

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
Appellant/Cross-Appellee,)
) CASE NO. 94,989
v.)
) Circuit Court No. CR80-5117
FREDDIE LEE WILLIAMS,) (Orange)
)
Appellee/ Cross-Appellant.)
_____)

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CROSS-APPELLANT'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The cross-appellant, FREDDIE LEE WILLIAMS, was charged by indictment with first degree premeditated murder for the shooting death of his live-in girlfriend, Mary Robinson. (Vol.7, R 1245). Prior to the trial in this case defense counsel failed to investigate Mr. Williams' claims that he was not the perpetrator. (Vol.7, R 1258-1263).

First, defense counsel failed to investigate regarding gun powder residue evidence. (Vol.7, R 1259-1261). Mr. Williams was present at his apartment when the police responded to the crime scene shortly after the homicide occurred. (Vol.7, R 1260). Mr. Williams voluntarily consented to the police technicians taking swabbed samples of his hands, arms, and clothes for the purposes of conducting a gun powder residue test to determine if Mr. Williams had shot the pistol which was utilized in the instant case. (Vol.7, R 1260). During the trial, the state's expert, a firearm examiner with the Sanford Crime Lab, testified that in his opinion there was insufficient antimony on the cotton swab samples to determine if gunshot residue was present on the swabs. (Vol.7, R 1260). Thus the tests could not determine one way or another whether Mr. Williams had fired the gun. (Vol.7, R 1260). However, defense counsel never retained the services of an independent laboratory analyst in the area of gun powder residue analysis. (Vol.7, R 1260-1261). Such an expert would have

independently analyzed the swab samples to see if a determinative result could have been reached; would have testified that the procedures utilized by the police were performed in an inadequate and slipshod manner; and would have testified that had the police officers done a thorough job and proper job in swabbing Mr. Williams' hand, arms and clothes for barium and antimony, a determinative test rather than a neutral conclusion would have been reached. (Vol.7, R 1260-1261). Additionally, trial counsel failed to investigate the validity of the state's blood splatter expert testimony; failed to investigate that the "Mary" referred to by several witnesses referred to another lady named "Mary" who lived in the same complex as Mr. Williams and did not refer to Mary Robinson, the victim; and failed to investigate the validity of Gloria Davis' testimony (which was the state's most critical evidence pointing to Mr. Williams as the perpetrator) as well as other leads concerning the possibility that Mr. Williams was not the perpetrator.¹ (Vol.7, R 1258-1263).

In October of 1981, Mr. Williams' case proceeded to a jury trial. During the actual trial, Mr. Williams continued to maintain his innocence. (Vol. 7, R 1263-1265). He testified

¹Interestingly, after the trial, prosecution witness Gloria Davis recanted her trial testimony in a letter to the Honorable George N. Diamantis, of Orange County. In that letter she stated that the decedent, Mary Robinson was killed in a fight over the gun with a person other than Mr. Williams. A expert comparison of the letter with a handwriting exemplar given by Gloria Davis, indicate that Gloria Davis did in fact author the letter. The letter was attached to Mr. Williams' amended 3.850 motion as Appendix 5. (Vol. 7, R 1259).

that on the night of Mary Robinson's death that he had left a gun on the dresser in the bedroom at home when he went out and that when he returned, Mary Robinson staggered toward him, already shot. He called the police and an ambulance. Williams v. State, 437 So.2d 133, 134 (Fla. 1983)².

However, in spite of Mr. Williams' testimony before the jury, his defense counsel chose a different and incompatible avenue of defense and actually suggested to the jury that he did not believe his own client. (Vol.7, R 1263). During closing argument in the guilt phase of the trial, the entire thrust of defense counsel's argument was that Mr. Williams did shoot Mary Robinson but that premeditation had not been shown and a lesser degree of homicide was justified. (Vol.7, R 1264). Very little of the closing argument concerned argument regarding Mr. Williams' innocence. (Vol.7, R 1264). Thus, counsel undermined his own client's testimony and defense, and basically conceded that Mr. Williams was the perpetrator. Defense counsel argued:

I submit what happened in that scuffle, Freddie Lee Williams was there and he was trying to help her. He shot the gun. Maybe it was to scare her. Maybe it was to hurt her. She was wounded very badly. He was there trying to help her. (Vol. 7, 1264).

²These facts were taken from this Court's opinion in Williams v. State, 437 So.2d 133, 134 (Fla. 1983) and are merely placed here for context. Because, this appeal concerns the facial validity of Mr. Williams 3.850, the remaining facts contained within this statement of the case and facts are properly derived from the motion and accompanying circuit court orders.

Later, in a reference that is apparently a concession by defense counsel that he did not believe his own client, counsel argued to the jury:

I am not attempting to insult your intelligence, but one thing I would submit to you that has not been proven is the crime of guilty of first degree premeditated murder. There has not been shown any premeditated design to kill. (Vol. 7, R 1264).

At another point during closing argument, defense counsel most clearly intimated to the jury that he disbelieved his own client:

But, if you should choose to believe that Freddie Lee Williams was not telling the truth, *I ask you not to be vindictive, not to be upset and not to be mad at Freddie Lee Williams for lying to you, but consider instead what motive he would have for lying.* Obviously, he knows he is in a great deal of trouble, but *because he doesn't tell you the truth, don't vest [sic] your displeasure on him* by finding him guilty of something the State has not proven. The State has to prove him guilty. He does not have to prove anything. *No matter how many lies he may have told you, he doesn't have to prove anything.* The State does. [emphasis added].(Vol. 7, R 1264).

