IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,

Appellant,

CASE NO. SC02-2044

v.

STATE OF FLORIDA,

Appellee.

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/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, DONALD DAVID DILLBECK, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

The trial transcript will be referred to as T followed by the volume and page. (T. Vol. page). The evidentiary hearing will be referred to as EH followed by the volume and page. (EH Vol. page). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

The facts of the crime are recited in this Court's direct appeal opinion:

> Dillbeck was sentenced to life imprisonment for killing a policeman with the officer's gun in 1979. While serving his sentence, he walked away from a public function he and other inmates were catering in Quincy, Florida. He walked to Tallahassee, bought a paring knife, and attempted to hijack a car and driver from a shopping mall parking lot on June 24, 1990. Faye Vann, who was seated in the car, resisted and Dillbeck stabbed her several times, killing her. Dillbeck attempted to flee in the car, crashed, and was arrested shortly thereafter and charged with first-degree murder, armed robbery, and armed burglary. He was convicted on all counts and sentenced to consecutive life terms on the robbery and burglary charges, and, consistent with the jury's eight-to-four recommendation, death on the murder charge.

Dillbeck v. State, 643 So.2d 1027, 1028 (Fla. 1994).

The trial court found five aggravating circumstances: (1) under sentence of imprisonment; (2) previously been convicted of another capital felony; (3) the murder was committed during the course of a robbery and burglary; (4) the murder was committed to avoid arrest or effect escape and (5) the murder was especially heinous, atrocious, or cruel. *Dillbeck*, 643 So.2d at n.1. The trial court found one statutory mitigating circumstance, substantial impairment, and numerous nonstatutory circumstances: abused childhood, fetal alcohol effect, mental illness, the mental illness is treatable, imprisonment at an early age in a violent prison, good-behavior, a loving family, and remorse. The court gave little weight to the mitigating circumstances. *Dillbeck*, 643 So.2d at n.2. Dillbeck raised ten issues on appeal: 1) juror qualifications; 2) evidence of specific intent; 3) requiring Dillbeck to submit to a

psychological exam by the State's expert; 4) flight instruction; 5) testimony of the State's mental health expert; 6) instruction on heinous, atrocious, or cruel; 7) the finding of heinous, atrocious, or cruel; 8) escape instruction; 9) proportionality; and 10) the allocating of the burden of proof in the penalty phase. *Dillbeck*, 643 So.2d at n.3. The Florida Supreme Court affirmed the conviction and sentence.

Dillbeck filed a petition for writ of certiorari in the United States Supreme Court arguing that the trial court's order permitting the State's mental health expert to examine him prior to the penalty phase violated his Fifth Amendment right against self-incrimination. On March 20, 1995, the United States Supreme Court denied certiorari. *Dillbeck v. Florida*, 514 U.S. 1022, 115 S. Ct. 1371, 131 L. Ed. 2d 226 (1995).

On April 23, 1997, Dillbeck filed a motion for post-conviction relief. (Vol. 1 27-62). On April 16, 2001, Dillbeck filed an amended motion to vacate the judgments of conviction and sentence. (Vol. 3 485-531). The amended motion raised eight claims: (1) trial counsel's concession of guilt without an expressed waiver; (2) trial counsel's concession of guilt without an expressed waiver; (3) defendant's wearing physical restraints; (4) trial counsel's concession of an aggravator; (5) trial counsel's failure to conduct a proper voir dire; (6) trial counsel's failure to move for change of venue (7) trial counsel's failure to request a PET scan and (8) trial counsel's introduction of the defendant's prior crimes during the penalty phase. The State responded agreeing to an evidentiary hearing

on claim VIII. (Vol. 3 534-551). Claim VIII was an ineffective assistance of counsel claim for introducing evidence of the defendant's prior crimes during the penalty phase for which not conviction had been obtained. The trial court granted an evidentiary hearing on all eight claims.

The trial court held an evidentiary hearing on April 1, 2002. Dillbeck testified. The State called trial counsel, Randy Murrell, to testify. (EH 4 613). Trial counsel is now the federal public defender for North Florida. (EH 4 614). Trial counsel has been an attorney since 1976 and most of that time he was an assistant public defender. (EH 4 614). He was the chief of the felony division. (EH 4 615). He has tried 19 first degree murder cases. (EH 4 615). He believes he tried his first capital case in 1978. (EH 4 615). He testified that probably most of those cases were capital cases where the State was seeking the death penalty. (EH 4 615). Of those cases, this is the only case in which the death penalty was actually imposed. (EH 4 616). He has attended several conferences on defending capital cases including the life over death conference. (EH 4 616).

Both parties submitted written post-evidentiary hearing memos. (Vol. 4 677-708; 709-741). The trial court then denied the motion for post-conviction relief, on September 3, 2002, stating that "the amended motion to vacate judgments of conviction and sentence is without grounds for relief and there would be no

benefit from a further recitation of the facts of argument by this Court." (Vol. 4 753).[1]

[1] The new rule of criminal procedure governing collateral relief after death sentence has been imposed and affirmed on direct appeal, rule 3.851(f)(5)(d), Fla. R.Crim.P., provides in pertinent part:

> Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review.

