

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC01-1275

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PAUL ANTHONY BROWN,

Appellant,

VS.

STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT  
IN AND FOR VOLUSIA COUNTY, FLORIDA

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INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of an Order denying Paul Anthony Brown's Second Amended Motion for Postconviction Relief after an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

R: Record on Direct Appeal.

I R: Index to Record on Appeal

R-PC: Record on Appeal from denial of Second Amended Motion For Postconviction Relief.

EX #3, SC01-1275: Exhibit from postconviction hearing which is identified as Copy Taped Interview of Scott McGuire (22 pages Typed).

EX #4, SC01-1275: Exhibit from postconviction hearing which is identified as Copy of certified copy of Judgment and Sentence 12-10-86 - Scott Keenum.

EX #5, SC01-1275: Exhibit from postconviction hearing which is identified as Copy of three page inmate population information - Scott McGuire 10-22-00.

CR #: court reporter page number for deposition of Scott McGuire, October 9, 1996, 49 pages, case no. 92-34756-CFAES, contained in R-PC, V V.

M-PC: Second Amended Motion For Postconviction Relief



### REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument on these issues.

### STATEMENT OF THE CASE AND OF THE FACTS

An Indictment for First Degree Murder was returned against Appellant and Scott Jason McGuire on April 6, 1993, by the Fall term Grand Jury for Volusia County, Florida (I R, 4). On August 5, 1996, Peyton Quarles was appointed to represent Appellant(I R, 9). Trial counsel filed a Motion to Suppress statements of Appellant on October 4, 1996 (I R, 40-41). An Information charging Appellant with Armed Robbery with a Deadly Weapon and Armed Burglary of a Dwelling was filed by the state on October 8, 1996 for other crimes arising out of the murder of Roger Hensley(I R, 49). A hearing on the Motion to Suppress Appellant's statements was held on October 10, 1996 (R, V. II, 31-97). The court denied Appellant's Motion to Suppress finding that the confession was voluntary(R, V. II, 97). Guilt phase of the jury trial occurred on October 15 through October 18, 1996 (R, 465-1317). The jury returned a verdict of guilty of First Degree Premeditated Murder and First Degree Felony Murder against Appellant on October 18, 1996 (I R, 77). The penalty phase of the jury trial occurred on October 23, 1996 (R, 1318-1457). Sentencing hearing occurred on November 7, 1996 (R, 1508-1520). The sentencing

recommendation was by a vote of 12-0 to recommend the death penalty (I R, 83). Appellant was sentenced to death by the Honorable R. Michael Hutcheson on November 7, 1996 (I R, 113-116). Appellant filed a Notice of Appeal on December 9, 1996 (I R, 132).

Appellant's conviction and sentence of death was affirmed on appeal by the Florida Supreme Court. See Brown v. State, 721 So.2d 274 (Fla. 1998). Petition for Writ of Certiorari to the United States Supreme Court was denied. See Brown v. Florida, 119 S.Ct. 1582 (1999).

Appellant filed a Motion for Postconviction Relief on November 3, 2000 (R-PC, V. IV, 457-481). A Motion for Leave to Amend was filed November 7, 2000 (R-PC, V. IV, 482-489). An Order denying Appellant's Motion for Leave to Amend was entered November 29, 2000 (R-PC, V. IV, 490). Appellant's Motion to Continue the evidentiary hearing and Order granting same was filed February 8, 2001 (R-PC, V. IV, 491-493). An Amended Motion for Postconviction Relief was filed February 12, 2001 (R-PC, V. IV, 494-581). Appellant's Second Amended Motion for Postconviction Relief was filed April 26, 2001 (R-PC, V. V, 582-702). The evidentiary hearing was held on April 26 and 27, 2001 (R-PC, V. I-III, 1-420). The court orally denied relief on April 30, 2001 (R-PC, V. III, 421-455). The court entered a written Order denying Appellant's Second

Amended Motion for Postconviction Relief on May 2, 2001 (R-PC, V. V, 726) Appellant timely filed his Notice of Appeal of the order denying relief of the Second Amended Motion for Postconviction Relief on May 29, 2001 (R-PC, V. V, 728).

Edwin Lester Davis, the trial prosecutor in the case was called as Appellant's first witness (R-PC, V. I, 28). He assumes he provided, to trial counsel, a copy of the taped statement between Scott McGuire and FDLE Agent Miller which was conducted on February 15, 1993, at the Volusia County jail (Id. 30). He listed the two (2) tapes of the McGuire/Miller interview on a supplemental discovery (Id. 32). He was not surprised at how fast the trial was progressing (Id. 35). This trial didn't stand out as being necessarily more difficult or easier than any other trial (Id. 35).

On cross examination Davis, said the strength of the case was that Appellant confessed to committing the crime and there was quite a bit of corroborating physical evidence (Id. 40-41). When Appellant was arrested he was in possession of the decedent's truck. Appellant gave a statement to the FBI indicating he had just killed this man explaining exactly how it happened (Id. 41). Appellant's confession was obtained prior to the co-defendant McGuire's arrest and statement (Id. 41). Appellant gave detailed facts exactly how the murder was accomplished (Id. 42-43). Appellant's statement at trial was

that he went to the victim's apartment and fell asleep and didn't know what happened until (the co-defendant) McGuire awakened him with the knife with blood all over him (Id. 43). Appellant testified that the statements that were attributed to him by the FBI were never made by him (Id. 43). Appellant indicated he stabbed the victim a number of times; he left with Scott McGuire; took the victim's truck; left an ID at a gas station on the way to Tennessee; all that information was corroborated by evidence introduced at trial (Id. 43). Appellant gave a confession to the police and then his story that he told the jury was totally unbelievable (Id. 44-45). He would not disagree with the record if it indicated that depositions were only taken a week to ten (10) days before trial (Id. 46). It is true that if Appellant was present and observed Scott McGuire stabbing the victim he would have knowledge of the specific facts of the case (Id. 48). In Appellant's confession he said he stabbed the victim but the other guy slit his throat (Id. 49). Davis said that when Defendant got to trial Appellant said he wasn't involved in the murder at all and it was all Scott McGuire's fault (Id. 49).

Just before Scott Jason McGuire was called to testify, the state brought up the issue of counsel being appointed for Scott McGuire prior to his testimony at the hearing (R-PC, V.

I, 50-55). State said that McGuire was entitled to be informed of his right not to testify and that it may incriminate him (Id. 51). Counsel for Appellant asked if the court was going to advise McGuire of the consequences if he didn't testify and the state said there weren't any (Id. 52). State said that if McGuire were to get on the stand and say something different than he testified to at trial under oath he could very well find himself facing the death penalty (Id. 52-53). The state said that it was not giving McGuire immunity (Id. 55). Counsel for Appellant said it would be asking the court to find McGuire in contempt if he refused to answer anything (Id. 65). The state said you can't do that (Id. 65).

The court announced "for the record, Mr. McGuire has taken the stand, and he's been referred to as the co-defendant in this case" (Id. 66). The state said that they wanted it understood that they had not subpoenaed McGuire and that they were not immunizing him in any way, that anything he says can be used against him (Id. 67). When asked to state his name the witness said that he'd been instructed to take the Fifth (Id. 67). When asked if his name was Scott Jason McGuire he said he'd like to take the Fifth Amendment (Id. 67). The witness was asked, "Mr. McGuire, did you enter a plea in case number 93-3720, State of Florida v. Scott Jason McGuire, on

August 6, 1993." The witness replied he believed he did (Id. 68). When asked if he had a felony conviction from the State of Ohio in 1989, McGuire plead the Fifth (Id. 71). When asked if it was true that he was convicted of Aggravated Battery (Burglary) in Cuyahoga County in 1986, the witness plead the Fifth (Id. 71). When asked if it was true that he escaped from Mansfield Correctional Institution on February 15, 1989, the witness plead the Fifth (Id. 71). The witness plead the Fifth when he was asked if on the date of the murder he was an escaped convict from the State of Ohio (Id. 71). When asked if he'd ever gone by the name of Scott Kenan (Keenum), he plead the Fifth (Id. 71). When asked if he'd ever used the name of Daniel Scott Davison in Daytona Beach the witness replied yes (Id. 71). He believed he used the name of Scott Steven Michaels in Daytona Beach also (Id. 72). The witness took the Fifth Amendment and refused to answer a question about the total number of felony convictions that he has (Id. 74). He admitted to living at 507 Earl Street in Daytona Beach (Id. 74). He also admitted to having a Florida identification card with that address on it (Id. 74-75). He believes he did give that ID card to Appellant (Id. 75). He recalled giving a tape recorded statement to FDLE Agent Miller on February 15, 1993, at the Volusia County jail (Id. 75). An audiotape was published before the court and the witness. He

said the second voice on the tape sounded like him (Id. 75-76).

McGuire said he believed he recognized his voice on the tape that was played in court (Id. 76). He identified the other voice as Detective Miller, Osterkamp or one of them (Id. 76). McGuire identified his voice on tape two also (Id. 81-82). The tapes were offered into evidence as defense exhibit one (1) and two (2) (Id. 82). McGuire denied stabbing Roger Hensley to death and framing Appellant (Id. 84). The state had no questions for McGuire (Id. 84).

Peyton Quarles was the next witness called on Appellant's behalf. He was trial counsel for Appellant in this case (R-PC, V.I, 88). Quarles recalled taking the deposition of Scott McGuire (Id. 92). He took the deposition of Scott McGuire shortly before trial; very near the trial date (Id. 92). Between August 6, 1996, when he was appointed and the trial date in early October 1996, to prepare for trial in the case, he took some depositions. He reviewed an autopsy report, reviewed police reports. He met with Appellant on numerous occasions (Id. 93). He did not recall reviewing the tapes of an interview between McGuire and Miller which occurred on February 15, 1993, at the Volusia County jail (Id. 93-94). He didn't know if the state provided him with the tapes of the McGuire interview (Id. 94). He identified Scott McGuire as

the co-defendant who testified at Appellant's trial (Id. 96). On the date of trial Quarles did not have any information that McGuire had been convicted of a felony Burglary in Ohio (Id. 97). At trial, he did not have any information that Scott McGuire was an escaped convict from the State of Ohio (Id. 97). He said this information would have perhaps minimally assisted him at trial (Id. 98). He thought that prior to trial he did review the plea proceedings before Judge Hutcheson in State v. Scott McGuire, case number 93-3720, which were held on August 6, 1993 (Id. 98). He did not know what the tapes were that were referenced on state discovery pleading (Id. 98-99). He thought he received a copy of defense exhibit for identification six (6) from the state which listed aliases for Scott McGuire (Id. 100). Quarles recalled a witness testifying at trial about finding a driver's license and phone card of victim near Earl Street and Oleander in Daytona Beach (Id. 104). He said it would perhaps have been relevant to cross examine McGuire about the fact that his ID card listed an address at 507 Earl Street and the fact that the witness found the victim's driver's license and phone card on the corner of Earl and Oleander (Id. 105). He admitted it might have been proper to cross examine McGuire about his statement that he discarded or lost his clothes he was wearing at the time Hensley was murdered (Id. 105). He



did not attached much significance to that inconsistency (McGuire's statements the man was half on bed, half on floor versus. the gentleman was on floor) but he might have cross examined on it (Id. 107). Perhaps it would have been something that would be relevant to cross examine McGuire about his prior inconsistent statement, "what we should do" versus "how would you like to do it" (Id. 110-111). The contradiction about selling the crack versus giving away the crack did seem like something that would be relevant (Id. 111-112). Quarles did not think the gun allegedly belonging to Appellant was introduced at trial (Id. 113). He did not remember making the statement in opening that McGuire and Brown don't go play golf together. They don't do things like that. They do things like consume a lot of alcohol. They do crack cocaine. They hang out on the Boardwalk area. It's not a good life and it's not something that any of us would do - that's the way it was (Id. 116). But then, Quarles said he made this statement to the jury because it was true and he was trying to be honest with the jury as far as getting them in a posture or mind set to know what they were dealing with and get it out in the open so that - it would benefit Mr. Brown (Id. 117). This was said to created credibility with the jury, in some fashion make them believe that Brown had not committed the murder (Id. 117). In regard to not objecting to

personal opinion of the prosecutor, he said he didn't think it was of any significance as far as the affect it would have on the jury in the verdict and that he wasn't sure that the law in Florida was very well developed as far as attorneys giving their opinion in opening and closing statements (Id. 119). He did not know if it was alright to give personal opinions at the time of Appellant's trial (Id. 120). It did not matter for him to argue that blood found on Appellant's shoes matched Hensley's when the lab witness testified that the blood found on Appellant's shoes was only consistent with Hensley's (Id. 131). When asked if he thought that it mattered that there was trial testimony that the unmatched shoe prints at the scene far outnumbered those positively identified with Appellant witness replied that, "you never know with juries." There could have been somebody on there who thought that was very significant. It didn't occur to me at the time, or it still seems rather insignificant (Id. 131-132). When asked if the defense in the case was McGuire committed the murder and that there were far more unidentified footprints at the scene wouldn't that have been helpful Appellant's case to argue that to the jury, Quarles replied it might have been (Id. 132-133). He did not recall arguing to the jury that there's blood all over the place so sure he's going to get some blood on his shoes. But he believed it was in Appellant's best interest to

make that argument to the jury (Id. 133). His statement to the jury that these aren't people you're going to have over to your house on Sunday afternoon, these are not wonderful people by any means was an attempt, unsuccessfully to get the jury to believe that Appellant had his problems and he's not a stellar citizen and that trial counsel was being up front with the jury about what kind of person Appellant is so certainly, he's not going to mislead them about Appellant not being a murderer (Id. 133-134). He did not know if Appellant agreed to him arguing to the jury that these aren't people you're going to have over to your house on Sunday afternoon for a Labor Day picnic, they're not wonderful people by any means (Id. 134-135). He did not remember if he asked a question at the trial that led to the testimony of the standoff (Id. 146-148). When asked why he asked Agent Childs whether Appellant was given alcohol by the agency Quarles replied that it seemed to him that Appellant was unsuccessful in a pretrial Motion to Suppress this statement and perhaps grasping at straws, he was trying to indicate that Appellant was under the influence of alcohol or was bribed in some matter in order to obtain the statement (Id. 149). When asked whether or not it was true that trial testimony indicated that the statement of Appellant was given the day after he was taken into custody by the FBI, so even if he was given a shot of whiskey, that would not have

had any effect on Appellant's mental faculties twenty-four (24) hours later, he replied "it seemed that it would be a stretch" (Id. 149-150). Since he moved for a mistrial that would indicate that he thought the standoff testimony was damaging (R-PC, V. II, 154). If he thought any hearsay statements of the victim were damaging to the case he would have objected (Id. 155). He did not agree that the victim's statement that Appellant could sleep with him was not against the interest of Appellant if it was in the context or immediately following the statements by Hensley about being homosexual and what the sleeping arrangements were (Id. 155-156). When asked if he thought that Hensley's statement in reference to him being robbed and putting money down and then Appellant or McGuire robbing him later, whether or not that was detrimental to allow McGuire to make that statement, Quarles replied not necessarily (Id. 156-157). He did not recall whether or not the state, from beginning to end, with all its witnesses used leading questions on direct examination (Id. 161). Quarles did not recall saying to the judge "I've been rather lenient so far. We object to the continuing leading nature of Mr. Davis' questions" and the court sustaining the objection (Id. 161-162). He admitted that two questions the state asked Gogarty did sound like leading questions. He did not object because he did not think it was

of any consequence. He stated that they'd just rephrase the question and get the same information before the jury. It would look like he was hiding something (Id. 164).

