limited primarily as a law enforcement investigative tool, one can only wonder why Hetherington placed such faith in surrendering his client to the process.

Right from the beginning of representation of Mr. Philmore, Hetherington abdicated his responsibility to his client and worked as a veritable arm of the State in solving the murder of Perron. Within hours of appointment to represent Mr. Philmore, Hetherington began receiving information about the case from law enforcement. Apparently, it was not unusual to receive information from law enforcement on this case because Hetherington had this arrangement in the past and on other cases. At the evidentiary hearing, as if he had an epiphany, Hetherington acknowledged that the law enforcement agencies just might have their own self interest in clearing cases in mind when providing him information. At the 3.851 hearing, Hetherington admitted that law enforcement was not providing him information to assist him in the representation of his client, rather, law enforcement was acting in their own self-interest. (PCR Vol. II-165).

In Cronic The United States Supreme Court further held:

> The Amendment requires not merely the provision of counsel to the accused, but AAssistance,@ which is to be Afor his defense.@ Thus, Athe core purpose of the counsel guarantee was to assure ›Assistance: at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. AUnited Staes v. Ash, 413 U.S. 300,309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). If no actual AAssistance@ for Athe accused:s Adefense@ is provided, then the

> constitutional guarantee has been violated. To hold otherwise Acould convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution=s requirement that an accused be given the assistance of counsel. The Constitution=s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.@ Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321,322, 84 L.Ed. 377 (1940) (footnote omitted). Id. at 654-5 *2044.

The appointment of Hetherington to represent Mr. Philmore on the armed trespass and the Indiantown bank robbery amounted to a sham. Mr. Philmore had not been charged with the abduction and murder of Ms. Perron and the police had only a vague description of a Aman in a white tee shirt and a light-skinned male in a blue Subaru,@ (PCR Vol IV-402), yet Hetherington then proceeded to aid the polic*e* in solving the abduction and subsequent murder of Kazue Perron. In no way did Hetherington provide assistance for the defense of Mr. Philmore regarding the abduction and subsequent murder. What Hetherington did in fact do was to provide assistance to law enforcement, and put their interests ahead of his client=s interest. Hetherington did not investigate the circumstances of the abduction, nor did he subject the then existing evidence of the abduction to a reliable adversarial testing. Hetherington went so far as to browbeat and question his client along with and in the presence of police detectives

whose interests were focused on inculpating Mr. Philmore in the abduction and subsequent murder. (PCR Vol.IV-318-326). Hetherington abused his position of trust by using an improper police tactic to discover the body of Kazue Perron.

THE CHRISTIAN BURIAL SPEECH

During the 3.851 hearing, Hetherington admitted that he was aware of the case concerning the AChristian burial speech@ and that he used that technique on his own client. (PCR Vol. V p.446-448).

The case that Hetherington was familiar with is Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977). ADetective Leaming delivered what has been referred to in the briefs and oral arguments as the AChristian burial speech.@ Id. at 392,* 1236. What Hetherington neglected to mention is that the United States Supreme Court condemned this practice:

> The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet@ (d)isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.@ Haley v. Ohio, 332 U.S. 596, 605, 68 S. Ct. 302, 306, 92 L.Ed. 224 (Frankfurter, J., concurring in judgment). Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteen Amendments as here occurred cannot be

> condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all. Id. at 406,*1243.

The clear violation of the Sixth and Fourteen Amendments which occurred Brewer v. Williams occurred in Mr. Philmore=s case. However, the violation is compounded by the fact that Hetherington was Philmore=s attorney. Philmore trusted Hetherington to represent him, not to represent the victim=s family in securing a Christian burial. From the moment Hetherington met Philmore on November 15, 1997 until the final confession was secured on November 26, 1997, John Hetherington was acting as an agent of law enforcement rather than as Mr. Philmore=s advocate. The waiver of Mr. Philmore=s rights to Aclear his name@, the interrogation by Hetherington of Philmore in the presence of police officers, the AChristian burial speech@, the lie detector debacle, the receipt of information by law enforcement, and not doing his own investigation to determine if this information was valid, all prove that Hetherington had violated his oath to represent Philmore Awithout regard to lucre or malice@ and was in fact acting as an agent of the police. As the testimony of Dr. Maher revealed, Philmore was

vulnerable and due to his brain injury, and was easily led. Hetherington took advantage of this and led Philmore to death row.