The new rule applies only to postconviction motions filed on or after October 1, 2001. Postconviction motions pending on that date are governed by the old rule. See Rule 3.851(a), Fla. R.Crim.P. Dillbeck's motion was filed in April of 1997. The old rule applies to his motion and the old rule did not require detailed findings of fact or conclusions of law. Fla. R. App. P. 3.850(d)(providing "if an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall . . . determine the issues, and make findings of fact and conclusions of law with respect thereto.").

SUMMARY OF ARGUMENT

ISSUE I

Dillbeck asserts his counsel was ineffective *per se* when he conceded Dillbeck's guilt to felony murder in the guilt phase in violation of *Nixon II*, *Nixon III* and *Harvey*.[2] The State respectfully disagrees. Dillbeck personally ratified this strategy when he testified in the guilt phase. Dillbeck admitted to the underlying facts amounting to felony murder during his own testimony. A defendant may not raise a *Nixon* claim when he testifies at trial to the same underlying facts that counsel has conceded. Moreover, during jury selection, the defendant was informed that his personal agreement to the concession was required. The trial court gave the defendant the opportunity to object if he disagreed with trial counsel's concession of guilt and Dillbeck declined to respond. A defendant who is informed prior to trial that he must personally agree to the concession of guilt and does not object has knowingly waived his right to adversarial testing. Trial counsel conceded felony murder but not premeditated murder. Trial counsel subjected the State's case to meaningful adversarial testing by disputing premeditation. Thus, the trial court properly denied this claim of ineffectiveness *per se* following an evidentiary hearing.

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[2] *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000); *Nixon v. State*, 28 Fla.L.Weekly S597 (Fla. July 10, 2003) and *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003).

ISSUE II

Dillbeck asserts his counsel was ineffective for conceding to the HAC aggravator. Dillbeck claims that when his trial counsel described the murder as "brutal" this was conceding the heinous, atrocious and cruel aggravator. The State respectfully disagrees. Describing the murder as "brutal" is not conceding the heinous, atrocious and cruel aggravator. Trial counsel argued against the HAC aggravator in his closing argument during penalty phase. Furthermore, *Nixon III* does not apply to concessions of aggravators. Trial counsel must concede that death is the appropriate penalty, not merely concede an aggravator, to raise a *Nixon* issue. *Strickland*, not *Cronic*, governs concessions of aggravators. Describing a brutal murder as brutal is not deficient performance. Counsel is maintaining credibility with the jury by being honest with them about the nature of the crime. Furthermore, there is no prejudice. The jury would have found this murder to be HAC without counsel's concession that the murder was brutal. Additionally, the jury would have recommended death regardless of the HAC aggravator based on the four remaining aggravators which included a prior conviction for the murder of a policeman. Thus, there is no prejudice. So, the trial court properly denied this claim following an evidentiary hearing.

ISSUE III

Dillbeck contends that trial counsel was ineffective for failing to strike numerous jurors for cause. The State

respectfully disagrees. Two of the complained ofs jurors were alternates only who did not participate in the jury's verdict. Obviously, Dillbeck cannot show prejudice based on alternate jurors that never served. The remaining seven actual complained of jurors were not subject to cause challenge because, while most of them were exposed to pre-trial publicity, each assured the trial court that they could decide the case based solely on the evidence. None of the actual jurors knew of the prior capital felony conviction. Trial counsel was not ineffective for failing to challenge jurors who were not actually biased. Thus, the trial court properly denied this claim following an evidentiary hearing.

ISSUE IV

Dillbeck asserts that his trial counsel was ineffective for failing to move for change of venue. The State respectfully disagrees. There is no deficient performance. Trial counsel made a reasonable tactical decision not to file a motion for change of venue. As trial counsel testified at the evidentiary hearing, Tallahassee is a good place for the defense. Moreover, as trial counsel recognized, if granted a change of venue, the trial would likely to be moved to a location with more conservative jurors which would be more likely to recommend death. Nor is there any prejudice. Any motion for change of venue would have been denied. Motions for change of venue are only granted where there are significant difficulties encountered in attempting to seat a jury. There were no

significant difficulties in seating a jury in this case. Therefore, the trial court properly denied the claim of ineffectiveness following an evidentiary hearing.

ISSUE V

Dillbeck asserts his trial counsel was ineffective for discussing during the penalty phase his criminal history which included crimes for which no conviction was ever obtained. The State respectfully disagrees. There is no deficient performance. Collateral counsel fails to acknowledge that, if trial counsel wanted to introduce mental health mitigation, he had to acknowledge the prior bad acts. As trial counsel testified, presenting the mental mitigation opened the door to the prior bad act of the Indiana stabbing. Moreover, if trial counsel want to present model inmate mitigation, he had to acknowledge the incidents in prison. Trial counsel's only alternative was to present no mitigating evidence at all. There was no "clean" mitigation evidence available to trial counsel. Furthermore, trial counsel's anticipatory rebuttal is not deficient performance. The State introduced this evidence to rebut trial counsel's mental mitigation and to rebut the model prisoner mitigation. Once the door is open to evidence, it is perfectly reasonable and a common trial practice for defense counsel to introduce the evidence himself. Nor is there any prejudice. If no mitigation was presented the jury would have been faced with a defendant who they had convicted of stabbing

a woman to death who also had a prior conviction for the murder of a law enforcement officer. If trial counsel had presented no mitigating evidence, the jury still would have voted for death. Indeed, the jury probably would have voted for death more quickly if no mitigation evidence was presented. Nor can there be any prejudice from trial counsel referring to the evidence prior to the State introducing it. It was solely a matter of timing. Either way the jury was going to hear this rebuttal evidence. Therefore, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVENESS *PER SE* CLAIM FOR CONCEDING TO FELONY MURDER IN THE GUILT PHASE? (Restated)

