IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-195

GUY RICHARD GAMBLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Guy Richard Gamble's motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Gamble was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Gamble’s motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Guy Richard Gamble, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF CASE AND FACTS

Guy Richard Gamble, the defendant, was charged by way of Indictment for conspiracy to commit armed robbery, armed robbery with a deadly weapon and first degree murder of Helmut Kuehl. (R. C08-07) The case proceeded to a jury trial in Lake County Circuit Court before Judge Richard Singletary. This Court summarized the facts in its direct appeal opinion by noting that "[O]n December 10, 1991, Guy R. Gamble and Michael Love

murdered their landlord, Helmut Kuehl, by striking him several times in the head with a claw hammer and choking him with a cord. Gamble and Love also stole their victim's car and wallet. Within the wallet was a blank check which Gamble forged and cashed in the amount of $8,544. After cashing the check the men, accompanied by their girlfriends, drove to Mississippi in the stolen car. Gamble subsequently abandoned the group, but was later arrested." Gamble v. State, 659 So.2d 242, 244 (Fla. 1995).

On June 25, 1993, the jury returned unanimous verdicts of guilty on all counts. (R. 1462-63).

On June 28, 1993, the case proceeded to penalty phase before the same jury. After hearing matters in aggravation and mitigation, the jury advised and recommended by a vote of 10 to 2 that defendant be sentenced to death. (R. 1859).

On August 10, 1993, the Court sentenced defendant to death, a consecutive life sentence for armed robbery and consecutive 15 years prison term for conspiracy to commit armed robbery. (R.2082-83).

On May 25, 1995, this Court affirmed defendant's sentence and conviction in *State v. Gamble*, 659 So. 2d 242 (Fla. 1995).

On February 20, 1996, the United States Supreme Court denied defendant's Petition for Writ of Certiorari in Gamble v.

Florida, 516 U.S. 1122, 116 S.Ct. 933, 133 L.Ed.2d 860 (1996). Fla.R.Crim.P. 3.850(c)(2).

On or about March 17, 1997, defendant filed a Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend.

On September 20, 1999, Mr. Gamble filed his amended Motion to Vacate Judgment under authority of Fla.R.Crim.P. 3.850 and Fla. Stat. § 924.066 seeking collateral relief from his judgments of conviction for first degree murder, armed robbery, conspiracy to commit armed robbery, sentence of death, consecutive life sentence and consecutive 15 year sentence, respectively. Fla.R.Crim.P. 3.850 (c)(5). Mr. Gamble filed a Motion to Supplement Rule 3.850 Motion with Additional Claims XI and XII on July 20, 2000.

A hearing was held on February 10, 2000, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). On October 20, 2000, the court entered its *Huff* order *nunc pro tunc* to February 10, 2000, as to Claims I - X and August 23, 2000, as to Claims XI and XII. In that order, the court granted an evidentiary hearing on Claims I through V and XI and XII while denying Claims VI through X of the Rule 3.850 Motion as amended and supplemented.

An evidentiary hearing was held by the trial court on August 23 and 24, 2001, on Claims I - V and XI and XII of his Rule

3.850 motion. By order dated January 8, 2002, the court denied relief to Mr. Gamble as to the evidentiary hearing claims and an appeal to this Honorable Court was subsequently and duly noticed.

Mr. Gamble remains incarcerated at Union Correctional Institute under a sentence of death by a Court established by the Laws of Florida within the meaning of Fla.R.Crim.P. 3.850(a) and Fla. Stat. § 924.066.

This appeal is properly before this Court.

SUMMARY OF ARGUMENT

1. In denying the claim regarding the CCP aggravator, the evidentiary court erred twice. First, the court was wrong for finding (even as a matter of law) that counsel cannot be ineffective for failing to predict the evolution of case law. In fact, trial counsel did anticipate the evolution of case law to a point and materially so. The evidentiary court, secondly, erred in seizing upon this Court's ruling that the CCP aggravator was applicable to the facts of the case. But for the failure of trial counsel to make a proper objection at trial counsel, the Appellant would have received a new sentencing upon the direct appeal.