The outrage of the United States Supreme Court over the cited misconduct and the consequences of said misconduct are reflected in the concurring opinion of Justice Marshall:

> Leaming knowingly isolated Williams from the protection of his lawyers and during that period he intentionally Apersuaded@ him to give incriminating evidence. It is this intentional police misconduct not good police practice that the Court rightly condemns. The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant. If Williams is to go free and given the ingenuity of Iowa prosecutors on retrial or in a civil commitment proceeding, I doubt very much that there is any change a dangerous criminal will be loosed on the streets, the bloodcurdling cries of the dissents notwithstanding it will hardly be because he deserves it. It will be because Detective Leaming, knowing full well that he risked reversal of Williams= conviction, intentionally denied Williams the right of every American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State. Id. at 408-9 *1244.

Justice Marshall condemned the AChristian burial speech@ as intentional police misconduct rather than good police practice. Outrageously, Attorney Hetherington used on his client a police tactic which was condemned by the United States Supreme Court in

Brewer v. Williams. Clearly the *Cronic* standard applies in assessing Hetherington=s Arepresentation.@

In Mr. Philmore=s case there was no Aprotective shield of a lawyer between himself and the awesome power of the State.@ Hetherington *was* an integral part of the awesome power of the State. Furthermore, there is no danger that Philmore will be loosed on the streets, he is already serving a life sentence for the West Palm robberies. Philmore merely prays this court right an injustice and commute his sentence of death to life in prison without possibility of parole, the very benefit he was promised by his lawyer.

It is clear from the testimony of Attorney Hetherington at the 3.851 hearing, that Hetherington never intended to represent Mr. Philmore at a trial. Attorney Hetherington testified that he had never taken a death case to verdict, and had been at the Abeginning of those cases. Usually I get off them for one reason or another.@ (PCR Vol. II p. 147-8). This case was no exception. Hetherington used his position of trust to clear the case for law enforcement. Mr. Philmore respectfully contends that the ethical thing to do when faced with a case beyond counsel=s experience would have been to obtain experienced capital counsel from within the Public Defender=s office, not to provoke a conflict and cause himself to be fired by the client for not

representing his client=s interest.

(PCR Vol. V-470-471).

During the first 24 hours of representation, Hetherington met with Mr. Philmore twice. Much of what Hetherington knew about the Indiantown robbery, he learned from law enforcement. He was also learning about the abduction of Perron, the Lexus automobile, and the West Palm Beach robberies which would later serve as aggravators. No attempt was made by Hetherington to independently verify or corroborate what law enforcement was telling him regarding the crimes. Nevertheless, Hetherington hastily arranged for the first of several meetings between Mr. Philmore and law enforcement which would ultimately lead to Mr. Philmore being convicted and sentenced to death for the murder of Perron.

The arrangement of the interviews and the failure by Hetherington to **tell Mr. Philmore in no uncertain terms not to make any statements to police under any circumstances** resulted in representation that fell below the standard set in Cronic. To begin, Mr. Philmore terminated his first uncounseled interview with law enforcement and requested an attorney when the questioning touched on the abduction. Termination of that first interview was critical because it ensured that Mr. Philmore would maintain a chance of testing the State=s case against him.

