IN THE SUPREME COURT OF FLORIDA

LENARD JAMES PHILMORE,

Petitioner,

vs. **Case No. SC05-250**

JAMES V. CROSBY,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PROCEDURAL HISTORY

Petitioner, Lenard James Philmore, was the defendant in the trial court below and will be referred to herein as "Petitioner" or "Philmore". Respondent, James V. Crosby, Secretary, Florida Department of Corrections, will be referred to herein as "the State." The following symbols will be used in this Response: R denotes the record on direct appeal in Philmore v. State, 820 So.2d 919 (Fla. 2002) and PCR denotes the appellate record from the pending 3.850 appeal. Any supplements to these are SR or SPCR, followed by the appropriate page number.

On December 16, 1997, both Defendant, Lenard James Philmore ("Philmore"), and co-defendant Anthony A. Spann, ("Spann"), were indicted for the November 14, 1997 first-degree murder of Kazue Perron; conspiracy to commit robbery with a deadly weapon (bank robbery); carjacking with a deadly weapon; kidnapping; and robbery with a deadly weapon; and third-degree grand theft (TR 1-4). The trials of Philmore and Spann were severed (TR 613-18). Philmore's trial commenced January 18, 2000 and resulted in a January 20, 2000 verdict of guilty as charged on all counts (TR 636-37). See also Philmore v. State, 820 So. 2d 919, 925 (Fla. 2002). Between January 24, 2000 and January 28, 2000, the penalty phase was held following which, the jury recommended death unanimously (TR 2581-85). On July

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18, 2000, the trial court conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993) (TR Vol.28 2592 - 2673). Sentencing was held on July 21, 2000 and the trial court found five aggravating factors: (1) prior violent felony ("PVF");[1] (2) felony murder (kidnapping); (3) avoid arrest; (4) pecuniary gain; and (5) the cold, calculated, and premeditated ("CCP"). No statutory mitigation was found, but the trial court found non-statutory mitigation of: (1) defendant was victim and witness of physical/verbal abuse by an alcoholic father (moderate weight); (2) history of extensive drug and alcohol abuse (some weight); (3) severe emotional trauma and posttraumatic stress (moderate weight); (4) Philmore was molested and/or raped when young (some weight); (5) classified as severely emotionally handicapped (little weight); (6) ability to form close loving relationships (moderate weight); (7) cooperation with State (moderate weight); and (8) remorse (little weight). Based upon these factors, the death sentence

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

was imposed. (Sentencing Orders; TR Vol28 2678 - 81).[2] Philmore, 820 So. 2d at 925-26.

On direct appeal, this Court found:

> Philmore, who was twenty-one at the time of the commission of the crimes, was charged and convicted of first-degree murder, conspiracy to commit robbery with a deadly weapon, carjacking with a deadly weapon, kidnapping, robbery with a deadly weapon, and third-degree grand theft based upon the events surrounding the November 14, 1997, abduction and murder of Perron.
>
> The evidence presented at trial revealed the following. Philmore and codefendant Anthony Spann[1] wanted money so they could go to New York. On November 13, 1997, Philmore, Spann, and Sophia Hutchins, with whom Philmore was sometimes living, were involved in a robbery of a pawn shop in the Palm Beach area. However, the robbery was unsuccessful. Consequently, Philmore and Spann decided to rob a bank the following day.
>
> On the evening of November 13, Philmore and Spann picked up their girlfriends, Ketontra "Kiki" Cooper and Toya Stevenson, respectively, in Spann's Subaru and stayed at a hotel for the evening. The following morning, Spann told Philmore that they needed to steal a car as a getaway vehicle in order to facilitate the robbery. Spann

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[2] Philmore also received 15 years for conspiracy to commit robbery with a deadly weapon (Count II), life for Counts III, IV, and V (carjacking with a deadly weapon, kidnapping, and robbery with a deadly weapon, respectively), and 5 years for Count VI (third-degree grand theft) (TR28 267-81).

told Philmore that they would have to kill the driver of the vehicle they stole.