2. The evidentiary court was wrong in denying the opening argument admission of guilt claim because the court was wrong for indicating that Mr. Gamble was charged with "first degree murder." In fact, the indictment charged premeditated first degree murder and the alternative of first degree felony murder.

3. The evidentiary court was wrong in denying the claim regarding the concession of pecuniary gain at the penalty phase because the second chair's penalty phase concessions damaged any "degree of credibility" with the jury by directly contradicting the guilt phase counsel's arguments.

4. Because the evidentiary court relied on completely inconsistent portions of the record, on contradictory sworn

statements of attorney involvement and case work-up that cannot be reconciled with each other, the basis for the court's ruling in denying the claim regarding ineffectiveness based on inexperience was in error.

ARGUMENT I

THE EVIDENTIARY COURT ERRED WHEN IT DENIED WITHOUT AN EVIDENTIARY HEARING MR. GAMBLE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICIALLY DEFICIENT IN FAILING TO CHALLENGE THE UNCONSTITUTIONALLY VAGUE AGGRAVATOR OF COLD, CALCULATED AND PREMEDITATED, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The evidentiary court erred in denying Claim VII of the Rule 3.850 motion. It did so without an evidentiary hearing. In its order denying the claim, the court explained:

> In this claim, Defendant first argues that the cold, calculated and premeditated instruction was unconstitutionally vague in that it did not include any limiting instructions. As authority for this point, Defendant cites Jackson v. State, 648 So.2d 85 (Fla. 1994) where the Florida Supreme Court held that the then standard CCP instruction, which did not include limiting instructions, provided insufficient guidance for determining whether the factor existed. Jackson v. State, 648 So.2d 85, 90 (Fla. 1994). However, the Court also held that claims that the CCP instruction were unconstitutionally vague were procedurally barred unless a specific objection regarding that issue was made at trial. Id. In the instant case Defendant argued on direct appeal that he had sufficiently objected to the specific form of the CCP aggravator at the trial level. Gamble v. State, 659 So.2d 242, 245 (Fla. 1995). The Florida Supreme Court, on the other hand, found that defendant had failed to properly raise the objection and found this issue to be procedurally barred. Id. As to

> Defendant's argument that counsel's failure to object appropriately constituted ineffective assistance, this Court finds that as a matter of law counsel cannot be ineffective for failing to predict the evolution of case law. (Need cite)[1].
>
> Defendant also contends that the CCP instruction was inapplicable to this case. This issue was raised by the Defendant on direct appeal, thereby making it procedurally barred. In addition, the Florida Supreme Court specifically addressed this issue on direct appeal and found that '[t]hese facts, which speak for themselves, completely support the trial court's finding of cold, calculated and premeditated.' Gamble, 659 So.2d at 245. Even beyond this, the Florida Supreme Court has cited Gamble as an example of when the CCP aggravator is applicable. Gordon v. State, 704 So.2d 107 (Fla. 1997). Accordingly, this claim is denied. (PC-R. 1201-02).

In this ruling, the evidentiary court erred twice. First, the court was wrong for finding (even as a matter of law) that "counsel cannot be ineffective for failing to predict the evolution of case law." (PC-R. 1201). In fact, trial counsel did anticipate the evolution of case law to a point and materially so.

Specifically, trial counsel challenged the subject cold, calculated and premeditated aggravator by his pre-trail motions

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[1] While the evidentiary court never supplemented its order with a citation of authority for this ruling, it can be presumed that the court had in mind such a case as Williams v. State, 516 So.2d 975, 977 (Fla. 5th DCA 1987), review denied, 525 So.2d 881 (Fla. 1988) (Defense counsel not required to raise specific argument on motion for judgment of acquittal which had been recently rejected by the en banc decision of the district court of appeal), as cited in Mr. Gamble's initial brief on direct appeal (IB. 22).

