IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs. **Case No. SC 01-1468**

THE STATE OF FLORIDA,

Appellee.
_____/

On Direct Appeal From A June 28, 2001 Final Order Of The Circuit Court For The Sixth Judicial Circuit In And For Pinellas County, Florida, Denying Appellant's Post Conviction Motion To Vacate His Convictions, Judgments And Death Sentences Filed Per The Provisions Of Florida Rule Of Criminal Procedure 3.850.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT INCLUDING RECORD REFERENCES

Appellant, Oba Chandler, the defendant in the trial court, will be referred to as "the defendant" or "Chandler." Appellee, State of Florida, will be referred to as "the state."

Except as noted below, the record on appeal in this Florida Rule of Criminal Procedure 3.850 post conviction proceeding is in twelve volumes. At the bottom of each page, the Clerk of Circuit Court has provided a page number. This part of the record includes the pleadings, orders and other related documents. Reference to this part of the record will be by the letter "R" followed by an appropriate page number, or, for example, "R. 2002."

The transcript of the evidentiary hearing on Chandler's post conviction motion is in two volumes. The Clerk of Circuit Court did not designate the pages of these transcripts with an "R" citation. Therefore, reference to this transcript will be by the symbol "EH" (standing for evidentiary hearing) followed by the page number provided by the court reporter located in the upper right-hand corner of each page.

Items introduced in evidence during the Rule 3.850 post

conviction proceeding will be referred to by a generic description, the exhibit number and the location of the item in the record on appeal. Two reports prepared by Media Specialist Paul Wilson, not introduced in evidence but authorized by the trial court to be a part of the record in support of Chandler's venue claim, will be referred to by the abbreviated date, author and page number (appearing in the lower right-hand corner of each page) or, for example, "12/7/2000 Wilson Media Report, p. 10." References to the record on appeal in Chandler v. State, 702 So. 2d 186 (Fla. 1997), the original direct appeal of Chandler's convictions, judgments and death sentences, will be by the symbols used in that proceeding, a record volume and page number, or for example, "Vol. 7, R. 2324."

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case

This is a direct appeal from a final Order (R. 2054-2089) of the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida, in Case No. CRC 92-17438 CFANO-B, Hon. Susan F. Schaeffer, Circuit Judge, presiding, rendered on June 28, 2001, denying the defendant's post conviction motion to vacate and set aside his first degree murder convictions, judgments of guilt and death sentences, filed per the provisions of Florida Rule of Criminal Procedure 3.850.

B. Course of the Proceedings

On November 10, 1992, Chandler was indicted by a Pinellas County, Florida grand jury on three counts of first degree murder for the deaths of Joan and her daughters, Michelle and Christe Rogers, occurring on or between June 1-4, 1989. (R. 1, 2054) Frederick Zinober, Esq, was appointed to represent the defendant. Trial commenced on September 19, 1994, and the jury ultimately returned guilty verdicts on all three

counts. (R. 2055; Vol. 66, R. 11082-84)[1] On November 4, 1994, after a penalty phase proceeding conducted per the provisions of Section 921.141, Florida Statutes, the trial court imposed three death sentences upon Chandler for the murders of the Rogers women. (R. 2055; Vol. 68, R. 11520-11530) After the filing of a timely notice of appeal, this Court affirmed the convictions, judgments and sentences. Chandler v. State, 702 So. 2d 186 (Fla. 1997). A timely filed petition for writ of certiorari was denied by the United States Supreme Court on April 20, 1998. Chandler v. Florida, 523 U.S. 1083 (1998). On June 17, 1998, the Office of Capital Collateral Representative, Middle Region (CCR-Middle), filed an original "shell" motion to vacate the defendant's convictions, judgements and sentences per the provisions of Florida Rule of Criminal Procedure 3.850 with leave to amend. (R. 1-27, 2055) A slew of discovery and public records litigation ensued. (R. 28-201) On May 5, 1999, the Trial Court granted a defense request for an extension of time to amend the Rule 3.850 motion. (R. 352-353) On July 28, 1999, the undersigned was appointed to represent Chandler regarding his post conviction claims per the provisions of Sections 27.710 and .711, Florida

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[1] As noted above, when a volume number precedes the "R" citation, the reference (for example, "Vol. 14, R. 1002") is to the original record on appeal in Chandler v. State, 702 So. 2d 186 (Fla. 1997).

Statutes (1998 as amended). (R. 357, 358) After undersigned Registry Counsel was afforded time to study the files and investigate possible post conviction claims, Chandler timely filed a complete, amended Florida Rule of Criminal Procedure 3.850 motion on May 30, 2000. (R. 415-475) The state filed a response with exhibits on or about August 11, 2000. (R. 559-1523) The trial court held a Huff hearing on September 15, 2000, the purpose of which was to determine judicially what issues raised in the amended 3.850 motion merited an evidentiary hearing. (R. 1536-1615, 2055) The Trial Court ruled in this regard that an evidentiary hearing was not necessary regarding Chandler's claim (labeled "IA" by the state in its response to the amended 3.850 motion) that his trial counsel failed to protect him from the alleged prosecutorial misconduct committed during closing argument[2] (R. 423-431,1637) and the venue issue (labeled "IB" by the state) except whether Chandler waived any objection to selecting jurors from Orange County[3]. (R. 431-457, 1637, 2055-56) An evidentiary hearing was ordered regarding Chandler's claim

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[2]2 Except the trial court allowed the parties to explore in the evidentiary hearing the strategy trial counsel used in this regard. (R. 2056)

[3] The trial court held that "(the) defendant may supplement the record as to Claim I-B, pursuant to the discussion at the *Huff* hearing, prior to or within twenty (20) days of the evidentiary hearing." (R. 1637)

("IC.1") that his trial counsel lacked his permission to admit that he raped Judy Blair and the claim ("ID") that trial counsel failed to protect him regarding cross-examination related to the Blair, "Williams Rule" evidence. (R. 462-467, 1637, 2055-56) An evidentiary hearing was held on November 20, 2000 in Clearwater with Judge Schaeffer presiding. (R. 1646-1894) Zinober and Chandler testified during that hearing.

C. Disposition in the Lower Tribunal

After the parties were afforded an opportunity to file written closing arguments (R. 1896-1996), the Trial Court denied the amended Rule 3.850 motion in an "Order Denying Defendant's Amended Motion To Vacate And Set Aside Convictions, Judgments and Sentences" with appendix dated June 28, 2001. (R. 2054-2089) The defendant filed a notice of appeal of the trial court's June 28, 2001 Order on July 2, 2001. (R. 2101-02)

D. Statement on Jurisdiction

This Court has jurisdiction per the provisions of Article V, Section 3(b)(1), Florida Constitution, and Florida Rule of Criminal Procedure 3.850(e) because this is a direct appeal of a final Order (R. 2054-2089) denying the defendant's post conviction motion to vacate his

convictions, judgments and death sentences filed per the provisions of Florida Rule of Criminal Procedure 3.850.

E. Standard for Appellate Review

This is a post conviction capital case involving mixed questions of law and fact. As such, the circuit court Order (R. 2054-2089) denying the Florida Rule of Criminal Procedure 3.850 motion is subject to plenary, *de novo* review except that deference is given to the Trial Court's findings of fact so long as there is competent and substantial evidence to support them. See Johnson v. Moore, 789 So. 2d 262 (Fla. 2001); Rose v. State, 675 So. 2d 567 (Fla. 1996). In some instances, the Trial Court summarily denied certain of Chandler's claims without an evidentiary hearing. In those instances, the standard of appellate review is whether the amended Rule 3.850 motion, the state's response thereto and the files conclusively demonstrate that the defendant is not entitled to post conviction relief. See Fla. R. Crim. P. 3.850(d) and Peete v. State, 748 So. 2d 253, 257 (Fla. 1999). ("To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record.")

F. Statement of the Facts

A Synopsis of the Evidence Presented During the Original Trial

The basic facts of the case are set forth in Chandler v. State, 702 So. 2d 186 (Fla. 1996) and the Trial Court's Order denying the amended Rule 3.850 motion at R. 2054. Joan Rogers and her two daughters, Michelle and Christe, were vacationing in central Florida (first, at Disney World near Orlando, then in the Tampa Bay area) on or about June 1, 1989, when they allegedly met Chandler near the beaches in Pinellas County. He supposedly lured them onto his boat and dumped them into Tampa Bay weighted down with ropes and concrete blocks. Evidence linking the defendant to the homicides included Chandler's hand-written directions to a Courtney Campbell Causeway boat ramp and his palm print found on a brochure in Joan Rogers' rented vehicle, Chandler's admission to law enforcement that he met Michelle Rogers at a gas station and gave her directions to a boat ramp and that he had been out in his boat at a time that the homicides could have occurred, testimony from Rollins Cooper, a man who Chandler worked with, to the effect that Chandler stated to him on June 1, 1989 that he had a date with three women,[4] and testimony from two jail inmates, Arthur Wayne Stephenson and Blake Leslie, and from Chandler's daughter and son-in-law, Krystal

[4] Cooper also said that he saw Chandler on June 2nd, that he looked disheveled and stated that he had been out on his boat the night before.

and Rick Mays, that Chandler made incriminating statements regarding these homicides to them. In addition, the state was permitted to present "similar fact" evidence per the provisions of Section 90.404(2), Florida Statutes, from a Canadian tourist, Judy Blair, who testified that approximately two weeks earlier, Chandler lured her onto his boat at night and, when she would not consent to his request for sex, he raped her. Blair and Barbara Mottram, a friend, had been vacationing in the Tampa Bay area where they met Chandler. According to Ms. Blair, Chandler took her out on his boat one morning and returned her to shore that afternoon. Blair added that Chandler invited both women to join him later for a nighttime boat ride. When Ms. Mottram did not meet her at the dock that evening, Blair and Chandler went back out in his boat together. (EH 20) Blair stated that, once they were well offshore, Chandler began making unwanted advances toward her. When she resisted, Chandler repeatedly battered her sexually. Chandler then returned to shore and let Blair leave.[5] Robert Carlton, a man who bought Chandler's boat in August 1989, testified that he observed several concrete blocks with holes in them at Chandler's residence.

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[5] Blair identified a green shirt taken from Chandler's residence as similar to the one he was wearing when he allegedly raped her.

A Synopsis of Chandler's Post Conviction Claims

During the course of Mr. Zinober's representation of the defendant in the trial court, defense counsel took certain actions that Chandler contends constituted ineffective assistance of counsel and which are the subject matter of this appeal.

The first claim concerns venue. After obtaining a venue change so that the jurors would not be selected from residents of either Pinellas or Hillsborough counties, Zinober agreed (allegedly without Chandler's permission) to seat jurors selected from residents of Orange County, despite the massive amount of adverse pretrial publicity generated there. Chandler contends that trial counsel's ineffectiveness regarding this ill-advised decision resulted in denying the client a right to a venue change which would have avoided the use of Orange County jurors who presumably would have been prejudiced by the massive, negative pretrial publicity. (R. 433-457) He argues that he was, at the very least, entitled to an evidentiary hearing on this claim, and that the trial court committed reversible error by denying him that hearing.