Quarles did not object to leading questions with witness Van Hof because he did not think it was damaging to Appellant (Id. 170). He admitted that the questions sounded like the state was suggesting the answers to the witnesses on direct examination (Id. 170). When asked why he would allow that to continue throughout the trial he stated that if he felt that they could get it in by doing it in a more detailed, drawn out way, he saw no reason in not letting them do it by asking leading questions (Id. 170). When asked why in a case where he would say the evidence was overwhelming against Appellant, why didn't he subject the state's case to adversarial testing and let them do it the "hard" way rather than letting them do it the easy way, Quarles said that the more times in which you object, and then the evidence that the prosecutor is trying get before the jury eventually gets before the jury - a pattern along those lines is detrimental to any defendant in a criminal case (Id. 170). He admitted he does not always allow the state to use leading questions from the beginning to the end of a trial (Id. 171). Asked why he allowed the state to use leading questions so much in this case he replied because he determined, in this case and those questions, it would be

detrimental to Mr. Brown to object, have the jury sit there and say, well there's some more damaging or incriminating evidence that Quarles does not want us to hear about Mr. Brown, sit back down, have a ruling by the court and then have the court allow the procedure so that the evidence then gets in front of the jury (Id. 171). Asked if he thought if he had objected two, three or four times that this would have gotten the state's attention in the case he replied yes (Id. 171). He said that every question that he thought was a leading one which he did not object to, he thought that the state would get the evidence in (Id. 173). When asked what was so damaging about the question "I assume all three of you got out of the pickup truck and walked into the room there that this gentleman had there" Quarles replied that he couldn't see anything that was more damaging. He stated maybe just at the time, it just felt like the thing to do. I just felt like getting up and objecting at that time. I think it's an innocuous question and I see no damage that would have been done if I had not objected (Id. 174). He did not object to the Schlaupitz statement that the victim was in slightly worse condition than he had ever seen him because he didn't know what the basis of the objection would be (Id. 179-180). Then, Quarles agreed that the statement was prejudicial but he saw no point in analyzing it as he sat in court. To object would

have drawn the jury's attention to the prejudicial nature of the testimony (Id. 179-180). He did not remember arguing to the jury in closing of the penalty phase that they could consider that Appellant didn't grow up in Ozzie and Harriet's house; it's clear that he didn't have a good upbringing and it's clear that he was influenced by others and that he "turned bad" (Id. 181). He said he made that statement because he thought it was a popular method or tactic, in penalty phase proceedings, to show how miserable the person has become due to other circumstances, such as his mother being in jail or prison for murder so that the jury will think that it wasn't his fault (Id. 182). He agreed that he saw a difference between saying that societal influence has deprived a person compared to a person "turned bad." He stated he like that language a little bit better than the term bad (Id. 182). He did not think that Appellant consented to the statement that he had "turned bad" (Id. 182). He didn't object to the state asking McGuire whether he was telling the jury the truth because he just didn't think it was that important. He admitted that for a witness to tell the jury that they were telling the truth did invade the province of the jury in a theoretical sense (Id. 184). He didn't think it was improper for McGuire to tell the jury he was telling them the truth (Id. 185-186). Quarles said he felt that he provided

competent representation to Appellant at trial (Id. 186).

On cross examination Quarles stated that he has been a practicing criminal defense attorney for twenty-six years (Id. 189). From 1981-1983 he handled First Degree Murder capital cases and other cases with Howard Pearl at the public defender's office (Id. 189). Quarles evaluation of the case was the state had a co-defendant's testimony, they had a confession. As far as physical evidence they had Appellant's footprints at the scene of the homicide with the distinctive tennis shoe pattern and Appellant was wearing those shoes when arrested. He thought it was fairly straight forward (Id. 194-195). The victim's truck was also recovered in Appellant's possession. The truck had been stolen from the scene of the crime (Id. 195).

There was a motion and a hearing on his attempt to suppress the confessions of Appellant (Id. 195). He had some success in limiting testimony that Appellant had been involved in bank robbery attempts in Tennessee (Id. 195-196). He talked to the witnesses he thought were important, Scott McGuire, medical examiner and the investigating officers (Id. 196). In reviewing the deposition of Scott McGuire it was clear that he had received Scott McGuire's taped statement to Miller (Id. 198). In the deposition he asked McGuire about talking to Agent Miller on 2/15/93 (Id. 198). McGuire made it



clear in deposition that Appellant was dead set on killing the man to make sure that he couldn't identify him for stealing the truck (Id. 198). He wasn't sure but he believed the strongest evidence against Appellant was either his statement or McGuire's testimony (Id. 200-201). Appellant tried to lay a major portion of the culpability on McGuire by saying McGuire slit his throat (Id. 201-202). He believes that Appellant testified to something substantially different at trial (Id. 202). He believed at trial Appellant testified he got to Hensley's condo and drank some beer and smoked some marijuana. Then Appellant went to sleep on the couch in the livingroom area. Then he was awakened by McGuire who had killed Hensley (Id. 202). In regards to the confession, at trial Appellant said he didn't say it or he didn't remember saying it (Id. 202-203). In retrospect he believes that the trial testimony of Appellant is what caused the jury to recommend the death penalty (Id. 203). In trying a case like this where the evidence doesn't look good for the client and counsel is looking toward the penalty phase there is a school of thought that says you don't want to alienate the jury, that you want to maintain credibility with them (Id. 204-205). You try to suppress the confession (Id. 206). He thinks it would have undermined his credibility with the jury if he had objected to the prosecutor's use of the words "I think" after

he had done so a number of times in his opening and closing (Id. 208). He didn't think that Appellant suffered any detriment because of the prosecutor saying "I think" (Id. 208). His philosophy regarding objections during closing argument is that unless it reaches a level where he believes that it is certainly clearly detrimental to his client's case, even though it may be somewhat incorrect or improper, he doesn't object (Id. 209). He was not asleep when closing arguments were made (Id. 209). He is aware of the negotiated plea that McGuire had made with the state because he had been provided the transcript (Id. 210). Even if the jury had not believe McGuire in his entirety, he believes the jury was still going to convict Appellant of First Degree Murder. This was a penalty phase oriented trial because of the evidence against Appellant (Id. 213). The characterization that Appellant wasn't the nicest person in the world was made to be honest an up front with the jury so that they would give him a break in the penalty phase. He knew Appellant had made the decision to testify and the jury would find out about his prior felony convictions (Id. 214-215). He normally doesn't discuss every tactical decision he makes at trial with the client (Id. 218-219).

On redirect examination Quarles remembered receiving the transcript of the interview of McGuire and Agent Miller on

2/15/93 at the Volusia County branch jail (Id. 222-223). He was aware that the taped statement of McGuire did not occur until two and a half to three hours had passed (Id. 223). At trial he was aware of the McGuire statement that Appellant never did anything with the gun except keep it hid (Id. 224). At the time of trial he was aware that McGuire had made a prior statement that Hensley said he was bi-sexual and not homosexual (Id. 225). To impeach the credibility of McGuire at trial he thinks he tried to emphasize the fact that McGuire got this wonderful deal for testifying against Brown and that it was in his best interest to lie about what happened because he was receiving a benefit (Id. 236-237). When asked if he argued to the jury that it didn't make sense that McGuire did nothing but drive a truck and got a forty year sentence, Quarles said "you know, it's sounds like it would be a good argument, because I can see where I could go with it but I don't recall" (Id. 237-238). He would argue something like this guy claims all he did was be there when this happened an yet he went ahead an took a plea to a Second Degree Murder for forty years. The only way that he would make a deal like that is he must have really done the murder ladies an gentlemen. He did not recall if he made this argument at trial (Id. 238). He agreed that approximately four years had elapsed between the time of the crime and the trial (Id. 246-247).

Paul Anthony Brown testified that he did not consent to trial counsel's statement in opening that Appellant and McGuire didn't play golf; they did things like consume a lot of alcohol and crack cocaine; they hung out on the Boardwalk area, it wasn't a good life but that's the way it was (Id. 256). Appellant never hung out on the Boardwalk and he came to Daytona Beach in October 1992 on vacation (Id. 256-257). He did not consent to trial counsel telling the jury in the penalty phase that they could consider that Appellant didn't grow up in Ozzie and Harriet's house; that it's clear that he did not have a good upbringing and it's clear that he was influenced by other and the he "turned bad" (Id. 258-259). He said that the person that came to the hearing to testify in the orange jumpsuit was Scott McGuire (Id. 259). In 1992, Appellant did not know that McGuire had a felony conviction in Ohio for Burglary (Id. 260). Appellant did not consent to trial counsel telling the jury that he and McGuire are convicted felons that these weren't people that you were going to have over to your house on Sunday afternoon for a Labor Day picnic; that these were not wonderful people by any means (Id. 264). He did not tell trial counsel to ask FBI Agent Childs whether or not on the day that Appellant was arrested he was given alcohol by the agency (Id. 264). Appellant did recall when trial counsel objected to the state using leading

questions with the witnesses (Id. 266). He said the state was basically telling McGuire what to say (Id. 266-267). When he heard what he believed was the state telling McGuire what to say, he started complaining to Quarles. The state was basically doing that with every witness that was testifying (Id. 266-267). Finally, he decided he would make one objection during the whole trial (Id. 267). He told Quarles that the state was telling the witnesses what to say even before they said it. It was obvious to Appellant that the witnesses didn't really know what they were talking about anyway (Id. 268). Quarles only objected to the state's use of leading questions on direct examination of one witness (Id. 268). He did not like the way that Quarles was representing him. He felt that he could have done a lot better job by himself. He didn't think that Quarles really put a lot of effort into representing him in the trial. He didn't think that Quarles really did much of anything (Id. 269). Instead the state pretty much had the floor all the time to basically run the courtroom the way that he saw fit. His lawyer wasn't going to do very much on his behalf. Especially on making any objections to anything that was said or anything like that (Id. 270). In his opinion he felt that Quarles was letting the state just get their way (Id. 270).

On cross examination Appellant testified that he did not

expect it was his responsibility to be telling his lawyer at trial what objections to make and what objections not to make (Id. 275). He said that he believed that he would have argued a lot more point, made more objections and he could have done a better job himself (Id. 277). Quarles framed him (Id. 279). In his opinion, he would say that the trial on his behalf was one sided. The state presented its case and Appellant was sitting over there at the table with his hands tied behind his back (Id. 279).

After all the testimony was taken, counsel for Appellant said he was surprised that Scott McGuire had invoked his Fifth Amendment right and asked for additional time to obtain certified copies of his Judgment and Sentence from the State of Ohio (Id. 295). Counsel for Appellant said that he called the clerk's office in Cuyahoga County and they told his secretary that they could not find a certified conviction using Scott Kenan (Keenum) (Id. 295). Counsel for Appellant said that Appellant was not able to obtain a full and fair hearing on that matter because McGuire invoked his Fifth Amendment right to remain silent (Id. 295). The state objected to any additional time (Id. 295-296). Counsel for Appellant said that McGuire talked freely to him about the Ohio conviction over the phone (Id. 296). Counsel for Appellant said McGuire tried to minimize it, saying that

nobody got hurt or anything, he walked into somebody's house (Id. 296). Counsel for Appellant asked for a delay to obtain a certified copy. The court denied additional time in regard to this matter (Id. 298).

## SUMMARY OF ARGUMENT

I. Trial counsel's overall performance at trial resulted in a per se denial of effective assistance of counsel. Trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. The breakdown in the adversarial process which justifies a presumption of ineffective assistance of counsel is: (1) Trial counsel did not use cross examination to impeach the credibility of Scott Jason McGuire, one of the state's star witnesses (2) Trial counsel did not object to improper comments and opinion or belief comments of the state in closing argument (3) Trial counsel opened the door, during the testimony of agent Robert Childs, to highly prejudicial testimony of an armed standoff which was not relevant to this case (4) Appellant was denied effective assistance of counsel when trial counsel made an argument in the penalty phase in which he conceded Appellant had "turned bad" (5) Trial counsel did not object to inadmissible hearsay testimony of Scott Jason McGuire concerning victim's statements (6) Trial counsel did not object to the state's use of leading questions on direct examination of its witnesses from the beginning to the end of trial (7) Trial counsel did not object when the state elicited testimony from Scott Jason McGuire that he was telling the truth (8) Trial counsel made a statement in opening which was



highly prejudicial to appellant (9) In closing argument, trial counsel did not make arguments that would have supported the defense theory of the case and that would have impeached the credibility of one of the State's star witnesses; trial counsel made a statement of concession not supported by the evidence and trial counsel made a statement prejudicial to the interests of Appellant (10) Trial counsel made a concession in rebuttal argument not supported by the evidence (11) Trial counsel did not object to irrelevant and prejudicial testimony concerning the condition of the victim (12) Trial counsel did not object to improper comments and argument of the state in opening statement (13) Trial counsel failed to take the deposition of Robert Childs before trial (14) Appellant was denied effective assistance of counsel because trial counsel did not question numerous state witnesses about Appellant not confessing the murder to them.