While presenting the alternative and incompatible defense that premeditation did not exist, defense counsel argued to the jury that alcohol played a large part in the dispute between Mr. Williams and Mary Robinson. (Vol.7, R 1254-1258). Defense counsel argued in his initial closing argument to the jury:

I submit to you that if tempers flared, perhaps

the alcohol played a good part in that. But that doesn't create or show a premeditated design to kill. (Vol.7, R 1256-1257).

Furthermore, defense counsel referred to the fact that Mr. Williams had been drinking and was intoxicated or drunk several times in his closing arguments. (Vol.7, R 1257-1258). As a theory of Mr. Williams' defense, defense counsel in closing argument basically argued to the jury that Mr. Williams' intoxication may have negated his ability to form a premeditated design to kill the decedent. Defense counsel argued:

Now, we have a reasonable theory should you decide Freddie Lee Williams was the one that pulled the trigger. That is the two of them got intoxicated and had gotten into an argument over one thing or another; that Freddie Lee Williams had a fit of rage. He got the gun and pointed the pistol in her direction and pulled the trigger. (Vol. 7. 1257).

Thus, counsel effectively raised the issue of intoxication as a reason for Mr. Williams not being able to form the premeditated intent in this case. (Vol.7, R 1257). Unfortunately, however, defense counsel failed to do the proper pretrial investigation regarding Mr. Williams' drinking habits and history which was necessary to properly mount this defense. (Vol.7, R 1255). Defense counsel never requested any mental health evaluations of Mr. Williams, including psychological or psychiatric testing or consultation, concerning the Defendant's drinking habits. (Vol.7, R 1255). Furthermore, no testimony was developed through lay or

expert witnesses concerning the effects of alcohol upon Mr. Williams. (Vol.7, R 1255). Moreover, despite defense counsel's awareness of substantial evidence in the record that Mr. Williams was drunk at or around the time of the homicide, defense counsel failed to request a jury instruction on voluntary intoxication. (Vol.7, R 1254-1255).

Finally, during the trial, defense counsel failed to object to the prosecutor's misleading the jury regarding the definition of premeditation. (Vol.7, R 1262). During voir dire and during his closing argument, the prosecutor presented definitions and examples of premeditation to the jury which repeatedly did not properly or adequately include the essential element of reflection. (Vol.7, R 1262-1263). The prosecutor defined premeditation as merely consciously doing something, leaving out the essential element of reflection. (Vol.7, R 1262-1263). Furthermore, during closing argument, the prosecutor stated:

Anytime anybody takes a gun, a .38 caliber gun and shoots another person in the head, that is premeditated. That is intent to kill. (Vol.7, R 1262).

Later the prosecutor again misinformed and misled the jury:

Mr. Jones [defense counsel] can argue to you until he is blue in the face, but shooting somebody in the head is about as solid and convincing evidence of intent to kill as there can be. (Vol.7, R 1262).

Defense counsel failed to object or ask for a curative

instruction regarding the improper definitions and examples of premeditation. (Vol.7, R 1262).

At the close of the trial, Mr. Williams was convicted as charged of first degree murder and, after a brief penalty phase, the jury recommended that he receive the death penalty. (Vol. 7, R. 1246-1247). On December 18, 1981, he was sentenced to death by electrocution. (Vol. 7, R 1248-1251). Mr. Williams filed a direct appeal to this Honorable Court and on June 23, 1983 the judgement and sentence were affirmed. Williams v. State, 437 So.2d 133 (Fla. 1983), *cert. denied* 466 U.S. 909(1984). On July 23, 1986, Mr. Williams petitioned this Honorable Court for a Writ of Habeas Corpus. Habeas Corpus relief was denied. Williams v. Wainwright, 503 So.2d 890 (Fla. January 29, 1987), *cert denied Williams v. Dugger*, 484 U.S. 873 (Oct. 5, 1987).

On December 4, 1986, Mr. Williams filed a Motion for Post Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850. On December 4, 1987, that motion was amended. (Vol.7, R 1254). Among the ten claims for relief included in that amended motion, claim I alleged ineffective assistance of trial counsel at the pretrial and guilt phase of the trial³. (Vol.7, R 1254).

³The amended post-conviction motion raised the following ten claims:

- I. Ineffective assistance of counsel at the pre-trial and guilt phase of the trial.
- II. Ineffective assistance of counsel at the advisory sentencing phase and at the court's sentencing phase.
- III. Ineffective assistance of counsel at the sentencing phase for failing to present evidence or argument

Eight sub-issues were raised within claim I: Failure to investigate and properly raise the defense of voluntary intoxication; failure to investigate the possibility of another perpetrator; failure to investigate gun residue evidence; failure to object to a direct comment on Mr. Williams' right to remain silent; failure to investigate the validity of the state's blood splatter evidence; failure to object to the state's improper definition and examples of premeditation; failure to investigate the possibility that references to "Mary" did not refer to the victim; and the impropriety of defense counsel's suggestion to the jury that he did not believe his own client. (Vol.7, R 1254-1263). The amended 3.850 motion also claimed that the individual and aggregate prejudicial effect of the various claims included within required post-conviction relief. (Vol.7, R 1292).

