

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1275

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PAUL ANTHONY BROWN  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

---

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

---

REPLY BRIEF OF APPELLANT

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## ARGUMENT I

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

The state argues that it is Brown's burden to prove that his counsel rendered him ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984).(AB 20).

Further, to meet that burden, the state argues that Brown must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense.(AB 20).

Brown disagrees. As in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), the parties are in disagreement regarding the appropriate standard of review in this case. Brown contends that trial counsel's conduct in this case amounted to per se ineffective assistance of counsel and that United States v. Cronic 466 U.S. 648(1984), not Strickland, is the proper test. In Cronic, decided the same day as Strickland, the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed. Nixon, 758 So.2d at 621. Brown contends that the circumstances as claimed in Argument One are so egregiously prejudicial that

ineffective assistance of trial counsel should be presumed.

The state fails to acknowledge Brown's claim that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. (IB 29-30). (If so), then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. Nixon, 758 So.2d at 622. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. Cronic, 466 U.S. at 656-657. The crux of Cronic is that the right to effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. See Stano v. Dugger, 921 F.2d 1125, 1152-1153 (11th Cir. 1991).

The state fails to acknowledge Brown's contention that there was an actual breakdown of the adversarial process which justifies a presumption of ineffective assistance of counsel. (IB 27). Brown argues that under Cronic, a defendant need not show prejudice; prejudice is presumed. Nixon, 758 So.2d at 623.

To determine which test applies, one must first decide whether trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Id at

622. In Nixon, this Court stated that trial counsel's statements during the opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the state's case to meaningful adversarial testing. Id at 622. The state argues that trial counsel saw the only question in the case as the death penalty, and so, the trial became "penalty phase oriented..." (AB 11). Brown argues that Nixon was also a "penalty phase oriented" trial.

Further, the state contends that where evidence of guilt is overwhelming, deficient performance does not merit relief because there is no reasonable probability that the results would have been different. Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989). (AB 21).

Brown argues the exception to the Strickland standard is appropriate as in this case where the circumstances would offend basic concepts of due process. Stano, 921 F.2d 1125, 1154 (11th Cir. 1991). Further, the Eleventh Circuit has stated that when such prejudicial circumstances exists, the concern is with procedural fair trial requirements, and not whether the defendant would have been found guilty. Id at 1154. Further, Brown replies that in Nixon v. Singletary this court noted that the defendant was disruptive, uncooperative at trial and that there was overwhelming evidence against

Nixon. Nixon, 758 So.2d at 625. Nevertheless, the defendant, not the attorney, is the captain of the ship. Id.

The state argues that reasonable strategic decisions of trial counsel will not be second guessed. (AB 21). Brown contends that trial counsel's trial strategy in this case was not reasonable. By pleading not guilty, Brown exercised his right to make a statement in open court that he intended to hold the state to strict proof beyond a reasonable doubt as to the offenses charged. Nixon, 758 So.2d at 623. Brown concedes that although trial counsel in this case could make some tactical decisions, the ultimate choice as to which direction to sail was left up to Brown. Id. at 625. Brown did not consent to trial counsel's trial strategy of essentially sitting on his hands at trial, assisting the state in its proof of the case or obtaining the death penalty against Brown. Justice Anstead in a specially concurring opinion in Nixon v. Singletary stated that:

"Even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."

Id. at 627.

Thus, in reply to the state's argument, Brown contends that trial counsel did not hold the prosecution to its heavy burden of proof beyond reasonable doubt. Brown argues that

Cronic, not Strickland applies.

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

Next, the state argues Brown did not prove that trial counsel's performance was ineffective in the use of cross examination for impeachment of co-perpetrator McGuire. (AB 21). The State cites to Robinson v. State 707 So.2d 668, 697-698, 700 n.12 (Fla. 1998), a case where the defendant complained that his trial attorney deficiently handled the main witness against him and did a poor cross examination and impeachment of that witness at trial. The State then argues that this Court affirmed the trial court's holding that this claim was procedurally barred because it could have been raised on direct appeal and that in a 3.850 motion the defendant was improperly attempting to re-litigate substantive matters under the guise of ineffective assistance.(AB 22). Thus, the State argues that Brown's claim is procedurally barred.

Brown argues that in Robinson, the trial court summarily denied the ineffective assistance of counsel claim as being procedurally barred. In Brown's case, the trial court did not rule that this claim was procedurally barred. Also, this Court stated in Robinson that not all of the sub-claims were

barred on Robinson's ineffective assistance of counsel claim. Robinson, 707 So.2d at 700.

This Court did not find an ineffective assistance of counsel claim was procedurally barred which was based upon failure to adequately impeach the state's key witness. Asay v. State, 769 So.2d 974, 984 (Fla. 2000). Further, Ventura v. State, 794 So.2d 553, 558 (Fla. 2001) was an appeal of an order entered by the trial court denying his motion for postconviction relief under Rule 3.850. Ventura claimed, in part, ineffectiveness in counsel's cross examination of Juan Gonzales and Timothy Arview. Id at 565-566. This Court considered the claim but found it to be wholly without merit. Apparently, this Court considered this claim of ineffective assistance based on trial counsel's cross examination of witnesses without finding a procedural bar to this claim.