Defense counsel was also ineffective when he told the jury in his opening statement and closing arguments that in fact Chandler had raped

Judy Blair.[6] (R. 457-62) Chandler contends that Zinober did this without his permission. Id. Zinober also instructed Chandler not to deny raping Blair when he testified, but, instead, to assert his Fifth Amendment privilege against self-incrimination regarding the Blair incident and answer questions only about the Rogers homicides. Chandler asserts that this advice was disastrous and, whether or not he agreed to Zinober's strategy regarding the Blair evidence, it constituted ineffective assistance of counsel.

During closing arguments, Zinober failed to object when the prosecutor repeatedly insulted, disparaged and verbally attacked him and Chandler and otherwise improperly commented on the evidence. (R. 423-475)

Finally, Chandler claims that, when the acts of ineffectiveness are considered in their totality, he suffered prejudice because of the distinct likelihood that the outcome of the proceedings were not constitutionally reliable.

A Synopsis of the Testimony Presented During the

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[6] It is acknowledged that Zinober vigorously pursued efforts to prevent the Blair "similar fact" evidence from being admitted at Chandler's trial, to no avail.

Evidentiary Hearing on the 3.850 Motion

As noted above, Frederick Zinober, Esq. served as Chandler's court appointed trial attorney. He worked for the state attorney's office from about 1982 to 1986, then entered private practice. (EH 9) The Florida Bar certified him with expertise in criminal law about a year before being appointed to the Chandler case. (EH 7, 12) As a defense attorney, he handled and/or tried about eighteen serious criminal cases before Chandler's, eleven of them involving homicides. (EH 10, 11) Chandler's was the first case as a defense attorney in which he encountered a "Williams Rule" issue. (EH 12)

Zinober was aware even before he was appointed to defend Chandler that the state would attempt to introduce evidence of the alleged rape of Judy Blair as "similar fact" evidence against his client within the context of Section 90.404(2), Florida Statutes. (EH 15, 17, 18) The state did this in order to bolster its case regarding the Rogers women since " . . . there was no evidence directly linking him to the homicide." (EH 51, 52)

Zinober conceded that Blair did not tell anyone about any sexual abuse until a day after it allegedly occurred, when she confided in her

companion, Ms. Mottram. (EH 21, 22) Chandler told Zinober that he took Blair out in his boat, but he insisted that the sex was consensual (EH 22), and Zinober admitted that there was no physical evidence to corroborate force being used against Blair. (EH 22, 24)

Zinober defended his decision to admit Chandler's alleged guilt of the rape at trial after filing about eleven "C-4"[7] motions, unsuccessfully trying to exclude the Williams Rule evidence. (EH 26, 39) He testified that Blair appeared very "wholesome" looking and intelligent. (EH 42, 43) He felt that she was a very credible witness and that the jury would believe her over Chandler. (EH 37, 38, 42) Thus, Zinober believed that when Chandler testified in his own behalf, he should avoid any mention of the Blair case (EH 26-29) and instead assert a Fifth Amendment privilege against self-incrimination regarding that matter. (EH 30) In lieu of challenging Blair's testimony, Zinober decided to emphasize to the jury that the Blair incident was separate and distinct from the instant case, and that he was not going to defend it. (EH 31, 123) His stated strategy

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[7] Defense counsel was referring to Florida Rule of Criminal Procedure 3.190(c)(4) regarding a defense motion to dismiss an indictment or information where "there are no disputed facts and the undisputed facts do not establish a prima facia case of guilt against the defendant."

was to not defend the Blair case and to preserve the issue for appellate review. (EH 31, 32) Thus Zinober told the jury, "(t)hey're probably going to be able to prove the rape, but they're not going to be able to prove the murder," (EH 36), and further told them that it was a separate case. (EH 34, 35) Zinober believed that Chandler understood what his over-all trial strategy was going to be before the trial began. (EH 67, 68) He admitted, however, that Chandler expressed displeasure with his opening statement because he conceded his client's guilt regarding the Blair case. (EH 68)

Zinober noted that defending a sexual battery case more often than not turns on the issues of identity and consent. (EH 43) Identity was not an issue here, but to establish that there was consent, he would have had to deal with the difficult problem of why the alleged victim would lie about the incident. (EH 44) Chandler told him she would lie because she was angry with him for the anal sex act he committed on her. (EH 45) Zinober felt that <u>if</u> Chandler told his version of the incident, the jury would not believe him (EH 45, 129), the state could therefore persuade the jury that he was lying, and imply that he would also lie about the homicides. (EH 49-50) His defense team agreed. (EH 121, 122)

Judge Schaeffer noted that defense attorneys must consider the difference in persona between victim and perpetrator. She stated that jurors would ask themselves if Blair would want to have sex with Chandler. (EH 86) Zinober agreed, stating that Blair came to the trial well-dressed and very attractive, while Chandler appeared heavy and very pale. (EH 86, 87, 89) Zinober conceded, however, that Chandler weighed a lot less at the time of the alleged rape and that Blair had described him as tanned and reasonably nice looking when she was with him. (EH 89, 90)

Zinober added that he always takes into account personal appearances in considering a consensual sex defense. (EH 88) After meeting with Blair and assessing her and Chandler, as well as the circumstances in the murder case, he decided that a consensual sex defense was not going to be believable. (EH 89, 129) Had he felt otherwise, he would have demanded that the rape case be resolved first. (EH 89)

Zinober wanted Chandler to be able to assert his Fifth Amendment privilege so that he didn't have to pit his story against Blair's, thereby losing his credibility and forfeiting his chances of prevailing in the homicide cases. (EH 51, 84, 85, 139) Another reason for having

Chandler assert the privilege was to preserve a possible appellate issue. (EH 130)

At this point in the hearing, Judge Schaeffer clarified her ruling regarding the issue of the Williams Rule evidence. Judge Schaeffer stated that once Chandler took the stand and denied culpability in the homicide case, everything about the rape case would be admissible since the Court had ruled that the rape case was relevant. (EH 82) Chandler did not have to answer specific questions about the rape case since it was pending; however, the state would be allowed to ask its questions and Chandler would be allowed to assert the Fifth Amendment privilege as to each one. (EH 83-84)

Zinober's memorandum to his file dated May 17, 1994 indicated that Chandler agreed with this strategy when questioned about the rape case. (EH 126) As a death penalty lawyer, he anticipated being questioned later about his actions, and his memorandum was made for that reason. He admitted he did not send Chandler a copy of the memorandum. (EH 112) Zinober stated that there were far too many decisions he had to make to warrant writing to Chandler about each one of them. (EH 64, 65) He added that inmates housed with his client were trying to gather and provide the state with information on Chandler to

better their own circumstances, thus written communication between him and Chandler were susceptible to being intercepted or otherwise misused. He stated that Chandler agreed with him. (EH 65, 66) Furthermore, Zinober agreed with the state's contention that sending memoranda to the client undermines the client's confidence in the attorney. (EH 125)

Zinober thought the state's strategy was to "intermix" the facts of the two cases (Rogers and Blair) to such a degree as to confuse the jury. (EH 47-48) If he could let the jurors be convinced that Chandler was going to be convicted on the rape case and serve a life sentence for it, they would not be under as much pressure to find him guilty on the homicide case if and when they found that there was not enough evidence to convict him. (EH 52, 127, 128)

Zinober stated that usually Williams Rule evidence applies to cases in which a defendant has been convicted previously, but in this instance, the Blair rape case had not been tried yet. (EH 130) Thus, the night before Chandler was to testify, he met with Judge Schaeffer and the prosecutors, Crow and Bartlett, and he (Zinober) told them that if the court allowed the Blair case evidence, Chandler would plead the Fifth when questioned about it. Zinober said that he did this in order to see how the judge would rule. (EH 131-132) Zinober did not think the state

would be allowed to repeatedly ask Chandler questions about the rape case as long as Chandler asserted his Fifth Amendment privilege against self-incrimination. As it turned out, however, Chandler was compelled to plead the Fifth some twenty-one times. (EH 57, 58) Zinober noted that he believed Judge Schaeffer and the Florida Supreme Court were wrong to allow the repeated questioning about the rape case in that manner. (EH 59, 60) Judge Schaeffer interjected here, again noting that the Trial Court had ruled that Chandler would have to respond to each question put to him by the prosecutor during cross-examination. (EH 61)

Judge Schaeffer asked Zinober if he had considered what he would have done if the Court had ruled that Chandler had to answer the questions, to which Zinober answered that Chandler would have disobeyed the court and would not have answered the questions. (EH 137-138)

Zinober stated that he did not instruct Chandler on just how to assert his Fifth Amendment privilege regarding the Blair case, assuming that the client already knew how to do this since he asserted the privilege when he was arrested in Volusia County. (EH 69) He did not go over his direct examination questions with Chandler (EH 132-134) before trial, feeling that Chandler was better when he was not rehearsed (EH 135).

Zinober emphasized again that Chandler understood what his (Zinober's) over-all trial strategy was going to be before the trial began. (EH 67, 68) And as stated, he admitted that Chandler expressed displeasure with his opening statement because he conceded his client's guilt regarding the Blair case. (EH 68)

Zinober stated that Chandler agreed with him to use an Orange County jury. (EH 70) They wanted to avoid Tampa Bay jurors. (EH 70) Judge Schaeffer asked Zinober if he agreed that she originally believed that they could seat a jury in Hillsborough County (EH 74), which he did. (EH 74) The judge noted that the court did not want to go to Hillsborough County for the trial, and a newly enacted law made other options available. (EH 74) The judge explained that they could hold the trial in Pinellas County and bring in a jury from Orlando, since it was close enough not to present a great hardship to those jurors (EH 75, 77-79); otherwise, they would have to try the case in Hillsborough County with jurors selected from that (Hillsborough) county. (EH 77-79) However, if they could not seat a jury in Orlando, defense would still have the right to move for a change of venue. (EH 80-81) Zinober added that the judge's calendar was such that should the Chandler trial have to be continued, it would not have been tried until the spring of the

following year. (EH 78) Had he demanded speedy trial of the rape case and had that case been tried before the Rogers case, there was a good probability that the state would win the Blair case. Chandler would not then have been allowed to take the Fifth regarding the Blair case in the murder trial, thereby making matters worse. (EH 146)

Assistant State Attorney James Hellickson showed Zinober a change of venue form from Hillsborough to Pinellas County dated July 15, 1994 signed by Chandler. (EH 91, 100) Zinober testified that Chandler had asked him to avoid Orange County jurors because of the media coverage of his arrest in near-by Volusia County. Zinober agreed to a jury from the Orlando area because he felt they could not get a fair jury in Hillsborough or Pinellas. (EH 95) He and Chandler discussed the arrangements for picking the jury and Chandler was involved in selecting the jury, and had no objection to the jury selected. (EH 100, 101)

Zinober stated that he did not object during most of the prosecutor's (Assistant State Attorney Douglas Crow's) closing arguments for strategic reasons. (EH 113, 118) He thought Crow was only hurting himself when he (Crow) attacked him (Zinober) personally. Zinober felt that by keeping silent, he was letting Crow alienate the jury, thus enhancing his (Chandler's) chance of an acquittal which he felt was

more important than objecting to the offensive remarks. (EH 117, 152) Zinober was confident that he had established a good rapport with the jurors based upon their body language and smiles. (EH 117)