On March 8, 1996, the trial court issued the first part of

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- regarding residual doubt.
 - IV. Counsel for both the prosecution and defense impermissible diminished the jurors' understanding of the importance of their role and responsibility in the sentencing phase.
 - V. Prosecutorial misconduct.
 - VI. Improper use of two prior circuit court cases to establish two statutory aggravating factors.
 - VII. Ineffective assistance of counsel at the court sentencing phase by counsel's failure to assert a proportionality argument.
 - VIII. Ineffective assistance of counsel in jury selection.
 - IX. Adoption of any and all claims raised in the original post-conviction motion.
 - X. The individual and aggregate prejudicial effect of the claims requires post-conviction relief.

its ruling on Mr. William's post-conviction motion. (Vol.8, R 1495-1496). The court determined that after reading the entire record, as well as the decisions concerning the defendant's direct appeal and habeas proceedings, that claims V, VI, VIII, IX, and X were procedurally barred. The court further found that claims I and VII were facially insufficient in that they did not meet both requirements of Strickland v. Washington, 466 U.S. 668 (1984). Finally, the court ruled that claims II, III, and IV, each concerning the penalty phase proceedings, were sufficient to state a claim and granted an evidentiary hearing as to these claims. (Vol.8, R 1495-1496).

The five-day evidentiary hearing began on November 30, 1998. Subsequently, on February 1, 1999, the court rendered the second and final part of its order regarding Mr. William's amended motion for post-conviction relief. (Vol.14,R 2522-2538). The court found that defense counsel was constitutionally ineffective at the sentencing phase of the Defendant's trial and ordered new penalty phase proceedings. (Vol.14,R 2522-2538). In the circuit court's order, the court made the following findings of fact which are pertinent to the instant appeal:

1. The court found that evidence of Mr. Williams' medical records, prior substance abuse, and evidence regarding head trauma was available to defense counsel and would have been appropriate to present to the jury (as mitigation) in this case.

(Vol.14,R 2529-2530). The court further found that failure of defense counsel to adequately investigate this evidence was an omission that fell outside the broad range of reasonably competent performance under prevailing professional standards of that time. ". . ., [C]ounsel's acts cannot be said to be a strategic decision where, as here, the lack of investigation precludes an informed choice." (Vol.14,R 2530).

2. With regard to brain damage suffered by Mr. Williams, the court found that the following evidence presented at the evidentiary hearing would have been available to defense counsel had they properly investigated:

Several lay witnesses testified that the defendant had suffered serious blows to the head before the murder was committed. Witnesses Carol Henson, Mary Ann Harrell, Willie "Wink" Brown, and Mary Lee Williams all testified that in the early 1960's the Defendant was beaten about the head with nightsticks during a confrontation with police until he bled from his mouth and head and his teeth were knocked out. Witnesses Henson and Willie "Wink" Brown testified that during a fistfight in the early to mid 1970's the Defendant fell and struck his head on the cement with such force that he was knocked unconscious. In addition, witness Alvin Cobb testified that he once saw the Defendant struck in the head with a two-by-four by a hidden assailant. Witness Albert Lewis stated that around the time of the fistfight, he took the Defendant, bleeding from the back of his head to the hospital.

Most of these witnesses testified that the Defendant's behavior dramatically changed after the blows to the head. Expert testimony regarding the significance of these

alleged traumas was provided by Dr. Robert Sidney Thornton, M.D., a clinical neurologist, and Dr. Robert M. Berland, Ph.D., a forensic psychologist. Dr. Thornton interpreted magnetic resonance imaging ("MRI") scans conducted on the Defendant. He concluded that a distinct abnormality was present in the frontal orbital cortex of the Defendant's brain in that cerebrospinal fluid occupied a space normally filled by brain tissue. He testified that the absence of brain tissue in that region was most consistent with brain injury resulting from trauma such as that inflicted on the Defendant in the incidents described by the lay witnesses. Such trauma, he stated could result from a shearing of the brain against irregular bones of the skull caused by a blow to the back of the head. Dr. Thornton also testified that computerized tomography ("CT") scans were available around 1980 that were sensitive enough to reveal this abnormality and that had such a scan been conducted on the Defendant, his brain abnormality would likely have been discovered if it existed at that time.

Dr. Berland testified that in January of 1998 he performed a two-part examination of the Defendant consisting of a diagnostic evaluation and a clinical legal evaluation. Dr. Berland interviewed Mr. Williams, interviewed lay witnesses, reviewed Department of Corrections medical records and other independently created documents as part of his examination. He also administered the Minnesota Multiphasic Personality Inventory ("MMPI") and Wechsler Adult Intelligence Scale ("WAIS") tests to Defendant.

Dr. Berland first concluded from the tests that there was no indication that the Defendant was malingering. His examination showed that the Defendant suffered auditory, visual, tactile, and olfactory hallucinations and that the Defendant also exhibited symptoms of delusional paranoid beliefs, manic or hypomanic disturbances, and

biologically determined depressions, all of which was consistent with the result of the MMPI test. Dr. Berland stated that the Defendant, at various times of incarceration predating this crime, had been prescribed antipsychotic drugs by the DOC, indicating to him that the Defendant had consistently manifested his symptoms of mental illness several years before this crime. Dr. Berland also testified that the symptoms of mental illness demonstrated by the Defendant is typically a byproduct of brain trauma resulting from head injury. (Vol.14,R 2530-2532).

3. With regard to evidence of Intoxication, the court found that the following evidence presented at the evidentiary hearing would have been available to defense counsel had they properly investigated:

Witnesses Willie "Wink" Brown and Willie "Blue" Brown essentially testified that they were drinking buddies with Defendant and that Defendant consistently drank large quantities of alcohol and was frequently intoxicated. This was corroborated by witness Carol Henson who testified that Defendant normally drank alcohol throughout the day. *More importantly, witnesses Willie "Blue" Brown and Rosa Lee Jones testified that Defendant had been drinking the day he murdered the victim. From this evidence, a reasonable juror might have found that Defendant was likely intoxicated at the time of the murder and could have weighed Defendant's intoxicated state as a mitigating factor before imposing the death penalty. Whether the jury would or would not find voluntary intoxication a mitigating factor is not the issue before the Court.*

Dr. Berland offered testimony that use of alcohol by a person often exacerbates any mental illness that person might be suffering. Thus, Defendant might also have

used his intoxication as a mitigating factor by attempting to show the jury that the murder was committed during an episode of mental illness that was substantially intensified by his use of alcohol.[emphasis added](Vol.14,R 2532-2533).