II. Newly discovered evidence entitles Appellant to a new trial. That newly discovered evidence is that Scott Jason McGuire has a prior Burglary conviction and escaped from the State of Ohio. At the time of trial he did not admit to this violent felony conviction. McGuire only admitted to two felony convictions for drug offenses. The state made a point of showing the jury that McGuire's prior felony convictions were only for drug offenses. These facts were unknown to the

trial court, to Appellant, and trial counsel at the time of trial. Neither Appellant nor trial counsel could have known about these facts by the use of due diligence. These facts were only discovered when an internet search of the Florida Department of Law Enforcement website indicated that Scott Jason McGuire had a hold on him from the State of Ohio for escape. The newly discovered evidence goes to the credibility of Scott Jason McGuire as one of the state's star witnesses. Further, this evidence would have provided a motive for McGuire destroying all evidence of his presence at the crime scene. Also, it would have provided the motive for McGuire to frame the Defendant. McGuire did not want to the jury to know that he had a Burglary conviction in Ohio and was an escaped convict at the time of Hensley's murder. This evidence is of such a nature that it would probably produce an acquittal on retrial.

III. Appellant was denied effective assistance of counsel by trial counsel's cumulative errors. The determination of ineffectiveness is a two prong analysis (1) whether trial counsel's performance was deficient (2) whether the deficient performance prejudiced the outcome. Both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings.



## ARGUMENT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM OF PER SE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF SIXTH AMENDMENT, U.S. CONSTITUTION.

Appellant's Second Amended Motion for Postconviction relief alleged, in part, per se denial of effective assistance of counsel (R-PC, V V, 681) Counsel's overall performance at trial is the focus of this issue. Appellant alleged that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing.

Appellant contends the breakdown in the adversarial process which justifies a presumption of ineffective assistance of counsel is: (1) trial counsel did not use cross-examination to impeach the credibility of Scott Jason McGuire, one of the State's star witnesses (2) trial counsel did not object to improper opinion and belief comments of the State in closing argument (3) trial counsel opened the door, during the testimony of Robert Childs, to highly prejudicial testimony of an armed standoff which was not relevant to this case (4) trial counsel made an argument in the penalty phase in which he conceded Appellant had "turned bad" (5) Trial counsel did not object to inadmissible hearsay testimony of Scott Jason McGuire concerning victim statements (6) Trial counsel did not object to the State's use of leading questions

on direct examination of its witnesses from the beginning to the end of trial (7) trial counsel did not object when the State elicited testimony from McGuire that he was telling the truth (8) trial counsel made statements in opening which were highly prejudicial to Appellant (9) in closing argument, trial counsel did not make arguments that would have supported the defense theory of the case and that would have impeached the credibility of the State's star witness; trial counsel made a statement of concession not supported by the evidence and finally, trial counsel made a statement prejudicial to the interests of Appellant (10) trial counsel made a concession in rebuttal argument not supported by the evidence (11) trial counsel did not object to irrelevant and prejudicial testimony concerning the condition of the victim (12) trial counsel did not object to improper comments and argument of the State in opening statement (13) trial counsel did not take the deposition of Childs before trial (14) Appellant was denied effective assistance of counsel because trial counsel did not question numerous State witnesses about Appellant not confessing the murder to them.

A two day evidentiary hearing was held in this case. Appellant testified to his lack of consent to most of trial counsel's conduct of which Appellant complains (R-PC, V. II, 255-268, 272-273).

In denying this claim, the trial court found that the totality of the grounds three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), seventeen (17), eighteen (18), twenty (20) and twenty-one (21) did not show a per se denial of effective counsel(R-PC, V III, 449). The trial court did not find that there was no breakdown in the adversarial process(Id). Further, the trial court did not point to any specific conduct by trial counsel that did subject the prosecution's case to meaningful adversarial testing(Id). Appellant contends the trial court did not apply the correct legal standard. Appellant contends the determination is not whether evidence is overwhelming, but whether trial counsel entirely failed to subject prosecutions case to meaningful adversarial testing. Appellant contends the trial court erred in denying this claim.

Trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Trial counsel did attempt to suppress evidence of Appellant's statement to the FBI (R, V X, 35-97). After the suppression hearing, trial counsel was essentially absent as Appellant's advocate.

Counsel's overall performance in this case is per se constitutes ineffective assistance of counsel. The

appropriate standard of review is whether counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. United States v. Cronic, 466 U.S. 648 (1984).

Appellant acknowledges that normally, the two prong test of Strickland v. Washington, 466 U.S. 668 (1984) is applied to ineffective assistance of counsel claims. In that two prong test, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense.

**1. Trial counsel did not use cross-examination to impeach the credibility of Scott Jason McGuire, one of the State's star witnesses**

Appellant alleged in this ground of his motion for postconviction relief that trial counsel did not use cross-examination to impeach Scott McGuire with prior inconsistent statements and with other matters (R-PC, V V, 596; M-PC, ground 3). McGuire made numerous prior inconsistent statements in the transcribed interview between himself and FDLE agent Miller.<sup>1</sup> Trial counsel testified at the evidentiary hearing that he was not sure, but he believed the strongest evidence against Appellant was either Appellant's statement and/or McGuire's testimony (R-PC, V. II, 200-201).

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<sup>1</sup>Exhibit #3, SC01-1275 - Is a copy of the transcript of the taped interview of Scott McGuire with FDLE agent Steven Miller which occurred on February 15, 1993 at the Volusia County Jail. The transcript is 22 pages.

If McGuire's testimony was so important to the State's case, why didn't trial counsel try to impeach his credibility?

Trial counsel failed to impeach McGuire with numerous prior inconsistent statements.

Trial counsel knew about the taped interview of Scott McGuire by FDLE Agent Miller and Officer Osterkamp that occurred on February 15, 1993 at the Volusia County Jail (R-PC, V II, 222-223). Reviewing the transcript also refreshed trial counsel's memory concerning the tape recordings of McGuire's statement on February 15, 1993 (R-PC, V II, 226-227). Appellant contends trial counsel knew about McGuire's prior inconsistent statements at the time of Appellant's trial but did not use them in cross-examination.

Appellant alleges trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing during the cross-examination of McGuire. This court addressed the duty of defense counsel in situations involving co-defendants in Craig v. State, 510 So.2d 857 (Fla. 1987):

"In a criminal trial, whenever the evidence shows that more than one perpetrator participated in a crime, defense counsel can be expected to raise questions about the relative roles and culpability of the other perpetrators and will attack the credibility and motives of any accomplice testifying for the state."

Appellant contends trial counsel failed to execute his duty to attack the credibility of the co-defendant, McGuire. Trial



counsel had discovery evidence of prior inconsistent statements which he did not use.

Any party may attack the credibility of a witness by introducing statements of the witness which are inconsistent with the witness' present testimony. Section 90.618(1)(a), Fla. Stat. (1997). Prior inconsistent statements may be used to impeach a witness's trial testimony. See Howell v. State, 667 So.2d 869 (Fla. 1st DCA 1996). It is error not to permit defense counsel to impeach the testimony of a key state witness with a prior inconsistent statement. See Abbott v. State, 589 So.2d 943 (Fla. 2nd DCA 1991).

Further, any party may attack the credibility of a witness by showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified. Section 90.608(1)(d), Fla. Stat. (1997). Trial counsel should have tested McGuire's capacity or opportunity to remember and recount the matters surrounding the death of Roger Hensley. Effective cross-examination on these matters would have proved a defect in McGuire's capacity or ability to observe, remember or recount the matters about which he testified at trial.

Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Section 90.612(2), Fla. Stat.

(1997). As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief... See Geralds v. State, 674 So.2d 96 (Fla. 1996).

Scott McGuire was a key state witness. McGuire testified at trial that when they got out of Hensley's truck and were walking to Hensley's apartment, Appellant said something to the effect as "how would you like to do it? (R, V. VIII, 863). Appellant argues this was testimony the jury interpreted meaning Appellant asked McGuire how he would like to "rip" off Hensley. The jury used this statement to find Appellant planned and committed the robbery and murder of Hensley.

McGuire made a prior inconsistent statement that when they got out of (Hensley's) pickup truck and started walking to the hotel room, Appellant asked him "what I thought, you know, we should do" (EX #3, SC01-1275, 9-10). This question by Appellant was concerning a job offer by Hensley, not how they were going to "rip" off Hensley(Id. at 9-10). Trial counsel failed to cross-examine McGuire about this inconsistency (R, V VIII, 883-894, 897-898).

Trial counsel should have impeached McGuire on this point. McGuire was the State's star witness. He was the co-

defendant and was also originally charged with first-degree murder (R-PC, V. V, 690). Further, if McGuire had denied making or did not distinctly admit making the prior statement, extrinsic evidence of such statement was admissible. Section, 90.614(2), Fla. Stat. (1997). The extrinsic evidence of the prior inconsistent statement was the tape recording or transcript of the recording of the interview between McGuire and FDLE Agent Steven Miller on February 15, 1993 at the Volusia County Jail (EX #3, SC01-1275).

Appellant argues that this inconsistency was an important inconsistency to feature during the cross-examination of McGuire. The jury was not aware of this inconsistent testimony. The statements and their meanings are materially different. The trial statement means Appellant was asking McGuire how he wanted to rip off Hensley. The tape recorded/transcribed statement means Appellant was asking McGuire what he or they should do about Hensley's job offer.

As a general rule, the purpose of cross-examination is to elicit testimony favorable to the cross-examining party, to challenge evidence adduced from the witness by other parties, and to challenge the witness's credibility when appropriate. See Shere v. State, 579 So.2d 86 (Fla. 1991). It would have been appropriate to challenge McGuire's credibility on this matter. This inconsistency along with the others would have

caused the jury to place little if no weight on the testimony of McGuire.

At deposition, in response to a question by trial counsel, McGuire said that Appellant "was dead set against killing him" (R-PC, V V, CR# 31). This comment referred to the victim, Roger Hensley. Further, this inconsistency is contained in the transcript of McGuire interview with Steven Miller that occurred on February 15, 1993. The transcript statement is that McGuire said Appellant was dead set against killing the guy (EX #3, SC01-1275, 16). Appellant admits that McGuire also corrected this statement in his deposition testimony, but only after being corrected by trial counsel.

Appellant suggests this was a "Freudian" slip by McGuire. McGuire had admitted that Appellant did not want to kill Hensley. The inference is that if Appellant did not want to kill Hensley then McGuire is the one who did. Appellant argues it would prove McGuire is the person who had the premeditated design to kill Hensley. Or, in the alternative, it would have proved to the jury just how "fried" McGuire's mind was. Trial counsel did not bring this inconsistent statement to the jury's attention during the cross-examination of McGuire (R, V. VIII, 883-894, 896, 897-898). Trial counsel did not use this inconsistent statement to Appellant's advantage. This inconsistency, along with the other

inconsistencies detailed here, would have severely impeached, if not destroyed the credibility of McGuire, the state's star witness.

McGuire testified at trial that he believed Appellant took his gun out of his waistband and had it behind the seat of the driver (Hensley) (R, V VIII, 861). This trial testimony was inconsistent with a prior statement that McGuire had made.

The prior inconsistent statement occurred in the taped interview between McGuire and FDLE agent Miller (EX #3, SC01-1275, 7). McGuire said "he (Appellant) never did anything with the gun except, uh, keep it hid." Appellant acknowledges that in the same interview, McGuire had also stated that Appellant had taken his gun out of his waistband and placed it behind the seat of the driver (EX #3, SC01-1275, 7). Therefore, McGuire made inconsistent statements not only in the transcript but also at trial.

Trial counsel knew before trial that McGuire had made the prior statement that Appellant never did anything with the gun except keep it hid (R-PC, V II, 224). Trial counsel failed to cross-examine McGuire about this prior inconsistent statement (R, V. VIII, 883-894, 896, 897-898). The jury did not know that McGuire had made this inconsistent statement. This inconsistency would have affected the credibility of one of

the State's star witnesses.

Scott Jason McGuire testified at trial that Appellant handed him a knife and McGuire took it and threw it down on the ground, floor (R, V VIII, 868). McGuire made a prior inconsistent statement on February 15, 1993, in the taped interview between FDLE agent Miller and McGuire. In that prior inconsistent statement, McGuire stated that after he took the knife from Appellant, McGuire immediately set it down on the table (EX #3, SC01-1275, 12). Trial counsel did not use this inconsistency to impeach the credibility of McGuire (R, V VIII, 883-984, 896, 897-898). The jury did not know McGuire made this inconsistent statement. Appellant argues this shows an inconsistent statement or shows a defect in ability to observe, remember or recount the matters about which McGuire testified. Section 90.608(1)(d), Fla. Stat. (1997).

McGuire testified at trial that after Appellant stabbed Hensley, McGuire remembered the knife Appellant handed him. McGuire went back into the living room, pick up the knife and wiped off his fingerprints (R, V VIII, 871). McGuire made a prior inconsistent statement in his deposition. McGuire testified he didn't touch the knife after he threw it down (R-PC, V V, CR# 28). Appellant acknowledges that McGuire also said in the same deposition that he did pick the knife back up

to wipe his fingerprints off of it (R-PC, V V, CR# 28). This was in response to prompting by trial counsel. Appellant argues that this was another example of trial counsel assisting the State in prosecuting its case by correcting one of the State's star witnesses. It was another example of McGuire's testimony not being consistent in the same statement.

The jury did not know about this inconsistency. Trial counsel did not question McGuire about it (R, V VIII, 883-894, 896, 897-898). Trial counsel knew about this inconsistency since it occurred during the deposition he took.

McGuire testified at trial that he got up after he heard what he heard and walked over to the doorway and saw this gentleman (Hensley) on the floor, bloodied (R, V VIII, 869). McGuire made a prior inconsistent statement about this matter. In deposition, McGuire stated he stood by the door and he saw the man half on the bed, half on the floor, blood all over the place (R-PC, V V, CR# 28).

This inconsistency is important for several reasons. First, it shows that McGuire was not consistent in his testimony. Second, it shows a defect in his memory. Third, the statement by McGuire that the man (Hensley) was half on the bed, half on the floor does not agree with trial testimony of the crime scene investigator that Hensley's body was found

close to the entrance to the bedroom (R, V IX, 1009-1010).

The jury did not know about this inconsistent statement by McGuire. Trial counsel did not question the witness about it (R, V VIII, 883-894, 896, 897-898). Trial counsel knew about it since he had taken the deposition statement of McGuire.

Appellant argues this was still another example of McGuire not being able to get it right. That is because he was making up his testimony to fit his own needs or those of the State.

McGuire testified at trial that "he (Hensley) got around to the fact that he (Hensley) was a homosexual (R, V VIII, 864). McGuire made a prior inconsistent statement in his deposition testimony.