Chandler testified in his own behalf. He stated that he did not know that Zinober was going to concede his guilt in the Blair case in his opening argument, and he believed that even Zinober didn't know he was going to do it, that it just "came out." (EH 162) He acknowledged that they had discussed not defending the Blair case, but he had no idea that Zinober was going to concede his guilt, and he did not authorize that strategy. (EH 177, 237) He was not aware of it until the next day because he was not paying full attention to the opening statements. (EH 220)

Chandler acknowledged that he was on the boat with Blair (EH 227), but emphatically denied that by conceding identity, he was also conceding guilt. (EH 228, 229) Zinober never told him that he did not think the jury would believe his version of events in the Blair case, and never told him that he was better off not presenting it. (EH 221, 224, 231, 239) He pled the Fifth because Zinober told him to do so; at times he agreed with that strategy and at other times he did not. (EH 222, 223)

Chandler said that he met Blair and Mottram at a 7-Eleven store when the women initiated a conversation with him. (EH 167) He gave the women a ride to John's Pass where they were taking beer to teenagers they had met. (EH 168) As to Zinober's evaluation of Blair (that she seemed to be a wholesome, believable witness), Chandler disagreed, stating that she was wearing a tube-type top and cut off shorts, both very tight fitting. (EH 168) He said that she was drinking and was "pretty loaded," loud and boisterous. (EH 168) Chandler added that, while the state presented her to the jury as prim and proper, at the time he met her she was drinking, bumping up against him, " . . . you knew that Judy Blair, right, was somebody that you could sleep with." (EH 191)

He testified that while he was with her, Blair was drinking steadily and she never objected to his "touching her breasts or anything." (EH 171) Once they were out on the water, they spent about an hour or two " . . . just goofing around, made out and so forth." (EH 171) When they came back and docked, Blair left for awhile, then returned with more wine coolers and a camera, and was still fairly drunk. (EH 172)

She was still drinking steadily and they began touching as a "prelude to sex" (EH 172, 173); she did not object when he put his hands all over her. (EH 198) When they had sex, his penis accidentally entered

her anus and came right back out again, and she indicated through a sudden loss of interest in sex that she wanted to stop. (EH 175, 199-200) He testified that he wanted to complete the act. (EH 201) He said that since they were having sex, "in the heat of passion" he was entitled to "finish." (EH 201-202) She did not object, she just seemed to lose interest in sex. (EH 202)

At no time did he feel like he was forcing himself against Blair's will. She never pushed him away and never told him to stop; had she done so, he would have stopped. (EH 236) Chandler testified that he was not at all concerned that he would be charged with rape at the time of the incident, and Blair had never said anything about rape. (EH 204) He added that he did nothing to keep her from clearly seeing the boat numbers, which he believed showed he did not consider it rape. Furthermore, Blair was trying to find him the next day, looking through the phone book and at John's Pass. (EH 204)

Chandler noted that when Blair made her first statements to law enforcement, she made no accusations about him ripping her clothes off, threatening her, or anything of that nature. (EH 174) It was the state's investigators, needing a stronger case, who talked her into adding these

accusations to her testimony, according to the defendant. (EH 174) Chandler asserted further that, while Zinober testified that she was a strong witness, he neglected to note that the state had talked with her first, thus having the opportunity to coach her about her testimony before Zinober spoke with her. (EH 223)

He heard Zinober say in his opening statement that he was going to testify. He agreed that he (Chandler) could have told him that he did not want to testify, and could have refused to testify, but he wanted to go along with whatever Zinober said. (EH 237-238)

Knowing that the Blair evidence was going to be admitted, Chandler said that he would rather have testified (and denied her claim) instead of asserting his Fifth Amendment privilege because he felt that not answering would be tantamount to an admission of guilt. (EH 177, 186-188) However, he deferred to Zinober's judgement. (EH 189, 190, 224, 225) He did not feel it was fair to have the Blair case admitted in the murder trial. (EH 187)

He and Zinober talked about his testimony only in general terms, not in specific detail as to what he would say. (EH 188, 189, 231) The first he heard about asserting the Fifth Amendment privilege was when the judge brought it up at trial. (EH 189) Zinober did not give him any

instructions on how to answer when asserting his Fifth Amendment privilege, and he did so with great anger at the prosecutor because the prosecutor was interjecting statements like, "well, you don't want to answer that because that means that you're guilty of it or it will incriminate you." (EH 182)

Chandler said that he was forced to assert his Fifth Amendment privilege against self-incrimination some twenty-one times at trial regarding the Blair incident. (EH 180) He took the stand because Zinober had told him, "that puts it in the record." (EH 180) At that time, he did not know what that meant, "but obviously that's what it means is when your attorney says do something, he does it during the trial, and in order to save . . . the record, or whatever you want to call it there, and so he said that, you know, I have to, you know, take the Fifth here." (EH 180)

Chandler said that he and Zinober never discussed the selection of jurors from Orange County, or the procedure for picking a jury. Instead, they talked about moving him from Hillsborough County to Pinellas County for the convenience of the attorneys and the judge. (EH 183) Chandler was given a section of the record to read which indicated that he had agreed with picking the jury from Orlando; but he said that

had not known how much media attention the case had received there. (EH 211-212) Chandler said that he had been concerned about the publicity in Orange County related to his pending robbery trial in nearby Volusia County. (EH 212-13) However, he did not voice his concerns about pretrial publicity in the Orlando area related to the homicide case because at the time, he was unaware of the amount of it. (EH 213) He felt the voir dire of the jurors was not strong enough concerning that issue. (EH 214)

Chandler asserted that at no time was he advised that he could have avoided the Orange County jury pool based upon presumed prejudice due to the extent of pretrial publicity. He understood that they only had two choices for a jury pool: Orange County or Jacksonville. (EH 234, 235)

Chandler remembered the Trial Court telling him that he could move to change venue if picking a jury from Orange County became very difficult. (EH 183) Although he received the judge's order in writing (EH 232-233), he never understood that they could still move the trial. (EH 185) Again, he thought they could only have Jacksonville or Orange County. He accepted Zinober's choice of jurors because he deferred to

him as the attorney (EH 215) and wasn't paying attention to the selection. (EH 185)

Chandler stated that he repeatedly told Zinober that he didn't like Orlando (EH 213), however, since the only other options offered to him by the court were Hillsborough or Pinellas Counties, Orange County (Orlando) was the best option. (EH 213)

The Court interjected, and Chandler affirmed that he had agreed to Orlando because he did not like the treatment he was receiving in the Hillsborough County jail and he knew he would be moved to the Pinellas County jail under the Orlando jury arrangement. (EH 215-217) Another reason he accepted Orlando was that he wanted to avoid a continuance of the trial. (EH 218)

SUMMARY OF THE ARGUMENT

In this appeal, Chandler questions neither the legal abilities nor the loyalty and high ethical standards displayed by his trial lawyer. On the contrary, Chandler acknowledges trial counsel's efforts and commitment to him during his state court murder trial. In addition, the defendant was afforded every courtesy by the Trial Court during the post conviction proceedings below especially in terms of being granted a liberal opportunity to present his case within the lawful boundaries the Trial Court deemed appropriate. Still, however, ineffectiveness is about performance – and the Trial Court committed reversible error by rejecting Chandler's fundamental claim that he was denied constitutionally effective assistance of counsel at trial. The errors and omissions of defense counsel, especially when considered cumulatively, were so serious and significant that defense counsel was not functioning as

"counsel" as guaranteed by the Sixth Amendment. The deficiencies fell significantly below the minimum standards for effective assistance of legal counsel in a capital case as enunciated in Strickland v. Washington, 466 U. S. 668 (1984), and the Florida cases that follow Strickland, such as Roberts v. State, 568 So. 2d 1255 (Fla. 1990) and Knight v. State, 394 So. 2d 997 (Fla. 1981).

During the murder trial, the state presented extremely damaging Williams Rule evidence of the alleged commission of a sexual battery by Chandler. The defendant had not even been brought to trial in the Williams Rule case at the time of trial in this case. Defense counsel, without obtaining his client's permission, conceded Chandler's guilt to the jury regarding this very serious ancillary crime which Chandler claims he did not commit and therefore wanted to deny, but was not allowed to do so by his lawyer. To make matters worse, defense counsel allowed his client to be forced to unnecessarily and repeatedly assert his Fifth Amendment privilege against self-incrimination in the presence of the jury regarding the Williams Rule feature of the case thus making him "look guilty" of the capital felonies with which he was charged.

Defense counsel's errors regarding the Williams Rule evidence were exacerbated when he allowed the state to unleash a vicious,

demeaning, unfair personal attack on Chandler himself, defense counsel and the defense's theory of the case during the closing arguments. This Court described the prosecutor's verbal assault as "thoughtless and petty." Chandler v. State, 702 So. 2d at 191. This Court was prevented from addressing the prosecutorial misconduct on direct appeal, however, because defense counsel did not object contemporaneously to most of the comments and, therefore, ineffectively failed to preserve the issue for appellate review.

Chandler suffered prejudice as a result of his lawyer's ineffectiveness to the extent that the outcome of the proceedings was not constitutionally reliable. That is, the state's case against Chandler was circumstantial at best. Had defense counsel not made the errors noted herein, there is a distinct likelihood and reasonable probability that the outcome of the proceedings would have been different, in that he may well have been acquitted. This is especially true because defense counsel failed to protect Chandler from a jury chosen from residents of Orange County. There was a significant body of information to the effect that residents from there were not impartial due to the great amount of adverse pretrial publicity generated by the media about the case in the mid-Florida media market, including Orlando and all of Orange County.

However, defense counsel declined the opportunity he was afforded by the trial court to seek a venue change so that Orange County jurors would not be used. This matter was not sufficiently developed during the Rule 3.850 hearing, however, since the trial court denied Chandler an evidentiary hearing on the issue. This too was error.

ARGUMENT

The defendant was denied constitutionally effective assistance of counsel at trial as guaranteed by Amendments VI and XIV, United States Constitution, and Article I, Section 16, Florida Constitution, and within the meaning of ineffective assistance of counsel in capital and other criminal cases as defined by Strickland v. Washington, 466 U. S. 668 (1984), Cherry v. State, 659 So. 2d 1069 (Fla. 1995), Garcia v. State, 622 So. 2d 1325 (Fla. 1993), Roberts v. State, 568 So. 2d 1255 (Fla. 1990), and Knight v. State, 394 So. 2d 997 (Fla. 1981). The acts and omissions of trial counsel, as referenced with specificity below, were not just negligent acts. Instead, these acts, omissions, errors and deficiencies were so serious, fundamental and significant that defense counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution as applied to the states via the Fourteenth Amendment.

Claim (Issue) I:The Trial Court Erred By Denying Chandler An Evidentiary Hearing Regarding His Claim That Defense Counsel Was Ineffective For Failing To Seek A Venue Change From Orange County.