The State filed a timely notice of appeal from the court's partial granting of the amended post-conviction motion and Mr. Williams filed a notice of cross-appeal from the partial denial of the motion. (Vol.14,R 2545-2546, 2557-2558). While the state has since dismissed its notice of appeal, the notice of cross appeal remains. This cross-appeal follows.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Claim I as being facially insufficient. Claim I, which alleges ineffective assistance of counsel in the guilt phase of the trial, sufficiently states a claim for post-conviction relief as it meets both requirements set forth in Strickland v. Washington, 466 U.S.688 (1984). Under Strickland, first, the defendant must identify particular acts or omissions by counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards and Second, the defendant must prove prejudice.

The allegations contained in Claim I satisfy the first prong of the Strickland analysis. Claim I alleges specific facts indicating that defense counsel rejected Mr. Williams' claims of innocence in front of the jury and presented an incompatible avenue of defense in which he conceded Mr. Williams' guilt; defense counsel failed to adequately investigate and present the defense of voluntary intoxication; and that defense failed to object to the prosecution's misleading definitions and examples of premeditation. Each of these acts or omissions falls outside of the broad range of reasonably competent performance under prevailing professional standards.

The allegations in Claim I also meet the second prong of Strickland in their cumulative effect. This Honorable Court has held that the cumulative effect of various claims may undermine

the confidence in the outcome of the trial and may thus satisfy the prejudice requirement of Strickland. Here, Mr. Williams was denied having even a single defense presented during his capital trial. The defense that Mr. Williams sought and expected to have put forth on his behalf, his innocence, was completely undermined by his defense counsel. Defense counsel failed to investigate Mr. Williams' claims, indicated to the jury that Mr. Williams may have been lying to them, and conceded that Mr. Williams was the perpetrator of the offense. Moreover, defense counsel asserted an alternative, but incompatible defense, that Mr. Williams shot the victim but that there was no premeditation in the shooting. In presenting this defense, counsel acknowledged that there was evidence that Mr. Williams may have been "drunk" at the time of the incident and, thus, there was no premeditation. Thus, counsel alluded to a voluntary intoxication defense. However, counsel failed to investigate voluntary intoxication, failed to properly present evidence through expert and lay witnesses and failed to have the jury instructed with regard to the defense of voluntary intoxication. Furthermore, had defense counsel properly investigated the defense of voluntary intoxication, a great deal of relevant *and compelling* evidence on the issue of voluntary intoxication would have been available to present to the jury on behalf of Mr. Williams. Accordingly, the cumulative effect of all of these allegations was sufficient to undermine

the confidence in Mr. Williams' trial and satisfy the prejudice requirement of Strickland.

ARGUMENT

ISSUE

WHETHER THE LOWER COURT ERRED IN DENYING AS FACIALLY INSUFFICIENT, CLAIM I OF CROSS-APPELLANT'S MOTION FOR POST CONVICTION RELIEF WHICH ALLEGED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE GUILT PHASE OF HIS CAPITAL TRIAL?

The trial court erred in denying Claim I as being facially insufficient. Claim I, sufficiently states a claim for post-conviction relief as it meets both requirements set forth in Strickland v. Washington, 466 U.S.688 (1984).

In Strickland, 466 U.S. 688 (1984), the United States Supreme Court established a two-prong test for determining whether a defendant has been denied effective assistance of counsel. First, the defendant must identify particular acts or omissions by counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Id. at 690. Second, the defendant must prove prejudice, i.e., that a reasonable probability exists that but, for counsel's error the result in the case would have been different. Id. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Id. When an evidentiary hearing is not held, the allegations must be accepted as true, except to the extent that they are conclusively rebutted by the record. Urquhart v. State, 676 SO.2d 64 (Fla. 1st DCA 1996).

Claim I of Mr. William's motion for post conviction relief alleged ineffective assistance of defense counsel in the guilt phase of the capital trial. Eight sub-issues were raised within the claim: Failure to investigate and properly raise the defense of voluntary intoxication; failure to investigate the possibility of another perpetrator; failure to investigate gun residue evidence; failure to object to a direct comment on Mr. Williams' right to remain silent⁴; failure to investigate the validity of the state's blood splatter evidence; failure to object to the state's improper definition and examples of premeditation; failure to investigate the possibility that references to "Mary" did not refer to the victim; and the impropriety of defense counsel's suggesting to the jury that he did not believe his own client.

A. The first prong of the Strickland Standard: identification of particular acts or omissions by counsel that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards.

In the interest of clarity of analysis, these sub-issues have been arranged into three broad allegations of ineffective assistance of counsel and will be presented in the following order. First, defense counsel's rejection before the jury of Mr.

⁴This sub-issue, failure to object to a direct comment on Mr. Williams' right to remain silent, is not re-alleged within this cross-appeal as it was previously raised and ruled upon in Mr. Williams' petition for writ of habeas.

Williams' claims of innocence and presentation of an incompatible avenue of defense. Second, defense counsel's failure to adequately investigate and present the defense of voluntary intoxication. And third, defense counsel's failure to object to the prosecution's misleading definitions and examples of premeditation. Each of these allegations easily meets the first prong of the Strickland standard.