entitled Motion to Declare Florida Statutes 775.082(1) and 921.141 Unconstitutional (arguing that "[t]he aggravating circumstances as enumerated in Florida Statute Section 921.141 is [sic] impermissibly vague and overbroad..." (R. 230-36) and by his Motion to Declare Section 921.141 Florida Statues Unconstitutional (arguing that F.S. 921.145(5)(i) (1979) made premeditated murder *inherently* an aggravating factor that would mandate a death sentence in all premeditated first degree murder cases in violation of Woodson v. North Carolina, 428 U.S. 280 (1976)) (emphasis added) (R. 237).[2]

Trial counsel did not fail to predict the evolution of case law in this respect. What trial counsel failed to do was renew the CCP vagueness argument already presented by his pre-trial motions. Trial counsel failed in not making a subsequent and proper argument and objection at the appropriate time during the

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[2] Not only did trial counsel anticipate the limiting instructions to CCP from Jackson, supra, but some of his pre-trial motions seemed to anticipate the issues presented by Ring v. Arizona, — U.S. —, 2002 WL 135257 (decided June 24, 2002) as shown in the following: Motion for Statement of Aggravating Circumstances and Motion for Special Verdict Form with Specific Findings (R. 14044); Motion to Dismiss Indictment or to Declare that Death Is Not a Possible Penalty (R.136-39 and 330-31); Motion for Specific Guilt Phase Verdict Form (R. 297-99); Motion for Interrogatory Penalty Phase Verdict (R. 289-92); Motion to Preclude Judicial Override of Jury Recommendation for Life Sentence; Motion for Special Jury Verdict Form; Memorandum of Law in Support Thereof (R. 114-135).

trial. It makes no sense in analyzing the record in this case to give counsel such a pass on his ineffectiveness. He knew the issue regarding vagueness in the CCP instruction had constitutional importance and so presented them in the pre-trial motions. But instead of renewing this position, he merely argued at trial that the evidence was insufficient to prove premeditation. This led to the procedural bar of raising the issue on direct appeal. See Gamble, 659 So.2d at 245.

The United States Supreme Court requires that a defendant show two elements in establishing a claim of ineffective assistance of trial counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687.

Furthermore, establishment of prejudice is controlled by the following requirement:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

> different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694.

As presented in the Rule 3.850 Motion, after the guilt phase of a capital trial, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may never have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). Mr. Gamble was thereby prejudiced by trial counsel's lack of functioning as guaranteed by the Sixth Amendment to the United States Constitution because trial counsel only went “half-way” with his CCP vagueness argument. He filed the proper pre-trial motions but failed to renew the issue(s) with a proper objection during the trial. Mr. Gamble is prejudiced because, but for appellate counsel's deficiencies in failing to raise the objection for appeal, Mr. Gamble would have been entitled to a new sentencing upon the direct appeal in order to cure the “constitutional infirmity” of the CCP instruction identified in Jackson, supra. Strickland, 466 U.S. at 694.

The evidentiary court, secondly, erred in seizing upon this

Court's ruling that the CCP aggravator was applicable to the facts of the case. Gamble, 659 So.2d at 244-45. Evidentiary Court Order, (PC-R. 1201-02). Even though such cases as Gordon v. State, 704 So.2d 107 (Fla. 1997) use Gamble, supra, as CCP precedent, the point is that a proper Jackson objection by trial counsel at trial would have called for a new sentencing (upon the direct appeal) before a jury receiving proper CCP limitations, thereby preventing the "applicability" determination on direct appeal in the first place.

In explaining that "a jury may automatically characterize every premeditated murder as involving the CCP aggravator," this Court noted in Jackson:

> "[B]ecause the CCP factor is so susceptible of misinterpretation and has been the subject of so many explanatory decisions, we cannot say that the current instruction sufficiently informs the jury of the nature of this aggravator.
>
> For all these reasons, Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey–the description of the CCP aggravator is 'so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.' Espinosa, 505 U.S. at —, 112 S.Ct. at 2928."

Jackson, 648 So.2d at 89-90 (citations omitted in original).

To support summary denial of a Rule 3.850 claim without a hearing, a trial court must either state its rationale in its

decision or attach those specific parts of the record that refute each claim presented in the motion. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), citing Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim...")(emphasis added).