In the alternative, the state argues that even if not defaulted, Brown is entitled to no relief because the claim has no merit. (AB 22). Further, the state argues that McGuire did not testify at trial that Brown did not ask him the question which Brown claims is inconsistent with McGuire's trial testimony. (AB 23). Unfortunately, the state fails to advise that in McGuire's pretrial, transcribed tape-recorded statement the only subject of conversation after McGuire and

Brown got out of the truck and were walking to the motel room was the subject of working for the guy (Hensley).(EX #3, 9-10).

Brown argues that the failure of McGuire to mention the alleged statement by Brown "How would you like to do it?" is a material difference between his trial statement and the prior transcribed tape-recorded statement. Further, Brown argues that to be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. See State v. Hoggins, 718 So.2d 761,771 (Fla. 1998). This includes allowing witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Id at 771. In a prosecution arising out of domestic dispute, it was reversible error to prohibit the defense from impeaching the victim by showing that in her initial statement to police she did not mention that defendant had shoved her. See Davis v. State, 756 So.2d 205, 208 (Fla. 4th DCA 2000). That was a prior material omission. Thus, Brown argues McGuire's failure to state in his transcribed tape-recorded statement to Stephen Miller of February 15, 1993, that Brown wanted to know "How would you like to do it?" was a prior material omission.

The state argues that had Quarels brought up this

inconsistent statement, the state could have brought out that McGuire told Brown he wanted to work for the man, and Brown was firmly against that because he wanted McGuire to do his bidding. (AB 25). Further, the state argues that such a tactic had it been tried by Quarels, would have provided another motive for Brown to kill Mr. Hensley. (AB 25). Brown argues that McGuire in his statement said he had made up his own mind not to work for the man.(AB 9-10). There is nothing in McGuire's previously transcribed tape-recorded statement which would provide another motive for Brown to kill Hensley. Id. Finally, Brown argues that if there were any downside to this tactic, it is far out weighed by the jury having known that Brown never made the statement "How would you like to do it?" ie: rip off or kill Hensley.

In regard to the failure of trial counsel to impeach McGuire with his statement that Brown was "dead set against killing the guy," the state argues that Mr. Quarels felt it was pretty clear that McGuire meant to say that Brown was dead set on killing Mr. Hensley.(AB 26). Mr. Brown argues that what McGuire meant to say and what McGuire said were two completely different things. The jury should have known that McGuire made the prior inconsistent statement that Brown was "dead set against killing the guy to get his car" in his



transcribed tape-recorded statement (Ex#3, 16) and again in his deposition testimony. (R-PC, V, CR#31). The bottom line is that on two separate occasions McGuire meant to say that Brown was dead set on killing the guy but also said exactly the opposite.

The state next argues that Brown's claim that McGuire made a previous inconsistent statement that Brown "never did anything with the gun except uh, keep it hid" (IB 36) is frivolous. (AB 27). The state further argues that had Mr. Quarels tried to claim that the part of the statement which indicated Brown "never did anything with the gun except uh, keep it hid" was inconsistent with his trial testimony that Brown held the gun at Hensley's back behind the truck seat, the entire context would have been presented, and the defense would have completely lost its credibility. (AB 27-28).

Brown replies that only the consistent portions of the prior statement given by McGuire would have been admitted. See Hills v. State, 428 So.2d 318,320 n. 1 (Fla. 1st DCA 1983).

The state next argues that McGuire mixed up the time he laid the knife on the table and the time which he threw it to the floor. (AB 29). The state argues it would have no impact whatsoever on any material matter. (AB 29). This was in

answer to Brown's claim that McGuire testified at trial that Brown handed him a knife and McGuire "took it and threw it down on the ground, floor." (IB 36). Brown had claimed that McGuire told Agent Miller in his transcribed tape-recorded statement that after he took the knife from Appellant, McGuire "immediately set it down on the table." (IB 36).

Mr. Brown argues that this inconsistency was material because at trial, McGuire was trying to emphatically show the jury that he was not involved in Hensley's murder by testifying that he "took it and threw it down on the ground, floor." (R, VIII 868). The state fails to include that in the transcribed tape-recorded statement, McGuire two times stated that he set the knife down on the table or that he laid it down. (EX #3,12-13). There is nothing in McGuire's transcribed tape-recorded statement which indicates his vehement disagreement (as he did at trial) with any plan to kill Hensley by throwing the knife down. (EX #3,12-13). Brown argues this would show that McGuire didn't get mixed up about the disposition of the knife, he was fabricating his trial testimony.