1. Defense counsel's rejection before the jury of Mr. Williams' claims of innocence and presentation of an incompatible avenue of defense.

Claim I, of Mr. Williams' amended motion for post conviction relief plainly alleges that defense counsel was ineffective for rejecting, in front of the jury, Mr. Williams' claim of innocence and presenting an incompatible defense in which counsel basically conceded Mr. Williams' guilt. Mr. Williams' motion alleged that during his jury trial, Mr. Williams testified and maintained his innocence. (Vol. 7, R 1263-1265). He testified that on the night of Mary Robinson's death that he had left a gun on the dresser in the bedroom at home when he went out and that when he returned, Mary Robinson staggered toward him, already shot. He called the police and an ambulance. Williams v. State, 437 So.2d 133, 134 (Fla. 1983). However, in spite of Mr. Williams' testimony before the jury, his defense counsel chose a different and incompatible avenue of defense and actually suggested to the jury that he did not believe his own client. During closing

argument in the guilt phase of the trial, the entire thrust of defense counsel's argument was that Mr. Williams did shoot Mary Robinson but that there was no premeditation and a lesser degree of homicide was justified. Very little of the closing argument concerned argument regarding Mr. Williams' innocence. (Vol.7, R1263-1264). Thus, counsel undermined his own client's testimony and defense, and basically conceded that Mr. Williams was the perpetrator. Defense counsel argued:

I submit what happened in that scuffle, Freddie Lee Williams was there and he was trying to help her. He shot the gun. Maybe it was to scare her. Maybe it was to hurt her. She was wounded very badly. He was there trying to help her. (Vol. 7, 1264).

Later, in a reference that is apparently a concession by defense counsel that he did not believe his own client, counsel argued to the jury:

I am not attempting to insult your intelligence, but one thing I would submit to you that has not been proven is the crime of guilty of first degree premeditated murder. There has not been shown any premeditated design to kill. (Vol. 7, R 1264).

At another point during closing argument, defense counsel most clearly intimated to the jury that he disbelieved his own client:

But, if you should choose to believe that Freddie Lee Williams was not telling the truth, *I ask you not to be vindictive, not to be upset and not to be mad at Freddie Lee Williams for lying to you, but consider instead what motive he would have for lying.*

Obviously, he knows he is in a great deal of trouble, but *because he doesn't tell you the truth, don't vest [sic] your displeasure on him* by finding him guilty of something the State has not proven. The State has to prove him guilty. He does not have to prove anything. *No matter how many lies he may have told you, he doesn't have to prove anything.* The State does. [emphasis added].(Vol. 7, R 1264).

The allegation that defense counsel was ineffective for rejecting, in front of the jury, Mr. Williams' claims of innocence and presenting an incompatible defense which conceded Mr. Williams' guilt, clearly meets the first prong of the Strickland Standard. Claim I of the amended 3.850 motion specifically identifies several particular acts or omissions by counsel (within this broad allegation) that are outside the broad range of reasonably competent performance under prevailing professional standard. First, defense counsel's statements to the jury suggesting that he did not believe his own client cannot be said to be within the realm of competent performance. As an advocate, a lawyer is expected to zealously assert the client's position under the rules of the adversary process. Ch. 4, Rules of Professional Conduct [Preamble'; A Lawyer's Responsibilities]. Such zealous representation surely must not include statements such as *"I ask you not to be vindictive, not to be upset and not to be mad at Freddie Lee Williams for lying to you, but consider instead what motive he would have for lying"* or *"No matter how many lies he may have told you, he doesn't have to prove*

anything. The State does." Such statements can only convey a lack of belief in the defendant's testimony. Representation of a criminal defendant entails basic duties. Counsel's function is to assist the defendant and thus counsel owes the client a duty of loyalty. Strickland v. Washington, 466 U.S. 668, 688 (1984). Moreover, it is not a lawyer's task to determine guilt or innocence, but only to present evidence so that others - either court or jury - can do so. A lawyer therefore should not make a determination regarding what is true and what is not unless there is compelling support for his conclusion. Sanborn v. State, 474 So.2d 309, 313 (Fla. 3d DCA 1985).

Second, defense counsel's concessions of the defendant's guilt during closing argument also fall outside the range of competent performance. Among other references to Mr. Williams as the perpetrator, defense counsel argued:

I submit what happened in that scuffle, Freddie Lee Williams was there and he was trying to help her. He shot the gun. Maybe it was to scare her. Maybe it was to hurt her. She was wounded very badly. He was there trying to help her. (Vol. 7, 1264).

Another time counsel stated:

Now, we have a reasonable theory should you decide Freddie Lee Williams was the one that pulled the trigger. That is the two of them got intoxicated and had gotten into an argument over one thing or another; that Freddie Lee Williams had a fit of rage. He got the gun and pointed the pistol in her direction and pulled the trigger. (Vol. 7, 1257).

These concessions nullified Mr. Williams' fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. In Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995), Harvey alleged that his defense counsel was ineffective for conceding Harvey's guilt in opening statements of the trial. This Honorable Court held that because the record was unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, an evidentiary hearing was required. Id. In the instant case, it is apparent from Mr. Williams' claims of innocence before the jury that he did not expect his defense counsel to concede that he was the perpetrator. Moreover, because this concession was incompatible with the defense of Mr. Williams' innocence, it cannot be deemed to be a sound strategic decision on the part of defense counsel.