The October 23, 2000, order (PC-R. 1198-1205) contains neither a clear rationale nor record attachments for the denial of a hearing or the claim itself. Additionally, the evidentiary court's ruling that "as a matter of law counsel cannot be ineffective for failing to predict the evolution of case law" (PC-R. 121) is in error because it ignores that there are facts to be developed and considered as to why trial counsel abandoned his CCP jury instruction arguments by the time of the penalty phase of the trial. When trial counsel did not renew his written objections to the CCP aggravator and its instructions at trial, he may have had a tactical reason for doing so. But without an evidentiary hearing, neither the evidentiary court, not this Court, have any record of facts regarding tactics for

resolution of this matter in violation of such authority as Ford v. State, --- So.2d ---, 2002 WL 1926633 (Fla. Aug. 22, 2002).

The presentation of a rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the claim would ordinarily comply with the requirements of Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000). However, the trial court's rational is, as stated, erroneous. Consequently, an erroneous, incomplete or non-existent rationale, in the absence of a record attachment, cannot comply with Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

ARGUMENT II

THE EVIDENTIARY COURT ERRED IN DENYING RELIEF ON THE *NIXON/CRONIC* CLAIM OF THE RULE 3.850 MOTION REGARDING TRIAL COUNSEL'S OPENING ARGUMENT.

In denying relief on Claim I of the Rule 3.850 Motion, the evidentiary court distinguished Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) from Mr. Gamble's case as follows:

Having considered Nixon and having compared its facts

> to those presented here, this Court distinguishes the case at hand. In Nixon, defense counsel admitted that the defendant was guilty of the charged offense – first degree murder. Such is not the case here. While trial counsel did admit that Defendant was guilty of a lesser included offense of first degree murder, counsel never admitted that Defendant had committed first degree murder, the offense with which Defendant was charged.... Additionally, during closing Defendant's counsel advised the jury that they '[would] conclude that Mr. Gamble [was] guilty of second or third degree murder but not first degree murder." (R. At 1421). This limited admission does not amount to the 'complete concession of guilt" contemplated in Nixon (citations omitted) and therefore does not create the Cronic presumption that effective assistance was denied.
>
> (PC-R. 1212).

The evidentiary court was wrong with this ruling because it was wrong for indicating that Mr. Gamble was charged with "first degree murder." In fact, the indictment charged premeditated first degree murder and the alternative of first degree felony murder:

> [t]he Grand Jurors do present that MICHAEL WILLIAM LOVE AND GUY RICHARD GAMBLE in the county of Lake, and the State of Florida, on the 10th day of December, 1991, in the County and State aforesaid did unlawfully and feloniously, from a premeditated design to effect the death of a human being, or while engaged in the perpetration of the felony of Armed Robbery, kill and murder HELMUT G. KUEHL, a human being, by beating, cutting and choking him, in violation of Florida Statute 782.04(1)(a)...
>
> (R. 8).

The error in treating the case as simply one of "first degree murder" ignores the trap that trial counsel created for

himself by conceding to second degree murder in his opening statement to the jury. In doing this, trial counsel was presumed ineffective under the rule presented in United States v. Cronic, 466 U.S. 648, 659 (1984). When trial counsel did so, he was ignoring the facts regarding the planned robbery of the victim that counsel knew was to part of the State's case. The evidentiary court recognized this evidence and described it as follows:

> It is clear to this Court that defense counsel did not adopt this strategy without carefully considering all of its options, limited as they were. (Hr'g Tr. At 44-48). Any hopes of preventing Defendant's multiple confessions from being offered were dashed when Defendant refused, at the last minute, to testify at the scheduled supression hearing. (Hr'g Tr. At 31-33). In addition to Defendant's own statements, was other overwhelming evidence against Defendant, including detailed testimony by Defendant's girlfriend of Defendant's plan to "take out" the victim, a window blind cord which Defendant used in a trial run on his girlfriend before actually strangling the victim with it, and clothes recovered from Defendant stained with the victim's blood. Defense counsel also had to deal with the looming possibility of a death sentence if Defendant were [sic] convicted of first degree murder. In this regard, Defense counsel recognized the importance of maintaining a degree of credibility with the jury if and when the case proceeded to the penalty phase. (Hr'g Tr. At 44-45). In light of the evidence against Defendant and the lack of defense options, admitting to a lesser offense of first degree murder was a reasonable decision on the part of defense counsel.
>
> (PC-R. 1213-14).