In regard to the prior inconsistent statement claim of Brown concerning McGuire's deposition testimony that he stood by the door and "he saw the man half on the bed and half on

the floor, blood all over the place," the state argues that McGuire may have omitted this factual testimony at trial but it is not inconsistent. (AB 29-30). Mr. Brown argues this was an inconsistency which affected the credibility of the co-defendant, McGuire. The state further argues that competent counsel would not have wanted to bring out that Hensley was half on and half off the bed when McGuire first saw him and at some point thereafter, he wriggled off the bed and on to the floor, because that would further have supported the HAC aggravator which the state sought and the trial judge found.(AB 30). Evidence of a prior inconsistent statement offered as impeachment is admissible only for that purpose unless it is independently admissible on other grounds. See State v. Smith, 573 So.2d 306,313 (Fla. 1990).

The state argues that trial counsel significantly impeached McGuire at trial. (AB 31-32). Brown argues that the state gave absolutely no examples of this significant impeachment of McGuire by Mr. Quarels. Further, the state points out that McGuire in his deposition said that he really wasn't paying attention. (AB 31). Brown argues that trial counsel should have been attempting to show to the jury that McGuire really wasn't paying attention and therefore his testimony was not truthful and/or not credible. The state

argues as frivolous Brown's claim that at trial McGuire sold Appellant a state ID while at deposition he said Appellant gave him some crack for it. (AB 32). Further, the state makes the claim that Brown was here (Daytona Beach) selling drugs. (AB 32, Footnote 8). The state fails to include that McGuire also said in the prior inconsistent statement at deposition that McGuire figured he was going to get it (the ID) back. (R-PC, V, CR #32). Mr. Brown was not selling drugs as the state argues, Brown merely gave some drugs to McGuire in return for the use of the ID. Brown argues that this shows that McGuire's trial testimony that he sold Appellant a state ID was inconsistent with his prior statement.

Further, the state argues that Brown has not met his burden under Strickland. (AB 32-33). Again, Mr. Brown argues that the appropriate standard is not Strickland but Cronic.

In its answer to Brown's claim that trial counsel did not question McGuire about exactly what he received from the state in return for his plea, the state argues that Quarels substantially impeached McGuire. (AB 34). The state did not address Brown's claim that trial counsel did not bring to the jury's attention that McGuire's plea and sentencing could be set aside if his trial testimony was substantially different from his proffered statement. (IB 43). The state fails to

acknowledge that McGuire was told, in essence, at the time of his plea, that his testimony at trial better be the same or his plea and sentencing could be set aside. Brown argues that trial counsel failed to show the jury that McGuire lied to avoid the death penalty. The state concludes its argument by saying that Brown has not met his burden under Strickland. Again, Mr. Brown argues that Cronic, not Strickland applies.

The state next addresses Brown's claim that 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 2½ to 3 hours. (AB 36). The state argues that Brown has not alleged that McGuire gave a different version of events during the unrecorded interview. (AB 36). The state fails to acknowledge that Brown in his Initial Brief did state that trial counsel did bring out the fact that McGuire initially lied to Miller. (IB 44). The state fails to acknowledge that Brown has argued that McGuire initially lied and the lie lasted for 2½ to 3 hours. The state argues that Brown has failed to show prejudice. Mr. Brown argues that Cronic not Strickland applies. The state also argues that this claim is pure speculation and is legally insufficient to support relief. (AB 36). Brown argues that this claim is not speculation and is legally sufficient

because Brown has shown that McGuire not only initially lied but that he continued to lie for 2½ to 3 hours. Apparently, the state does not deem it important that McGuire lied about his involvement for 2½ to 3 hours.

Finally, the state addresses Brown's claim that trial counsel did not question McGuire concerning the shoes he was wearing at the time of Hensley's death and that his clothes were lost. (AB 36-37). First, the state fails to acknowledge that Brown claims that McGuire admitted to FDLE Agent Miller that his clothes were "lost." (IB 45). Next, the state argues that Brown claims the value of this information is that the trial evidence established there were at least twelve (12) other shoe tracks at the scene. (AB 37). Mr. Brown claims not only that there were at least twelve (12) other shoe tracks at the scene of the murder but also they could not have been made by the shoes of Brown. (IB 45). The state further argues that McGuire admitted that he stood in the doorway of Mr. Hensley's bedroom. (AB 37). Brown wonders who would believe that McGuire just stood in the doorway after considering the inconsistencies in his testimony shown here? Further, the state argues that the bloody shoe prints would not have been consistent with those of McGuire. (AB 37). Brown argues that the state's assumption is false since McGuire's shoes were

never compared to the bloody shoe prints. Finally, the state argues that Brown fails to satisfy the burden under Strickland. (AB 37). Again, Mr. Brown is entitled to relief under Cronic. The state also argues that the evidence against Brown was so overwhelming that he cannot meet the second prong of the Strickland ineffective assistance of counsel standard and he is entitled to no relief. (AB 38). Mr. Brown argues that Strickland is not the appropriate standard. The concern here should be with procedural fair trial requirements, and not whether the defendant would have been found guilty. Stano, 921 F.2d at 1154.