At approximately 11:30 a.m. on November 14, Philmore and Spann dropped their girlfriends off at their houses, and went in search of a car to steal. Philmore and Spann first looked for a car at the Palm Beach Mall, but were unsuccessful. They then followed a woman to another mall, but by the time they reached her car, she was already outside of her car, making it difficult for them to steal the car. They ultimately spotted Perron driving a gold Lexus in a residential community, and the two followed her.

At approximately 1 p.m., Perron entered the driveway of a friend with whom she intended to run errands. Upon entering the driveway, Spann told Philmore to "get her." Philmore approached the driver's side of the vehicle and asked Perron if he could use her phone. Perron stated that she did not live there, and Philmore took out his gun and told Perron to "scoot over." Philmore drove Perron's car, with Spann following in his Subaru. During the drive, Perron was crying and told Philmore that she was scared.

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

Philmore and Spann passed a side road in an isolated area in western Martin County, and Spann flashed his lights, indicating that they turn around and head down the road.

Philmore chose the place to stop. Philmore ordered Perron out of the vehicle and ordered her to walk towards high vegetation containing maiden cane, which is a tall brush. Perron began "having a fit," and said "no." Philmore then shot her once in the head. Philmore picked up Perron's body and disposed of it in the maiden cane. Spann did not assist in disposing of the body.

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

After concealing the Subaru, Philmore and Spann returned to Palm Beach County to pick up Cooper and Stevenson at their houses. They then went to a fast food restaurant to get food and Cooper's paycheck. Afterwards, Philmore wanted to go to Hutchins' house because he left his shoes there. However, as they approached Hutchins' house, Philmore spotted an undercover police van sitting at a nearby house, and stated that it "looked like trouble." An officer of the West Palm Beach Police Department, who happened to be engaged in a stakeout in the area, observed Spann driving the Lexus and recognized him because there was an outstanding warrant for his arrest on an unrelated matter. Spann

sped away and a high-speed chase ensued on Interstate 95.

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

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

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

[2] Philmore later threw the rings out the car window because Spann told him that "they will get you in a lot of trouble." The rings

were never recovered.

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

Philmore raised eleven issues[3] on direct appeal and this Court affirmed both the conviction and sentence. Id. Philmore did not seek a rehearing, instead, on July 4, 2002, he served his petition for writ of certiorari with the United States Supreme Court in which he raised the following four (4) issues:

I - Did the Florida trial and appellate

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[3] Philmore alleged that the trial court erred by: (1) failing to suppress his numerous statements to law enforcement; (2) allowing the State to exercise a peremptory challenge against prospective juror Tajuana Holt; (3) denying Philmore's motion to exclude a gruesome photograph; (6) compelling a mental health examination of Philmore by the State's expert; (7) finding the CCP aggravaotr; (8) finding the "avoid arrest" aggravator; (9) rejecting the statutory mitigator of "under the influence of extreme mental or emotional disturbance"; (10) rejecting the statutory mitigator of "under the substantial domination of another"; and (11) rejecting the statutory mitigator of "capacity to appreciate the criminality of conduct was substantially impaired." Philmore also alleged that the State made improper comments during guilt and penalty phase closing arguments (4 & 5).

> courts violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by allowing into evidence custodial statements of the accused which were provided to law enforcement as a result of ineffective assistance of counsel?
>
> **II** - Did the Florida trial and appellate courts violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by excluding a potential juror who was a member of a minority race on a non-record supported explanation of the prosecutor?
>
> **III** - Did the Florida trial and appellate courts violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States by allowing the prosecutor to make a misrepresentation regarding the Jury's ability to dispense mercy in its capital sentencing decision?
>
> **IV** - Did the Florida trial and appellate courts violate the Fifth and Fourteenth Amendments to the Constitution of the United States by requiring defendant to incriminate himself by way of a compelled mental health examination?

On October 7, 2002, certiorari was denied. Thereafter, on September 16, 2003, Philmore filed his 3.851 Motion for Postconviction Relief in state court raising ten (10) claims and filed an Amended Claim I on February 6, 2004. An evidentiary hearing was held from March 29, 2004 through April 1, 2004, at which Philmore called four (4) witnesses to testify. Following the evidentiary hearing, the trial court denied all relief and a timely appeal was filed. That appeal is currently pending before this Court. See Philmore v. State, case no. SC04-1036.