Chandler pled (R. 423-457) and attempted to pursue during the post conviction proceedings below a claim that defense counsel was ineffective for not seeking a venue change so that jurors would not be selected from Orange County. This effort was to no avail, however, since the Trial Court determined that the record was sufficient to resolve the issue in the state's favor without the need for an evidentiary hearing.[8] (R. 2057-2061)

Describing this issue as an "enigma," the trial court noted that Chandler had initially filed a venue change motion so that jurors would not be selected from either Hillsborough or Pinellas Counties, and "won" when the motion was granted (R. 2086, 2087) and it was agreed that jurors would be selected from Orange County which, demographically,

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ved Chandler to p[8] resent testimony during the evidentiary hearing on the issue of whether he agreed to the strategy employed by his counsel regarding venue.

fit the criteria of recently enacted Section 910.03(3), Florida Statutes. (R. 2057, 2058) The trial court pointed out that Chandler had expressed reservations about being tried in Hillsborough and that all the attorneys expressed a preference for having the trial held at the courthouse in Clearwater for the sake of convenience. (R. 2058) Most importantly, however, was the Trial Court's position that the Order granting the original venue change motion was based upon a stipulation by the parties to use Orange County jurors and, if Chandler and his counsel reneged on the agreement, the stipulation "would have been void" and "he would have been attempting to pick a jury in Hillsborough County." (R. 2059, 2086-2087) The Trial Court emphasized that, as the state pointed out on pages 11-14 (R. 569-572) and 16-18 (R. 574-576) of its response to the order to show cause, as a practical matter, there had been very little difficulty in finding jurors from Orange County who did not know of or had not formed opinions about the homicides (or Chandler's alleged responsibility for them), thus, nothing the defendant could have added in the Rule 3.850 proceeding could have "met the Rolling test that the 'general state of mind of the inhabitants of a community (here, Orange County, Florida) is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors

could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom'," citing Rolling v. State, 695 So. 2d 278, 284 (Fla. 1997) and Foster v. State, 778 So. 2d 906, 912 (Fla. 2001). The judge added that, because the issue of whether any juror was not fair and impartial was not raised on direct appeal, it was procedurally barred as a post conviction issue, citing Henyard v. State, 689 So. 2d 239 (Fla. 1996). (R. 2058) Under those circumstances, the question for this Court is whether the trial court was correct in finding that the post conviction "motion, files and records in the case conclusively show(ed) that (Chandler was) entitled to no relief" on the venue issue. Fla. R. Crim. P. 3.850(d) Chandler contends that the trial court erred in its findings in this regard. In order to put the venue issue in its proper perspective, the defendant notes the following:

As indicated in part above, the Indictment charging the defendant with three counts of first degree murder alleged that the homicides occurred either in Pinellas County or Hillsborough County, Florida, or both. (R. 676, 677) Therefore, Chandler was entitled, per the provisions of Section 910.03, Florida Statutes, to elect to be tried by a duly qualified jury from either of those two counties. Through counsel, the defendant initially elected to be tried in Hillsborough County but reserved the right

to seek a venue change if that became necessary. On or about June 9, 1994, defense counsel, per the provisions of Section 910.03, Florida Statutes, and Florida Rule of Criminal Procedure 3.240, moved for a venue change (and a sequestered jury) from Hillsborough County due to the extensive amount of adverse pretrial publicity that permeated the Tampa Bay area. (R. 662-675) On July 19, 1994, the trial court rendered an order which, *inter alia*, made findings that the trial would be held at the Pinellas County Courthouse in Clearwater. However, a "fair and impartial jury cannot be impaneled in Pinellas County. . . " Thus, since "Orange County closely resembles the demographic composition of Pinellas County, in accordance with Section 910.03(2), Florida Statutes," per an agreement between defense counsel (but, according to Chandler, not the defendant himself) and the state, "(t)he jury will be selected in Orange County in accordance with Section 910.03(3), Florida Statutes, and then will be returned to Pinellas County where the trial will take place." See R. 2086-87, the trial court's Order rendered July 19, 1994, dated July 18, 1994 and made *nunc pro tunc* to July 5, 1994.

The Obligation To Establish Presumed Prejudice

Chandler claimed in his Rule 3.850 motion that his trial counsel rendered constitutionally ineffective assistance regarding venue by failing

to test the nature and extent of the adverse pretrial publicity in Orange County as well, Judge Schaeffer's Order (R. 2086-87) of July 19, 1994, notwithstanding. (R. 423-457) This is so because if juror prejudice in Orange County would make it unlikely that he would obtain a fair trial by an impartial, indifferent jury selected from that county, Chandler was entitled, as a matter of state and federal constitutional law, to have jurors selected from another, impartial county venire pool in Florida. Mills. v. Singletary, 63 F.3d 999, 1009 (11th Cir. 1995), Irvin v. Dowd, 366 U. S. 717 (1961). Failure to accord Chandler a fair trial by a panel of impartial, indifferent jurors constituted the denial of a fair trial as well as due process of law. See for example Irvin v. Dowd, supra, and Sheppard v. Maxwell, 384 U.S. 333 (1966). The existence of an atmosphere of prejudice requires a change of venue when widespread public knowledge of the case in Orange County would cause prospective jurors from that county to judge the defendant with disfavor because of his character or the nature of the offenses. When that prejudice is shown, the remedy is a change of venue so that jurors are selected, not from a legally proper[9]

[9] Chandler does not dispute the fact that Orange County met the demographic requirements of Section 910.03(2), Florida Statutes.

but partial venire pool, but from an impartial one. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979), where the court held:

> A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived opinions are the natural result.

See also Murphy v. Florida, 421 U. S. 794 (1975), and Oakley v. State, 677 So. 2d 879 (Fla. 2nd DCA 1996). In Copeland v. State, 457 So. 2d 1016 (Fla. 1984), the defendant was convicted of first-degree murder and sentenced to death. On appeal he argued, that due to pretrial publicity, the trial court should have granted his motion for change of venue. The court held that:

> Appellant's motion was based on a showing that there was widespread public knowledge of the crimes throughout Wakulla County. Public knowledge alone,

> however, is not the focus of the inquiry on a motion for change of venue based on pretrial publicity. The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors, that may accompany the knowledge. It has long escaped strict definition:
>
> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient artificial formula."

Copeland, supra, 457 So. 2d at 1016. The Copeland court, relying on language in Murphy v. Florida, 421 U.S. 794, 800 (1975), which quoted from Irvin v. Dowd, 366 U.S. 717, 723 (1961), held that

> [i]t is the defendant's burden 'to demonstrate the actual existence of such an

> opinion in the mind of the juror as will raise the presumption of partiality.'

Copeland, supra, 457 So. 2d at 1017, emphasis added. The court added that the presumption of partiality is established by "showing that the general atmosphere of the community is deeply hostile to him." Id. at 1017, emphasis added. In this regard, the court stated,

> Two ways to establish that such hostility exists are by showing that there was inflammatory publicity and by showing great difficulty in selecting a jury.

Copeland, supra, 457 So. 2d at 1017, emphasis added. However, the court found that Copeland failed to establish hostility by either of these methods because:

> As was the case in Murphy, the pretrial publicity here was largely factual, rather than emotional, in nature and mainly occurred around the time of the crime and the investigation, several months before the

> trial. Also as in Murphy, here there was no great difficulty in selecting a jury. In Murphy the Supreme Court noted that in contrast with Dow where 268 of 430 venire men were excused because they were inclined to believe the accused guilty, only '20 of the 78 persons questioned were excused because they indicated an opinion as to the petitioner's guilt.' 421 U.S. at 803, 95 S. Ct. at 2037, 44 L. Ed. 2d 589. Similarly, in the present case only seventeen of the seventy potential jurors questioned were excused for possible bias either because they were related to the victim or because they had formed an opinion as to the defendant's guilt.

Copeland, supra, 457 So. 2d at 1017, emphasis supplied. Thus, the court in Copeland found that the trial court did not err in denying his motion to change venue because the defendant failed to meet the burden

of raising a presumption of partiality through one of the above mentioned methods.

In the case at bar however, according to the amended Rule 3.850 motion (R. 431-457) and the studies from media consultant Paul Wilson, the evidence of massive, prejudicial, emotional, inflammatory, non-factual and hostile pretrial publicity in Orange County, Florida was pervasive and overwhelming. Even so, defense counsel failed to present the obvious to the trial court and instead played right into the hands of the prosecution by agreeing that the jury could be selected from venire persons residing there. That is, trial counsel apparently but incorrectly assumed that, once it was determined by the trial court and stipulated by counsel that the jury would not be selected from Pinellas or Hillsborough Counties, per the provisions of Section 910.03, Florida Statutes, his obligation to see that Chandler was tried by jurors who had not been subjected to massive, prejudicial pretrial publicity was over. Even worse, trial counsel incorrectly advised Chandler that he had no choice under the circumstances but to agree to a trial using Orange County jurors or risk the voiding of Judge Schaeffer's July 19, 1994 venue Order and guaranteeing a trial in Hillsborough County (R. 676, 677) -- a venue Chandler wanted to avoid at all costs. This was wrong for two critical

reasons: First, the trial court had already found and held (albeit in part by stipulation of the parties) that "[a] fair and impartial jury cannot be impaneled in Pinellas County . . ." (R. 2086) Second, Zinober, to his credit, had accumulated the evidence (see for example, R. 656-661) sufficient to support his motion to change venue (R. 662-675) from Hillsborough County. Thus, even if defense counsel sought to avoid Orange County jurors and, therefore, the trial court considered the stipulation set forth in its Order (R. 676, 677) of July 19, 1994 void, defense counsel still had the facts (including the Trial Court's Order of July 19, 1994 acknowledging that Chandler could not get a fair trial in Pinellas) and law on his side to make sure that the case was not tried using jurors from the Tampa Bay area including Pinellas and Hillborough Counties. In other words, even if the aforementioned stipulation were voided, Chandler could still have filed a venue change motion that would have been successful in terms of avoiding a trial in Pinellas or Hillsborough. For these reasons, defense counsel was still obligated to determine the extent of adverse pretrial publicity in Orange County as well -- and if great hostility against his client existed there, to demand that the jurors be selected from another, impartial county by seeking another venue change. This, trial counsel utterly failed to do.

Chandler suffered prejudice as a result of his lawyer's ineffectiveness because, had defense counsel sought to avoid Orange County jurors, there is a distinct likelihood that he would have been successful in that effort as well. This is so because the indescribably brutal murders of the three female tourists constituted one of the most horrific homicides in the history of Central Florida especially in Orange County. (12/7/00 Wilson Media Analysis[10], pp. 86, 186, 187) From the day that the partially nude bodies of the victims were discovered floating in Tampa Bay on June 4, 1989, the grisly facts of these senseless murders as reported by the media shocked Central Florida residents to the point of disbelief and their anger was fueled when Chandler's own wife and children condemned him in the press. (12/7/00 Wilson Media Analysis, pp. 52-58, 98, 119, 122) This was especially true in Orange County since the victims, residents of Ohio, were vacationing in Orange County (at several of the Disney World venues) immediately before they traveled to the Tampa Bay area. (The 12/7/00 Wilson Media Analysis contains news articles almost exclusively from The Orlando Sentinel.)

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[10] It is again acknowledged the Wilson Media Reports were authorized by the Trial Court to be filed in the context and in support of Chandler's venue claim. However, since an evidentiary hearing on that claim was deemed unnecessary, they are not in evidence.