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

The state argues that Brown's claim that certain comments constituted fundamental error means that the claim is procedurally barred. (AB 38). Further, the state argues that it has long been held that claims which could have been raised on direct appeal are procedurally barred in postconviction Rule 3.850 motion. See Floyd v. State, 27 Fla. L. Weekly S75, S78 n.9(Fla. Jan. 17, 2002).(AB 38-39).

Brown argues that none of the issues or claims in Floyd found to be procedurally barred because they could have been raised on direct appeal concern improper comments of the

prosecutor which rose to the level of fundamental error. Rule 3.850, Florida Rules of Criminal Procedure, expressly prohibits its use to seek relief based upon grounds which could have or should have been raised at trial and, if properly preserved, on direct appeal. See Willie v. State, 600 So.2d 479 (Fla. 1st DCA 1992). Brown argues that the doctrine of fundamental error operates as a narrow exception to the general prohibition contained in Rule 3.850. Id at 482. <sup>1</sup>

Brown argues that this Court in Thompson v. State, 759 So.2d 650, 664 (Fla. 2000) considered a claim that trial counsel was ineffective for failing to object to several improper remarks by the prosecutor. This Court affirmed the trial court's summary denial of the claim because none of the prosecutorial comments would have constituted reversible error had they been objected to at trial. Id at 664. Further, this Court has considered claims that assert that trial counsel failed to object to instructions and argument that diminished the jury's sense of responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) and a claim that argued that

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<sup>1</sup>Willie concerned the allegation that the court lacked subject matter jurisdiction and therefore this constituted fundamental error which could be raised in a postconviction proceeding.



the cumulative affect of prosecutorial misconduct rendered the trial and sentence fundamentally unfair. See Turner v. Dugger, 614 So.2d 1075, 1079 (Fla. 1992). This Court denied the cumulative affect claim finding that the prosecutor's comments did not deprive Turner of a fair trial and no fundamental error was found. Id at 1079.

Where it is clear that the issue is not preserved for appeal and the court could have affirmed for that reason, such failure may be sufficient to constitute the ineffective assistance of counsel pursuant to Rule 3.850. See Mannolini v. State, 760 So.2d 1014 (Fla. 4th DCA 2000).

The summary denial of a 3.850 motion for postconviction relief alleging ineffective assistance of counsel was reversed and remanded with respect to the argument that trial counsel's failure to object to the prosecutor's comments concerning appellant's post arrest silence. See Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998). The court said such failure may be sufficient to constitute the ineffective assistance of counsel pursuant to a Rule 3.850 motion. Id at 1372.

The state next argues that Brown complains that the prosecutor was mocking him when he repeated Brown's trial testimony that he tried to comfort the victim, and he "went down and asked him if he was okay." (AB 39). The state

further argues that the prosecutor's comments was entirely appropriate as it was a mere repetition of what Brown himself had testified to. (AB 39). The state fails to include all of the complained of argument. The prosecutor's comment was..."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, XI, 1259). The part of the quotation deleted by the state does show that the prosecutor was mocking Brown's trial testimony.

Next, the state argues that the prosecutor's comment that the victim was "gurgling" was a reasonable inference from the evidence and therefore a fair comment on it. (AB 41). Brown argues that the state fails to acknowledge that grasping for breath and gurgling or choking on one's own blood are two materially different things. The prosecutor's argument was not fair comment and it was over-reaching and an attempt to inflame the passions of the jury.

The state argues that the prosecutor's use of the term "I think" or "I don't think" was the prosecutor merely arguing to the jury the conclusion that he is the representative of the state, felt could be drawn from the evidence. (AB 42).

Brown argues that the prosecutor could and should have drawn these inferences by the use of questions. Therefore, he

would have avoided the presentation of his own personal opinion. Brown argues that it is common for attorneys, including prosecutors to use rhetorical questions to argue inferences at trial.

Next, the state argues that the prosecutor's comment that Mr. Brown's testimony was "worthless" was an argument on Brown's credibility or lack thereof. (AB 43). Further, the state cites Henyard v. State, 689 So.2d 239,250 (Fla. 1996) for the proposition that a prosecutor may comment on the defendant's truthfulness or lack thereof and on his claims of innocence. (AB 43). The comment in Henyard was "And my first thought in that regard is, does it matter how many times you tell a lie for it to become the truth? Id at 250. The complained of comment in Henyard was not that all the defendant's testimony was "worthless." Further, the state cites Shellito v. State, 701 So. 2d 837, 841 (Fla. 1997) and argues that many of the complained of comments made in regard to Brown and his trial testimony were made by the prosecutor in the context of allowing the jury to determine his credibility. (AB 43-44). Brown argues that in Shellito, the prosecutor gave the jury a choice in explaining the testimony in saying Shellito's mother was "either an extremely distraught concerned mother or ... a blatant liar." Id at

841. In this case, the prosecutor's statement did not give the jury a choice when he said Brown's testimony was worthless. (R, XI, 1258. The prosecutor said he was "not going to talk much about -- and not at all -- about the testimony of Mr. Brown here in court, because it's worthless." Id at 1258. In fact, the prosecutor had previously briefly talked about Brown's trial testimony. (R, XI, 1250).