Third, counsel failed to investigate Mr. Williams' claims of innocence. Mr. Williams' amended 3.850 motion specifically states that counsel did not adequately investigate the area of gun powder residue evidence which may have shown that Mr. Williams did not shoot the murder weapon; counsel failed to investigate the validity of the state's blood splatter expert testimony; counsel failed to investigate the possibility that the "Mary" referred to by several witnesses referred to another lady named "Mary" who lived in the same complex as Mr. Williams and

did not refer to Mary Robinson, the victim; and counsel failed to investigate the validity of Gloria Davis' testimony (which was the state's most critical evidence pointing to Mr. Williams as the perpetrator) as well as other leads concerning the possibility that Mr. Williams was not the perpetrator. (Vol.7, R 1258-1263). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 690-691 (1984). More importantly, the fact that counsel did little or no pretrial investigation regarding the establishment of Mr. Williams' innocence indicates that counsel's decision to reject Mr. Williams claims of innocence in front of the jury must not have been an informed, strategic decision. Where there is little or no investigation, the court may conclude that the omission [or act] was a substantial oversight, rather than a legitimate trial strategy. LeCroy v. Dugger, 727 So.2d 236,243 (Fla.1998), *citing* Rose v. State, 675 So.2d 567, 572-573 (Fla. 1996)(finding counsel's penalty phase performance deficient because it was "neither informed nor strategic," involved "a strategy which even he believed to be ill-conceived," and entailed "no investigation of options or meaningful choice.")

2. Defense counsel's failure to adequately investigate and present the defense of voluntary intoxication.

Claim I of Mr. Williams' amended 3.850 also alleges that

defense counsel was ineffective for failing to adequately investigate and present the defense of voluntary intoxication. The motion specifically alleges that while arguing during closing that there was no premeditation, defense counsel argued to the jury that alcohol played a large part in the dispute between Mr. Williams and Mary Robinson. (Vol.7, R 1254-1258). Defense counsel argued in his initial closing argument to the jury:

I submit to you that if tempers flared, perhaps the alcohol played a good part in that. But that doesn't create or show a premeditated design to kill. (Vol.7, R 1256-1257).

Furthermore, defense counsel referred to the fact that Mr. Williams had been drinking and was intoxicated or drunk several times in his closing arguments. (Vol.7, R 1257-1258). As a theory of Mr. Williams' defense, defense counsel in closing argument basically argued to the jury that Mr. Williams' intoxication may have negated his ability to form a premeditated design to kill the decedent. Defense counsel argued:

Now, we have a reasonable theory should you decide Freddie Lee Williams was the one that pulled the trigger. That is the two of them got intoxicated and had gotten into an argument over one thing or another; that Freddie Lee Williams had a fit of rage. He got the gun and pointed the pistol in her direction and pulled the trigger. (Vol. 7. 1264).

Thus, counsel effectively raised the issue of intoxication as a reason for Mr. Williams not being able to form the premeditated intent in this case. (Vol.7, R 1257). Unfortunately, however,

defense counsel failed to do the proper pretrial investigation regarding Mr. Williams' drinking habits and history which was necessary to properly mount this defense. Defense counsel never requested any mental health evaluations of Mr. Williams, including psychological or psychiatric testing or consultation, concerning the Defendant's drinking habits. Furthermore, no testimony was developed through lay or expert witnesses concerning the effects of alcohol upon Mr. Williams. (Vol.7, R 1255). Moreover, despite defense counsel's awareness of substantial evidence in the record that Mr. Williams was drunk at or around the time of the homicide, defense counsel failed to request a jury instruction on voluntary intoxication. (Vol.7, R1254-1255).

Counsel's failure to properly investigate and raise the defense of voluntary intoxication - including failing to request a jury instruction on voluntary intoxication clearly falls outside the broad range of competent performance. It is well settled that voluntary intoxication is a defense to specific intent crimes such as first degree murder. Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985); Urquhart v. State, 676 So.2d 64, 66 (Fla. 1st DCA 1996). Moreover, a defendant has a right to a jury instruction on the law applicable to his defense where any trial evidence supports that theory. Gardner, 480 So.2d at 92-93. Even evidence elicited during the cross-examination of

prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Id.

Here, Mr. Williams' amended 3.850 sufficiently states a claim for post-conviction relief in this area where it specifically alleged that defense counsel was aware of substantial evidence in the record that Mr. Williams was drinking at the time of the incident; that defense counsel even argued to the jury that he was drunk; that defense counsel had presented a defense of lack of premeditation which included argument that Mr. Williams was intoxicated; that defense counsel failed to properly investigate the defense of voluntary intoxication by requesting mental health evaluations of Mr. Williams or by consulting lay or expert witnesses regarding Mr. Williams' drinking habits or the effect of alcohol on him; and, finally, that defense counsel failed to request a jury instruction on voluntary intoxication. (Counsel also attached as an appendix, a report by psychiatrist, Dr. Harry Krop, detailing Mr. Williams' history as an abusive drinker.) In light of these thorough and specific allegations, a prima facie claim for ineffective assistance of counsel has been made with regard to this issue. Compare Jackson v. Dugger, 633 So.2d 1051, 1054 (Fla. 1994)(counsel not ineffective for failing to raise voluntary intoxication where there was no evidence that defendant was intoxicated prior to commission of murder)[and] Koon v. Dugger, 619 So.2d 246, 248-249 (Fla. 1993)(where counsel

reviewed results of EEG, CT scan, and psychiatric reports and discussed with the defendant the possibility of raising a voluntary intoxication defense, counsel was not ineffective for failing to raise voluntary intoxication at trial).