Counsel knew the evidence regarding the plans for the robbery,

the details of the robbery and the cord involved in the robbery were going to come in. Therefore, any time and every time that trial counsel admitted to second or third degree murder he was conceding to the actual alternative charge of felony murder.

Just as the evidentiary court was mistaken about the perceived charge as being simply "first degree murder," trial counsel also failed to understand that the indictment charged premeditated murder with felony murder in the alternative. An example of trial counsel's understanding and preparation for the trial is shown by the following statement made at the evidentiary hearing:

> [I]n this case, I thought we needed to plant the seed in the jury's mind that, hey, we're not – we don't want you, with all this mountain of evidence, we're not saying ridiculously that Guy Gamble shouldn't be responsible and should be punished to some degree. We just don't think that this punishment should be, or that his offense is *First Degree Murder* and we don't think the punishment should be the death penalty.
>
> (PC-R. 2438)(emphasis added).

In making that statement, trial counsel was explaining why he did not use the option of waiving opening argument as was emphasized in Nixon, supra: "Yeah. I always realize that option, but I also realize that if you waive opening that you don't get your theory before the jury before the State starts their case... {I]f you say nothing then they are going – in my opinion, the jury is wondering why, you know, silence can be an

admission almost." (PC-R. 2438). At trial, defense counsel ended his opening statement by saying "... that you will conclude that Mr. Gamble is guilty of second or third degree murder but not first degree murder." (R. 1421).

The evidentiary hearing court also felt the "Defendant stated that he had indeed given his consent to the strategy of admitting to second or third degree murder on cross-examination at the evidentiary hearing. (PC-R. 1213, citing "Hr'g Tr. At 120-21").

Mr. Gamble did respond to the prosecutor that the second degree argument was "okay" with him. (PC-R. 2491). But an additional response to the prosecutor's cross examination at the evidentiary hearing might show that Mr. Gamble's understanding of the issues was less than complete because he said the consent was "okay" "as far as I understood it." (PC-R. 2492). Trial counsel further testified at the evidentiary hearing that Mr. Gamble "[l]eft it up to us because, you know, he didn't have the experience and didn't know, you know, the procedures or what was going on, that we were the lawyers and he was relying on us to, you know, whatever we thought we needed to do, that we – he would rely on us." (PC-R. 2420). This hardly comprises the picture of "indeed [having] given his consent to the strategy of admitting to second or third degree murder." (PC-R. 1213).

Under these circumstances, Mr. Gamble is entitled to relief under Cronic, supra.

ARGUMENT III

THE EVIDENTIARY COURT ERRED IN DENYING RELIEF ON THE *NIXON/CRONIC* CLAIM OF THE RULE 3.850 MOTION REGARDING TRIAL COUNSEL'S CLOSING ARGUMENT DURING THE PENALTY PHASE.

In denying relief on Claim XI of the Rule 3.850 Motion, the evidentiary court felt that "there is no indication that the holding [in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000)] would even apply as here to the penalty phase where guilt is no longer an issue." (PC-R. 1220). The appellant concedes that Nixon spoke only to concessions of guilt as charged during opening argument. However, the point of the claim and the thrust of the evidentiary hearing was the way in which second-chair trial counsel conceded the pecuniary gain aggravator.

In the instant case, counsel made the following remarks in the penalty phase closing argument:

> "As Mr. Gross told you, the State has to prove aggravating factors sufficient to impose the death penalty before you even consider anything in mitigation. We're all clear that the death penalty in Florida is saved for the most aggravated and unmitigated first degree murder, but that's not this case. The first thing you have to decide is if the murder of Mr. Kuehl is something set apart from the other murders that justifies the death penalty. I would suggest that it's not. **It was committed for financial gain, there's no question about that, it was a robbery. Guy**

> **Gamble was involved in that robbery. You have heard all the testimony."** (R. 1816-17)(emphasis added).