The United States Supreme Court explained why early representation is crucial:

> It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, [FN10]and ›any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.:**1764 Watt v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1347, 1357, 93 L.Ed. 1801 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a ›stage when legal aid and advice: are surely needed. Massiah v. United States, supra, 377 U.S. at 204, 84 S.Ct. At 1202: Hamilton v. Alabama, supra; White v. Maryland, supra. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.Escobedo v. State of Ill., 378 U.S. 478, *488, 84 S.Ct. 1758,** 1763 - 1764 (U.S.Ill. 1964)

Attorney Hetherington squandered a chance of Asubject[ing] the state:s case to meaningful adversarial testing@ when he allowed questioning of Mr. Philmore at that critical period after arrest. Cronic at 659. There could be no adversarial testing

because Hetherington delivered to the State, on a silver platter, all the evidence they would need to ensure a conviction against Mr. Philmore.

Mr. Philmore, upon the advice of Attorney Hetherington, gave the State, with nothing in return, a full confession detailing: (1) that Perron had been abducted; (2) that she was shot by Mr. Philmore; (3) that Spann was present; (4) the location of the body; (5) and details on two other crimes for which Mr. Philmore would be tried and convicted and which would serve as aggravators. All of this evidence was not known or in the possession of the State until after Hetherington appeared on the case and advised Mr. Philmore to cooperate with law enforcement. It was only during the series of statements given by Mr. Philmore between November 18, 1997 and November 23, 1997 did the State learn of evidence. During each statement, Mr. Philmore incrementally incriminated himself while building the State=s case for them.

Had Attorney Hetherington Asubject[ed] the State=s case to a meaningful adversarial testing@ from the beginning of representation, the State=s case would have been weakened to the point where a conviction for first degree murder would have been unlikely. Cronic at 659. The right to assistance by counsel at early stages is crucial because once counsel comes on a case,

the adversarial testing should begin, making it more difficult for the State to prove their case - not easier. A lawyer=s obligation is to the client and not the State or society in general. The United States Supreme Court recognized a lawyers obligation to the client:

> To subject one without counsel to questioning which may and is intended to convict him is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client - - guilty or innocent - - and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstance.

Moran v. Burbine, 475 U.S. 412, *437, 106 S.Ct. 1135, ** 1149(U.S.R.I.,1986)

Attorney Hetherington actions indicate that he placed other interests above those of Mr. Philmore. Hetherington appeared to have little or no interest in taking Mr. Philmore=s case to trial. He also showed more concern for locating the body for the families sake than he did for Mr. Philmore=s situation.

For instance, at the evidentiary hearing Hetherington testified that he Ahandled@ eleven murder cases. However, of the cases that he Ahandled,@ none of them went to trial. When questioned about why his murder cases never went to a verdict,

he responded that A[u]sually I get off them for one reason or another.@ (PCR. Vol. II p. 147-148)

Even on the occasions where Hetherington was present during police interrogations, he acted as if he were a law enforcement agent. When Mr. Philmore became uncomfortable and reticent during questioning, instead of terminating the questioning, Hetherington pressed on. Hetherington coaxed Mr. Philmore to answer questions without regard to his reluctance to continue. Incredibly, Mr. Philmore was questioned as if his own attorney was another law enforcement agent. Hetherington was acting more as an arm of the State than as Mr. Philmore=s counsel.

Attorney Hetherington=s assertion that Mr. Philmore insisted on speaking with law enforcement is disingenuous. Mr. Philmore incriminated himself upon the advice of Hetherington and upon the subtle promises of both Hetherington and law enforcement. Consider that Mr. Philmore terminated the first interview and did not wish to speak with law enforcement when questioned about the abduction. It was only after he met with Hetherington did Mr. Philmore reconsider his willingness to speak with law enforcement. Further consider that Hetherington testified that he believed that Mr. Philmore=s cooperation with law enforcement would establish mitigation. Although Hetherington told Mr. Philmore that there was no deal in exchange for cooperation on

the table - and there was not - Hetherington did suggest and lead Mr. Philmore to believe that he would receive a life sentence if he did cooperate. Finally, during questioning, law enforcement told Mr. Philmore that they wanted to see him Aget the benefit that comes along with cooperating.@ (See PCR. Vol. III p. 246)