At deposition, McGuire said he thought Hensley said he was bisexual (R-PC, V V, CR# 24). Again though, trial counsel assisted the State in its prosecution of the case by getting McGuire to state that it was possible Hensley said he was homosexual (R-PC, V V, CR# 24).

Trial counsel was aware, prior to trial, of this prior inconsistent statement (R-PC, V II, 225). The jury was not aware of this inconsistent statement by McGuire. Again, trial counsel did not question McGuire about it (R, V VIII, 883-894, 896, 897-898).



If McGuire could not get this fact right, how could his other testimony be right? McGuire had been in prison for three years at the time of Appellant's trial (R, V VIII, 855). Plenty of time to get his testimony right. Either way, the jury did not have this information at Appellant's trial.

McGuire testified at trial that he sold Appellant a state ID he had (R, V VIII, 874). McGuire made a prior inconsistent statement in his deposition. At deposition, McGuire told trial counsel that Appellant gave him some crack for it (McGuire's id card) so he figured he was going to get it back (R-PC, V V, CR# 32). The jury was not aware of this inconsistent statement by McGuire. Trial counsel did not cross-examine McGuire about it (R, V VIII, 883-894, 896, 897-898).

Appellant contends that in a capital case, the jury should examine the evidence presented by the State under a microscope. The jury did not have the opportunity to examine these inconsistent statements made by Scott Jason McGuire. He was one of the State's star witness, if not the star witness. McGuire was present when Roger Hensley was murdered. Even trial counsel acknowledged the importance of McGuire's testimony. Trial counsel took McGuire's deposition shortly before trial, very near the trial date (R-PC, V I, 88). McGuire's trial testimony took place on Wednesday, October 16,

1996 (R, V VIII, 839-840). Trial counsel could not have forgotten the deposition statements.

McGuire testified at trial that his name was Scott Jason McGuire (R, V VIII, 855). McGuire also testified at his plea proceedings that his name was Scott Jason McGuire (R-PC, V. V, 704). He also testified at his plea proceeding that his full, correct, legal name was Jason McGuire (R-PC, V. V, 714-715).

The complaint affidavit charging Scott Jason McGuire with the first-degree murder of Roger Hensley lists aliases of Daniel Scott Davidson and Scott Stephen Michaels (R-PC, V. V, 691).

Trial counsel testified at the evidentiary hearing that he thought he did receive a copy of a complaint affidavit naming Scott Jason McGuire as a defendant or suspect in the killing of Roger Hensley which occurred on November 11, 1992 (R-PC, V I, 100). Trial counsel admitted that this complaint affidavit for McGuire listed aliases (R-PC, V I, 100). Trial counsel did not question McGuire at trial about his use of aliases (R, V VIII, 883-894, 896, 897-898 ).

Trial counsel did not use this information to show the jury that the identity of McGuire was questionable. McGuire had used at least three different identities in the past. The jury did not know about all the different identities McGuire had used. Appellant argues this is a know and successful trial

technique to show the jury that a witness has more than one identity and should not be believed.

Cary Ace Bowers testified on behalf of the State. He said he found the driver's license and phone card of Roger Hensley on November 6, 1992. He found these items at the corner of Earl Street and Oleander in Daytona Beach (R, V VI, 693-694). The Florida identification card of Scott Jason McGuire which was issued to him in May, 1992 listed an address of 507 Earl Street, Daytona Beach, Florida was admitted into evidence as State's exhibit number 8 (R, V VI, 711).

Trial counsel did not question McGuire about the fact that he lived at 507 Earl Street in Daytona Beach and that he was familiar with the area of Earl and Oleander where the victim's driver's license was found. Further, trial counsel did not ask McGuire whether or not it was true that he dropped this evidence at Earl and Oleander. Appellant acknowledges that McGuire could have denied it. But this was evidence that should have been emphasized to the jury.

Trial counsel had the opportunity in cross-examination of McGuire to show that McGuire had gotten rid of the clothes he was wearing when Roger Hensley was murdered. Trial counsel had reviewed, before trial, the transcribed interview between McGuire and FDLE agent Steven Miller (R-PC, VII, 222-223).

But, trial counsel did not question McGuire about the clothes

he was wearing at the time of Hensley's murder (R, V VIII, 883-894, 896, 897-898).

McGuire told FDLE agent Miller that he believed the clothes he was wearing at the time of Hensley's death were "lost" (EX #3, SC01-1275, 19). Trial counsel failed to ask McGuire whether he intentionally got rid of or destroyed his clothes to destroy any evidence of his involvement in this crime.

Trial counsel did not question McGuire about exactly what he received from the State in return for his plea. Appellant acknowledges that trial counsel did question McGuire about receiving a forty year sentence for second degree murder (R, V VIII, 883, 892). It was also shown during cross-examination that part of the deal was to testify against Appellant (R-PC, V VIII, 892).

Questioning McGuire about everything he got for his plea would have shown not only all the incentive or reasons for McGuire testify for the State but also his incentive lie. This was proof of bias or interest that trial counsel did not present. Any party may attack the credibility of a witness by showing that the witness is biased. Section 90.608(1)(b), Fla. Stat. (1997). Trial counsel did not question McGuire about the fact that: McGuire received a forty year sentence instead of a life sentence for second degree murder (R-PC, V

V, 708, 714, 719); the State agreed not to pursue pending armed robbery and grand theft charges arising out of the circumstances of the Hensley murder against McGuire ( R-PC, V V, 709); McGuire did not have to pay state attorney costs, law enforcement costs and restitution (R-PC, 710); McGuire's plea and sentencing could be set aside if his trial testimony was substantially different from his proffered statement (R-PC, V V, 710); if McGuire's plea and sentence were set aside, he could face something other than a forty year sentence (death) (R-PC, V V, 720).

On the direct examination of McGuire, the State did address fact that in return for his plea, McGuire was allowed to plead to second degree murder(reduced from first) and was sentenced to forty years prison (R, V VIII, 879, 880). Trial counsel did not bring out on cross-examination, that McGuire got much more in return for his plea. The jury did not know about all of the quid pro quo McGuire received.

The jury did not know that McGuire had incentive not only to testify for the State but to lie. If his story at trial was not what the State wanted to hear, McGuire could face the death penalty. The jury did not know the extent to which McGuire's testimony was bought and paid for by the State. If the jury had known these facts about exactly what McGuire received in return for his plea and the prior inconsistent

statements, the jury would have placed little if no weight on the testimony of McGuire.

Trial counsel did not question McGuire on the fact that his tape recorded statement with FDLE agent Miller was not made until Miller had interviewed McGuire for approximately two and a half to three hours (EX #3, SC01-1275, 2). Trial counsel knew, prior to trial, that Scott Jason McGuire did not allow his statement to be taped until he had been interviewed for approximately two and one-half hours (R-PC, V II, 223).

Appellant acknowledges that trial counsel did bring out the fact that McGuire initially lied to Miller (R, V VIII, 889). In addition, trial counsel had the opportunity to show the jury that a McGuire not only initially lied but he also did not want to be tape recorded until after he had been questioned for such a long period of time. The jury did not know all of the circumstances surrounding the tape recorded statement of McGuire.

Trial counsel did not question McGuire concerning the shoes McGuire was wearing at the time of Hensley's death. McGuire admitted to FDLE agent Miller that the clothes (including his shoes) he wore when Hensley was murdered were "lost" (EX #3, SC01-1275, 19). At trial, the State introduced testimony that there were at least twelve other shoe tracks at the scene (of the murder) which could not have been made by

the shoes of Appellant (R, V IX, 1047-1048).

Trial counsel had the opportunity during the cross-examination of McGuire to ask whether McGuire lost or destroyed his shoes because they could have been used as evidence against him. This information was not presented to the jury.

At trial, Appellant testified that he did not kill Roger Hensley (R, V X, 1127). He also testified that he did not confess or did not remember confessing to the FBI (R, V X, 1127). Therefore, the credibility of the co-defendant, McGuire was key to the state's case. Appellant argues all these inconsistencies would have severely affected the credibility of McGuire. Trial counsel did nothing to impeach the credibility of McGuire at trial.

**(2) Trial counsel did not object to improper comments and opinion or belief comments of the State in closing argument.**

In this ground of his postconviction motion Appellant alleged that trial counsel failed to object to the State's numerous comments in closing argument: of personal opinion or belief; mocking Appellant's testimony and/or the defense and which were inflammatory comments or argument (R-PC, V V, 617; M-PC, Ground 7). Trial counsel did not object to any of these improper comments or argument by the State (R, V, XI, 1237-1263). A criminal trial is a neutral arena wherein both

sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence. See Ruiz v. State, 743 So.2d 1 (Fla. 1999). In this case the prosecutor gave his personal opinion on the credibility of the defense and Appellant's credibility as a witness, inflamed the jury's emotion or passion and argued non-record evidence.

The duty of prosecutors was addressed by this Court over sixty years ago:

... "that trials should be conducted coolly and fairly, without indulgence in abusive or inflammatory statements made in the presence of the jury by the prosecuting officer. That it must be realized that the most corrupt and hardened criminal is entitled to have the constitutional benefit of the same sort of a fair and impartial trial as has a first offender of previous good character."

Goddard v. State, 196 So. 596 (Fla. 1940). Appellant contends that based upon all of the comments and statements made in closing argument in this case, the prosecutor believed that Appellant should have entered a plea rather than waste everyone's time with a trial.

In this case, the prosecutor's comments in closing argument were improper because they were pejorative and disparaging. See Fullmer v. State, 790 So. 2d 480 (5th DCA 2001). Further, the prosecutor expressed his personal opinion



in Appellant's guilt. Fullmer, 790 So.2d at 481. Finally, the prosecutor commented on the legal effect of the evidence. Fullmer, 790 So.2d 482.

Appellant contends the unobjected to comments of the prosecutor were improper and constituted fundamental error. In determining whether fundamental error has occurred where improper comments are not objected to, the totality of the circumstances approach applies. See Scoggins v. State, 726 So. 2d 762 (Fla. 1999). Fundamental error is the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. See Caraballo v. State, 762 So.2d 542 (Fla. 5th DCA 2000) citing McDonald v. State, 743 So.2d 501 (Fla. 1999).

The State made several comments in closing argument which mocked Appellant, his testimony or the defense.

One example of the prosecutor mocking Appellant and/or his testimony, appealing to the jury's passion, sitting as a thirteenth juror, personal opinion on the credibility of Appellant's testimony, and arguing non-record evidence occurred when the prosecutor said:

"there is one thing about his testimony that was particularly insulting, not only because it wasn't true -and that's the fact that Mr. Brown - and this is knowing - this is us knowing how Mr. Hensley died. Us knowing from the

testimony the force of those stab wounds in his body, plunging 4 to 5 inches into his heart. I mean, those are ferocious, that's a ferocious, brutal, savage stabbing that goes into the body so hard it causes blood to fly all over the walls. And knowing that Mr. Hensley is in that room alive and conscious, struggling for his life, moving from the bed and still being assaulted, stabbed not just in the chest numerous times but then being stabbed in the back, having his life, his blood, spilling from him onto everything, gasping for breath, falling down. His lungs filling with blood, gurgling, gasping for life. We hear all that, and we know how Mr. Brown murdered Mr. Hensley, and we have to sit here and hear Mr. Brown sit up there and tell us, I tried to comfort this man. I went down and asked him if he was okay."

(R, V XI, 1258-1259). The prosecutor was mocking Appellant and/or his trial testimony when the prosecutor said, "I tried to comfort this man. I went down and asked him if he was okay." This was an attempt to disparage Appellant's testimony. Also, it was a successful attempt to inflame the jury's passion.

Appellant contends that the prosecutor made an improper argument similar to a thirteenth juror argument when he said, "this is us knowing how Mr. Hensley died. Us knowing from the testimony..." "we hear all that, and we know how Mr. Brown murdered Mr. Hensley, and we have to sit here and hear Mr. Brown sit up there and tell us ..." Appellant contends it was almost as if the prosecutor was making an argument to his fellow jurors in the jury room rather than in court!

Appellant admits that the prosecutor did not ask the jury to consider him a "thirteenth juror" when it retired to deliberate its verdict. These comments also inflamed the passion of the jury.

The prosecutor's comment that the victim was "gurgling" was not supported by the record. McGuire said the victim was struggling to breathe, gasping his last breath (R, V VIII, 871). Appellant contends this was a thinly veiled attempt to argue that the victim choked to death on his own blood. The medical examiner did not testify that the victim choked to death on his own blood (R, V IX, 1057-1090). This comment was inflammatory and denied Appellant a fair trial.

The prosecutor gave his personal opinion on the credibility of Appellant's testimony when he said, "there is one thing about his testimony that was particularly insulting, not only because it wasn't true..." Appellant contends this comment invaded the province of the jury.

The prosecutor was giving his personal opinion that Appellant's testimony was insulting not only to him but also to the jury when he said, "there was one thing about his testimony that was particularly insulting..." It is inappropriate and prejudicial to make comments including arguing a witness' testimony insulted the jury's intelligence. See Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998).

Appellant contends this comment along with the other comments detailed here deprived Appellant of his right to a fair trial and constituted fundamental error.

These highly prejudicial, inflammatory and improper comments of the State constituted prosecutorial misconduct, invaded the province of the jury and, in one instance, was not supported by evidence. Appellant argues the cumulative effect of the comments was so prejudicial as to constitute fundamental error.

The prosecutor mocked Appellant in closing argument when he said:

“the defendant came to Daytona Beach on his so-called vacation.” When he was tired of his so-called vacation, he decided he wanted to go back to Tennessee.

(R, V XI, 1238). This is a statement mocking or ridiculing Appellant because he testified that he came to Daytona Beach on vacation (R, V X, 1112 ). Appellant argues this statement was nothing more than a veiled attempt by the State to say, “What is Appellant’s idea of a vacation? It is to kill someone.” The jury understood the comment as such. It was also a veiled “bad person” argument by the State. This statement was highly prejudicial and constituted improper argument.

Next, the prosecutor made improper comments in closing

argument when he argued to the jury:

"Now, tell me something. If Mr. McGuire is the man in control and Mr. McGuire is someone to be feared and scared of, and you feel that way about somebody, what do you think about leaving that persons - oh here we are, just committed a murder and oh, Mr. McGuire, I'm leaving your license here, your identification card, here at the gas station the same day, the next day after we committed this murder, and lets get in the truck and head out of here. I think if someone is someone to be feared, they would not stand for that being done to them."