When the reality of the atrocities sank in, shock was replaced by intense, heartfelt pain for the loss of the Rogers family members -- and heightened fear because the perpetrator was at large and thought by many to still be in the Orange County area. (12/7/00 Wilson Media Analysis, pp. 70-86) And when in September 1992 Chandler was arrested and charged with the murders, that shock, pain, and fear became focused squarely upon the defendant, turning to community-wide contempt, disgust, hatred and loathing against him in Orange County as well as a virtually unanimous demand for swift, merciless, maximum punishment (the death penalty). (12/7/00 Wilson Media Analysis, pp. 88-168) The communal sense of outrage and anger toward Chandler in Orange County created by the events themselves and constantly fueled by the Central Florida news media grew steadily from the time of the defendant's arrest, and (while admittedly it abated at times) was at its zenith during the time of jury selection. (12/7/00 Wilson Media Analysis, pp. 104-127) While in no way minimizing the sincere and thoughtful feelings of sympathy for the victims' family, the fact that those killed were tourists who had just come from Orange County and the fact that the alleged killer lived in near-by Volusia County and was arrested near his home, and indeed "who lived for four years in the Orlando area while a fugitive . . ." (Orlando Sentinel,

September 26, 1992, 12/7/00 Wilson Media Analysis, p. 90), only added to the heightened climate of hatred among the Orange County jury population directed at Chandler.

Newspaper reports of Chandler's alleged culpability for the Rogers homicides published in The Orlando Sentinel, numbering in the hundreds, were overwhelmingly pervasive, prejudicial, inflammatory, unbalanced, often inaccurate, and one-sided against the defendant. Examples are set out in the December 7, 2000 Media Analysis prepared by Mr. Paul Wilson. A few of them are cited here for reference including a page number from the Wilson Analysis.

- "Few other cases in recent Tampa Bay history have caught public attention like the triple slaying." (Orlando Sentinel, May 30, 1990; 12/7/00 Wilson Media Analysis, p. 86)

- " 'We're looking at him for a lot of different crimes,' said Phil Ramer, head of the FDLE regional office in Tampa. 'We think he's going to turn out to be a one-man crime wave.'" (Orlando Sentinel, September 26, 1992; 12/7/00 Wilson Media Analysis, p. 90)

- "In early 1978, he was living in the Orlando area, using aliases and different Social Security numbers to elude capture. Secret Service

agents tracked him down in Maitland in 1982. (Orlando Sentinel, September 26, 1992; 12/7/00 Wilson Media Analysis, p. 90)

- "He was sentenced to seven years for passing counterfeit money and served two years in federal prison in Bastrop, Texas. Officials then returned him to Florida, where he served two years for escape and the armed robbery." (Orlando Sentinel, September 26, 1992; 12/7/00 Wilson Media Analysis, p. 90)

- "Several women say Oba Chandler, whom police say is their prime suspect in the 1989 slaying of three Ohio tourists, tried to lure them on boat rides too, according to investigators." (Orlando Sentinel, September 28, 1992; 12/7/00 Wilson Media Analysis, p. 92)

- "Bonnie Tischler, special agent in charge of U.S. Customs' Tampa office, confirmed that Chandler was an informant for the agency from May to September 1991. . . . 'The first time I saw Obie, I thought he was a little weird,' Segura said. (Segura was arrested as a result of Chandler's informant work.) 'He was a little sicko. You can tell a sicko by the twinkle in their eye.'. . . 'Someone needs to know that while all this (investigation of the triple slaying) was going on, he was

out on the streets with police protection,' Segura said." (Orlando Sentinel, October 2, 1992; 12/7/00 Wilson Media Analysis, p. 93, 94)

- "The prime suspect in the 1989 slaying of three Ohio tourists saved newspaper clippings about the case, his sister said. Oba Chandler's sister, Lula Harris, in an interview with the St. Petersburg Times published Thursday, said she told prosecutors about the clippings when she spoke to them last week. She told them Chandler's wife suspected her husband was involved in the deaths of Joan Rogers and her teen-age daughters Christe and Michelle. 'She was scared because she was afraid he did do it,' Harris said of Chandler's wife. 'She was frightened because he was saving the newspaper clippings.' . . . They also say there are similarities between the circumstances of those deaths and the rape of a Canadian tourist weeks before in which Chandler is charged. He remains jailed on $1 million bond." (Orlando Sentinel, October 16, 1992; 12/7/00 Wilson Media Analysis, p. 98)

- "The day after authorities placed billboards around Tampa showing the handwritten directions, police received a tip from someone with several samples of Chandler's handwriting." (Orlando Sentinel, October 16, 1992; 12/7/00 Wilson Media Analysis, p. 101)

- "An artist's sketch of a suspect was released in November 1989. Chandler's wife Debra told authorities it looked exactly like her husband of 18 months. Within hours, Chandler – whom she said always read the newspapers and watched the news – left their Tampa home without saying goodbye. Days later, he called one of his daughters, Kristal Sue Mays, from a motel in Ohio. She said her father was 'very erratic, fast-talking and sounded scared.' Chandler was gone for three weeks and during his absence admitted to Mays, her husband and another daughter that he committed the grisly bay murders, according to the prosecution documents. Debra Chandler told investigators her husband's behavior and attitude changed following the slayings. She said his temper became short, he yelled at her frequently, they argued a lot and he refused to have sex during those two months. Two of his daughters told investigators that Chandler didn't have a good track record with women. One said he treated them 'like garbage'. Daughter Valerie Lynn Troxell described her father as a 'professional criminal, very manipulative, one who uses women.'" (Orlando Sentinel, February 17, 1993; 12/7/00 Wilson Media Analysis, pp. 106, 107)

- "A fellow jail inmate says Oba Chandler not only confessed in the 1989 slaying of three Ohio tourists but implicated a second person, a newspaper reported Tuesday. Chandler, 46, told the victims to 'swim for it' after he and his partner bound, gagged and tossed them into Tampa Bay, the inmate said he was told. The inmate described the second person as a buddy of Chandler's. (Orlando Sentinel, May 26, 1993; 12/7/00 Wilson Media Analysis, p. 108)

- "A former Central Florida resident charged in the 1989 Slayings of three Ohio tourists is suspected in several rapes and abductions over the past 30 years, including two crimes that happened 18 years apart in Daytona Beach. The continuing investigation of Oba Chandler suggests that police and prosecutors suspect him of being a serial rapist. . . . A crime 'time line' put together by police officers and filed last week by the Pinellas-Pasco State Attorney's Office implicates Chandler in a similar abduction and several unreported rapes dating to 1963. In the 1991 abduction of a 15-year-old girl in Daytona Beach, the girl 'gave a positive response' upon seeing Chandler's picture in a photo lineup. The girl told police that a man stopped her on the street, and she thought he wanted directions. When she

approached his camper, he got out, grabbed her arm and dragged her into the van. The man bound her wrists and ankles with duct tape as she struggled and screamed. . . . she freed herself from the tape and jumped from the van window, as it was moving, breaking her foot. Police also suspect Chandler of a 1973 rape in Daytona Beach." (Orlando Sentinel, July 11, 1993; 12/7/00 Wilson Media Analysis, p. 110, 111)

· **INVITATION TO DIE – A DEADLY STRANGER ONE OF ST. PETERSBURG'S MOST BAFFLING MURDER CASES BEGAN WHEN AN OHIO TOURIST AND HER DAUGHTERS WENT ON A CRUISE WITH A FRIENDLY BOATER. MORE THAN FOUR YEARS LATER, A SUSPECT AWAITS TRIAL** (Headline) "The man with the ruddy tan and pot belly introduced himself as Dave Posno. He seemed nice enough to the two Canadian Women who were vacationing in Madeira Beach on May 14, 1989. . . he offered a sunset cruise, urging her to bring her girlfriend and camera along. But again the friend declined to go. It was a decision that probably saved both of their lives. . . . he pushed himself on her, hugging and feeling her body. When she

> tried to talk him out of it, he pointed to a roll of gray duct tape and threatened to tape her mouth shut. Is sex worth losing your life over? he asked. . . . She recalled the man cutting gray duct tape and having an assortment of ropes with the life preservers. . . . and she wondered whether he would have raped and killed both of them if her friend had gone along. . . (Orlando Sentinel, September 26, 1993; 12/7/00 Wilson Media Analysis, pp. 116, 117)

According to the Amended 3.850 motion and the Wilson Reports, television broadcasts of the tragedies and of Mr. Chandler's alleged responsibility for them by local (Orlando market area) and regional stations such as WESH, Channel 2, NBC; WKMG, Channel 6, CBS; WFTV, Channel 9, ABC; WMFE, Channel 24, PBS; WOCL, Channel 35, FOX; and WKCF, Channel 18, Warner Brothers -- just to name a few, numbered in the hundreds, and were more often than not inflammatory. (12/7/00 Wilson Media Analysis, pp. 28-48) One such story noted:

> Stories on Oba Chandler ranged from being called (sic) a 'suspected serial rapist,' to his

> arrest in a jewelry heist, and ultimately, the arrest for the Rogers killings. News of Chandler and the 'grisly' murders made its way into nearly 200,000 Orlando area homes *prior* to the case going to trial. (12/7/2000 Wilson Media Analysis, p. 29)

Intense local and regional radio coverage of the homicides and Chandler's alleged responsibility for them were broadcast by stations such as WAJL, WCFB, WDBO, WSHE, WFIV, WRLZ, WHOO, WHTQ, WJHM, WJRR, WKIQ, WLBE, WLOQ, WMGF, WMMO, WOCL, WOKB, WOMX, WONQ, WOTS, WPRD, WQBQ, WRMQ, WRMQ, WQTM, WTKS, WTLKS, WTLN, WPYO, WTRR, WUNA, WWKA, WWNZ, WXXL, and WZKD, as well. (12/7/00 Wilson Media Analysis, pp. 14-18)

The intense coverage of the homicides and Mr. Chandler's alleged involvement in them which penetrated Orange County was, of course, not limited just to the Orange County media. This is so because even more media coverage originated from within the Tampa Bay market (the 13th largest television media market in the United States), and much of it extended significantly into Orange County as well. See in this

regard, the contents of the June 9, 1994 Motion for Change of Venue and Sequestered Jury (including the attachments thereto) filed by Mr. Zinober in this cause. (R. 662-675) For example, between 1989-1994, some 4,865 copies of The Tampa Tribune newspaper were distributed Monday through Saturday into Orange County daily. On Sundays, that figure was some 6,081 newspapers distributed daily. The major Tampa Bay (Tampa and St. Petersburg) based television stations broadcast many hundreds of stories about the case into Orange County regularly and extensively between 1989 and 1994 as well. WTVT, Channel 13, FOX (formerly a CBS affiliate), broadcast more than 300 news stories about the case into southwestern Orange County and beyond. (12/7/00 Wilson Media Analysis, pp. 25, 26) The actual number of Tampa based television stories (which were broadcast into Orange County) about the case was closer to one thousand and were broadcast by other stations into Orange County such as WFTF, Channel 9; WTSP, Channel 10; WMEF, Channel 24; WFLA, Channel 8; WFTS, Channel 28; and WTOG, Channel 44, UPN Affiliate. (12/7/2000 Wilson Media Analysis, pp. 18-58) For example,

> During the years of 1989 through 1994, WTOH was known as 'the superstation' from Tampa. . .

> when examining the television viewership levels of Orange County, it is evident that approximately 10,000 homes in Orange County, watched WTOG Channel 44 from Tampa/St. Petersburg every week between the years 1990 and 1991. Now disbanded, the WTOG new operation was considered very aggressive in their coverage of news." (12/7/2000 Wilson Media Analysis, p. 19)

Thus, there was a doubling and overlapping effect upon the residents of Orange County in that, in addition to the incredible amount of pretrial media publicity generated in Orange County proper, much of the pretrial publicity emanating from the large Tampa Bay media market infected Orange County venire persons also. See 12/7/2000 Wilson Media Analysis, pp. 20, 32.