Further, defense counsel stated:

> "We're talking about somebody who was killed during the commission of a robbery and Guy Gamble was involved in that robbery. **He was involved in planning that robbery. That's not in dispute and never has been**." (R.1819)(emphasis added).

In addition, counsel told the jury:

> "And the evidence in this case, listen to Guy's statement, what he said, he intended to rob him, he never meant to kill him . . . It was as a result of and part of a robbery and that's part of the pecuniary gain. That's been proven. Nobody is going to tell you there are no aggravators in this case. **It is aggravated because it was for financial gain. Try to think about what murder can there be where there wasn't something aggravating**. In this case, I would submit you've got one aggravator, it was committed for financial gain. That the evidence you have before you is of a heightened premeditation for robbery." (R. 1820-21)(emphasis added).

The defense theory of the case largely repeated that of the State and compounded the harm when the defense conceded in opening statement that the defendant was guilty of felony murder. As the evidentiary court noted in its order, "[t]here was considerable focus at the evidentiary hearing on the strategy utilized by defense counsel and whether it was appropriate despite the meager facts facing the attorneys." (PC-R. 1212). A key component of that "strategy" was that "[d]efense counsel recognized the importance of maintaining a degree of credibility with the jury if and when the case

proceeded to the penalty phase (citing “Hr’g Tr. at 44-45")(PC-R. 1214).

Mr. Gamble argues here that the second chair’s penalty phase concessions damaged any “degree of credibility” with the jury because the second chair’s chairs concessions amounted to a direct contradiction of the guilt phase counsel’s arguments. To say that “there’s no question” that it [the crime] was committed for pecuniary gain, that “it was a robbery” and “Guy Gamble was involved in that robbery”is to say that guilt phase counsel was untruthful or wrong when he argued that “we were trying to go on the theory of a possibility that Mr. Gamble had no intentions at this time of killing Mr. Kuehl or being involved with it, that it came up suddenly, with, you know, Mike Love suggesting it and it caught Guy off guard and that he had no intent to kill or rob Mr. Kuehl at the time he was actually killed, but that as an after affect, after the death, then that he participated in a theft from Mr. Kuehl.” (PC-R. 2409-10).

Guilt phase counsel’s theory of theft after the killing is similarly destroyed by penalty phase counsel’s acknowledgment that Mr. Gamble “was involved in planning that robbery. That’s not in dispute and never has been.” (R. 1819). Because it was disputed by guilt phase counsel, it is impossible to see how “maintaining credibility with the jury” was being carried out by

the penalty phase counsel. This is the penalty phase counsel who tells the jury "[t]ry and think about what murder an there be where there wasn't something aggravating." (R. 1820-21).

Adams v. State, 727 So.2d 997 (Fla. 2d DCA 1999) stands for the proposition that a wholly deficient legal strategy can never withstand both prongs of Strickland, supra. In the instant case, both trial counsel pursued a legally unsound theory that could not fall under the guise of a legitimate trial strategy. Because of trial counsel's deficient legal strategy, this case was nothing more than a plea to first degree felony murder with a given aggravator rather than a true adversarial contest.

While Nixon indicates that defense counsel's opening argument admission of guilt as charged is per se ineffective assistance of counsel in the absence of the defendant's consent to such strategy, Mr. Gamble urges the Court to find that penalty phase concessions that contradict guilt phase arguments, as here in Mr. Gamble's case, is also entitled to the per se ineffectiveness of counsel analysis of Nixon and Cronic, supra.

ARGUMENT IV

THE EVIDENTIARY COURT ERRED IN DENYING RELIEF ON THE CLAIM OF THE RULE 3.850 MOTION REGARDING TRIAL COUNSEL'S INEFFECTIVENESS DUE TO INEXPERIENCE AND INADEQUATE PREPARATION FOR TRIAL.