(R, V XI, 1252-1253). Appellant argues the prosecutor was again mocking Appellant and/or his testimony. Appellant contends the "oh here we are, just committed a murder ..." comment was pejorative and disparaging.

The prosecutor's "now tell me something" comment was made as if he were a member of the jury. Appellant admits that the prosecutor did not ask the jury to consider him a "thirteenth juror" when it retired to deliberate its verdict. See Hill v. State, 477 So. 2d 553 (Fla. 1985). Appellant argues the prosecutor is not to align himself with the jurors through his comments and argument. A prosecutor's job is to assist the jury in its factual determination. This constituted prosecutorial misconduct.

The prosecutor also gave his personal opinion on the credibility of the testimony when he said "I think if someone is to be feared, they would not stand for that being done to

them." This statement was improper and invaded the province of the jury whose duty is to determine the facts and the credibility of the witnesses.

Appellant contends these statements contain a "golden rule" argument. That occurred when the prosecutor said, "If Mr. McGuire is the man in control and Mr. McGuire is someone to be feared and scared of, and you feel that way about somebody, what do you think about leaving that persons..." An improper golden rule argument occurred when during closing a prosecutor improperly suggested to the jury that if they placed themselves in the shoes of the defendant, they would not have stabbed the victim in reaction to the circumstances the defendant had faced. See Gomez v. State, 751 So.2d 630 (Fla. 3d DCA 1999). In this case, the prosecutor was asking the jury to place themselves in the shoes of Appellant and consider whether or not Appellant really feared McGuire. This comment along with the other comments detailed herein were prejudicial and denied Appellant a fair trial.

The prosecutor made an improper personal opinion comment when he said:

"Essentially, I think that Mr. Brown's testimony here before you is worth just about as much as Mr. Brown felt that Mr. Hensley's life was worth back in November of 1992."

(R, V XI, 1258). This was the personal opinion or belief of

prosecutor concerning the credibility of Appellant's testimony at trial. Appellant contends this is also a thinly veiled argument suggesting the jury give Appellant the same consideration as he gave the victim. This statement invaded the province of the jury. This statement along with the other statements detailed herein were prejudicial and denied Appellant a fair trial.

Appellant also argues this comment constitutes a personal attack on Appellant or his character.

The prosecutor's next improper argument occurred when he said in closing that:

"I'm really not going to talk much about  
– and not at all – about the testimony of Mr.  
Brown here in court, because it's worthless."

(R, V XI, 1258). This statement gives the prosecutor's personal opinion about the credibility of Appellant's trial testimony. This statement invaded the province of the jury. Prosecutors may not directly or indirectly express their opinions as to the credibility of witnesses or the guilt of the defendant. See Martinez v. State, 761 So. 2d 1074 (Fla. 2000). Trial counsel did not object (R, V XI, 1258).

Another improper comment made in closing argument by the prosecutor occurred when he stated:

"Looking back on all the evidence, I think  
it's clear to see the plan was to kill Mr.  
Hensley when Mr. Hensley was met by Mr. Brown."

(R, V XI, 1239). Appellant contends this statement was the personal opinion of prosecutor that appellant formed the intent to commit premeditated first degree murder or felony murder when he met the victim. This statement also invaded the province of the jury who was the fact-finder on intent or premeditation. Appellant admits trial counsel did not object to this statement (R, V XI, 1239). Nevertheless, this statement was highly prejudicial and constituted improper argument.

The prosecutor gave his personal opinion or belief concerning the evidence when he said:

"And I think the end result is clear that Mr. Brown went in there with one purpose, and that was to murder Mr. Hensley, make sure he did not get out of that bedroom."

(R, V XI, 1240). This is an improper statement of the personal opinion of prosecutor that Appellant was guilty of murder. Martinez, 761 So. 2d at 1081. Appellant argues this was improper opinion or belief of the prosecutor concerning the evidence in the case. This statement invaded the province of the jury as fact-finder.

Another improper personal opinion comment of the prosecutor happened when he stated:

"I think it's obviously clear here that Mr. Hensley didn't consent to being stabbed to death for this gentleman to remain in his apartment and rummage through his belong-



ings and steal his money and his truck keys."

(R, V XI, 1246). Appellant argues this improper statement invaded the province of the jury.

The prosecutor gave an improper personal opinion when he said in closing argument that:

"now, contrary to what defense would have you believe, I think Mr. McGuire or Mr. McGuire's statement is important. It helps to explain things. It helps to corroborate."

(R, V XI, 1249). Appellant contends this statement invaded the province of the jury. It was the jury's function to determine the weight of conflicting evidence, not the prosecutor.

Yet another improper personal opinion statement occurred when the prosecutor said:

"I think it's important to look at what Mr. McGuire had to say. It tells us something about the relationship between Mr. Brown and Mr. McGuire."

(R, V XI, 1249). Appellant alleges this statement invaded the province of the jury. It is the jury's function to determine what the testimony means. It is not the prosecutor's function.

The prosecutor made an improper personal opinion statement when he said in closing:

"the defense would have you believe that if someone comes in here and has better eye contact with the jury, then that must mean

that they're the ones that are telling the truth. Well, if that's all there was to it, then I don't think there would be a need for trials or anything else."

(R, V XI, 1249). Appellant contends this statement invaded the province of the jury. Judging witness demeanor is the function of the jury. It is not the function of the prosecutor. The prosecutor's personal opinion on whether the need for trials to occur is improper. Appellant alleges this statement is close to the improper statement that they were only there because Appellant had a right to a jury trial. State v. Bell, 723 So. 2d 896 (Fla. 2d DCA 1998).

Another example of the prosecutor giving his personal opinion in closing argument occurred when he stated

"when you look at Mr. McGuire's testimony and compare it to what Mr. Brown has to say, I think what you've got here is a choice between; one, Mr. Brown would have you believe that Mr. McGuire is the mastermind or the architect of this big frame up."

(R, V XI, 1250). This improper comment invaded the province of the jury. It is the personal opinion of the prosecutor on the credibility of the witnesses. Martinez, 761 So. 2d at 1081.

The prosecutor made an improper personal opinion comment when he said that:

"well I think what we really have - and I think if you look at everything, you'll see that what you really have is Mr. McGuire is just one dumb sucker."

(R, V XI, 1251). This comment invaded the province of the jury.

The prosecutor made an improper comment when he said:

"now, keep in mind these things I'm talking about when you consider whether you want to buy this stuff about Mr. Brown being scared of Mr. McGuire and under his control and all of this nonsense that you heard."

(R, V XI, 1251). Appellant alleges this comment concerned the prosecutor's personal belief in the lack of credibility of Appellant's testimony and the defense. The prosecutor expressed his opinion as to the credibility of the witness (Appellant) or the guilt of Appellant. Martinez, 761 So.2d at 1081.

The prosecutor gave his personal opinion on the evidence when he said:

"Well, you heard the evidence. That neck wound - and I think the evidence clearly shows Mr. Brown did it."

(R, V XI, 1255). Appellant alleges this improper statement invaded the province of the jury. The prosecutor was giving his personal opinion as to the guilt of the defendant. Martinez, 761 So. 2d at 1081.

Another improper comment by the prosecutor in closing argument occurred when he stated:

"there is really only one appropriate verdict and that is the top box guilty of both types

of first-degree murder."

(R, V. XI, 1262). This was personal opinion.

The prosecutor made an improper comment in closing that:

"I think it's important to realize, and you'll be instructed, that if you return a verdict of guilty to the charge, it should be for the highest offense that has been proved beyond a reasonable doubt."

(R, V. XI, 1260-1261). This is an improper personal opinion of the prosecutor concerning jury instructions. This comment invaded the province of the jury.

Improper opinion was given by the prosecutor in closing argument when he stated:

"And once again, I don't think much time needs to be spent on that because this is not a Manslaughter case. This is a premeditated, first-degree and first-degree felony murder case."

(R, V. XI, 1262). Appellant argues this improper statement concerned the prosecutor's personal opinion concerning the guilt of Appellant. Martinez, 761 So. 2d at 1080. This comment invaded the province of the jury. Finally, Appellant contends this statement conveyed the impression that evidence not presented to the jury, but known to the prosecutor supports the charge against Appellant. Martinez, 761 So. 2d at 1080.

The prosecutor made an improper character attack on Appellant when he stated in closing argument:

"some people take pride in their country, their church, whatever. But you can tell a lot about someone when you know what they are proud of. Mr. Brown expressed his pride and what he was proud of back on November 9, 1992, just days after he murdered Mr. Hensley, and Mr. Brown was proud to be a murderer."

(R, V. XI, 1262). The rule in Florida relating to character evidence is that the character of a person accused of crime is not a fact issue, and the state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show his bad character... See Martinez, 761 So.2d at 1082. Appellant argues that the prosecutor's comment was an attempt to convince the jury to find Appellant guilty because of bad character.

The prosecutor made an improper "send a message" argument in closing when he stated:

"I simply ask that you follow the law, applying the evidence to the law, and announce through your verdict yes, that's right, Mr. Brown you are a murderer."

(R, V. XI, 1263). Appellant argues this was an improper "send a message" argument. It is not the duty or function of any jury to send a message to any defendant. It was improper for the prosecutor to ask the jury to send a message to Appellant.

Appellant admits this case is distinguishable from Freeman v. State, 761 So. 2d 1055 (Fla. 2000) where a prosecutor told the jury to use the case to send a message to the community. In Freeman, defense counsel had objected

before the statement was made. Also, the judge overruled the objection and reminded jury that arguments were not the law and he would instruct the jury on the law after closing arguments. Freeman, 761 So.2d at 1070. In this case, trial counsel did not object to the "send a message" comment and the court did not give a curative instruction (R, V XI, 1263). Freeman is further distinguishable because defense counsel continually objected during the prosecution's closing arguments. Defense counsel in Freeman also moved for a mistrial at the conclusion of the prosecutor's closing argument. Trial counsel did none of that in this case (R, V XI, 1263).

Trial counsel did not object to any of these improper comments or statements of the prosecutor (R, V XI, 1237-1263). Appellant contends these comments either individually or cumulatively denied him a fair trial. The unobjected to comments denied Appellant a fair trial and constituted fundamental error.

**(3) Trial counsel opened the door, during the testimony of Robert Childs, to highly prejudicial testimony of an armed standoff which was not relevant to this case**

In this ground, Appellant alleged that trial counsel opened the door to inadmissible and highly prejudicial evidence that Appellant was involved in an armed standoff with the FBI in Tennessee (R-PC, V V, 640; M-PC, Ground 10).

Trial counsel opened the door to highly prejudicial testimony when on re-cross examination he asked Robert Childs whether or not on the day that Appellant was arrested Appellant was given alcohol by the agency. The witness replied in the affirmative and that Appellant was given a shot of whiskey. Childs stated it was part of the negotiation to get him out (R, V VII, 776).

Thereafter, the State requested to approach the bench and the court asked the question "Do I hear a door opening?" and the State replied absolutely (R, V VII, 776). Trial counsel attempted to withdraw the question but the court stated it thought that the door had been opened enough to allow the State to get into at least the standoff (R, V VII, 777).

Then, the State then followed up with a question that wasn't it true that there was a standoff at the farmhouse with Mr. Brown having a firearm and having a standoff with police authorities for over two hours at the farmhouse? (R, V VII, 782). Childs answered yes and then he testified that Appellant stated he would come out if he could get a shot of whiskey (R, V VII, 782). Further, Childs said Appellant did come out and throw down his gun eventually after a two hour standoff. Childs also said that Appellant came out and was taken into custody by the FBI who gave him a capful of whiskey (R, V VII, 783). The State would not have been able to go

into this but for trial counsel's ineffectiveness.

The bottom line was that Appellant, through trial counsel, was able to prove that the Appellant was given a capful of whiskey the day before his statement to the FBI. In return, the state was able to prove that there was a standoff with Appellant. Appellant had a gun and the standoff lasted more than two hours.

Appellant argues that even if the jury did not apply this evidence towards the elements of the crime charged it used this irrelevant and highly prejudicial testimony in its finding that Appellant should be sentenced to death.

Trial counsel had no reason to get into the subject of Appellant being given alcohol on the date of Appellant's arrest by the FBI. This is because Appellant spent the night in jail after his arrest by the FBI and did not give any statements to the FBI until the next day (R, V II, 38-55). Therefore, whether Appellant was given a shot of whiskey by the FBI on the day of his arrest would not have been helpful to the defense anyway.

What is even more puzzling is why trial counsel even asked this question. That is because trial counsel knew the answer to this question. He was informed by witness John Grant, at the hearing to suppress Appellant's confession, that Appellant was given a shot of whiskey as part of the



negotiations to get Appellant to surrender (R. V. II, 75). Trial counsel had obtained this information at the suppression hearing only six days before the trial began (R, V II, 29).

**4. Appellant was denied effective assistance of counsel when trial counsel made an argument in the penalty phase in which he conceded Appellant had "turned bad"**

Appellant alleged in his motion for postconviction relief that trial counsel made a highly prejudicial argument in rebuttal closing that Appellant had "turned bad"(R-PC, V V, 682; M-PC, Ground 20).

Appellant testified at the evidentiary hearing he did not consent to trial counsel arguing to the jury that Appellant "turned bad" (R-PC, VII, 258-259).

Trial counsel denied Appellant effective assistance of counsel when he stated:

"You can consider that he (defendant) didn't grow up in Ozzie and Harriett's house. It's clear that he did not have a good upbringing. And it's clear that he was influenced by others and that he turned bad."

(R, V XII, 1432). Appellant argues that trial counsel was indirectly telling the jury that defendant deserved to be executed because he was a "bad person." If trial counsel was trying to tell the jury that "nurture" rather than "nature" was the reason for Appellant's behavior, trial counsel utterly

failed. Appellant admits this statement was not the direct "concession" which counsel made in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000). But, it is an indirect "concession" which the jury used to sentence Appellant to death. Appellant contends this statement lessened the prosecution's burden of proof or assisted the State in obtaining a death sentence.

**(5) Trial counsel did not object to inadmissible hearsay testimony of Scott Jason McGuire concerning victim statements**

Trial counsel failed to object to inadmissible hearsay testimony of Scott Jason McGuire concerning statements the victim made just before his death (R-PC, V V, 643; M-PC, Ground 12). Appellant argues that these hearsay statement were introduced to prove the victim's state of mind and subsequent acts of Appellant.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Section 90.801(1)(c), Fla. Stat. (1997). Appellant also argues that no exceptions to the hearsay rule apply to these statements.