Dillbeck asserts his counsel was ineffective *per se* when he conceded Dillbeck's guilt to felony murder in the guilt phase in violation of *Nixon II*, *Nixon III* and *Harvey*.[3] The State respectfully disagrees. Dillbeck personally ratified this strategy when he testified in the guilt phase. Dillbeck admitted to the underlying facts amounting to felony murder during his own testimony. A defendant may not raise a *Nixon* claim when he testifies at trial to the same underlying facts that counsel has conceded. Moreover, during jury selection, the defendant was informed that his personal agreement to the concession was required. The trial court gave the defendant the opportunity to object if he disagreed with trial counsel's concession of guilt and Dillbeck declined to respond. A defendant who is informed prior to trial that he must personally agree to the concession of guilt and does not object has knowingly waived his right to adversarial testing. Trial counsel conceded felony murder but not premeditated murder. Trial counsel subjected the State's case to meaningful adversarial testing by disputing premeditation. Thus, the trial court properly denied this claim of ineffectiveness *per se* following an evidentiary hearing.

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[3] *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000); *Nixon v. State*, 28 Fla.L.Weekly S597 (Fla. July 10, 2003) and *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003).

Trial

During voir dire, trial counsel repeatedly admitted that Dillbeck had committed this "crime". (T. II 209; VII 978; IX 1446)[4]. In response to trial counsel's admission during jury selection, the prosecutor, referring to the *Nixon* case,[5] asked the judge to establish Dillbeck's personal agreement to conceding guilt on the record. (T. III 325-326). The prosecutor noted that while this was obviously a strategic decision, it was one that required the "concurrence and agreement of his client." (T. III 325-326). Trial counsel, Randy Murrell, objected to any inquiry regarding discussions between him and Dillbeck. (T. III 327). Trial counsel was offended at the suggestion that he was deliberately being ineffective. (T. III 327). Trial counsel stated: "[c]ertainly, we have had discussions about our strategy". (T. III 327). Trial counsel stated that *Nixon* does not stand for the proposition that the Court should inquire of the defendant. (T. III 327).[6] The prosecutor clarified that he

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[4] Trial counsel said: "I must tell you that if you sit on this jury, you will find that Donald Dillbeck did commit this crime. You will find that it was a particularly brutal crime. The woman was stabbed repeatedly." (T. II 209). This is not a concession to first degree murder; rather, it is a concession that Dillbeck had committed a "crime". Counsel conceded identity; he not did not concede the degree of murder.

[5] This was a reference to *Nixon I*. *Nixon v. State*, 572 So.2d 1336 (Fla. 1990)

[6] While *Nixon I* may not have, *Nixon II* stands for exacting that proposition. The *Nixon II* Court stated:

> We hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and

was not asking for the defense's trial strategy, but for an on-the-record personal consent to the strategy from Dillbeck. (T. III 328). The trial court noted that Mr. Murrell had already indicated that he had discussed the matter thoroughly with Mr. Dillbeck but expressed concern based on the *Nixon* case. (T. III 328). The trial court requested trial counsel's assurance that he had discussed the matter with Mr. Dillbeck and trial counsel assured the trial court that he had. (T. III 329). The prosecutor quoted from an order from the Florida Supreme Court in *Nixon* relinquishing jurisdiction to the trial court to conduct an evidentiary hearing to determine whether Nixon was informed of and knowingly and voluntarily consented to the trial strategy of conceding guilt. (T. III 329). The trial court found that trial counsel had discussed the strategy with Mr. Dillbeck based on Mr. Murrell's assurances. (T. III 330). The trial court noted that Dillbeck was present throughout jury selection and that if he disagreed with the strategy he certainly could have made that known to the judge. (T. III 330-331). The trial court expressed his opinion based on his experiences with trial counsel, that it was "inconceivable" that Mr. Murrell could be accused of being ineffective counsel and noted trial counsel's grasp of the problems involved in the case

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> question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Nixon, 758 So. 2d at 625 (citations omitted). *Nixon II* had not been decided at the time of this trial in February of 1991.

and that trial counsel's preparation "has been totally without fault". (T. III 331). The trial court declined to obtain a personal, on-the-record waiver from Dillbeck (T. III 331-332). The trial court explicitly gave Mr. Dillbeck an opportunity to be heard on it if he chose to do so. (T. III 332). The trial court noted Dillbeck's lack of response to the given opportunity and the smile on his face. (T. III 332). Mr. Murrell argued that any on-the-record waiver was "potentially very damaging" to the attorney/client relationship and again objected to any colloquy. (T. III 332). The trial court explained that based problems in *Nixon*, "we simply don't want to travel that road again if we don't have to". (T. III 333). The trial court noted that it was satisfied that this was a "knowing procedure" between trial counsel and the defendant. Trial counsel asked for a couple of minutes to discuss what had just occurred with his client. (T. III 333).