The Office of the Public Defender was appointed to represent

Mr. Gamble on December 19, 1991. (R. 6). The assigned lead counsel had no capital case experience either as a first or second chair. (PC-R. 2384). The office already had a policy of always assigning two assistants to a capital murder case. (PC-R. 2385). First chair counsel recalled that a second chair was "probably" assigned to the case in the fall or early winter of 1992. (PC-R. 2385). This assigned lead counsel worked on Mr. Gamble's case until he left the office in either February or March of 1993. (PC-R. 2386).

The second chair, who took the assignment as lead chair in March of 1993, had no capital case experience as lead chair and sat through one one capital case as a second, penalty phase chair. (PC-R. 2396). Three days before the start of the trial, the next assigned second chair counsel came off a sixty-day Bar suspension. He was working in Sumter County, took a thirty day vacation, but returned to the office to perform "paralegal" work exclusively on Mr. Gamble's case. (PC-R. 2460-63).

In denying relief, the evidentiary court found the lead chair's "experience was adequate to hold the position of lead counsel in the underlying trial" and that the second chair's "had considerable previous trial experience" which included capital case experience." (PC-R. 1222). The court ignored the second chair's testimony that he could recall experience on only

three capital cases (PC-R. 2464) and that he had taken a vacation for half of the time of his Bar suspension, thereby working on Mr. Gamble's case for approximately 33 days instead of a full sixty days. (PC-R. 2460-63; Order, PC-R. 1222).

Importantly, the evidentiary court's ruling was largely founded on lead counsel's hearing testimony that "[h]e had available to him and did consult with other veteran and highly experienced attorneys in the Public Defender's Office." (PC-R. 1222). The court was referring to the testimony regarding trial counsel regularly consulting with the chief assistant for his advice of Mr. Gamble's case. (PC-R. 2445-46).

This reliance by the court was a significant error. It ignored the trial record in this case where the consultations were effectively denied by the chief assistant in the Public Defender's Office. During the June 16, 1993, hearing in which the trial court considered the Public Defender conflict and waiver issue, the chief assistant testified under oath as follows:

> [F]or the record, let the record reflect what my responsibility has been. As the Court indicated, I am responsible for supervision on a day-to-day basis. I have had no direct involvement in this case other than one afternoon I took a couple of depositions in this case. **Beyond that, I have had no contact with this case whatsoever.** I haven't told Mr. Nakcke to do or not do anythign with regard to the case other than move to withdraw based upon this conflict before the

> Court today. I have instructed him it's our position we are not moving to withdraw because there is no conflict.
>
> (R. 1880-81)(emphasis added).

Simply put, there is no need to make further argument with the trial court's ruling on this claim because either the lead counsel's evidentiary hearing testimony about consultations with the chief assistant was inaccurate and baseless or the chief assistant's pre-trial testimony about "no contact" [other than an afternoon's depositions] "whatsoever" was inaccurate and baseless. The Public Defender's Office was trying to have it both ways: when considering advise given to inexperienced trial counsel, the chief assistant was there on a regular basis; when denying that the chief assistant's relationship with co-defendant's counsel could be a potential conflict of interest to Mr. Gamble's case, the chief assistant's involvement was significantly diminished.

Because the evidentiary court relied on completely inconsistent portions of the record, on contradictory sworn statements of attorney involvement and case work-up that cannot be reconciled with each other, the basis for the court's ruling is indefensible. Counsel was, in fact, inexperienced and ineffective; relief should have been granted on this claim due to the resulting prejudice to Mr. Gamble by going to trial with

counsel that denies the potential for conflict among the co-defendants' trial counsel and thereafter that admits to felony murder in the guilt phase and admits to pecuniary gain in the penalty phase. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.850 relief to Guy Richard Gamble. This Court should order that his conviction and sentence be vacated and remand the case for such further relief as the Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118-3951 and Guy R. Gamble, DOC# 123096; Union Correctional Institution, 7819

NW 228th Street, Raiford, Florida 32026 on this 26th day of August, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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