First, trial counsel failed to object to McGuire's hearsay testimony that Hensley starting talking about sleeping arrangements. He told Mr. Brown he could sleep in his bedroom with him. He told McGuire he could sleep on the couch; he said he didn't know what their game was but if they came to

rob him that was all the money he had; they could take it(R, V VIII, 865). Appellant argues this was inadmissible hearsay to which no hearsay exception applied. A homicide victim's state of mind prior to the fatal event generally is neither at issue nor probative of any material issue raised in the murder prosecution. See Woods v. State, 733 So.2d 980 (Fla. 1999).

The jury heard inadmissible hearsay evidence that Hensley had told Appellant he could sleep with him in his bedroom. This inadmissible evidence caused the jury to believe that if Hensley told Appellant he could sleep in the bedroom with him that Appellant is the one who stabbed Hensley to death rather than McGuire who was told he could sleep on the couch. Statements of a victim are not admissible to prove subsequent acts of a defendant. See Bailey v. State, 419 So.2d 721 (Fla. 1st DCA 1982).

Further, the jury was allowed to hear inadmissible hearsay evidence that Hensley must have thought that Appellant and McGuire were at his room to rob him. Ordinarily, a victim's state of mind is not a material issue, nor is it probative of a material issue in a murder case. Woods, 733 So.2d at 987 Appellant contends no hearsay exceptions apply to this statement. The jury heard inadmissible hearsay evidence of the victim's state of mind. Appellant argues this led the jury to believe that the victim believed Appellant was at

Hensley's room to rob him and then Appellant did rob Hensley. Finally, this inadmissible hearsay evidence led the jury to believe Appellant should not have killed the victim after he offered his money. The jury heard evidence in which the probative value was far outweighed by the danger of unfair prejudice to Appellant. Appellant contends the jury used this inadmissible evidence to find Appellant guilty and/or sentence him to death.

Second, trial counsel failed to object to McGuire's hearsay testimony that Hensley said he was a concrete contractor; he had some work lined; he was shorthanded and he offered them a job. (R, V VIII, 863). Appellant contends this was inadmissible hearsay to which no hearsay exception applied.

The jury heard inadmissible hearsay testimony that Hensley had offered a job to Appellant and then, Appellant turns around and stabs him to death. This evidence was not relevant. The probative value was outweighed by the danger of unfair prejudice to Appellant. The jury used this inadmissible hearsay to convict Appellant and/or sentence him to death.

Third, trial counsel failed to object to McGuire's hearsay testimony that Hensley got around to the fact that he was a homosexual and he asked then what their preference in

sexual activities were(R, V VIII, 864). Appellant argues this was inadmissible hearsay to which no hearsay exception applied.

This hearsay testimony led the jury to believe that Appellant killed Hensley because he was a homosexual. This was the inference even though there was no testimony to support this inference(R, V VI-IX, 657-1089). The jury considered irrelevant and highly prejudicial evidence. Appellant contends the state argued the alleged motive was robbery, to obtain the victim's truck (R, V XI, 1237-1238). This hearsay testimony was highly prejudicial as there was no evidence at trial that Appellant had any animosity, bias or prejudice against homosexuals.

Further, this testimony along with other evidence led the jury to believe that Appellant stabbed Hensley because he told Appellant he could sleep with him in his bedroom. The jury considered this inadmissible hearsay evidence as proving or tending to prove that Appellant stabbed Hensley. A statement admitted to show state of mind is only allowed to prove the state of mind or subsequent act of the declarant, not of a defendant. See Brooks v. State, 787 So.2d 765 (Fla. 2001).

Fourth, trial counsel failed to object to McGuire's hearsay testimony that Roger Hensley suggested they go back to his apartment(R, V VIII, 862). Appellant argues this was

inadmissible hearsay to which no hearsay exception applied.

The jury heard and considered this hearsay statement as it gave a reason for Appellant and McGuire being in the room of Hensley. But for this inadmissible hearsay statement the jury would not have known exactly how Appellant and McGuire ended up in Hensley's apartment. Appellant argues that but for this statement and the other hearsay statements, he may not have felt compelled to testify.

Fifth, trial counsel failed to object to McGuire's hearsay testimony that Hensley said he had to get up awfully early to go to work (R, V VIII, 865). This was just before Hensley proceeded to go into the bedroom. Appellant argues this was inadmissible hearsay to which no hearsay exception applied.

Appellant argues this was inadmissible hearsay to which no hearsay exception applied. The jury's inference was that the victim was hard working man who went to bed early so he could go to work the next morning. This evidence was not material to the jury's consideration of Appellant's guilt or innocence.

Because trial counsel did not object, the jury heard inadmissible hearsay testimony concerning victim statements. Appellant argues that one statement in particular was extremely prejudicial. That statement concerned the victim's

state of mind about whether Appellant was there to rob him. Appellant contends this statement was used to prove the subsequent acts of Appellant.

**(6) Trial counsel did not object to the State's use of leading questions on direct examination of its witnesses from the beginning to the end of trial**

Appellant contends that the State used leading questions from the beginning to the end of trial (R, V VI, 567- 714, V VII, 740-828, V VIII, 855-898, V IX, 992-1090; M-PC, Ground 14).

Trial counsel only objected one time to the States use of leading questions (R, V VIII, 862). That occurred during the testimony of Scott Jason McGuire. On direct exam of McGuire the prosecutor asked:

Q I assume all three of you got out of the pickup truck and walked into the room there that this gentleman had there?

Mr. Quarles: Judge, I've been rather lenient so far. We object to the continuing leading nature of Mr. Davis' questions.

The Court: Objection be sustained.

(R, V VIII, 862). This objection to the use of leading questions was at the insistence of Appellant (R-PC, V II, 267). Appellant testified at evidentiary hearing that:

"I had previously, before that, that he was - you know, he was basically doing that to every witness that was brought up, so on that one issue, I started, more or less, complaining a lot more -"

(R-PC, V II, 267). Appellant testified he was complaining to trial counsel about the State's use of leading questions even before trial counsel objected. It was obvious to Appellant that the State was telling its witnesses what to say even before they said it (R-PC, V II, 267-268). Appellant testified the State was telling the witnesses what to say because they did not know what they were talking about (R-PC, V II, 268).

Appellant argues that trial counsel's failure to object to the use of leading questions allowed the State to introduce any evidence it wanted. Appellant further contends trial counsel's failure to object to the State's use of leading questions caused the trial to progress rapidly. At the end of the first day of trial, the prosecutor told the court that the first seven witnesses went a bit quicker than expected (R, VI, 559-560). The prosecutor also admitted that he was ahead of schedule (R, VI, 560). Even the court seemed to believe the witnesses and trial went faster than expected (R, V VI, 559). Just before Scott Jason McGuire testified on Wednesday, October 16, 1996, another indication of the fast pace of the trial took place when the court and prosecutor stated:

The Court: We're going too fast?

Mr. Davis: Yes. I was going to tell you earlier, we need to actually slow it down (R, V VII, 726-727, 828).



After twelve witnesses had testified for the State, the court again remarked about the fast pace of the trial when it said:

The Court: Admittedly, all the witnesses so far have been going pretty quick.

(R, V VIII, 853). At the evidentiary hearing, the trial prosecutor testified he was not surprised at how fast the trial progressed (R-PC, V I, 35).

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Section 90.612(3), Fla. Stat. (1997). Ordinarily, leading questions should be permitted on cross-examination. Section 90.612(3), Fla. Stat. (1997).

Although a party rarely has a choice in selecting the witnesses needed to prove his case, nevertheless, a party who calls a witness is expected to have reason to believe that the witness will give testimony favorable to that party without the need to use leading questions. From this assumption comes the general rule that a party may not ask a witness a leading question on direct or redirect examination. See Erp v. Carroll, 438 So.2d 31 (Fla. 5th DCA 1983)

Appellant contends that the State used leading questions beginning with Martha Doak, the housekeeper who discovered the victim's body and ending with Ronald Reeves, the medical examiner (R, V VI, 567- 714, V VII, 740-828, V VIII, 855-898, V IX, 992-1090) . Trial counsel did not object (except one

time) to the State's use of leading questions during the examination of each state witness (R, V VI, 567- 714, V VII, 740-828, V VIII, 855-898, V IX, 992-1090).

Appellant acknowledges that Doak, Edward Schlaupitz, Roy Von Hof and Officer Erickson, were not "important" witnesses like McGuire or the FBI agents (Jim Harcum, Robert Childs and John Grant) who testified for the State. But Doak, was the first witness for the State of Florida. She was the housekeeper who found the body of Roger Hensley (R, V VI, 659-660). Other than finding the body and establishing venue she did not provide the any other material testimony. Nevertheless, the State used leading questions throughout her testimony and each and every witness throughout the trial(R, V VI, 567- 714, V VII, 740-828, V VIII, 855-898, V IX, 992-1090 Leading questions that suggested the desired answer to the witnesses. It was not necessary to use leading questions with Martha Doak, or any of the other witnesses, to develop their testimony. They were not a hostile witness. They were not an adverse party. Most matters were not preliminary matters. The witnesses were not children or ignorant. Finally, this was not a situation where the witnesses' memory was exhausted.

Appellant further contends the State used leading questions during the direct examination of: the second

witness, Investigator James Gogarty of the Ormond Beach Police Department (R, VI, 675-691); the third witness, Cary Ace Bowers (R, V VI, 692-695); the fourth witness, Edward Schlaupitz(R, V VI, 695-701); the fifth witness, Roy Von Hof(R, Vol VI, 702-706); the sixth witness, Audrey Hudson (R, V VI, 707-712); the seventh witness, Officer David Erickson (R, V VI, 713-715.; the eighth witness, FBI agent James Harcum(Rec Vol. VII, pp. 740-747); the ninth witness, FBI agent Robert Childs (Rec Vol VII, pp. 747-754, 758-771, 773-774, 775-776, 782-783, 785-787); the tenth witness, FBI agent John Grant (Rec Vol. VII, pp. 788-797, 798); the eleventh witness, Detective Henry Osterkamp (Rec Vol. VII, pp. 799-816); the twelfth witness, FDLE agent Steven Miller (Rec, Vol. VII, pp. 816-823, 826); the thirteenth witnesses, co-defendant, Scott Jason McGuire (Rec, Vol. VIII, pp. 854-862, 863, 868-869, 870-871, 873-876, 878-879); the fourteenth witness, N. Leroy Parker (Rec, Vol. IX, pp. 992-1027); the fifteenth witness, David Perry (Rec, Vol. IX, pp. 1027-1035); the sixteenth witness, Jennie Ahern (Rec, Vol. IX, pp. 1036-1048); the seventeenth witness, Margaret Tabor (Rec, Vol. IX , pp. 1049-1057); and the eighteenth, and final witness, Ronald L. Reeves (Rec, Vol. IX , pp. 1057-1089).

Appellant contends trial counsel's failure to object to leading questions with the first witness, Doak set the tone of

the trial with the jury. Appellant argues it was not clear whether the answers of Doak and all other witnesses called by the State were their answers or the prosecutors answers. This is important because later in the trial in closing, the prosecutor made numerous statements of personal opinion or belief and other statements which made the jury treat him as a defacto member of the jury. Appellant submits it appeared to the jury that trial counsel was not subjecting the State's case to meaningful adversarial testing because trial counsel was convinced of the Appellant's guilt. Appellant contends that, but for this evidence elicited by leading questions, the state could not have elicited facts to prove the elements of the crime charged. The jury based its conviction of Defendant upon this evidence elicited by leading questions on direct examination.

**(7) Trial counsel did not object when the State elicited testimony from Scott Jason McGuire that he was telling the truth**

Appellant alleged in this ground that trial counsel failed to object when the State asked one of its star witnesses whether he was telling the jury the truth. (R, V VIII, 878-879; M-PC, Ground 21). Trial counsel denied Appellant effective assistance of counsel by failing to object to this testimony.

Trial counsel did not object when the state elicited

testimony from Scott Jason McGuire on direct examination that: he told the detectives the truth after they told him the didn't believe him (R, V VIII, 878); he told them the truth to help himself (Id. at 878); the bottom line is McGuire told the police the truth once he started talking (Id. at, 879); and McGuire was telling the truth at trial (Id. at 879).

Appellant contends that testimony that a witness is being truthful to a jury invades the province of the jury.

Determining the credibility of witnesses is solely within the province of the jury. See State v. Brown, 767 So.2d 565 (Fla. 4th DCA 2000). The State was also bolstering the credibility of this witness even before it had been attacked. This is improper. A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

Section 90.609, Fla. Stat. (1997). This was not reputation evidence for truthfulness. Appellant argues this testimony improperly bolstered the credibility of McGuire in the eyes of the jury. This testimony was inadmissible and highly prejudicial to the interests of Appellant.

**(8) Trial counsel made a statement in opening which was highly prejudicial to Appellant.**

In this claim, Appellant alleged that trial counsel was ineffective when he said in opening statement that Appellant didn't play golf, he drank alcohol, did crack cocaine, that it was not a good life and was not anything counsel or the jury would do (R-PC, V V, 614; M-PC, ground 5).

Trial counsel made a statement in opening which was both prejudicial to and not consented to by Appellant. Counsel said in opening statement:

"Mr McGuire and Mr. Brown, they don't go play golf together. They don't do things like that. They do things like consume a lot of alcohol. They do crack cocaine. They hang out on the Boardwalk area, unemployed. It's not a good life and it's not a - it's not something they any of us would do, but it's just a - that's the way it was."

(R, V VI, 648-649). Appellant testified at the evidentiary hearing he did not consent (except to the unemployment statement) to trial counsel making these statements (R-PC, V II, 256). Trial counsel may have been attempting to be "honest" with the jury to establish some credibility. But, trial counsel could have said that Appellant had used excessive alcohol and drugs prior to or about the time the victim was killed without saying Appellant did not live a good life. Appellant argues that trial counsel was telling the jury Appellant did not live a good life, he lived a bad life. Therefore, the jury believed that Appellant must be a bad person. Appellant argues that trial counsel was telling the

jury that Appellant was not like trial counsel or the jury. Appellant contends trial counsel was distancing himself from his own client right from the beginning of the trial. The effect was to convey to the jury, "he's not like us good people, he's a bad person." These statements were highly prejudicial to Appellant.