This case involves the petition for habeas corpus relief filed by Philmore.

REASONS FOR DENYING THE PETITION

ISSUE I

PHILMORE'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE TRIAL COURT IMPROPERLY IGNORED THE TESTIMONY OF EXPERT, DR. WOOD, IS PROCEDURALLY BARRED AND MERITLESS (Restated).

Philmore claims that his death sentence is invalid because the trial court ignored the testimony of defense expert, Dr. Frank Wood, whose testimony, he alleges, established the statutory mitigator of "under the influence of extreme mental or emotional disturbance." He further argues, in one sentence, that appellate counsel was ineffective for failing to raise this issue on direct appeal. Philmore is procedurally barred from raising a claim of "trial court error" in a petition for writ of habeas corpus. See Fennie v. State, 855 So.2d 597, 607 (Fla. 2003) (holding that defendant was procedurally barred from raising, in petition for writ of habeas corpus, claim that trial court erred in failing to independently weigh aggravating and mitigating circumstances, where claim could and should have been raised on direct appeal). Instead, "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of

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appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995). This Court will find that Philmore's ineffectiveness claim is without merit as appellate counsel was not deficient nor were his actions prejudicial.

"The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland v. Washington . . . standard for claims of trial counsel ineffectiveness." Arbelaez v. State, – So.2d –, 2005 WL 168570 (Fla. 2005), citing Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002)(citations omitted). Thus, to succeed on a claim of ineffective assistance of appellate counsel, it must be shown "first, that appellate counsel's performance was deficient" because the alleged errors "are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Armstrong v. State, 862 So.2d 705, 718 (Fla. 2003), citing Rutherford, 774 So.2d at 643. Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do

not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted). Further, appellate counsel is not ineffective for failing to raise nonmeritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, at 718, citing Rutherford. See also Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). With these principles in mind, it is clear that Philmore has not meet his burden. All relief must be denied.

Philmore contends that appellate counsel was ineffective for failing to argue, on direct appeal, that the trial court erred by ignoring the testimony of defense expert, Dr. Frank Wood, because the dcotor's testimony established the statutory mitigator of "under the influence of extreme mental or emotional disturbance." However, a review of Philmore's Initial Brief on Direct Appeal shows that appellate counsel **did** raise the issue. Point IX of Philmore's Initial Brief alleged that "the trial court erred in failing to find that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Thus, contrary to Philmore's assertions, appellate counsel did challenge the rejection of the

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statutory mitigator of "under the influence of extreme mental or emotional disturbance" on direct appeal.[4] Philmore's argument here--that appellate counsel was ineffective for not arguing that the trial court improperly ignored Dr. Frank Wood's testimony which established the statutory mitigator of "under

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[4]On direct appeal, this Court affirmed the trial court's rejection of the "under the influence of extreme mental or emotional disturbance" mitigator, noting that a trial judge "has broad discretion in determining the applicability of a particular mitigating circumstance, and [its] determination of the applicability of a mitigator [will be upheld] when supported by competent substantial evidence." Philmore 820 So.2d at 936. Regarding the expert psychological evaluations of Philmore's mental health, this Court noted that "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Id. After reviewing the trial court's order--its findings, reasoning and analysis--this Court upheld the rejection of the "under the influence of extreme mental or emotional disturbance" mitigator, finding it was supported by competent substantial evidence, especially in light of the controverted defense expert testimony. Id. at 936-37.

the influence of extreme mental or emotional disturbance"–- is but a variant of the argument presented on direct appeal. It is improper to argue in a habeas petition a variant to a claim previously decided or to simply re-cast a previously rejected argument in ineffective assistance of appellate counsel terms. Consequently, Philmore's claim is procedurally barred. See Mann v. Moore, 794 So.2d 595, 600-01 (Fla.2001)(holding that claims raised in a habeas petition which petitioner already raised in prior proceedings are procedurally barred); Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001)(finding procedural bar to habeas claim which was variant to claim previously addressed); Porter v. Crosby, 840 So.2d 981 (Fla.2003).[5]