Mr. Philmore did not of his own volition agree to again speak with law enforcement. Mr. Philmore agreed only after speaking with his appointed lawyer who made suggestions that a life sentence would be forthcoming. The illusion of a probable life sentence was only exacerbated when Detective Von Holle promised Mr. Philmore a benefit if there was cooperation. Mr. Philmore was led to believe by both Attorney Hetherington and the State that he would get a life sentence if he cooperated. Only through coaxing by Hetherington did Mr. Philmore agree to speak to law enforcement. To suggest that the meetings were Mr. Philmore=s idea is simply not true.

THE TRIAL COURT=S ORDER IS DEFECTIVE

The trial court=s Order Denying Motion For Postconviction Relief was defective because the court began her analysis of the case at the point beginning after Attorney Hetherington decided to allow Mr. Philmore to speak to police. The trial court does not address the initial decision to let Mr. Philmore speak to

police. The court denied the claim by focusing on the lies that Mr. Philmore told to Hetherington, the spontaneous nature of Mr. Philmore=s admissions, and that Hetherington made a strategic choice. All reasons relied upon by the court to deny the claim flow from Hetherington=s first instance of ineffective representation which in turn led to a series of miscalculations and blunders culminating in a conviction and death sentence for Mr. Philmore.

The trial court, in focusing on the lies told by Mr. Philmore to Hetherington, mentions twice in her order that Hetherington told Mr. Philmore the importance of telling the truth and the consequences of telling a lie. However, no mention is made of Hetherington=s acknowledgment that criminal clients often lie about allegations and that their versions must be confirmed by other evidence and through investigation and discovery. That criminal clients lie is one of several reasons that **any attorney worth his salt will tell the client in no uncertain terms not to make statements to the police under any circumstance.** Competent attorneys know that things can quickly go wrong if acting rashly based on the client=s initial reported version of the facts in a case. Learning too late that the client has not been candid is one of the things that can go wrong - and especially if the revelation happens in the police

interrogation room. If Mr. Philmore=s lying about the abduction is absolution to Hetherington for arranging a meeting with law enforcement, then every lawyer who is told by their client that they Adidn=t do it, it wasn=t me,@ could be justified in sending their client in for a polygraph with law enforcement. Of course, attorneys do not do this precisely because such advice is foolhardy and a disservice to the client. Yet the trial court seems to believe that it is not ineffective representation to send a client into a law enforcement polygraph exam when the client initially denies involvement in a crime.

The trial court makes note of the spontaneous nature of Mr. Philmore=s admissions which Hetherington could not have stopped. However, Hetherington is the one who recklessly placed Mr. Philmore in the position where he could be exposed during police interrogation. Additionally, the nature of police interrogation is inherently unpredictable, adversarial, and spontaneous. To subject a client to a police interrogation is simply dangerous. The trial court ignored that it was Hetherington who subjected Mr. Philmore to the risks of multiple police interrogations. The trial court, instead of placing blame on Hetherington for sending Mr. Philmore in, assigned Mr. Philmore responsibility for the interrogations resulting in his confession.

Finally, the trial court dismissed Hetherington=s blunders

as Astrategy,@ but a strategy cannot be based on ignorance. In Williams v. Taylor, 529 U.S. 362, 364, 120 S.Ct. 1495, 1498 (2000) the United States Supreme Court explained that a tactical decision cannot follow from a failure to conduct an investigation:

> Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of William= background. Id. at 364* 1498.

The trial court, in her order, details information that Hetherington did have when he formulated his Astrategy,@ however, that information did not relate to the abduction, shooting, or location of Perron. The information related only to a trespass charge and the Indiantown Bank robbery. Hetherington developed no true strategy based on knowledge of the case. He knew nothing of the details of the murder and abduction because he failed to conduct an investigation. His actions were based only on ignorance, and for his ignorance Mr. Philmore is sentenced to death.