3. Defense counsel's failure to object to the prosecution's misleading definitions and examples of premeditation.

Claim I of Mr. Williams' amended motion for post conviction relief includes an allegation that during the trial, defense counsel failed to object to the prosecutor's misleading the jury regarding the definition of premeditation. (Vol.7, R 1262-1263). During voir dire and during his closing argument, the prosecutor presented definitions and examples of premeditation to the jury which repeatedly did not properly or adequately include the essential element of reflection. The prosecutor defined premeditation as merely consciously doing something, leaving out the essential element of reflection. (Vol.7, R 1262-1263). Furthermore, during closing argument, the prosecutor stated:

Anytime anybody takes a gun, a .38 caliber gun and shoots another person in the head, that is premeditated. That is intent to kill. (Vol.7, R 1262).

Later the prosecutor again misinformed and misled the jury:

Mr. Jones [defense counsel] can argue to you until he is blue in the face, but shooting somebody in the head is about as solid and convincing evidence of intent to kill as there can be. (Vol.7, R 1262).

Defense counsel failed to object or ask for a curative instruction regarding the improper definitions and examples of premeditation.

This allegation meets the first prong of the Strickland standard because it was clearly error for defense counsel to fail to object to the prosecutor's voir dire and closing arguments regarding these definitions and examples of premeditation because it allowed an improper definition of premeditation to form in the juror's minds. In Waters v. State, the Fifth District Court of Appeal held that allowing a prosecutor to define premeditation as "killing after consciously deciding to do so" and "operation of the mind" a definition which failed to include reflection, the integral second requirement for premeditation, was error requiring reversal for new trial. Waters v. State, 486 so.2d 614 (Fla. 5th DCA 1986).

B. The Second Prong of the Strickland Standard: Prejudice.

The Second prong of the Strickland standard used to determine whether a defendant has been denied effective assistance of counsel is that the defendant must prove prejudice. Strickland v. Washington, 466 U.S. 688, 694 (1984). In other words, a defendant must show that a reasonable probability exists that but for counsel's error the result in the case would have been different. Id. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial.

Id. at 694. Cross-Appellant respectfully asserts that Claim I alleging ineffective assistance of defense counsel in the guilt phase of the trial sufficiently meets this second prong.

This Honorable Court has repeatedly recognized that the cumulative effect of claims may undermine the confidence in the outcome of the trial and may thus satisfy the prejudice prong of Strickland. State v. Gunsby, 670 So.2d 920, 924 (Fla. 1996); Harvey v. Dugger, 656 So.2d 1253, 1257 (Fla. 1995); Cherry v. State, 659 So.2d 1069, 1074 (Fla. 1995). In the instant case, the cumulative weight of defense counsel's alleged errors indicate that Mr. Williams was denied a fair trial by defense counsel's ineffective assistance. There is a significant probability that but for defense counsel's errors in the instant case, the outcome of the guilt phase of the trial would have been different.

A review of all of the allegations raised in Claim I reveals that the errors alleged therein circumvented the entire trial. Mr. Williams was denied having even a single defense presented effectively to the jury during his capital trial. The defense that Mr. Williams sought and expected to have put forth on his behalf, his innocence, was completely undermined by his defense counsel. Defense counsel failed to investigate Mr. Williams' claims, indicated to the jury that Mr. Williams may have been lying to them, and conceded that Mr. Williams was the perpetrator

of the offense. Moreover, defense counsel asserted an alternative, but incompatible defense, that Mr. Williams shot the victim but that there was no premeditation in the shooting. In presenting this defense, counsel acknowledged that there was evidence that Mr. Williams may have been "drunk" at the time of the incident and, thus, there was no premeditation. Thus, counsel alluded to a voluntary intoxication defense. However, with this defense as well, counsel only half-heartedly presented it to the jury. Counsel failed to investigate the defense, failed to properly present evidence through expert and lay witnesses to develop the defense and failed to have the jury instructed with regard to the defense of voluntary intoxication.

It is interesting to note, at this point, that the court's order on Mr. Williams' motions for post conviction relief reveals that had defense counsel properly investigated the defense of voluntary intoxication, a great deal of relevant *and compelling* evidence on the issue of voluntary intoxication would have been available to present to the jury on behalf of Mr. Williams. The lower court held an evidentiary hearing on similar claims raised in the same 3.850 motion regarding the penalty phase of the trial - that counsel had failed to request that a mental health expert be appointed to assist in uncovering statutory and non-statutory mitigators and that counsel failed to present evidence regarding Mr. Williams' alcoholism and/or abuse of alcohol. In the lower

court's ruling on Mr. Williams amended motion for post conviction relief the court made the following findings of fact:

1. The court found that evidence of Mr. Williams' medical records, prior substance abuse, and evidence regarding head trauma was available to defense counsel and would have been appropriate to present to the jury (as mitigation) in this case. The court further found that failure of defense counsel to adequately investigate this evidence was an omission that fell outside the broad range of reasonably competent performance under prevailing professional standards of that time. ". . . , [C]ounsel's acts cannot be said to be a strategic decision where, as here, the lack of investigation precludes an informed choice." (Vol.14, 2529-2530). 2. With regard to brain damage suffered by Mr. Williams, the court found that the following evidence presented at the evidentiary hearing would have been available to defense counsel had they properly investigated:

Several lay witnesses testified that the defendant had suffered serious blows to the head before the murder was committed. Witnesses Carol Henson, Mary Ann Harrell, Willie "Wink" Brown, and Mary Lee Williams all testified that in the early 1960's the Defendant was beaten about the head with nightsticks during a confrontation with police until he bled from his mouth and head and his teeth were knocked out. Witnesses Henson and Willie "Wink" Brown testified that during a fistfight in the early to mid 1970's the Defendant fell and struck his head on the cement with such force that he was knocked unconscious. In addition, witness Alvin Cobb testified that he once saw the Defendant

struck in the head with a two-by-four by a hidden assailant. Witness Albert Lewis stated that around the time of the fistfight, he took the Defendant, bleeding from the back of his head to the hospital.