Moreover, appellate counsel cannot be deemed ineffective for failing to raise a non-meritorious claim. The State does not agree that Dr. Frank Wood's testimony, standing alone, established "by the greater weight of the evidence" that Philmore was suffering from extreme mental or emotional

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[5] Philmore also raised the exact claim in his 3.851 post-conviction motion, as Claim IV. The State contended that the issue was procedurally barred because Philmore had already raised the issue on direct appeal or could/should have raised the issue on direct appeal. The trial court agreed, summarily denying the claim as procedurally barred (PCR 1357).

disturbance at the time of the murder. This Court has stated:

> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.... Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance.... Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case.... As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion...

Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert denied, 520 U.S. 1122 (1997); Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987) (opining "[i]n determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness."). Reviewing Dr. Wood's testimony, it is clear that he relied upon Dr. Burdette's assessment of the PET scan. It was Dr. Burdette who opined that the abnormality in Philmore's brain "is a non specific finding in that several causes are possible, but may be related to a prior brain insult." (TR V22 1998-99). Dr. Wood felt he had the expertise to determine that the PET scans were abnormal, but he did not have the expertise to diagnose the cause of the defect. (TR V22 2001-02). Further, Dr. Wood would not say that the brain area affected impacted Philmore's control of his free will or caused problems with impulse control. The

brain area involved dealt with Philmore being able to put into words what he saw, tasted, felt, heard, and smelled. (TR 2037-38).

In his Memorandum in Support of a Life Sentence, Philmore sought the three statutory mental mitigators and pointed to Dr. Berland's testimony for support. **Dr. Wood's testimony was utilized for the non-statutory brain injury mitigator** (Ex 8 at 11). The trial court assessed the brain injury reasoning:

> c) Defendant suffered brain damage at an early age.
>
> There was conflicting testimony that the defendant suffered brain damage at an early age. The Court considered the results of **Dr. Wood's** PET scans and other testimony given by him as well as various witnesses with regard to head injuries experienced by the defendant. While the Court acknowledges that Dr. Berlan also opined that the defendant suffered brain injury as a child, the Court finds the state's evidence in the form of expert testimony as well as cross examination of defense witnesses totally refuted the defense evidence.
>
> The Court finds no direct credible proof that the defendant suffered brain damage and the Court is not reasonably convinced of the existence of this mitigator. It is therefore rejected.

(Ex. 9 at 12) (emphasis supplied).

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the Florida Supreme Court established relevant standards of review for mitigating circumstances: (1) whether a particular

circumstance is truly mitigating in nature is a question of law and subject to de novo review on appeal; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent, substantial evidence standard; and finally,(3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000) (observing whether particular mitigator exists and weight to be given it are matters within sentencing court's discretion); Trease v. State, 768 So. 2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding, though trial court must consider all the mitigating circumstances, it may assign "little or no" weight to a mitigator); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (explaining trial court may reject claim mitigating circumstance has been proven provided record contains competent, substantial evidence to support rejection). From the foregoing, it is clear this Court considered Dr. Wood's testimony where appropriate and considered the three statutory mental health mitigators. The mental mitigation evidence was evaluated along with Philmore's actions during the criminal episode including its planning and execution to determine whether the mitigation existed.

Philmore was not prevented from presenting mitigation, the

jury was not barred from considering any evidence in mitigation, this Court considered all mitigation presented during the penalty phase and assessed the offered evidence as it related to sentencing. Thus, Philmore has not carried his burden of proving error and his reliance upon Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) and its requirement that the sentencing court consider all offered mitigation does not further his position. Similarly, given the fact that the trial court did not ignore Dr. Wood's testimony and explained the basis for rejecting the claim of brain damage as allegedly revealed by the PET scans and school records, Nibert v. State, 574 So. 2d 1059 (Fla. 1990) and Crook v. State, 813 So. 2d 68 (Fla. 2002) are not applicable. Dr. Wood's testimony was controverted by the State's mental health experts and record facts as this Court found in the sentencing order. Furthermore, based upon the rejection of Dr. Wood's testimony related to brain injury, such testimony would not have supported the statutory mitigators and no prejudice stems from not mentioning Dr. Wood's testimony in that analysis. This court conducted a thorough review of the penalty phase evidence, outlined the factual findings, and applied the proper law in sentencing Philmore. Such complied with Campbell and Trease. As such, Toney v. Franzen, 687 F.2d 1016, 1022 (7th Cir. 1982) does not further Philmore's position as this Court did not ignore any matter presented.