The result was that those Orange County residents eventually summoned for jury duty had been a captive audience of the media for more than five years, had been completely saturated with adverse, often false and negative news coverage about Mr. Chandler -- and therefore

could be expected, quite naturally, to hold very strong feelings of hostility, anger, hatred, fear and bias toward him.

Under the facts of this case and state of the law as outlined, *supra*, defense counsel had a fundamental legal obligation and duty, per the provisions of Amendments VI, and XIV, United States Constitution, and Article I, Declaration of Rights, Section 16, Florida Constitution, to insure and protect his client's right to a fair trial by a panel of impartial, indifferent jurors regarding the capital trial -- by aggressively doing all those things reasonable, proper and necessary to seat jurors who were not residents of Orange County. Failure to perform these duties amounted to constitutionally ineffective assistance of trial counsel as a matter of fact and law. See for example Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000);[11] and Oakley v. State, 677 So. 2d 879 (Fla. 2nd DCA 1996) in which a properly pled claim of "…ineffective assistance of counsel for failing to move for a change of venue…" was an appropriate

[11] Prejudice is established, when the ineffective claim is based upon a failure of trial counsel to properly handle a venue issue, upon a showing that, had defense counsel performed effectively, " . . . there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue . . ." Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000).

subject for a post conviction motion filed per the provisions of Florida Rule of Criminal Procedure 2.850.

A Lack Of Actual Prejudice?

The Trial Court noted, in denying the venue claim, that the record of the *voir dire* indicated that there was little if any difficulty in seating jurors from Orange County who indicated that they could be fair and impartial. (R. 2060) This may, however, have been due to kind of jurors who were asked to serve. That is, as stated, the physical location of the trial was in Clearwater but the jurors themselves resided in Orange County, a considerable distance from the Pinellas County Courthouse. Thus, the Orange County jurors necessarily had to be encouraged to travel to Clearwater. The Trial Court stated to the venire pool in this regard, "(w)e have arranged for your recreation and a hospitality room. We have more things arranged than you can imagine. Trust me. We have some great things." (R. 1958, quoting from Vol. 1 of the Voir Dire trial transcript, p. 8) While the Trial Court's effort to obtain jurors in this manner is innovative and admirable, there is the distinct possibility that it may well have attracted jurors with an agenda different that the Trial Court intended. Under the circumstances, then, this cause must be

remanded to the Trial Court so that the venue issue (especially, the extent, if any, to which the Orange County jurors were exposed to and affected by adverse pretrial publicity) can be fully explored -- and the reliability in the jury's verdict determined one way or the other.

Claim II: Defense Counsel Was Ineffective For Admitting Chandler's Guilt In The Blair Case, And In Advising Him To Invoke His Fifth Amendment Privilege Against Self-Incrimination Regarding Same.

Even before the state filed a notice of intent to offer Willliams Rule evidence related to the alleged sexual battery of Judy Blair per Section 90.404(2)(b), Florida Statutes, defense counsel filed well-researched motions in limine to exclude it. (Vol. 44, p. 7333, Vol. 51, pp. 8523-8630, Vol. 52, pp. 8631-8756) On August 25, 1994, a hearing on the motion was held after which the Trial Court determined that the Blair evidence was relevant to the facts at issue in the homicide case and therefore admissible. Defense Counsel cannot be faulted for the real and hard-fought effort made in this regard. However, once the Trial Court made it clear that this collateral crime evidence would be presented to the

jury, defense counsel was duty bound to do everything within reason to disprove Blair's allegations. Inexcusably, defense counsel did just the opposite. That is, Chandler always maintained that he did not force himself on Blair and told his counsel that he wanted to testify accordingly. (EH 174, 177, 186-188, 204, 236) Chandler advised his counsel that, while he had sexual relations with Blair, they were consensual. (EH 177, 186-188, 198, 201-204) Consistent with Chandler's version of events was the fact that there was no physical evidence (trauma to the person, torn clothing, etc.) to corroborate Ms. Blair's claim of forcible sexual battery and that she did not report the incident to law enforcement immediately upon being dropped off by Chandler at the dock after he supposedly assaulted her. However, defense counsel, in his opening statement, did not challenge Blair's anticipated testimony. Instead, defense counsel effectively told the jury that what Ms. Blair was going to testify to was true and "conceded that the State could prove that Chandler raped Blair several weeks before the Rogers' murders on a blue and white boat in the Gulf of Mexico." Chandler v. State, 702 So. 2d at 198.

Admittedly, there is a dispute regarding whether Chandler consented to his counsel's damaging admission. Zinober testified that

he discussed the matter with Chandler, and that the client agreed to his strategy. (EH 29-31, 67, 68) Chandler, on the other hand, vehemently denied it. (EH 161-166) The Trial Court credited the attorney's version of what happened. (R. 2061-2069) That was error and this Court should credit Chandler's version of events. Moreover, even if Chandler grudgingly followed his lawyer's advice, he was only doing what any client could be expected to do under the stressful, rushed circumstances; and his alleged willingness to do so cannot possibly be considered knowing and voluntary.

Zinober's testimony in this regard is not logical.

Chandler had not been convicted of raping Ms. Blair. Why would he admit that which he had always denied in the past? As stated, Chandler had always maintained that he had sex with Blair but that she consented to it. Why would he spontaneously abandon that position? Why would, by Zinober's own admission, Chandler be upset with his lawyer the day after opening statements when he read in the newspaper what he had said about the Blair case? (EH 68, 178) If Chandler was really the sly, overconfident, "ingratiating" (R. 1974) individual who thought that he had gotten away with raping Blair, as suggested by the state, why would he be willing to effectively admit through his lawyer to

the Rogers' jury that he did in fact rape her? Why would Zinober prepare a written memorandum (Defense Ex. 1) to the effect that Chandler consented to his strategy -- but never show it to Chandler (EH 112) -- much less have Chandler sign it? Zinober was very cautious in documenting his own file with this memorandum. Why then did Zinober not get Chandler's alleged concurrence in this bizarre approach to the case in open court on the record before the trial judge <u>if</u> in fact he really had the client's approval? Zinober claimed that, in the course of carrying out this strategy, Chandler agreed to assert his Fifth Amendment privilege against self-incrimination when asked about the Blair case instead of denying the rape. (EH 67, 68) If that were true, then why, by his own admission (EH 69), did Zinober not counsel Chandler regarding the manner and means that he should employ in asserting the privilege -- especially when he was going to have to invoke it so many times? The facts and common sense require a finding that Zinober did not have Chandler's informed consent to admit that the defendant raped Ms. Blair, at least not to the extent that the permission was obtained based upon the client's full and complete understanding of the situation.

As far as the strategy itself, which the trial court described (R. 2062) as "very ingenious," is concerned, how could Zinober or the Trial

Court possibly think that admitting Chandler's guilt in the Blair case could do anything other than seal his fate regarding the Rogers case? It must be remembered that the Blair evidence was admitted per the provisions of Section 90.404(2), Florida Statutes, not for the purpose of showing a "propensity" to commit crime generally, but to establish "(s)imilar fact evidence of other crimes, wrongs, or acts . . . relevant to prove a material fact in issue (in the Rogers case), such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." Thus, by admitting that Chandler raped Ms. Blair, Zinober was virtually conceding that the defendant also committed what the Trial Court had determined to be a "similar" offense (the murders) some two weeks later. Any doubt that may have remained in the jurors' minds had to be removed when Chandler, on the advice of his lawyer, repeatedly asserted his Fifth Amendment privilege against self-incrimination when asked questions about the Blair incident on cross-examination. Surely it is fair for this Court to recognize what Chandler's counsel ignored; the totally devastating effect of a defendant in a criminal case "taking the 5th," and refusing to answer questions of any sort, even regarding an ancillary issue, in the middle of a murder trial.

The Trial Court discusses in some detail in its Order (R. 2054-2089) denying the 3.850 motion why it felt that Zinober's strategy, which it states " . . . border(ed) on brilliance" (R. 2063), was the right one (or, at least, a constitutionally effective one). In fairness to the Trial Court, no attempt is made here to describe its position fully. However, there are some important assertions made by the Trial Court that the defendant contends constituted legal error that need to be challenged. The Trial Court noted at R. 2063 that:

> [I]n retrospect I should have compelled defendant to answer the state's questions. I had ruled, in allowing the Williams Rule testimony in the first place, that it was relevant to prove the murder. Once defendant denied committing the murder, the state should have been allowed to pursue, on cross, his explanation of the entire boat trip with Judy Blair. In essence, by my ruling, I allowed the defense to pull a ruse – take the 5th Amendment, allowing the jury to infer if I had compelled his answers he would have incriminated himself as to the rape, when in fact he would have incriminated himself as to the murder. His attorney felt that if the jury thought he lied about the rape,

> they would think he was lying about the murder (T. 139-143), 147-149). He had no 5th Amendment right as to the murder once he took the stand. By my incorrect ruling, brought on by the defense strategy, I assisted the defense strategy, I assisted the defense, at their request, and with Chandler's consent. How can Zinober's strategic decision be challenged? In retrospect, it borders on brilliance.

Respectfully, the trial court was correct in its original ruling. It goes without saying that a defendant has a constitutional right, per the provisions of Article I, Section 9, Florida Constitution, and Amendments V and XIV, United States Constitution, not to be a witness against himself/herself regarding a pending criminal charge. ("No person shall be . . . compelled in any criminal matter to be a witness against oneself." Art. I, Sec. 9, Fla. Const. "No person shall be . . . compelled in any criminal case to be a witness against himself." Amend. V, U.S. Const.) A defendant may waive that right, but the waiver must come from the defendant -- not, as suggested by Judge Schaeffer, by operation of law -- that is, merely by a finding by the Trial Court that the evidence in the Blair case was relevant under Section 90.404(2), Florida Statutes, to the

issues raised in the Rogers case. ("The right of privilege against compelling disclosure of incriminatory evidence is personal to the witness, he alone being entitled to invoke its protection, and that it may be waived by him." Cochran v. State, 117 So. 2d 544, 546 (Fla. 2d DCA 1960, quoting from an earlier decision.) The facts in the Blair case may have been similar to, relevant and, therefore, proper Williams Rule ("similar fact") evidence in the Rogers case, but that similarity would not have prevented the state from later prosecuting Chandler for allegedly raping Ms. Blair had it chosen to do so. That being the state of things, Chandler never lost his right to be free from self-incrimination regarding the Blair case (for which he had not been tried much less convicted) merely by taking the stand in his own behalf in the Rogers case.[12]

A lawyer cannot concede his client's guilt when the client does not specifically authorize the concession. In Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), in which the defense attorney acknowledged the defendant's guilt during opening and closing arguments, this Court made it clear that, unless it is shown on the record that the defendant agrees to do so, it is *per se* constitutionally ineffective assistance of counsel (not

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[12] Chandler was never tried by the state for allegedly raping Blair.

requiring proof of prejudice) for a lawyer to advise the jury that the client is in fact guilty. ("We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment." "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." Nixon, supra, 758 So. 2d at 623.) While the defendant contends that the trial court was going too far to state that " . . . Chandler's reliance on (the Nixon decision) is totally misplaced" (R. 2066), we concede that Nixon is not directly on point. Admittedly, Zinober did not admit Chandler's guilt regarding the Rogers homicides by acknowledging his guilt in the Blair case, but, as a practical matter, he ventured far too close to doing exactly that. The proof of this is in the pudding, or in this case, in the way that the state used Zinober's admission regarding the Blair case to urge Chandler's guilt of the Rogers murders. The state asserted in this regard:

> What the rape will tell you is that Mr. Chandler is a chameleon-like person. He can one minute portray that

ingratiating Samaritan, and when that is under control, he becomes a brutal rapist or conscienceless murderer.