During opening statement, trial counsel said that the case involved two issues: (1) whether Dillbeck will be permitted to live in prison or whether he will die in the electric chair, and (2) whether this crime was committed from a premeditated design. (T. XI 1939-1640). Trial counsel stated that he would be calling his client, Donald Dillbeck, to testify. (T. XI 1640). Trial counsel stated that Dillbeck would tell the jury that he was an inmate who was on the run. (T. XI 1641). Dillbeck would testify that he bought a knife because he might need it to get someone to give him a ride. (T. XI 1641). He did not intent to stab anyone only coerce them into giving him a ride. (T. XI

1641-1642). Dillbeck did not know how to drive a car. (T. XI 1642). He saw the victim parked outside Gayfers and he intended to force her to give him a ride. (T. XI 1642). She refused to give him a ride. (T. XI 1643). Dillbeck "lost it" and in a "panic" and "rage", he stabbed the victim. (T. XI 1643). Trial counsel stated that Dillbeck did not plan to kill her and he did not intend to. Trial counsel noted that "it wasn't anything he thought about" and "it wasn't anything he reflected upon". "In short, it wasn't premeditated" (T. XI 1643). This was not "some sort of calculated planned killing."(T. XI 1644). Trial counsel told the jury that this wasn't some kind of planned killing" and "you will see that the crime simply was not committed from a premeditated design." (T. XI 1646).

After defense counsel's opening statement, the prosecutor again raised the *Nixon* issue. (T. XI 1647). The prosecutor pointed out that trial counsel's opening was the "same thing Mr. Corin did".[7]
(T. XI 1647). The prosecutor expressed his concern that this is something that people who don't understand Mr. Murrell's strategy
later on when this case is being evaluated on appeal are going to ask questions about. The prosecutor thought that we can answer those here and now and not have the problem they're having in *Nixon*. (T. XI 1647). The prosecutor noted that the Court had already inquired and that Mr. Murrell was angry, but he wanted everyone to understand that this is a strategy

[7] Mr. Corin was defense counsel in *Nixon*.

decision made by Mr. Murrell and it was made with the concurrence of his client. (T. XI 1647). The prosecutor asked the trial court to again inquire. Trial counsel responded that it was a confidential matter but he stated that he had "discussed all this with my client". (T. XI 1648). He stated that he had a good relationship with Dillbeck. (T. XI 1648). Trial counsel objected to any personal inquiry of Dillbeck. (T. XI 1648). Trial counsel felt that any inquiry of Dillbeck would go into confidential matters. (T. XI 1648-1649). Trial counsel stated that he had "no trouble representing to the Court" that he had discussed the matter with Mr. Dillbeck. (T. XI 1648). The prosecutor noted his concern that the strategy was tantamount to a guilty plea but with the difference that counsel was not conceding to premeditated murder. (T. XI 1649). The trial court thought that he had gone as far into this as he could go. (T. XI 1649). The trial court did not wish to interfere with the relationship that Mr. Murrell had with Mr. Dillbeck. (T. XI 1649).[8] The trial court noted that this was part of the system we have to deal with due to the confidentiality of clients and lawyers. (T. XI 1651). The trial court also noted that Mr. Murrell was one of the most effective attorneys and it was "inconceivable" to the trial court that he was doing this for any purpose other than to protect the rights of his client. (T. XI 1651). The trial court found that personal inquiry of the defendant over defense counsel's objections was improper.

[8] A page, (T. XI 1650), is missing from the State's copy of the trial transcript; however, it is clear that the discussion regarding the *Nixon* issue continued on this page as well.

(T. XI 1651). The trial court concluded Dillbeck fully understood the proceedings and would have objected if he did not concur with it. (T. XI 1652).

Dillbeck testified during the guilt phase admitting the underlying facts of the crime. (T. XIII 1972-2006). He admitted that he escaped from Quincy Vocational Center and walked to Tallahassee. (T. XIII 1974-1975). He bought a knife. (T. XIII 1978-1979). He admitted that he bought to knife to force someone to drive him Orange City. (T. XIII 1975, 1978-1979). He explained that he could not just steal a car because he could not drive. (T. XIII 1979). He went to the Tallahassee Mall where he spotted a lady in a car that he thought would be a "good ride". (T. XIII 1980-1981). He went over to the car and told the lady "you're going to give me a ride". (T. XIII 1981). She refused and started honking the horn. (T. XIII 1981). He reached in and hit her, then he opened the door and shoved her in the car. She grabbed his hair and was screaming. He went "off" when the victim bit him. (T. XIII 1981). He started stabbing her. (T. XIII 1981). He admitted stabbing her "about five or six times". (T. XIII 1981). It dawned on him that she was dead when it became peaceful in the car. (T. XIII 1981-1982). He attempted to drive off in the car but could not drive. (T. XIII 1983). He jumped out of the car and took off running with people chasing him. (T. XIII 1983). On cross-examination, Dillbeck testified that he bought the knife from Publix because it was cheap, he could put it in his pocket and conceal it. (T. XIII 1989-1990). The reason he bought the knife

was to force someone into driving him by threatening them with the knife. (T. XIII 1991). Dillbeck acknowledged, under oath, stabbing the victim repeatedly in the abdomen and the throat. (T. XIII 1992). Dillbeck testified that the victim looked like somebody easy to get a ride from and that he did not think that she would put up a fight. (T. XIII 2001-2002). Defendant thought he only stabbed her 5 times. (T. XIII 1999, 2002,2004).[9]