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Analyzing the extreme mental of emotional disturbance mitigator, the trial judge found:

> ... Dr. Landrum testified that the tests utilized by Dr. Berland are outdated, which was ultimately acknowledged by Dr. Berland as it relates to the MMPI. Dr. Landrum opined that there is no credible evidence to suggest that the defendant suffered from psychosis or brain damage.
>
> Both experts agreed that the defendant has a anti social personality disorder. The testimony being that the nature of the disorder is that the defendant has a disregard for the rights of others and it reflects criminal thinking and behavior.
>
> ... This Court however simply cannot from Dr. Berland's diagnosis which was strongly rebutted on cross examination and the expert's opinion that the defendant has a personality/character disorder find that on November 14, 1997, the defendant acted under the influence of extreme mental or emotional disturbance.
>
> The facts and the circumstances of the homicide indicate a coherent well thought out plan which spanned over the course of two days. The abduction and homicide were part of a deliberate plan. Further, there was no evidence that the defendant was under the influence of drugs or alcohol at the time of the commission of the homicide. There simply is no record evidence to suggest the defendant was under the influence of extreme mental or emotional disturbance at the time of the commission of the homicide. The facts themselves belie any suggestion by Dr. Berland that the defendant acted while under extreme mental or emotional disturbance on November 14, 1997.

(R.4 - 1229-30). It was revealed that Philmore denied using

drugs or that they influenced his behavior on the day of the murder. His school records revealed he had a disruptive disorder, had been diagnosed with an impulse control disorder, intermittent explosive disorder, and conduct disorder before 18 years of age. This supported a finding of Antisocial Personality Disorder. The State's testing showed he had a normal IQ, Dr. Landrum's interview revealed no signs of psychosis or support for a diagnosis of brain injury. It was established that the MMPI tests employed by the defense, discriminated against black males by producing a diagnosis of psychotic/paranoid disturbance 90 percent of the time in normal individuals. Dr. Berland's assessment of Philmore's mental state was inaccurate (T.25 - 2293-94, 2304-13).

Given the testimony, and the judge's analysis of the evidence, it cannot be said error occurred. Foster, 679 So. 2d at 755 (holding judge may reject uncontroverted expert testimony regarding mitigation where such cannot be reconciled with evidence). Whether a mitigator is established lies with the judge and "[r]eversal is not warranted simply because an appellant draws a different conclusion."

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[6] The State notes that the jury's recommendation was unanimous since it was a 12-0 recommendation for death.

[7]See Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence (filed 8/26/99); Motion to Declare Section 921.141 Florida Statutes Unconstitutional for Failure to Provide Jury Adequate Guidance in the Finding of Sentencing Circumstances, and to Preclude Death Sentence (filed 8/26/99); Motion for Statement of Particulars as to Aggravating Circumstances and to Dismiss Indictment for Lack of Notice as to Aggravating Circumstances (filed 8/26/99); Motion for Special Verdict Form Containing Findings of Fact by the Jury (filed 8/26/99 and 9/1/99); Motion to Elect and Justify Aggravating Circumstances (filed 9/1/99).

[8] The State relies upon its Answer Brief filed in the Direct Appeal for a discussion of each individual comment (Points IV and V).

[9] Following this argument, the trial judge called the parties aside and addressed the State. "But I think (sic) out of your closing please, I don't want you to give any inference to the jury with regards to the witness's testimony." (TR V27 2413-14). The judge did not make of finding that the comments were improper, only that the State should not give the jury a wrong impression.

[10] Philmore concedes that the issue is premature under Florida Rules of Criminal Procedure 3.811 and 3.812