Appellant testified he came to Daytona Beach on vacation (R, V X, 1112). Appellant contends Daytona Beach is not the golf capital of the world. Daytona Beach is best known for events like Bike Week, Speed Week, Spring Break, Biketoberfest, and Black College Reunion. These are all events involving alcohol and partying. Further, Appellant did not hang out on the Boardwalk (R, V II, 256-257). The Boardwalk in Daytona Beach is well known for crime including drugs and teenage prostitution. Appellant was prejudiced by trial counsel's statement that Appellant hung out where crime, including teenage prostitution goes on.

Trial counsel's statements not only did not subject the State's case to meaningful adversarial testing. Appellant contends these statements also assisted the State in the prosecution of its case by lessening its burden of proof. The total effect of these statement was to convey to the jury that Appellant was a "bad person."

**(9) In closing argument, trial counsel did not make arguments**

that would have supported the defense theory of the case and that would have impeached the credibility of one of the State's star witnesses; trial counsel made a statement of concession not supported by the evidence and trial counsel made a statement prejudicial to the interests of Appellant

In this ground, Appellant alleged trial counsel entirely failed to subject the State's case to meaningful adversarial testing in his closing argument (R-PC, V V, 627; M-PC, Ground 8). Trial counsel's comments lessened the burden of proof on the State. Appellant was prevented from making many arguments because trial counsel was ineffective in the cross-examination of Scott McGuire about prior inconsistent statements and other matters.

First, trial counsel told the jury that one of the witnesses was Mr. Bowers who found the driver's license (of Roger Hensley) and contacted the police (R, V XI, 1222). Bower's testified he found Roger Hensley's driver's license and phone card at the corner of Earl Street and Oleander in Daytona Beach, approximately one block off of A1A (R, V VI, 693-694). At the evidentiary hearing, McGuire admitted to having lived at 507 Earl Street in Daytona Beach and having a Florida ID card with that address (R-PV, V I, 74-75). Trial counsel did not argue the fact that Scott Jason McGuire lived at 507 Earl Street in Daytona Beach and that Roger Hensley's driver's license was found on Earl Street.

Second, trial counsel said in closing argument that:



Margaret Tabor came in and said that she found some blood on those same tennis shoes or on one of the shoes. And I believe she said that -- well, I don't know, I think she did a match and indicated that the blood was -- some amount of blood on there matched Roger Hensley.

(R, V XI, 1229). Trial counsel's argument was incorrect.

Margaret Tabor testified that she:

identified human blood on the right shoe. It is consistent with him (Roger Hensley) meaning I can't -- I can't say, well it's the same allele type so it's him. All I can do is, he cannot be eliminated as a donor or a source of that particular blood stain, because there are other people out in the world who do have that type. But it is consistent with him.

(R, V IX, 1053-1054). Trial counsel failed to argue to the jury that some blood found on one of (Appellants) shoes was only consistent with Hensley's blood type. He failed to argue that while Hensley could have been a donor of the blood it was not proven conclusively that it was Hensley's blood. It was consistent with Hensley's blood and the blood of a lot of other people too. The jury heard trial counsel admit that Hensley's blood was found on one of Appellant's shoes. Appellant contends trial counsel lessened the State's burden of proof.

Third, trial counsel immediately followed up with the statement that:

the Defendant was in the place. There is blood all over the place. So sure, he's

going to get some blood on his shoes.

(R, V XI, 1229). Again, trial counsel erred when he admitted that Appellant had Roger Hensley's blood on his shoes.

Finally, trial counsel failed to argue that the State had not proved beyond a reasonable doubt that Hensley's blood was found on Appellant's shoes (R, XI, 1217-1237, 1263-1265).

Fourth, trial counsel made a statement that distanced himself from his client and lessened the State's burden of proof when he said:

McGuire and Brown are convicted felons.  
These aren't people that you're going to  
have over to your house on Saturday after-  
noon for a Labor Day picnic or anything  
like that. These are not wonderful people  
by any means.

(R, V XI, 1232). This statement did not place Appellant in a good light in the eyes of the jury. It distanced trial counsel from his own client. The jury viewed the statement as such. This statement made it appear to the jury that trial counsel did not believe in the defense or even like his own client. The jury believed that if Appellant was not someone who trial counsel would associate with and was not a nice person, he must have committed the crime. This statement was adverse to the interests of Appellant. Appellant did not consent to trial counsel making this statement about Appellant (R-PC, V II, 264).

Fifth, trial counsel argued to the jury that they should

consider whether a witness has ever been offered or received any money, preferred treatment, or other benefits. He then argued:

preferred treatment in order to testify at a proceeding. Well, that's Scott McGuire to a tee.

(R, V XI, 1235). Because trial counsel failed to cross-examine Scott McGuire on exactly what he received in return for his plea, Appellant was not able to argue all of the preferred treatment McGuire received. Trial counsel's ineffectiveness prevented Appellant from arguing everything McGuire received (as more thoroughly discussed in section(1) above). The jury did not know about and did not consider the fact that McGuire testified the way he did at trial because if he did not, the State would set aside his plea and sentencing and try him on the First Degree Murder charge (R-PC, V V, 710). Trial counsel's ineffectiveness prevented Appellant from arguing that McGuire's testimony was bought and paid for by the State and thus could not be relied upon. The jury did not know of these material facts when they considered the credibility of McGuire.

Sixth, trial counsel failed to argue to the jury that Scott McGuire admitted that the clothes (including his shoes) he was wearing at the time of Roger Hensley's murder were "lost" (EX #3, SC01-1275, 19).

The jury heard evidence that Appellant said he had destroyed or burned his pants because they had blood on them (R, V VII, 763). The jury did not know and did not consider the fact that McGuire had "lost" his clothes including the shoes he was wearing at the time of Hensley's death. Due to trial counsel's ineffectiveness, Appellant was prevented from arguing this fact as evidence of McGuire's guilt. If trial counsel had adequately cross-examined McGuire, Appellant could have made this argument to the jury.

Seventh, due to trial counsel's ineffectiveness, Appellant was prevented from arguing to the jury that Scott McGuire's tape recorded statement with Steven Miller of February 15, 1993, was not made until Miller had interviewed McGuire for approximately two and one-half to three hours (EX #3, SC01-1275, 2). Since trial counsel was ineffective during the cross-examination of McGuire about this fact, Appellant was prevented from arguing this to the jury. The jury did not know and did not consider that McGuire initially did not want to be tape recorded because trial counsel failed to make this argument. The jury did not consider the effect of this fact upon the credibility of McGuire

Eighth, due to trial counsel's ineffectiveness, Appellant was prevented from arguing to the jury that no gun had ever been introduced in Appellant's trial (I R, Exhibits, 1-4).

In his trial testimony, Scott McGuire testified that Appellant had a gun(R, V VIII, 857-861, 866).

Trial counsel failed to argue to the jury that FBI agent James Harcum had testified about Appellant being in possession of a gun when he was arrested in Tennessee in November of 1992 (R, V VII, 742). Appellant argues, trial counsel failed to argue that there was no gun introduced into evidence in Appellant's trial. (I R, Exhibits, 1-4). Appellant contends trial counsel also failed to argue that the lack of a gun introduced into evidence also affected the credibility of the FBI agents who testified about a confession Appellant had made. The jury did not consider this argument in weighing the credibility of the FBI agents and McGuire. Appellant contends this argument was especially important to the theory of defense since the FBI agents testified to a confession by Appellant.

Ninth, due to trial counsel's ineffectiveness, Appellant was prevented from arguing to the jury that there were far more footprints at the scene of the crime that were not identified with Appellant. The footprint expert for the State testified that there were 12 other shoe tracks not identified with Appellant's shoes at the scene of the crime (R, V IX, 1048). Appellant argues that although he was at the scene of the crime, so was McGuire. Trial counsel failed to argue this

fact to the jury (R, V XI, 1217-1237, 1263-1265). Further, trial counsel did not argue this fact in a reasonable doubt argument (Id at 1217-1237, 1263-1265).

Finally, due to trial counsel's ineffectiveness during the cross examination of McGuire (as discussed in section (1) above), Appellant was prevented from using each and every one of these prior inconsistent statements to impeach the credibility of the State's star witness, McGuire. Appellant was prevented from arguing that if the jury could not rely upon one statement of McGuire, they could not rely upon either of the statements. This was due to trial counsel's ineffectiveness. The jury did not know about and therefore did not consider the effect of these inconsistent statements upon the credibility of McGuire.

Since Appellant testified at trial that he did not stab Roger Hensley, Appellant contends the alleged confession would have been negated. Appellant further contends that since there were no credible eyewitnesses to testify that Appellant committed the murder, reasonable doubt would have been created.

**(10) Trial counsel made a concession in rebuttal argument not supported by the evidence**

In this ground, Appellant alleged that trial counsel had conceded in closing argument that the victim was "gurgling" on

his own blood. The evidence at trial did not support this statement(R, V VIII, 871; M-PC, Ground 9)

Trial counsel lessened the State's burden of proof when he said to the jury:

"and the prosecutor can stand up here and talk about gasping and gurgling and gasping and gurgling to make everything just sound horrible when Paul Brown is on trial. There is no doubt that all of that happened."

(R, V XI, 1264). Trial counsel's failure was in admitting that the victim was "gurgling." Scott McGuire never testified that he heard the victim "gurgling." McGuire testified that he only heard the victim sound like he was struggling to breathe, gasping his last breaths (R, V VIII, 871).

Trial counsel's concession of fact prejudiced Appellant because the statements of the prosecutor were not supported by the record and were highly inflammatory. They were made only to inflame the passions of the jury. By admitting that Roger Hensley was "gurgling" or choking to death on his own blood, trial counsel made statements which were highly detrimental to Appellant. Appellant argues that trial counsel was assisting the State. Trial counsel was lessening the burden of proof on the State.

**(11) Trial counsel did not object to irrelevant and prejudicial testimony concerning the condition of the victim**

This ground claims ineffectiveness of trial counsel for

failing to object to inflammatory and irrelevant evidence during the testimony of State's witness Edward Schlaupitz (R-PC, V V, 680; M-PC, Ground 17). Trial counsel did not object to non-relevant and inflammatory testimony of Edward Schlaupitz. This comment concerned the condition of the victim. The comment was neither relevant nor responsive.

The State called this witness to prove the identity of the victim. The State showed Schlaupitz State exhibit 3-E which was a photograph of a man. The witness identified the photograph as Roger (R, V VI, 701). In response to a question about Was this Roger Hensley? the witness said:

"In slightly worse condition than I have ever seen him. But yes, it is. Yes, sir."

(Id at 701). Trial counsel did not object (Id at 701). The jury heard inadmissible and irrelevant testimony of the witness' opinion about Hensley's physical condition. It was not responsive either.

Relevant evidence is defined as evidence tending to prove or disprove a material fact. Section 90.401, Fla. Stat. (1997). Whether the victim was in worse condition than this witness had ever seen him was not relevant to prove that Appellant had murdered Hensley. This testimony inflamed the passions of the jury. The jury relied on this emotional and highly prejudicial evidence to convict Appellant. This witness was successful in doing what that State could not do



concerning photographs which are "gruesome" and inflammatory. It tended to inflame the jury and was unduly prejudicial.

Appellant contends that trial counsel's failure to object was another example letting it all come without subjecting the case to adversarial testing.

**(12) Trial counsel did not object to improper comments and argument of the State in opening statement.**

Appellant claims in this ground that trial counsel did not object to personal opinion or belief and argument of the prosecutor in opening statement(R-PC, V V, 609; M-PC, Ground 4). Appellant contends opening statement is an opportunity for counsel to tell the jury what the evidence will be or what counsel believes the evidence will be. It is not the time to argue the case. It is not the time for counsel to tell the jury that after they hear the evidence, counsel is convinced they will return a verdict of guilty. The prosecution may tell the jury that the State will be asking the jury to find defendant guilty after the evidence has been heard. In this case the prosecutor went beyond the bounds of permissible opening when he said:

"that the fact of the matter will be after you hear all the evidence, I'm convinced you'll return a verdict of guilty as to first-degree murder on the part of Mr. Brown."

(R, V VI, 646). Trial counsel did not object (Id at 646).

This was the personal opinion of prosecutor on Appellant's

guilt. This statement was highly prejudicial and constituted fundamental error.

The prosecutor also said in opening:

"and in this case, I'm convinced when you hear all the evidence—you don't have to find a person guilty of both necessarily— but I'm convinced you'll find that Mr. Brown is guilty of first-degree murder ... "

(R, V VI, 646). Trial counsel did not object (Id at 646).

This statement constituted the personal opinion or belief of the prosecutor in Appellant's guilt. It also constituted argument. Appellant contends this statement was highly prejudicial and constituted fundamental error.

The State in opening also told the jury that Scott McGuire looked in the bedroom and:

"there is Mr. Hensley laying there on the floor, bloody mess everywhere."

(R, V, VI, 640). This comment was argument. Trial counsel did not object (R, VI, 640). Appellant acknowledges this is probably not the most prejudicial statement ever made by a prosecutor in opening. Nevertheless, it established a trend for trial counsel not to hold the State's feet to the fire concerning evidentiary matters.

Further, the State in opening told the jury that they would hear from McGuire that Mr. Hensley was:

laying there gasping for breath, gurgling, choking, basically dying there on the floor.

(R, V. VI, 641). Trial counsel did not object (R, V VI, 641). Appellant contends that this was argument by the State. It was not supported by evidence (R, V VIII, 871). It was also highly prejudicial.

Trial counsel's conduct in not objecting to these comments and arguments set the stage for the State to engage in the other conduct described herein. This was the beginning of trial counsel not acting as an advocate for Appellant. This conduct and the other conduct described herein resulted in an entire failure by trial counsel to subject the State's case to meaningful adversarial testing.

**(13) Trial counsel failed to take the deposition of Robert Childs before trial.**

This ground of the motion for postconviction relief alleged trial counsel failed to take the pretrial deposition of Robert Childs (R-PC, V V, 642; M-PC, Ground 11). Appellant argues that if trial counsel had taken the pretrial deposition of Robert Childs he would have learned that Appellant was not given any substantial amount of alcohol when he was arrested by the FBI. Therefore, trial counsel would not have asked the question which opened the door to highly prejudicial evidence of collateral crimes.

Any time after the filing of the charging document any party may take the deposition upon oral examination of any

person authorized by this rule. Fla. R. Crim P. 3.220(h). If trial counsel had taken the pretrial deposition of Robert Childs he would have learned that the Appellant was given only a capful of whiskey (R, V VII, 783).