In his initial first closing of guilt phase, trial counsel argued against premeditation. (T. XIII 2039-2051). Trial counsel asserted that there was no reflection as required for premeditation. Trial counsel explained that Dillbeck had "lost it" and was in a rage or panic. (T. XIII 2044,2045). Trial counsel asserted "this wasn't some kind of calculated plan" rather it was something that got out of hand. (T. XIII 2049-2050). Trial counsel argued: "I urge you to bring back a verdict of not guilty at least as to the premeditated murder." (T. XIII 2050). Trial counsel closed with the observation that "the State has not proven that it was a premeditated killing." (T. XIII 2051). The prosecutor argued in closing of guilt phase that the defense admitted that Dillbeck was guilty of felony murder but not premeditated murder but that he had to prove each element of each crime beyond a reasonable doubt "no matter what the defense might say." (T. XIII 2052-2053). The prosecutor noted that he was clearly guilty of felony murder and the only

[9] The expert medical testimony from Dr. Woods was there were 25 separate stab wounds.

thing that is really left is premeditated murder. (T. XIII 2054-2055). The prosecutor then argued for a finding of premeditated murder. (T. XIII 2055-2070). The prosecutor, referring to the special verdict form, asked the jury to not follow the defense's "easy choice" of just finding felony murder; rather, they should find both premeditated and felony murder. (T. XIII 2071). In his final closing of guilt phase, trial counsel argued against a finding of premeditation. (T. XIII 2071-2083). Trial counsel argued that Dillbeck killed in a rage and in "an absolute panic." (T. XIII 2076,2078). Dillbeck did not deliberate or reflect. (T. XIII 2079,2082-2083). Trial counsel opined that the evidence was that this was not a planned or calculated killing. (T. XIII 2081). According to trial counsel, because there was no reflection, there was no premeditation. (T. XIII 2083).

Evidentiary hearing testimony

Dillbeck testified at the evidentiary hearing that trial counsel did not tell him that he was going to concede his guilt. (EH 4 560, 561). Trial counsel did not tell him that he was going to admit his guilt during jury selection or in opening or in closing. (EH 4 561). Dillbeck testified that he never agreed to the strategy. (EH 4 561,562). Dillbeck testified that he never agreed to conceding to felony murder. (EH 4 562). Dillbeck testified that trial counsel never discussed trial strategy or defenses with him. (EH 4 572, 575). Dillbeck testified that he never asked trial counsel about trial strategy

or defenses. (EH 4 572). Dillbeck testified that he never made an suggestions about possible defenses to trial counsel. (EH 4 580). Dillbeck acknowledged that he had twice previously been involved with the criminal justice system including a prior first degree murder case. (EH 4 572). Dillbeck testified that he did not recall the discussion about conceding guilt during jury selection. (EH 4 576, 586,588). Dillbeck testified that he never knew that he could object to the concession. (EH 4 588). The prosecutor had Dillbeck read the trial transcript where the discussion occurred. (EH 4 589-590). Dillbeck admitted that a fair characterization of the record was that he was given the opportunity to make an objection or to raise any concerns and he did not do so. (EH 4 590). Dillbeck noted that he testified at trial that he killed the victim during the course of a robbery. (EH 4 591). He agreed that his trial testimony was a concession that he was guilty of felony murder. (EH 4 591).

Trial counsel, Randy Murrell, now the federal public defender, testified that he discussed the facts of the case with Dillbeck. (EH 4 617). There was no dispute about the fact Dillbeck killed the victim. (EH 4 617,618). Dillbeck killed her during the course of a kidnapping or robbery, so it “was felony murder, sure” (EH 4 618). It was clear to trial counsel that Dillbeck would be convicted of first degree murder, but he was hoping it would be felony murder, not premeditated murder. (EH 4 619). While he wanted to seek a second degree murder verdict, there was “just no getting around felony murder.” (EH 4 620). He was aware that felony murder was still first degree murder,

but “felony murder is a less egregious crime than premeditated murder” which would help in the penalty phase. (EH 4 620). He hoped he could get a jury to recommend life. (EH 4 619). If the murder is not premeditated, you don’t have the intent to kill which is a circumstance that the jury could consider in their recommendation. (EH 4 62). While he could not remember the exact conversation, he was sure that they discussed the strategy. (EH 4 619). There was “no doubt” in counsel’s mind that they talked about the concession, particularly in light of *Nixon I*. (EH 4 625). Trial counsel was sure that Dillbeck consented to the strategy of conceding to felony murder. (EH 4 625). Trial counsel testified Dillbeck was bright and that they had a good rapport. (EH 4 617). Trial counsel testified that the strategy of conceding is not “revolutionary”, he “did not invent it” and it “has been around for a long time” (EH 4 621). Conceding improves your chances of success, because if you argue things that are implausible or not very believable to the jury, you weaken your ability to convince them of what is really important. (EH 4 621-622). If you are trying to convince somebody, you don’t argue things that are patently false or wrong. (EH 4 622). Trial counsel testified that he did not want the trial court to inquire into his concession of felony murder because when the trial court intervenes it suggests that the lawyer is doing something wrong. (EH 4 623). He does not think that decisions of strategy are an area where the trial court should get involved. (EH 4 623). While trial counsel could not specifically remember, he was sure that he did not advise

Dillbeck not to respond if Dillbeck objected. (EH 4 623-624). He did not tell Dillbeck not to answer the trial court's question or how to answer the question. (EH 4 624). Trial counsel testified that at the second incident he assured the trial court that the concession was something they talked about. (EH 4 624). The strategy was to save Dillbeck's life. (EH 4 625).