Quite simply, if 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. Telling Mr. Philmore not to speak with anyone would have been sound and appropriate advice that any competent criminal defense lawyer would have given. Inexplicably, the trial court apparently chose to ignore the first instance of ineffective assistance of counsel from which all of Hetherington=s other errors flowed. Hetherington should never have sent Mr. Philmore in to speak to the police in the first place and the trial court should have recognized the mistake.

ARGUMENT III

THE LOWER COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO PRESENT EXPERT TESTIMONY TO EXPLAIN THE PRESENCE OF ORGANIC BRAIN DAMAGE IN SUPPORT OF MITIGATION THAT MR. PHILMORE WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference

only to the factual findings by the lower court.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN PENALTY PHASE

Attorney Garland was Abothered@ by the fact that Dr. Berland had given the old version of the MMPI to Mr. Philmore. (PCR Vol.I p.32). Dr. Berland=s testimony was then effectively impeached by the testimony of the State=s expert. Mr. Philmore contends that once Garland was aware of Dr. Berland=s error, it was imperative for him to bring out the statutory mitigation by another expert, said expert being Dr. Maher. Dr. Maher had already been deposed and had arrived at the same or similar conclusions regarding statutory mitigation as did Dr. Berland.

In Collier v. Turpin, 177 F.3d 1184, 1199 (11th Cir. 1999) the

Collier court stated:

> With regard to Collier=s claim that counsel failed to interview a number of close relatives and friends of Collier that could have provided additional evidence to be used in the sentencing phase of his trial, the district court found that counsels= failure to pursue those witnesses= testimony was the direct result of a conscious tactical decision. AThe question of whether a decision by counsel was a tactical one is a question of fact.@ *Bolender,* 16 F.3d at 1558 n. 12 (citing *Horton,* 941 F.2d at 1462). Whether the tactic was reasonable, however, is a question of law and is reviewed *de novo. See Horton,* 941 F.2d at 1462. I assessing the reasonableness of the tactic, we consider Aall the circumstances, applying

> a heavy measure of deference to counsel=s judgments.@ *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Id. at 1199.

In Mr. Philmore=s case, trial counsel was present for the impeachment of Dr. Berland. Effective counsel would have called a more qualified expert (Dr. Maher was a medical doctor specializing in psychiatry)to bring out the statutory mitigation through another avenue. Dr. Maher had been deposed and was available to testify. Trial counsel was ineffective for not calling him.

The Collier court further held:

> Although Collier=s attorneys concede that their performance was deficient, they blame the trial judge rather than themselves for their poor display. We find that the trial judge was not to blame for counsels= ineffectiveness; rather, they were. In sum, counsel did not perform as objectively reasonable attorneys would have; their performance fell below the standards of the profession and therefore their assistance at the sentencing phase of the trial was ineffective. Id. at 1202.

THE LOWER COURT=S ERROR AND PREJUDICE

The lower court in its order denying post conviction relief, held:

> 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 (TR at 2139-2140). Thus the Defendant has failed to overcome the presumption that his attorney=s actions under the circumstances were sound trial strategy. (See PCR Vol. X p.1356)

Mr. Philmore contends that Dr. Berland=s opinions regarding statutory mitigation were already Aundermined@ when Berland was impeached. Furthermore, there is no evidence in the post conviction record that Mr. Garland made a tactical decision and that the decision was Asound trial strategy@. Mr. Garland merely stated that AI reviewed his report. I reviewed his deposition. I spoke with him several times. Yes. It was my decision not to call him as a witness.@ (See PCR Vol. I p. 55). The 3.851 court erred in ascribing a tactical reason to counsel=s ineffectiveness when there was nothing in the post conviction record to support such a finding. Mr. Philmore was prejudiced by trial counsel=s ineffectiveness in that important statutory mitigation was dismissed by the trial court as having been impeached. Had the statutory mitigation been brought out through the available testimony of Dr. Maher, the outcome of the penalty phase would have been different.