Most of these witnesses testified that the Defendant's behavior dramatically changed after the blows to the head. Expert testimony regarding the significance of these alleged traumas was provided by Dr. Robert Sidney Thornton, M.D., a clinical neurologist, and Dr. Robert M. Berland, Ph.D., a forensic psychologist. Dr. Thornton interpreted magnetic resonance imaging ("MRI") scans conducted on the Defendant. He concluded that a distinct abnormality was present in the frontal orbital cortex of the Defendant's brain in that cerebrospinal fluid occupied a space normally filled by brain tissue. He testified that the absence of brain tissue in that region was most consistent with brain injury resulting from trauma such as that inflicted on the Defendant in the incidents described by the lay witnesses. Such trauma, he stated could result from a shearing of the brain against irregular bones of the skull caused by a blow to the back of the head. Dr. Thornton also testified that computerized tomography ("CT") scans were available around 1980 that were sensitive enough to reveal this abnormality and that had such a scan been conducted on the Defendant, his brain abnormality would likely have been discovered if it existed at that time.

Dr. Berland testified that in January of 1998 he performed a two-part examination of the Defendant consisting of a diagnostic evaluation and a clinical legal evaluation. Dr. Berland interviewed Mr. Williams, interviewed lay witnesses, reviewed Department of Corrections medical records and other independently created documents as part of his examination. He also administered the Minnesota Multiphasic Personality Inventory ("MMPI") and Wechsler Adult Intelligence

Scale ("WAIS") tests to Defendant.

Dr. Berland first concluded from the tests that there was no indication that the Defendant was malingering. His examination showed that the Defendant suffered auditory, visual, tactile, and olfactory hallucinations and that the Defendant also exhibited symptoms of delusional paranoid beliefs, manic or hypomanic disturbances, and biologically determined depressions, all of which was consistent with the result of the MMPI test. Dr. Berland stated that the Defendant, at various times of incarceration predating this crime, had been prescribed antipsychotic drugs by the DOC, indicating to him that the Defendant had consistently manifested his symptoms of mental illness several years before this crime. Dr. Berland also testified that the symptoms of mental illness demonstrated by the Defendant are typically a byproduct of brain trauma resulting from head injury. (Vol.14, 2530-2532).

3. With regard to evidence of Intoxication, the court found that the following evidence presented at the evidentiary hearing would have been available to defense counsel had they properly investigated:

Witnesses Willie "Wink" Brown and Willie "Blue" Brown essentially testified that they were drinking buddies with Defendant and that Defendant consistently drank large quantities of alcohol and was frequently intoxicated. This was corroborated by witness Carol Henson who testified that Defendant normally drank alcohol throughout the day. *More importantly, witnesses Willie "Blue" Brown and Rosa Lee Jones testified that Defendant had been drinking the day he murdered the victim. From this evidence, a reasonable juror might have found that Defendant was likely intoxicated at the time of the murder and could have weighed Defendant's*

intoxicated state as a mitigating factor before imposing the death penalty. Whether the jury would or would not find voluntary intoxication a mitigating factor is not the issue before the Court.

Dr. Berland offered testimony that use of alcohol by a person often exacerbates any mental illness that person might be suffering. Thus, Defendant might also have used his intoxication as a mitigating factor by attempting to show the jury that the murder was committed during an episode of mental illness that was substantially intensified by his use of alcohol.[emphasis added]. (Vol.7, R 2532-2533).

The above-stated evidence, found by the lower court to be relevant as mitigating evidence in the penalty phase proceedings would have been equally relevant to Mr. Williams' voluntary intoxication defense. Additionally, it was the same lack of investigation by the same defense attorneys that kept this evidence from the guilt phase of the trial. Had the defense been able to present this evidence to the jury to show that Mr. Williams' had been intoxicated at the time of the Mary Robinson's death, which intensified the effects of his brain damage and mental illness and diminished his capacity to form the requisite criminal intent for first degree murder, it is quite probable that the outcome of Mr. Williams' trial would have been much different.

Finally, defense counsel's failure to object to the prosecution's misleading definitions and examples of

premeditation merely compounded the errors in the instant case causing the jury to have an inaccurate view of premeditation and preventing them from rendering a lesser verdict of second degree murder if they were so inclined.

According to the cumulative effect of all of these allegations contained in Claim I (especially when considered with the ineffective assistance of counsel found to have been rendered during the penalty phase proceedings in this case), Mr. Williams' amended motion for post conviction relief shows sufficient prejudice to have required the lower court to have granted an evidentiary hearing on Claim I. Consequently, Cross-Appellant respectfully requests this Honorable Court to reverse the lower court's denial of Claim I as being facially insufficient and either remand the Claim for an evidentiary hearing or grant Mr. Williams a new trial.

CONCLUSION

WHEREFORE, based upon the above-stated reasons, Cross-Appellant respectfully requests this Honorable Court to reverse the lower court's denial of Claim I as being facially insufficient and either remand the Claim for an evidentiary hearing or grant Mr. Williams a new trial.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is twelve-point (12) Courier New, a font that is not proportionally spaced.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert Butterworth, Attorney General, by mail, to Assistant Attorney General, Scott A. Browne, 2002 N. Lois Ave., Suite 700, Westwood Center, Tampa, Florida 33607-2366 and to Freddie Lee Williams.

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