Merits

In *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), this Court remanded for an evidentiary hearing. Nixon claimed that his counsel was *per se* ineffective for conceding his guilt to first degree murder in closing of the guilt phase. During closing, Nixon's trial counsel said:

> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon, 758 So.2d at 620. The *Nixon II* Court concluded that *Cronic*,[10] not *Strickland*,[11] applied because a concession to the charged crime fails to subject the prosecution's case to meaningful adversarial testing. *Nixon*, 758 So.2d at 621-623. The *Nixon II* Court reasoned that counsel's concession to the charged crime operated as the "functional equivalent of a guilty plea." *Nixon*, 758 So.2d at 624. The *Nixon II* Court observed

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[10] *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).

[11] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

that the dispositive question was whether Nixon had given his consent to the trial strategy of conceding guilt. *Nixon*, 758 So.2d at 624. The *Nixon II* Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy" and "[s]ilent acquiescence is not enough." *Nixon*, 758 So. 2d at 624. The *Nixon II* Court stated:

> We hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Nixon, 758 So. 2d at 625 (citations omitted). The trial court had originally denied the claim without an evidentiary hearing. This Court reversed the summary denial and ordered an evidentiary hearing be held. *Nixon*, 758 So. 2d at 625.[12]

In *Nixon v. State*, 28 Fla. L. Weekly S 597 (Fla. July 10, 2003) (*Nixon III)*, this court reversed the trial court's denial of post-conviction relief and remanded for a new trial. At the evidentiary hearing held to follow the mandate of *Nixon II*, Nixon's trial counsel testified that Nixon did nothing when asked his opinion regarding this trial strategy. Nixon provided neither verbal nor nonverbal indication that he did or did not

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[12] The claim originated in the direct appeal. This Court attempted to develop the record by relinquishing jurisdiction during the direct appeal. However, when that could not be done due to attorney/client privilege, this Court declined to rule on the claim in the direct appeal without prejudice to raise the claim collaterally where the privilege would be waived.

wish to pursue counsel's strategy of conceding guilt. Nixon did not testify at the evidentiary hearing. The trial court found, based on the history of interaction between Nixon and his trial counsel where counsel would inform Nixon of something and Nixon would remain silent, that Nixon had approved of counsel's strategy. However, the *Nixon III* Court disagreed with the trial court's conclusion, reasoning that the evidentiary hearing testimony, at most, demonstrated silent acquiescence by Nixon to his counsel's strategy. The *Nixon III* Court found there was no competent, substantial evidence establishing that Nixon affirmatively and explicitly agreed to counsel's strategy.

DEFENDANT'S RATIFICATION

Dillbeck's guilt phase testimony is an "affirmative, explicit acceptance" of counsel's strategy to concede guilt. Dillbeck personally and explicitly adopted the strategy when he testified admitting the crime. If counsel's conceding guilt is the functional equivalent of a guilty plea, then it was Dillbeck who pled guilty to the jury during his testimony. There was no "silent acquiescence"; rather, the defendant was anything but silent. He testified at the guilt phase admitting to felony murder. His testimony was a personal waiver of the right to adversarial testing.

In *People v. Abt*, 646 N.E.2d 1341 (Ill. App. 1995), an Illinois appellate court rejected an ineffectiveness for conceding guilt claim where the defendant testified at trial. Abt was charged and convicted of possession of cocaine with

intent to deliver and possession of cannabis. Defense counsel conceded that the defendant possessed controlled substances for personal consumption due to an addiction to cocaine. Abt testified in his own defense. Abt admitted he was smoking cocaine and to using cannabis and barbiturates. Abt explained that he had been a cocaine addict for about 10 years and that the narcotics confiscated from the home were solely for his personal consumption. Abt asserted on appeal that trial counsel did not subject the State's case to meaningful adversarial testing when counsel conceded that the defendant possessed controlled substances for his own personal consumption and counsel was ineffective because his addiction to cocaine is not a legal defense to the crimes charged. While normally conceding guilt is *per se* ineffectiveness under Illinois law,[13] the Court rejected this ineffectiveness claim "because trial counsel had to proceed in light of the defendant's statements at trial." See also *United States v. Simone*, 931 F.2d 1186, 1196 (7th Cir.

[13] *People v. Hattery*, 488 N.E.2d 513 (Ill. 1985)(finding ineffectiveness based on *Cronic* in a capital case where an attorney conceded guilt to the charged crime in opening because the concession was "totally at odds with defendant's earlier plea of not guilty" relying on *Francis v. Spraggins* 720 F.2d 1190 (11th Cir. 1983) and *Wiley v. Sowders,* 647 F.2d 642 (6th Cir. 1981)); *but see People v. Johnson*, 538 N.E.2d 1118 (Ill. 1989)(narrowing *Hattery* to where counsel conceded to murder but not felony murder because if we were to accept an automatic ineffectiveness rule, there would be the danger that an unscrupulous defense attorney, especially in a death penalty case, would deliberately concede his client's guilt in order to lay the groundwork for a later reversal and it is even possible that client and counsel would conspire to this end); *People v. Reed*, 698 N.E.2d 620 (Ill. App. 1998)(finding no ineffectiveness where concession was to a lesser offense).