ARGUMENT IV

THE TRIAL COURT ERRED IN THE DENIAL OF THE

CLAIM THAT MR. PHILMORE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. TRIAL COUNSEL FAILED TO SUBJECT THE PROSECUTION TO A MEANINGFUL ADVERSARIAL TESTING IN THE GUILT PHASE OF MR. PHILMORE=S TRIAL BY CONCEDING GUILT WITHOUT CONSULTATION.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v.State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LACK OF EVIDENCE OF INFORMED CONSENT

In the 3.851 hearing, Mr. Garland testified that he did not handle the guilt phase of the trial. Garland could not testify as to where the alleged consent to the concession of guilt took place, nor could he recall the manner of the alleged consent, either by writing, verbally or a nod of the head. (PCR Vol.I 64-65) The State had ample opportunity to call the attorney who handled the guilt phase of the trial yet they chose not to do so. Mr. Philmore contends that there is no record evidence to indicate that Philmore agreed by anything other than silent acquiescence.

THE LOWER COURT=S ERROR

The trial court in its order, discussed penalty phase

counsel=s qualifications and strategy and concludes that Philmore consented to the strategy. (PCR Vol X 1357-1358). Mr. Philmore respectfully contends that the lower court=s finding that there was Aaffirmative and explicit consent to this strategy,@ (PCR Vol X-1358), is a finding not based in fact but rather an inference and a supposition in light of the lack of record evidence of Aaffirmative and explicit consent to this strategy.@

In Nixon v. State, 857 So.2d 172 (Fla. 2003) this Court held:

> The only evidence presented at the evidentiary hearing was Corin=s testimony, which indicated that Nixon neither agreed nor disagreed with counsel=s trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon *affirmatively* and *explicitly* agreed to counsel=s strategy. *Without a client=s affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel=s duty is to Ahold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State mist establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt.@ Nixon II,* 758 So.2d at 625 (emphasis added). Since we held in *Nixon II* that silent acquiescence to counsel=s strategy is not sufficient, we find that Nixon must be given a new trial. Id. at 176

Attorney Garland=s inability to recall where the alleged consent took place, his inability to recall the manner in which the alleged consent was obtained, only that A Oh, I recall him

agreeing, being aware that what our strategy was. Was it memorialized, I don=t recall. Mr. Bauer was doing the guilt phase,@ (PCR Vol.I p. 64-65), was not the competent, substantial evidence required by Nixon.

The lower court=s reliance upon Mr. Philmore=s confession and the denial of the motion to suppress the confession was error. In Harvey v. State, 2003 WL 2151139 (Fla.) The Supreme Court of Florida held:

> We are aware that *Nixon* did not involve a confession. However, even in cases involving a confession, the jury is free to give as much or as little weight to the confessions it wishes. As we explained in *Nixon:* A in every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged an that a conviction can only be based upon proof beyond a reasonable doubt.@ 758 So.2d at 625. In other words, trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution=s case to a meaningful adversarial testing just because Harvey confessed to the crime charged. Id at *4-*5.

Mr. Philmore respectfully contends that this Court must look to the facts in the evidentiary hearing. Improper factors aside, there is still no competent, substantial evidence required by Nixon. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Philmore contends he never received a fair adversarial testing of the evidence. Furthermore, Mr. Philmore:s pre trial representation fell below the standard in Cronic. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Davis moves this Honorable Court to:

1. Vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

2. Enter any order which this Court deems necessary and proper.

CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing Initial Brief of the Appellant was generated in Courier New, 12-point font pursuant to Fla. R. App. P. 9.210.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States mail to all counsel of record on this ___ day of February, 2005.

_____

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