At trial, Robert Childs testified that he came into contact with Appellant on November 8, 1992, at a farmhouse in Lafayette, Tennessee (R, V VII, 748). Childs said that the following day, November 9, 1992, he had contact with Appellant when Appellant was transported to the FBI field office to fingerprint him and take him to court for his initial appearance. The arrest of Appellant occurred on the 8th which would have been a Sunday (R, V VII, 751-752). Childs said that the capful of whiskey that was given to Appellant was when he was arrested on November 8, 1992. Childs said the interview that he had with Appellant was the next day, November 9, 1992 (R, V VII, 783).

Trial counsel's failure to take the deposition of Childs resulted in irrelevant and highly prejudicial testimony that there was a standoff at the farmhouse with Appellant having a firearm that lasted for over two hours (R, V VII, 782). Appellant argues that if the jury had not heard this highly prejudicial and irrelevant evidence, the jury would not have formed the opinion that Appellant was an extremely violent person and because of this other incident he must be guilty as

charged in the Indictment.

Appellant contends that if trial counsel had taken the pretrial deposition of Robert Childs he would not have asked the question concerning alcohol being given to Appellant.

**(14) Appellant was denied effective assistance of counsel because trial counsel did not question numerous State witnesses about Appellant not confessing the murder to them.**

In this claim, Appellant argues that it would have been a successful trial tactic for counsel to elicit testimony from FDLE agent Miller and Detective Osterkamp that Appellant did not confess to them (R-PC, V V, 681; M-PC, Ground 18). Trial counsel was ineffective for not asking Miller and Osterkamp whether Appellant had admitted to them that he stabbed Roger Hensley to death. Trial counsel waived cross-examination of Detective Osterkamp (R, V VII, 816). Trial counsel did not question FDLE agent Miller on this matter (Id. at 826-828).

Appellant contends this would have been a trial tactic to combat the confession testimony of the FBI agents. It would have shown the jury that Appellant did not confess to FDLE agent Miller who was involved in the investigation of Hensley's murder (Id. at 817). He was involved in the investigation of this case including interviewing the co-defendant, McGuire (Id at 817-822). It would have shown that Appellant did not confess to Detective Osterkamp either. Osterkamp handled murder investigations at the time of

Hensley's death (Id at 799). He was involved in the investigation of Hensley's death including going to Tennessee to retrieve some evidence taken from Appellant and arrest him for Hensley's murder(Id. at 799-802). Appellant contends that trial counsel should have shown that Appellant did not confess to the two investigators who were responsible for Hensley murder investigation.

Trial counsel's failed to neutralize or minimize the testimony of all the state witnesses (except the FBI agents and Scott Jason McGuire) regarding the witnesses lack of knowledge concerning Appellant's confession to stabbing Roger Hensley to death. The jury would have known how irrelevant the witnesses testimony was concerning the ultimate issue if trial counsel had asked each of these witnesses whether or not it was true that Appellant had never confessed to them that he killed Roger Hensley. This tactic would have made trial counsel's closing argument about the importance or lack of importance of witnesses even stronger. It would have tied testimony or facts to trial counsel's argument.

Appellant argues trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Trial counsel's ineffectiveness began in opening statement and ended in Appellant's closing argument. In between, trial counsel entirely failed impeach the credibility of the co-

defendant, opened the door to irrelevant and highly prejudicial testimony, did not object to inadmissible hearsay statements of the victim, did not object to the State's use of leading questions all during trial, made a concession of evidence not supported by the record. In rebuttal argument, trial counsel (without Appellant's consent) conceded Appellant had "turned bad." Appellant argues counsel's overall performance measured by the totality of the grounds under this issue creates a presumption of ineffective assistance of counsel.

**ARGUMENT II**  
**THE TRIAL COURT ERRED IN DENYING APPELLANT A NEW TRIAL**  
**BASED UPON HIS CLAIM OF NEWLY DISCOVERED EVIDENCE**

In this claim Appellant alleged he was entitled to relief based upon newly discovered evidence that Scott McGuire had a prior burglary conviction and escape from the state of Ohio. At trial he did not admit to this violent felony conviction. McGuire only admitted to two felony convictions for drug offenses. (R, V VIII, 880).

First, to qualify as newly discovered evidence, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of due diligence. Second, to prompt a new trial, the newly discovered evidence must be of such nature that it

would probably produce an acquittal on retrial. See Blanco v. State, 702 So. 2d 1250 (Fla. 1997).

The standard of review to be applied is that as long as the trial court's findings are supported by competent substantial evidence, the reviewing court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.

Blanco, 702 So.2d at 1252.

In his motion for postconviction relief, Appellant alleged the newly evidence was as follows: Scott Jason McGuire escaped from the Mansfield Correctional Institute, Mansfield, Ohio, on February 15, 1989. (R-PC, V V, 587). A copy of the Ohio Warrant of Arrest and Hold Order was attached to the motion in support of this allegation (R-PC, V V, 695). This document listed an AKA of Scott Jason McGuire. At the time of Roger Hensley's murder, on or about November 6, 1992, Scott Jason McGuire was an escaped convict (R-PC, V V, 587). Scott Jason McGuire was convicted of the felony of Burglary in Cuyahoga County, Ohio on December 12, 1986, and was sentenced to a term of five to twenty-five years incarceration. A copy of the Ohio Warrant of Arrest and Hold Order was attached to the motion in support of this allegation (R-PC, V V, 695). Scott Jason McGuire used the assumed name of Scott Keenum in



this Burglary conviction from Cuyahoga County, Ohio. A copy of Ohio Warrant of Arrest and Hold Order was attached to the motion in support of this allegation (R-PC, V V, 695.

Finally, the state of Ohio placed a hold on Scott Jason McGuire with the Florida Department of Corrections (R-PC, V V, 696). Appellant argued that there were no inconsistencies in the newly discovered evidence.

Appellant alleged in his motion for postconviction relief that this evidence was discovered when a check of the Florida Department of Corrections website on Scott Jason McGuire revealed a hold placed on him by the State of Ohio (R-PC, V V, 587).

In denying relief, the trial court found that Appellant failed to prove that the person who committed the aggravated burglary in Ohio and escaped was Scot McGuire (R-PC, V III, 427). The court also stated if McGuire was the person who committed the aggravated burglary and escape, this evidence would not have affected the outcome of the trial because of Appellant's detailed confession (R-PC, V III, 429-430). Appellant argues the trial court erred in denying relief on this ground. Further, Appellant contends the trial court's findings were not supported by competent substantial evidence. The trial court applied the wrong legal standard for newly discovered evidence.

Appellant argues he did prove Scott Jason McGuire and Scott Keenum are one and the same person. The Warrant of Arrest and Hold Order from the state of Ohio for Scott Keenum lists an AKA of Scott Jason McGuire (R-PC, V V, 695). It states Keenum was sentenced to 5-25 years on December 12, 1986 from Cuyahoga County, Ohio (Id.). It also states he escaped from custody on February 15, 1989 (Id.). The Florida Department of Corrections acknowledged receipt of Ohio's detainer for Scott Jason McGuire AKA Daniel Scott Davidson (Id. at 697). At the evidentiary hearing McGuire admitted he used the name Daniel Scott Davidson while in Daytona Beach (R-PC, V I, 71).

Appellant also contends he proved that Scott Jason McGuire was convicted in Ohio under the name of Scott Keenum. Exhibit#4, SC01-1275 was a certified copy of judgment and sentence dated 12-10-86 in the name of Scott Keenum (R-PC, V III, 306). It proves that McGuire (Keenum) was indicted for aggravated burglary in Ohio (Id.). It proves that Scott Keenum was imprisoned in the Ohio State Penitentiary, Mansfield, Ohio for a term of 5 to 25 years (Id.). He entered a plea of no contest to aggravated burglary (Id.).

At the evidentiary hearing, Scott Jason McGuire took the Fifth amendment and refused to state his name (R-PC, V I, 67). The trial court recognized the fact that "Mr. McGuire"

who had been referred to as the co-defendant in this case had taken the stand to testify (R-PC, V I, 66). Then, the state made it known that it was not offering immunity to McGuire (R-PC, V I, 67). McGuire said he believed he did enter a plea in case no. 93-3720 in State of Florida v. Scott Jason McGuire on August 6, 1993 (R-PC, V I, 68). He admitted he pled to second degree murder and was sentenced to 40 years prison (R-PC, V I, 68). When asked if he had a felony conviction in 1989 from Ohio for aggravated burglary, McGuire took the Fifth amendment (R-PC, V I, 71). When asked if he escaped from Ohio in February, 1989 and ever went by the name Scott Kenan (Keenum), he plead the Fifth (R-PC, V I, 71). McGuire admitted he had two felony convictions from Florida (R-PC, V I, 73). He admitted he believed he previously lived at 507 Earl Street in Daytona Beach and had a Florida identification card with that address (R-PC, V I, 74-75).

Trial counsel did not believe he knew about McGuire's Ohio conviction for Burglary and escape (R-PC, V I, 97). Appellant met Scott Jason McGuire in November 1992 (R-PC, V II, 259). Appellant said the person who came to court in the orange jump suit to testify was McGuire (R-PC, V II, 259). In 1992, Appellant did not know about McGuire's Ohio conviction for Burglary and escape (R-PC, V II, 260). In fact, McGuire never discussed his criminal record with Appellant (R-PC, V

II, 260). Thus, the facts concerning this newly discovered evidence was unknown to Appellant, trial counsel and the court.

Appellant argues the newly discovered evidence would probably produce an acquittal on retrial because it provides the motive to support Appellant's theory of the case. Appellant's theory of the case at trial was that Scott McGuire killed the victim. Proof that Scott McGuire was convicted of Aggravated Burglary and escape from prison in Ohio at the time of the murder would have provided the motive to the jury. Appellant contends McGuire killed Hensley because McGuire was involved in yet another violent Burglary. In this case, McGuire killed the occupant. Appellant contends this is the reason McGuire wiped his fingerprints from the knife he touched and the bottle of beer and any other objects in the apartment. This was to avoid detection and return to the State of Ohio. McGuire was serving a five to twenty-five year sentence in Ohio when he escaped thus, he was a fugitive from justice at the time that he murdered Roger Hensley. The newly discovered evidence would have also impeached the State's key witness, Scott McGuire. At trial Scott McGuire admitted to two prior felony convictions and a conviction for Petit Theft(R, V VIII, 880). Scott McGuire should have admitted to at least three prior felony convictions not two. This

Aggravated Burglary conviction would not have allowed the State to show the jury that McGuire's felony convictions were only for drug possession offenses (R, V VIII, 880). The State asked a leading question on direct examination to get McGuire to testify that his prior felony convictions were for drug offenses only (R, V VIII, 880). The state was showing the jury that its star witness, although a two time convicted felon, was not a violent felon. If this newly discovered evidence had been introduced at trial, the jury would have known that the State's key witness, Scott McGuire, was also convicted of a crime of violence, Burglary previously to the Murder conviction (R, V. VIII, 879). The jury would have also known that McGuire was an escaped convict at the time of Hensley's murder.

Appellant argues that evidence that Scott McGuire used the assumed name of Scott Keenum in the Ohio Burglary conviction would have further impeached his credibility. If the jury did not know the true identity of the person who was testifying to them at trial as the State's key witness, they could not believe anything he said. Appellant contends this evidence along with the other claims alleged would probably produce an acquittal on retrial.

In the alternative, Appellant contends he was denied a full and fair hearing because the trial court did not hold

McGuire in contempt for failing to testify. Also, the state made it know that Scott McGuire should not testify. The state brought up the matter of counsel for McGuire when he testified (R-PC, V I, 50). The state said that McGuire needed to be informed of his right not to testify and that it may incriminate him (R-PC, V I, 51). Counsel for Appellant asked the trial court if it were going to advise McGuire of the consequences of not testifying (R-PC, V I, 52). The state said it was not giving McGuire immunity (R-PC, V I, 55). Counsel for Appellant said he would be asking the court to find McGuire in contempt if he refused to answer anything (R-PC, V I, 65). The state said that could not be done (R-PC, V I, 65). The court never advised McGuire that he could be held in contempt of court for refusal to answer the questions propounded to him (R-PC, V I, 66-84).

### **ARGUMENT III**

#### **THE TRIAL COURT ERRED IN DENYING RELIEF BASED UPON THE CUMULATIVE EFFECT OF INEFFECTIVE ASSISTANCE OF COUNSEL IN GROUNDS 3-5,7-12,14,17,18, 20 AND 21 OF THE SECOND AMENDED MOTION FOR POSTCONVICION RELIEF**

Appellant claims the cumulative effect of trial counsel's deficient performance denied him effective assistance of counsel as guaranteed by the Sixth Amendment, U.S. Constitution.

Appellant argues that trial counsel's performance was deficient as discussed in Issue I, above. Second, the

deficient performance prejudiced the defense as discussed in Issue I, above.

The determination of ineffectiveness pursuant to Strickland is a two prong analysis (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudice thereby. See Stephens v. State, 748 So. 2d 1028 (Fla. 2000). Further, under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings. Stephens, 748 So.2d at 1033.

In denying relief, the trial court found that the prejudice prong of Strickland had not been met in any of the grounds (R, V III, 425-452). The court cited Appellant's detailed confession as the reason the result of the proceeding would not have been different (Id at 425-452).

Appellant contends the trial court erred in finding that the prejudice prong had not been proved.

### **CONCLUSION**

Based upon the foregoing cases, authority, and arguments, Appellant respectfully requests relief as follows:

In regard to Argument I, reverse the murder conviction and sentence of death and remand for a new trial.

In regard to Argument II, reverse the murder conviction and sentence of death and remand for a new trial. In the alternative, remand to the trial court for a full and fair hearing on this matter.

In regard to Argument III, reverse the murder conviction and sentence of death and remand for a new trial.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to Judy Taylor-Rush, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 and by mail to Paul



Anthony Brown, DC# V02093, F.S.P. Main Unit, P.O. Box 181,  
Starke, FL 32091 this 7<sup>th</sup> day of December, 2001.

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JOHN J. BONACCORSY  
ATTORNEY FOR APPELLANT

**CERTIFICATE OF FONT**

I hereby certify that the size and style of type used in  
this brief is point proportionally spaced Courier New, 12pt.

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JOHN J. BONACCORSY  
ATTORNEY FOR APPELLANT