1990)(rejecting an ineffectiveness claim for conceding guilt to some of the charged crimes but not other counts where the defendant admitted his guilt in similar manner to the concessions at trial in a letter to the judge because "[i]nstead of 'pleading his client guilty,'" as the defendant maintains, "this defendant's trial lawyer was following his client's wishes"); *People v. Johnson*, 538 N.E.2d 1118 (Ill. 1989)(stating that a reversal is necessary only where counsel's concession is contradicted by the defendant's actions); *Cf. Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983)(finding ineffectiveness where counsel conceded defendant's guilt to the jury but the defendant took the stand denying any knowledge of the crimes and observing that where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel may not concede).

It is clear from the record that trial counsel and the defendant shared the strategy of conceding guilt to felony murder. In his opening, trial counsel informed the jury that the defendant was going to testify and admit to the murder. Then, the defendant did indeed testify to the underlying facts amounting to felony murder. This was a coordinated defense strategy which clearly required, not merely the defendant's personal agreement to the concession, but the defendant's active participation. Dillbeck's own testimony is an "affirmative, explicit acceptance" of counsel's strategy.

WILLFUL MUTENESS

Dillbeck asserts that the trial court was required to obtain an on-the-record waiver. There was no such requirement at the time of this trial. Dillbeck was tried in February of 1991, nine years before *Nixon II* was issued in 2000. While this Court has not addressed the retroactivity of *Nixon II*, in the related area of a *Koon* inquiry[14], when the defendant waives presentation of mitigating evidence, this Court applied the rule requiring an on-the-record waiver prospectively only. *Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002)(noting the opinion in *Koon* applied prospectively only citing *Allen v. State*, 662 So. 2d 323, 329 (Fla. 1995)). *Nixon II*, likewise, is not retroactive; *Nixon II* is prospective only. At the time of this trial, no on-the-record waiver was required.[15]

Even if an on-the-record waiver colloquy is required, the trial court complied with that requirement to the extent possible. When given the opportunity to object, the defendant just smiled at the judge. A trial court cannot force a defendant to respond. This is not silent acquiesce; this is willful muteness. Just as the law will not tolerate willful blindness, it should not tolerate willful muteness. A defendant who is explicitly informed that he has the right to object to counsel's concession and refuses to do so, has knowingly and

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[14] *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993).

[15] The State acknowledges that *Nixon II*, *Nixon III* and *Harvey* were collateral cases. While the requirement that the waiver of adversarial testing be knowing, intelligent and voluntary applies to collateral cases, the part of *Nixon II* requiring an on-the-record waiver is prospective only.

voluntarily waived his right to adversarial testing. If a defendant wants to plea but refuses to answer questions during a plea colloquy, the trial court can simply stop the plea proceedings and set the case for trial. This is because the defendant has only a constitutional right to a trial, not a constitutional right to plea. *Parker v. State*, 790 So. 2d 1033 (Fla. 2001)(explaining that there is no constitutional right to plea bargain citing *Weatherford v. Bursey*, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977)). If a defendant wants a bench trial but refuses to waive the right to a jury trial, the trial court can simply stop the bench trial or the penalty phase being conducted without a jury and convene a jury. This is because the defendant has only a constitutional right to a jury, not a constitutional right to a bench trial. *Singer v. United States*, 380 U.S. 24, 34, 85 S.Ct. 783, 789, 13 L.Ed.2d 630 (1965)(holding there is no constitutional right to a bench trial). In both situations there is only a single constitutional right involved. In those situations, the trial court has an option and does not violate any constitutional right by refusing to proceed without a waiver.

However, where two mutually exclusive rights are involved, the trial court has no option. For example, the right to testify and the right to remain silent are mutually exclusive rights. A defendant has both the right to testify and the right not to.[16]

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[16] *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37 (1987)(stating that "a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"); Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)(stating, in dicta, that

This Court encourages trial courts to get on-the-record waivers of the right to testify; however, if a defendant refuses to answer the trial court's waiver colloquy, the trial court cannot then force the defendant to testify. Here, as in the waiver of the right to testify, two mutually exclusive rights are involved. The defendant has both the right to adversarial testing and the right to present a defense of his choice. Where two mutually exclusive rights are involved, requiring an on the record waiver is impossible. A defendant can prevent the State from trying him merely by refusing to state which right he wants to exercise and which one he wants to waive. All the trial court must do in such a situation is inform the defendant of both rights. The defendant's conduct then determines which of the two rights he has waived.