In the alternative, the state argues that even if some of the prosecutor's comments crossed the line of proper advocacy, none were objected to and the evidence of Brown's guilt of the instant crime was overwhelming. (AB 47). The state fails to acknowledge that exceptions to the Strickland standard are appropriate when circumstances would offend basic concepts of due process. See Stano v. Dugger, 921 F.2d 1125,1154 (11th Cir. 1991). The state argues that Brown has not carried his burden to prove prejudice affecting the outcome of the guilt phase of his trial and therefore his claim fails under Strickland. (AB 48-49). Mr. Brown argues that the concern is with procedural fair trial requirements, and not whether the defendant would have been found guilty. Stano, 921 F.2d at 1154.

**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.**

The state next addresses Brown's claim that trial counsel opened the door to permit the state to introduce evidence that Brown had engaged in a two hour armed standoff with the FBI before being arrested.(AB 49). The state cites to Mr. Quarels evidentiary hearing testimony that he was trying to indicate that Brown was under the influence of alcohol or was bribed in some manner in order to obtain the statement.(AB 49-50). The state fails to include that Quarels said ... "and perhaps, grasping at straws, I was trying to indicate that he was under the influence of alcohol or was bribed in some manner in order to obtain the statement."(R-PC, I, 149). Mr. Brown also argues that the state fails to advise that Mr. Quarels agreed when asked, "if it wasn't true that Brown's statement was given the day after he was taken into custody, so even if he was given a shot of whiskey, that wouldn't have affected his mental faculties twenty-four hours later? by stating "it seems that would be a stretch"(R-PC, I, 149-150). Finally, Brown argues that Quarels did recognize that he should not have asked the question about the FBI giving Brown alcohol because for a mistrial. (R-PC, II, 154).

Further, the state argues that the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted is allowed under the

evidentiary concept of opening the door. (AB 50). See Dennis v. State, 27 Fla. L. Weekly S101, S104 (Fla. Jan. 31, 2002). Mr. Brown argues that Dennis is distinguishable because in Dennis the complained of witness' testimony on redirect was properly admitted into evidence through the testimony of other witnesses. Id at S104. In Brown's case, neither of the other two FBI agents (Harcum and Grant) testified about the armed standoff with Brown. (R, VII, 740-747, 787-799)

The state also argues that Brown's counsel had a very specific purpose in seeking admission of the evidence that the FBI had given Brown alcohol and was seeking to cast doubt on the voluntariness and/or accuracy of the damaging statements that Brown gave. (AB 51). Again, the admissions of Quarels at the evidentiary hearing show how incompetent trial counsel was to ask the question. (R-PC, I, 149-150)

**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."**

The state argues that Quarels tried to save Brown's life using a well known defense tactic of trying to soften the blow of the bad character information the jury had, and would hear. (AB 53). Even Quarels admitted at the evidentiary hearing that he could have phrased this argument a little bit better. (R-PC, II, 182). Finally, the state argues that had Quarels'

performance been deficient in this regard, Brown has not demonstrated that he was prejudiced by the comment. (AB 57). Again, Mr. Brown argues that Cronic and not Strickland applies.

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

Relying on Blackwood v. State, 777 So.2d 399 (Fla. 2000), the state argues that a witness statement relaying the victim's comments to defendant are not hearsay. (AB 58-59). Brown argues that the state's reliance on Blackwood is misplaced since the complained of statements here were not victim's statements related through the defendant. The complained of statements here were victim's statements related through co-defendant, Scott Jason McGuire.

Further, the state argues that even if counsel's performance was deficient in not objecting to the complained of statements, Brown was not prejudiced by the admission of the evidence and has not carried his burden to prove that his counsel rendered him ineffective assistance under Strickland. (AB 59-60). Again, the state fails to acknowledge that Mr. Brown's claim under argument one relies on Cronic and not Strickland.

In regard to the offer of money statement by the

victim, the state argues "That Hensley offered them money, but Brown killed him anyway which was relevant to prove that Brown's motive in the crimes was to take Hensley's truck from him." (AB 60). Brown argues that the state's inference is fallacious. How could Hensley's offer of money to Brown and McGuire be relevant to prove that Brown's motive in the crimes was to take Hensley's truck from him?

Finally, the state argues that even if counsel's performance was deficient, Brown was not prejudiced by the admission of the evidence and therefore he has not carried his burden to prove his counsel rendered him ineffective assistance under Strickland. (AB 62). Again, the state fails to acknowledge that Mr. Brown's claim under argument one is made under Cronic, not Strickland.