Judy Blair and Barbara Mottram are in the parking lot. He initiates a conversation. A year after his wedding, he is out on Madeira Beach. And what is the first thing he does in that conversation?

Well, he doesn't say, "Hi, I'm Oba Chandler." He uses a false name. From the inception, there is a plan. There is a scheme to commit a crime.

It didn't start the next morning. It didn't start the next day. It didn't start when things got, quote, out of hand on the boat. It started with the conversation.

And he told a convincing tale. Half-truth, half-lie. "Well, I'm from New York. That's not too far from the Canadian border." Is he from New York? No, he's from Ohio, where the Rogers are from.

But you know, when he met Robert Foley, the man he was closest to in the whole world, Mr. Foley didn't know for a number of years that he was Oba Chandler and was told that he was from upstate New York and found out with some surprise later on that he was actually Oba Chandler from Ohio.

This was a mechanism to lure the people out. The blue-and-white boat is a trap to enable him to accomplish his purpose.

How does he? Judy Blair is an intelligent, articulate, and as Mr. Zinober has conceded, a very attractive woman. She didn't need to get a ride from a forty-year-old man like Oba Chandler. I'm sure there are plenty of guys on the beach that would have taken her just about anywhere she wanted to go.

But her guard was down. Here is an older man who was ingratiating, kind, non-threatening, and simply offering a ride; and she takes it.

And what does that tell you? Well, you probably wonder how he could accomplish that with the Rogers women. How did he do that? They were fresh in town, in the same day they show up in town, somebody's got them out on a boat.

How do you know he could accomplish it? **Because he did the exact same thing eighteen days earlier with people that were intelligent and attractive**.

See the State's Response to the Order to Show Cause, R. 1975-76, citing from the original trial record. Clearly then, if there was some exculpatory advantage or strategy for Chandler to have his lawyer admit that he raped Ms. Blair and to refuse to answer questions about that ancillary matter, it was lost on the prosecutor and, more importantly, lost on the jury as well.

Clearly then, Zinober's strategy regarding admitting his client's culpability for raping Blair was no strategy at all, and Chandler suffered the consequences. This Court should, therefore, find that defense counsel was ineffective for stating that Chandler raped Ms. Blair, reverse Chandler's convictions, judgments and death sentences on that basis, and grant him a new trial.

Claim III:The Trial Court Erred In Not Finding That Defense Counsel Was Ineffective For Failure To Object To The Prosecutor's Improper, Prejudicial Closing Argument to the Jury And Trial Court.

Defense Counsel had a solemn constitutional duty to protect Chandler from prejudicial, improper and self-serving comments by the prosecutor during all stages of the proceedings, especially during closing arguments. Failure to protect the defendant in this regard constitutes ineffective assistance of trial counsel as a matter of state and federal law. See for example Brown v. State, ___, So. 2d ____, 2000 WL. 263425 (Fla. March 9, 2000); Miller v. State, 676 So. 2d (Fla. 1st DCA 1996). See also, United States v. Morris, 568 F.2d 396 (5th Cir. 1978) and Connelly v. State, 744 So. 2d 531 (Fla. 2nd DCA 1999), where the courts

held that improper, prejudicial comments made by the prosecutor in a state court criminal trial violate the federal constitution.

The trial court, in considering this claim, determined that it was without merit for several reasons. First, the trial court noted that this Court determined on direct appeal in Chandler v. State, 702 So. 2d at 186, that any comments made by the prosecutor that might have been improper were not so prejudicial as to constitute fundamental error. (R. 2056) Second, the trial court determined that Zinober's decision not to object to some of the prosecutor's closing arguments as referenced below were strategically sound and may not be second-guessed in a post conviction Rule 3.850 proceeding, citing and quoting from Strickland v. Washington, 466 U.S. at 689. (R. 2057) Third, the Trial Court noted that most of the prosecutor's comments objected to by Chandler in his Rule 3.850 motion were valid comments on the evidence and, therefore not subject to an objection from defense counsel. ("Counsel cannot be ineffective for failing to make objections that would not have been sustained." R. 2057) Finally, the trial court decided that even if there were some comments by the prosecutor that could have been properly objected to, not doing so did not affect the outcome of the proceedings and, therefore, were not prejudicial. (R. 2057)

Respectfully, Chandler argues that the Trial Court erred in its findings on this issue.

When reviewing the prosecutor's conduct on direct appeal, the Florida Supreme Court went so far as to take the unusual step of branding some of the comments as "thoughtless and petty." Chandler, supra, 702 So. 2d at 191. However, because trial counsel did not object to the improper comments in a timely and proper manner, if at all, the Supreme Court held that the issue was procedurally barred. Id. The fact that this Court did not deem the comments to be so egregious as to constitute fundamental error does not mean that they cannot be an important part of an overall ineffective claim.

In Stewart v. State, 51 So. 2d 494 (Fla. 1951), the court referenced the duties of counsel and the trial court concerning closing arguments:

> We have not only held that it is the duty of counsel to refrain from inflammatory and abusive argument but that it is the duty of the trial court on its own motion to restrain and rebuke counsel from indulging in such argument.

The Court further explained the special duty owed by a prosecutor:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id. at 495. In Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), the court condemned improper arguments by prosecutors, stating, "It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the percepts of their profession and their office." This Court explained,

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime of the defendant rather than the logical

analysis of the evidence in light of the applicable law.

Id. at 134.

In the present case, the prosecutor made four types of remarks in his closing argument that were improper.

First, the prosecutor commented upon Chandler's exercise of his Fifth Amendment privilege regarding the alleged sexual battery of Judy Blair by stating: "Think about all the things he wouldn't talk about and didn't say(.)" (Vol. 101, R. 2618)

Zinober did not object until the prosecutor later commented upon Chandler never telling his daughter and son-in-law that he was innocent. (Vol. 101, R. 2645) Defense counsel then objected and moved for a mistrial because this was the second time the prosecutor commented on Chandler's right to remain silent. The trial court overruled the objection on the ground that Chandler took the stand. (Vol. 101, R. 2645-46) However, the trial court had ruled that Chandler was entitled to invoke his Fifth Amendment privilege regarding the sexual battery case (Vol. 98, R. 2161-64), so the prosecutor's remark about what Chandler did not talk about when he testified was fairly susceptible to being interpreted by the

jury as his comment upon Chandler's exercise of his Fifth Amendment privilege. See State v. Marshall, 476 So. 2d 150, 153 (Fla. 1985) and State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985).

This is unacceptable because prosecutors are forbidden from commenting upon the defendant's exercise of his or her Fifth Amendment right to remain silent. Griffin v. California, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), State v. Marshall, supra, 476 So. 2d at 153. Therefore, defense counsel was ineffective for failing to object in a timely manner to these improper prejudicial comments by the prosecutor. Chandler was prejudiced by this omission since the prosecutor effectively told the jury that Chandler should be faulted for asserting his Fifth Amendment privilege against self-incrimination and for not testifying about all matters raised during the trial.

The second category of improper remarks by the prosecutor consisted of attacks on defense counsel and his theory of the defense. Thus, the prosecutor responded to defense counsel's closing argument by telling the jury in part:

> Sometimes it's frustrating to sit there for an hour
>
> and a half and listen and not be able to talk and

> listen to the defense's desperation, distortion, and half-truths . . .

(Vol. 101, R. 2614) The prosecutor went further and accused defense counsel of being "completely dishonest to you," and asked:

> But what kind of charade have we been going through. Do we have direct, honest answers about any of these circumstances? No.

(Vol. 101, R. 2614) The prosecutor then accused defense counsel of "cowardly" and "despicable" conduct. (Vol. 101, R. 2630) He later characterized the defense as "totally irrational" and said:

> It's just throw out some confusion, and maybe there will be enough smoke that you can't see the compelling evidence to Oba Chandler.

(Vol. 101, R. 2654-55)

At the conclusion of the argument, defense counsel belatedly moved for a mistrial because the prosecutor made a reference to a smoke screen effect of the defense witnesses. The court denied the motion.

(Vol. 101, R. 2668-69) It should be noted in this regard that, in order for defense counsel to timely object to the aforementioned comments, the objection must be made contemporaneously or it is waived.

In a similar set of circumstances, in Adams v. State, 192 So. 2d 762, 764 (Fla. 1966), the court found reversible error when the prosecutor described defense counsel's closing argument as "twisted" and "perverted and distorted," and suggested that defense counsel violated his oath as a lawyer. Similarly, the district courts of appeal of Florida have found reversible error when prosecutors resorted to personal attacks on defense counsel and his/her credibility. See for example, Knight v. State, 672 So. 2d 590, 591 (Fla. 4th DCA 1996), Jenkins v. State, 563 So. 2d 791 (Fla. 1st DCA 1990), Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988), Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th DCA 1984) and Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982).

The aforementioned comments of the prosecutor should have been objected to contemporaneously. Failure to do so was very prejudicial to the defendant and constitutes ineffective assistance of counsel.

The third category of improper remarks by the prosecutor consisted of statements of his personal opinions and beliefs. Thus, the

prosecutor stated his personal opinion that Chandler's defense was not believable:

> The suggestion was made maybe (the gas) didn't leak all out at that time and in that particular trip – which I find it hard to believe. I find the whole thing hard to believe.

(Vol. 100, R. 2471, emphasis added) The prosecutor also stated his personal belief in Chandler's guilt:

> You know, I agree with that. There is only one person who knows whether Oba Chandler is guilty, because Oba Chandler is the murderer, not somebody else.

(Vol. 101, R. 2618)

In Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994), the district court ruled,

> [b]ecause a jury can be expected to attach considerable significance to a prosecutor's

expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in issue.

Thus, it was reversible error for the prosecutor to "express a personal belief in the guilt of the accused." Riley v. State, 560 So. 2d 279, 280-281 (Fla. 3d DCA 1990). It is also reversible error for the prosecutor to make it clear that "in his opinion the defense was a fabrication." Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989). It follows then, that trial counsel was ineffective for not objecting to these improper prosecutorial comments.

The fourth type of improper remarks by the prosecutor consisted of personal attacks on Chandler himself. For example, the prosecutor argued that Chandler was "malevolent," "chameleon-like," "a brutal rapist or conscienceless murderer." (Vol. 101, R. 2630) "It is improper for a prosecutor to refer to the accused in derogatory terms, in such a manner as to place the character of the accused in issue." Pacifico v. State, 642 So. 2d at 1183. In Pacifico, the First District Court of Appeal found fundamental error because the prosecutor attacked the character of the defendant by calling him a "sadistic, selfish bully," a "criminal," a

"convicted felon," a "rapist," and a "chronic liar." Id. Similarly, the Fifth District Court of Appeal found fundamental error when the prosecutor called the defendant shrewd, cunning, and diabolical, in combination with other improper remarks. Fuller v. State, 540 So. 2d 182, 184 (Fla. 5th DCA 1989).