**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.**

The state argues that this claim is procedurally barred because it could have been raised on direct appeal. (AB 63). The state cites Robinson v. State, 707 So.2d 688,700 (Fla. 1998) for the proposition that a claim regarding leading questions in a 3.850 proceeding is procedurally barred. (AB 63).

Brown argues that the trial court did not find that this



claim was procedurally barred. The trial court heard and ruled on this claim at the evidentiary hearing. (R-PC, III, 444). Brown argues if counsel did not preserve the issue, it could not have been addressed on appeal unless counsel's ineffectiveness in not objecting was apparent from the face of the record. See Gadson v. State, 773 So.2d 1183, 1184 (Fla. 2d DCA 2000).

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

The State argues that this claim is procedurally barred because it could have been raised on direct appeal, Overton v. State, 801 So.2d 877, 900-901 (Fla. 2001) (AB 64).

Brown argues that the trial court considered this claim at the evidentiary hearing. The trial court did not rule this claim procedurally barred. (R-PC, III, 451). Further, Brown argues if counsel did not preserve the issue, it could not have been addressed on appeal unless counsel's ineffectiveness in not objecting was apparent from the face of the record. See Gadson v. State, 773 So.2d 1183, 1184 (Fla. 2d DCA 2000).

The state also argues that had trial counsel's performance been deficient in not objecting to McGuire's testimony, Brown has not demonstrated that he was prejudiced (AB 66). Further, the state argues there is no possibility

that McGuire's testimony that he was being truthful affected the outcome of the proceedings. (AB 66-67). Again, the state fails to acknowledge that Mr. Brown's claim under argument one is pursuant to Cronic and not Strickland.

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

The state argues that Quarels' up front admission to the jury did not unduly prejudice Brown. (AB 67). Further, the state argues that any claim that this trail tactic prejudiced Brown in any way is entirely speculative, citing Maharaj v. State, 778 So.2d 944,951 (Fla. 2000). Brown notes that the state does not address the downside to Quarles' statement that ... "it's not something that any of us would do," The state just says that the comment was not unduly prejudicial. (AB 67). The state argues that at the evidentiary hearing, Quarles made it clear that he was employing a well known and widely used defense trial tactic when he made these statements to the jury. (AB 68). Mr. Brown argues that it is not a well known and widely used defense trial tactic for a capital murder defendant's trial counsel to distance himself from his own client.

Finally, the state argues that having failed to show either deficient performance or prejudice, Brown has not

carried his burden to prove that his trial counsel rendered him ineffective assistance. (AB 69). Again, the state fails to acknowledge that Mr. Brown's claim is pursuant to Cronic and not Strickland.

**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 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.**

The state argues that Brown's claim that trial counsel's closing argument distanced himself from his client and dehumanized him before the jury was insufficient to merit relief under Strickland because in view of the entire record there was no reasonable probability that counsel's performance affected either the jury's verdict or the recommendation of death, citing Thompson v. Haley, 255 F.3d 1292,1303-1304 (11th Cir. 2001). (AB 73-74). Thompson argued that certain comments of his attorney were prejudicial and he relied on the decision of Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), for support. In Thompson, the court recognized that counsel "virtually encouraged the jury to impose the death penalty" where counsel told the jury in part, that "the one you judge is not a very good person..." Id at 1303. Brown argues that counsel's statements in closing "hardly comport with the

fundamental duty of loyalty to a client and of insuring that the adversarial testing process works to produce a just result under the standards governing decision." Id at 1304. Brown argues that counsel could hardly hope to persuade a jury to be merciful while at the same time stressing the immoral and worthless quality of his client's life. Id at 1304. Finally, the court stated that although it recognized the need to develop and maintain credibility and report with the jury, it was unreasonable for trial counsel to do so at the expense of his client's best interest. Id at 1304.

Finally, the state argues that Brown has not carried his burden to prove deficient performance much less prejudice under Strickland. (AB 76). Again, the state fails to acknowledge that Mr. Brown's claim is pursuant to Cronic and not Strickland.

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

Next, the state addresses Brown's claim that trial counsel had conceded in closing argument that the victim was "gurgling" on his own blood but that the evidence at trial did not support this statement. (AB 77). Further, the state argues that Mr. Quarels was attempting to denigrate the prosecutor's argument, trying to paint the comment on the

evidence as an attempt to inflame the jury by bringing such facts before them. (AB 77-78). The state fails to include the complete statement by Mr. Quarels. Not only did Quarels concede in closing that "the prosecutor can stand up here and talk about gasping and gurgling and gasping and gurgling to make everything sound just horrible...", Mr. Quarels also stated "there is no doubt that all of that happened." (R, XI, 1264). Further, the state argues that the prosecutor was entitled to argue to the jury that a reasonable inference from the evidence included the Mr. Hensley was "gurgling." (AB 77). Brown argues that this was not a reasonable inference from the evidence and neither the state nor his own counsel should have stated that Mr. Hensley was "gurgling" on his own blood. Further, the state argues that Mr. Quarels could not legitimately argue with the facts, so he tried to distract the jury from those facts by accusing the state of being overly dramatic. (AB 78). Brown argues that Mr. Quarels should have in fact legitimately argued with the facts because the facts did not support the statement by the prosecutor. Finally, the state argues that even if Mr. Quarels' comment was deficient performance, Brown has not carried his burden to establish that he was prejudice from the deficiency. (AB 78). Again, the state fails to acknowledge that Mr. Brown's claim is

pursuant to Cronic and not Strickland.

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

First, the state argues that this claim is procedurally barred as it could have been raised on direct appeal. (AB 79). Further, the state argues that even if the claim is not procedurally barred, it lacks merit. (AB 80). Further, the state argues that this single comment was not sufficient to inflame the passions of the jury, but if it were, that would provide a very good reason for trial counsel not to object. (AB 80).

Mr. Brown argues if counsel did not preserve the issue, it could not have been addressed on appeal unless counsel's ineffectiveness in not objecting was apparent from the face of the record. See Gadson v. State, 773 So.2d 1183, 1184(Fla. 2d DCA 2000).

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

The state argues that in regard to the first two complained of comments, Brown contends that they constituted fundamental error. (AB 82). The state then argues that to the extent that Brown argues that the first two comments constituted fundamental error, they clearly should have been raised on direct appeal. (AB 82). The state also argues that

they are therefore, procedurally barred in this proceeding.  
(AB 82).

Mr. Brown argues this Court has considered ineffective assistance claims based upon failure to object to alleged improper remarks by a prosecutor. See Thompson v. State, 759 So.2d 650, 664 (Fla. 2000). This Court has considered a claim of failure to object to a prosecutor's comments on a motion to vacate conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. See Turner v. Dugger, 614 So.2d 1075, 1077, 1079 (Fla. 1992). Also, an allegation that counsel was ineffective for failing to object to the state's opening where the prosecutor testified and vouched for the credibility of state witnesses stated a claim for postconviction relief under the Florida Rule of Criminal Procedure 3.850. See Brown v. State, 777 So.2d 1131 (Fla. 4th DCA 2001).

Further, the state argues it is within the trial judge's discretion to determine when an attorney's argument is proper, Watson v. State, 651 So.2d 1159,1163 (Fla. 1994). (AB 83). Further, the state argues that this Court, in Watson rejected the claim that the state's opening argument was improper, and in so doing declared that such statement is argument. (AB 83).

The state fails to include that this Court said "in this instance, the Court sustained the defendant's objections and offered to give a curative instruction, which the defendant refused". Watson at 1163. Mr. Brown argues that in his case trial counsel did not object and the Court did not offer to give a curative instruction, which the defendant refused. (R, VI, 490-491). Finally, the state claims that Brown has failed to carry his burden to prove deficient performance, much less prejudice under Strickland (AB 84). Again, the state fails to acknowledge that this claim is made under Cronic and not Strickland.

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

First, the state argues that trial counsel had the opportunity to inquire about the alcohol pretrial and he did so at the suppression hearing. (AB 85). Further, the state argues that Agent Grant, at the suppression hearing stated that he was told that Brown was offered a shot of whiskey and that was given to him. (AB 85). First, Mr. Brown argues that it is apparent that Agent Grant was not present because he was told that Brown was given a shot of whiskey. This does not negate the necessity to take Childs deposition before trial. Second, Brown argues that Agent Grant was incorrect about the



amount of alcohol given to Brown. Mr. Brown was not given a shot of whiskey, he was given only a capful of whiskey. (R, VII, 783). Further, the state argues that Quarels trial question was not necessarily deficient in that Brown was given a measurable amount of alcohol shortly before he gave an incriminating statement about his shoes being used for evidence against him. (AB 86). First, Mr. Brown argues that a capful of whiskey while measurable, is different from a shot which can often be more than one ounce of whiskey. Second, Brown argues that any incriminating statement in regard to his shoes pales in comparison to any confession to murder!

Further, the state argues that trial counsel vaguely recalled having some indication that the combination of alcohol and cocaine which had been given to Mr. Brown earlier at his uncle's home, had some effect on the giving of the statements. (AB 86). First, Mr. Brown argues that trial counsel's statement was "my understanding, there was some other things that occurred as far as he was with an uncle, or something, and maybe there had some cocaine use, or something like that. I'm not sure." (R-PC, I, 150). Further, at the evidentiary hearing, trial counsel agreed that it would be a stretch to try to prove that the defendant gave a statement the day after he was taken into custody, so even a shot of

whiskey wouldn't have any effect on him twenty-four hours later. (Id at 149-150). Further, Brown argues that trial counsel admitted at the evidentiary hearing that perhaps he was grasping at straws when he asked this question. (Id at 149). Finally, the state argues that Brown has not carried his burden to prove that the outcome would have been different had the jury not learned that he was arrested after a standoff and that in view of the overwhelming evidence of guilt, there is no reasonable probability that the testimony affected the outcome. (AB 87). Again, the state fails to acknowledge that Mr. Brown's claim is pursuant to Cronic and not Strickland.