The defendant suffered severe prejudice in this regard for, had trial counsel objected contemporaneously (and the very first time the prosecutor made the improper statements in each of the four categories noted above), the objections would have been sustained, the statements would have been stricken, the jury would have been instructed to disregard the statement(s), and the prosecutor would have been instructed not to repeat the improper statements. Instead, these very harmful, prejudicial comments were repeatedly presented to the jury and necessarily affected the jury's determination that Mr. Chandler had to be guilty of the crimes charged. Had trial counsel prevented the remarks from being made, there is a distinct likelihood and reasonable probability that the defendant would not have been found guilty. This is especially true given the very weak, circumstantial evidence otherwise presented against him.

In the alternative, if counsel had made contemporaneous objections each time the prosecutor made an improper remark, and even if the trial court had not sustained trial counsel's contemporaneous objections, then at least the issue would have been preserved for appellate review. Upon subsequent appellate review, there is a distinct likelihood and reasonable probability that Mr. Chandler would have been granted a new trial based upon the trial court's failure to grant Chandler relief.

Even though this Court determined that the matter of the prosecutor's very prejudicial statements to the jury were not preserved for appellate review (since there had not been a contemporaneous objection to them by defense counsel), the state has continued to assert that this issue should have been raised on direct appeal and therefore, is procedurally barred from further consideration. See the state's Response to the trial court's Order to Show Cause pages 4, 5; R. 663, 664. The state is incorrect.

The defendant readily concedes that, as the court noted in Cherry v. State, 659 So. 2d 1069 (Fla. 1995), a Rule 3.850 proceeding cannot be used for a second appeal. By the same token, there are limits to this general legal premise. In Robinson v. State, 661 So. 2d 36 (Fla.

2d DCA 1995), affirmed on other grounds, Robinson claimed that trial counsel was ineffective for failing to properly respond to the prosecutor's comment on his failure to testify. Robinson acknowledged that his trial counsel objected to the prosecutor's comment but claimed that he (trial counsel) was deficient for failing to request a curative instruction. The trial court summarily denied the claim without an evidentiary hearing finding that, ". . . the issue had been raised and affirmed on direct appeal." Robinson, supra, 661 So. 2d at 37. The district court of appeal found after a review of the trial transcript that the prosecutor's comment was harmless -- but stated:

> In many instances, the fact that a legal issue was briefed on direct appeal does not preclude a post conviction claim that trial counsel handled the issue ineffectively during the trial. (Citation omitted.) Indeed, it is possible for a direct appeal to result in an affirmance because trial counsel failed to properly preserve the issue for direct appeal.

(Emphasis supplied.) Thus, the fact that a particular issue should have been raised on direct appeal is beside the point when the issue was presumably not preserved in the first place because trial counsel "handled the issue ineffectively during the trial." Id. In Knight v. State, 710 So. 2d 648 (Fla. 2d DCA 1998), the trial court summarily denied post conviction relief regarding Knight's claim that his trial counsel failed to object to what he (Knight) felt were improper comments by the prosecutor (allegedly bolstering the credibility of state witnesses). While finding that the comments failed to establish prejudice, the appellate court stated at page 649:

> We now consider the reason the trial court denied Knight's claim. The order denying this claim reads, "The Defendant is procedurally barred from raising this in a 3.850 motion, as it should have been raised on direct appeal." Knight's point in his rule 3.850 motion is that he was the one procedurally barred because of counsel's oversight in failing to register the appropriate objection. The trial court relied on Cherry v. State, 659 So. 2d 1069 (Fla. 1995). Cherry does

repeat the admonition that allegations of ineffective assistance of counsel cannot be used to circumvent the rule that post conviction proceedings cannot serve as a second appeal. See also Medina v. State, 573 So. 2d 293, 295 (Fla. 1990); Blanco v. Wainwrigh*t*, 507 So. 2d 1377 (Fla. 1987) (holding that assailing counsel for failing to expose prejudices against Mariel Cuban refugees merely recasts an unsuccessful direct appeal issue regarding those same alleged prejudices). However, these principles do not apply to a claim where a specific accusation is aimed at trial counsel – be it the failure to move to suppress evidence, the failure to object to the admission of evidence, or, as here, silence in the face of an objectionable comment by the prosecutor – which has not, and could not have, been raised on plenary appeal. There is a critical distinction between an attack on counsel for failing to object to, and thus preserve review of,

> a prosecutor's remark and the reviewability by an appellate court of the comment itself to determine whether reversal is warranted. (Citation omitted.)

(Emphasis supplied.) The Knight court added at 649:

> We observe a troubling tendency by trial courts in this district, principally in the two most populous counties, to deny procedurally legitimate attacks on trial counsel by relying on the prisoner's failure to raise the underlying, substantive issue on direct appeal when the prisoner has claimed he was prohibited from doing so only because of the very deficiency of counsel in failing to pose the appropriate legal objection.

(Emphasis supplied.) See also Highsmith v. State, 493 So. 2d 533

(Fla. 2d DCA 1986).

The state, in its Response to the trial court's Order to Show Cause (pages 3-8; R. 561-566), minimized the seriousness of the improper conduct of the prosecutor during closing arguments which we reference in our amended motion, arguing that we are exaggerating the alleged prejudice that resulted. Appellant respectfully disagrees. Chandler had more than enough to deal with during his jury trial in terms of the evidence, including the Blair case evidence, presented against him. He certainly did not need insult added to injury in the form of the failure of his lawyer to protect him from the very prejudicial, opinionated, personal attacks leveled against them both by an overly aggressive, hard-hitting prosecutor.

As noted above, defense counsel attempted to excuse his failure to object to the improper remarks of the prosecutor claiming that the omissions were strategic. Zinober testified, for example, that he had worked hard to establish a good rapport with the jury and he felt that the prosecutor was only hurting his case by attacking him and his client personally. Thus, Zinober stated:

> Candidly, I thought I did a pretty good closing argument, and I felt that I had established a pretty

> good rapport with the jury during the closing argument.
>
> I'm sure you recognize as a trial lawyer we try to read body language a lot, and I was getting smiles and head nods from several of the jurors, and felt that the closing argument was going very, very well. (EH 113-114)

He testified that another reason for not objecting was:

> Then I sat down and Doug started his closing argument. And . . . in general I don't like to jump up all the time anyway. I think it looks bad in front of the jury when you're continually jumping up and interrupting the other side's closing argument. (EH 114)

He went on:

When Doug got up, quite candidly, I felt his argument was pretty mean spirited in a lot of ways, some of the things he was saying. But I thought that was hurting him. I think quite candidly it hurts a prosecutor when he comes off mean spirited. I thought he as hanging himself to be honest with you.

I recall sitting across the courtroom and watching some of the jurors that I felt I established a particularly good rapport with, that, you know, the body language and smiling.

. . . what I saw in her (one of the jurors) body language, I felt that she was – that they (two of the jurors) were both sort of recoiling or at least had their arms folded and not responding well to what Doug was saying when he was saying contentious things about me. (EH 117-18)

The trial court accepted Zinober's explanation (R. 2057), but this Court should not. If defense counsel, in fact, had been able to establish a feeling of confidence in his and Chandler's credibility (as Zinober claims in order to excuse his failure to object), the prosecutor certainly destroyed that during closing argument. At some point in time, the failure of defense counsel to stand up to the state and protect the client from being berated by the prosecution can no longer be justified and sanitized as reasonable strategy. That point was reached and exceeded in this case, and, again, Chandler suffered the consequences. Zinober finally admitted as much, saying: "As it turned out, you guys won and maybe I was wrong, but that's what I thought at the time." (EH 118)

CONCLUSION

The errors and omissions of defense counsel, when considered separately, may not have been so serious as to constitute ineffective assistance of counsel sufficient to justifying the reversal of Chandler's convictions and death sentences. However, when considered cumulatively and in their totality, the ineffectiveness and resulting prejudice was so serious that a new trial must be granted. For the reasons set forth above, then, the Court is requested to reverse the order of the lower tribunal which denied the defendant's Florida Rule of Criminal Procedure 3.850 motion, order the lower tribunal to grant the motion and vacate the defendant's convictions, judgments and sentences, including his death sentences, grant the defendant a new trial, and grant him such other relief as is appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Initial Brief Of Appellant has been provided Douglas Crow, Esq., and Marie King, Esq., Assistant State Attorneys, The Pinellas County Justice Center, 14250 49th Street North, Clearwater, Florida 34662, and Candance Sabella, Esq., Assistant Attorney General, Office of the Attorney General of Florida, 2002 Lois Avenue, Suite 700, Tampa, Florida, by United States mail delivery, this 23rd day of January, 2002.

CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief of Appellant was prepared using a Times New Roman Font, 14 point, not proportionally spaced. A copy of the brief is submitted on a disk believed to be compatible with The Supreme Court's computer system.

_____

Baya Harrison

IN THE SUPREME COURT OF FLORIDA

OBA CHANDLER,

Appellant,

vs. **Case No. SC 01-1468**

THE STATE OF FLORIDA,

Appellee.

_____/

On Direct Appeal From A June 28, 2001 Final Order Of The Circuit Court For The Sixth Judicial Circuit In And For Pinellas County, Florida, Denying Appellant's Post Conviction Motion To Vacate His Convictions, Judgments And Death Sentences Filed Per The Provisions Of Florida Rule Of Criminal Procedure 3.850.

INITIAL BRIEF OF APPELLANT

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DID THE TRIAL COURT ERR BY NOT FINDING THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR ADMITTING THAT CHANDLER WAS

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PRELIMINARY STATEMENT INCLUDING RECORD REFERENCES

Appellant, Oba Chandler, the defendant in the trial court, will be referred to as "the defendant" or "Chandler." Appellee, State of Florida, will be referred to as "the state."

Except as noted below, the record on appeal in this Florida Rule of Criminal Procedure 3.850 post conviction proceeding is in twelve volumes. At the bottom of each page, the Clerk of Circuit Court has provided a page number. This part of the record includes the pleadings, orders and other related documents. Reference to this part of the record

will be by the letter "R" followed by an appropriate page number, or, for example, "R. 2002."

The transcript of the evidentiary hearing on Chandler's post conviction motion is in two volumes. The Clerk of Circuit Court did not designate the pages of these transcripts with an "R" citation. Therefore, reference to this transcript will be by the symbol "EH" (standing for evidentiary hearing) followed by the page number provided by the court reporter located in the upper right-hand corner of each page.

Items introduced in evidence during the Rule 3.850 post

conviction proceeding will be referred to by a generic description, the exhibit number and the location of the item in the record on appeal. Two reports prepared by Media Specialist Paul Wilson, not introduced in evidence but authorized by the trial court to be a part of the record in support of Chandler's venue claim, will be referred to by the abbreviated date, author and page number (appearing in the lower right-hand corner of each page) or, for example, "12/7/2000 Wilson Media Report, p. 10." References to the record on appeal in Chandler v. State, 702 So. 2d 186 (Fla. 1997), the original direct appeal of Chandler's convictions, judgments and death sentences, will be by the symbols used in that

proceeding, a record volume and page number, or for example, “Vol. 7, R. 2324.”