**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.**

The state argues that Brown complains that trial counsel should have elicited testimony from "two other law enforcement agents" involved in the case that Brown did not confess to them. (AB 87-88). The state fails to acknowledge that the "two other law enforcement agents" were FDLE Agent Miller and Detective Osterkamp who obtained the statement from co-defendant McGuire. (IB 89). The state fails to acknowledge that Ostercamp handled murder investigations at the time of Hensley's death (R, VII, 799); that he began the investigation of Hensley's death. (Id at 799-800); that Osterkamp requested

assistance from the FDLE in Hensley's murder investigation. (Id at 801); and that Miller is the agent who Osterkamp dealt with in Hensley's case. (Id at 801). Mr. Brown argues that it would have been reasonable to ask these two individuals whether or not Brown had confessed to them.

Finally, the state argues that Brown has not met the prejudice prong of Strickland. (AB 90). Again, the state fails to acknowledge that Mr. Brown's claim is pursuant to Cronic and not Strickland.

#### ARGUMENT II

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

First, the state argues that Ohio placed a detainer on Mr. McGuire on February 8, 2000. (AB 92). Further, the state argues: this information was made a matter of public record at that time and the one year statute of limitation for the filing of Rule 3.850 relief based on newly discovered evidence began to run; thus, under that rule, Brown had until February 7, 2001, to file this claim; (Id). The instant issue was first raised in the amended 3.850 motion which was filed in the lower court on February 12, 2001; (Id). Thus, the state argues the claim is both untimely and procedurally barred, citing Glock v. Moore, 776 So.2d 243, 251 (Fla. 2001) (Id).

Mr. Brown argues that this postconviction counsel was not appointed until February 16, 2000, by the Honorable R. Michael Hutcheson to represent Mr. Brown. (See Appendix "A"). Thus, Brown argues that his postconviction counsel did file this claim based on newly discovered evidence within one year of the date that postconviction counsel was appointed to this case. Further, Brown argues that the Florida Department of Corrections Offender Information Network, Inmate Population Information Details on Scott J. McGuire only indicates that Ohio placed a detainer on McGuire on February 8, 2000. (R-PC, V, 688). There is nothing to indicate that the information was placed on the Florida Department of Corrections website on February 8, 2000. Further, Brown argues that the detainer does not advise of the Burglary conviction and escape from Ohio. Therefore, by merely looking at the website information on McGuire, one would not know that he was convicted of Burglary in Ohio and had escaped from confinement. Mr. Brown argues that his claim of newly discovered evidence was therefore timely and not procedurally barred.

Further, the state argues that assuming that the claim is not procedurally barred, and that it qualifies as new discovered evidence, it still provides no basis for relief because Brown has failed to establish that it is relevant and

admissible for either substantive or impeachment purposes. (AB 93). The state ignores Brown's argument that a felony conviction for Burglary would have been admissible for impeaching the credibility of McGuire. (IB 96). Further, the state argues that since McGuire took the Fifth in regard to the issue of whether the Ohio conviction was his, the defense should have called a fingerprint expert to compare the prints on the Ohio conviction to the known prints of McGuire, citing Jackson v. State, 729 So.2d 947,952 (Fla 1st DCA 1998). Brown argues that this was impossible since the Ohio conviction did not contain any fingerprints. (See EX #4). This was the best documentary evidence available to Brown. Finally, the state argues that even if the conviction were McGuire's no relief is merited because the evidence of three, instead of two, prior felonies would have made no appreciable difference in the impeachment of McGuire. (AB 95-96). Unfortunately, the state fails to acknowledge that this would have prevented the prosecutor from showing to the jury that McGuire's felony convictions were only for drug possession offenses. (R, VIII, 800).

Brown argues that he would never be able to prove McGuire's Ohio conviction for Burglary (unless he admitted it) because of the inadequacy of the Ohio records. Further,

postconviction counsel was advised that the clerk's office in Cuyahoga County, Ohio could not find a certified conviction on Scott Keenan (Keenum). (R-PC, II, 295, 296-297).

**CONCLUSION**

For the reasons stated herein and in the Initial Brief, Mr. Brown respectfully requests the Court to reverse the lower court's denial of Mr. Brown's Rule 3.850 motion for postconviction relief, vacate his sentence of death, and grant him 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, DOC#V02093, F.S.P., Main Unit, P.O. Box 181, Starke, Florida 32091 this 16th day of May, 2002.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the font requirements of Rule 9.210 (a) (2), Fla. R. App. P., and that the size and style of type used in this brief is Courier New, 12-point font.

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