There is no default position for the trial court in this situation. A trial court has no option but to proceed with the trial when the defendant declines to respond to questions regarding the concession. The only other option is for the trial court to order the attorney not to concede; however, a trial court may not order an attorney to adopt a certain defense. Such an order would interfere with the right of counsel and violate the defendant's Sixth Amendment right to

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the defendant has the ultimate authority to make certain fundamental decisions regarding the case such as whether to testify in his or her own behalf"); *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992)(holding a defendant's right to testify is personal to the defendant and as such cannot be effectively waived by counsel); *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964)(incorporating the Fifth Amendment right against self-incrimination against the States).

present a defense of his choice. Courts have no such power. While the defendant cannot then claim ineffectiveness in post-conviction, he certainly can, and no doubt will, claim that such an order was a violation of his constitutional right to present a defense on direct appeal. *Nixon*, 758 So.2d at 625 (observing that if contesting guilt works to the defendant's detriment, the defendant himself must bear the responsibility for that decision).

Normally courts do not presume a waiver of a right from a silent record.[17] However, here, the trial record is not silent in the traditional meaning of that word. Traditionally, a silent record means there is no reference at all to the matter in the record. When there is no reference to the matter in the record, there is no way to know if the defendant was aware of his rights. A defendant who lacks knowledge of his rights would remain silent and not assert his rights out of ignorance. Here, the record establishes that the defendant was aware of his right to adversarial testing. The trial court, trial counsel and the prosecutor all discussed the requirement that the defendant consent to any concession of guilt at length in front of the defendant. The record is not silent. The matter was discussed at length. It is only the defendant that was silent, not the record. In this unique situation, this Court should presume a waiver from the defendant's silence.

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[17] *Boykin v. Alabama*, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)(observing: "[w]e cannot presume a waiver of . . . important federal rights from a silent record.").

Moreover, trial counsel repeatedly assured the trial court, during jury selection and again after opening statements that, he and Dillbeck had discussed the concession. At two different points in the trial, trial counsel assured the trial court that he had obtained his client's consent. Trial counsel was aware of *Nixon*. Indeed, the prosecutor read this Court's order in *Nixon* to the defendant, trial counsel and the trial court during jury selection. The order stated that the concession had been knowingly, intelligently and voluntarily made. Furthermore, as trial counsel testified at the evidentiary hearing, he was sure he and Dillbeck had discussed the concession. (EH 619, 625). There was "no doubt" in counsel's mind that they talked about the concession, "particularly in light of *Nixon I*." (EH 625). Trial counsel testified that they had a good rapport. There is competent, substantial evidence establishing that Dillbeck agreed to counsel's strategy. Trial counsel's assurances at trial establish that Dillbeck consented to the strategy. Trial counsel's testimony at the evidentiary hearing also establishes that Dillbeck consented to the strategy.[18]

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[18] Opposing counsel argues that Dillbeck has three reasons for not responding to the trial court when the judge gave Dillbeck the chance to object and Dillbeck did not respond. IB at 16. No, Dillbeck has no reason. Dillbeck repeatedly testified at the evidentiary hearing that he did not recall the incident during jury selection when the trial court gave him the opportunity to object, and even after being shown the transcript, he could not recall the incident. He belatedly expressed the idea that his attorney was in control but he did not explain why he thought that when the trial court had just told him that the decision was his. Basically, Dillbeck had no real explanation for why he refused to respond to the trial court.

PARTIAL CONCESSION

While trial counsel conceded to felony murder, he vigorously argued against premeditated murder. The jury found both premeditated and felony murder by special verdict. (T. XIX 3088).[19] The concession and the verdict did not match. The jury's verdict went beyond the concession. The jury found premeditated murder and trial counsel did not concede to that.

Conceding to one form of first degree murder is similar to conceding to a lesser degree crime or to one count of a multi-count indictment.[20] Just as conceding to second degree murder is

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[19] Before trial, trial counsel filed a motion for a special verdict. At the hearing on the motion, the prosecutor did not object to a special verdict. (T. XVII 2800)

[20] *Atwater v. State*, 788 So.2d 223 (Fla. 2001)(finding that counsel's concession to second degree murder in a first degree murder trial does not require the defendant's consent because there was adversarial testing); *Brown v. State*, 755 So. 2d 616, 629-630 (Fla. 2000)(holding that concession of guilt of lesser offense did not require defendant's consent and finding no ineffectiveness using *Strickland* and citing *McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984)); *United States v. Holman*, 314 F.3d 837 840 (7th Cir. 2002)(observing that conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance); *United States v. Simone*, 931 F.2d 1186, 1195 (7th Cir. 1991)(explaining that when the admissions concern only some of the charges to be proven, counsel's concessions have been treated as tactical retreats and deemed to be effective assistance); *United States v. Gomes*, 177 F.3d 76 (1st Cir. 1999)(finding it a "patently a reasonable strategy" to concede to one count of five counts but not reaching the issue of whether the defendant's consent is necessary); *Richardson v. United States*, 698 A.2d 442 (D.C. App. 1997)(finding the tactic of conceding to some of the less serious charges in a multi-count case to be reasonable).

not error, neither is conceding to felony murder when the jury convicts of premeditated murder. Conceding to second degree murder when the charge is first degree and the jury convicts of first degree murder is not the functional equivalent of a guilty plea. Or more precisely, the jury has rejected the "involuntary plea" of second degree murder. The jury's verdict of first degree murder in that situation is the result of adversarial testing at trial, not the guilty plea to second degree murder, whether voluntary or not.[21] Likewise, when there is a special verdict which finds beyond the concession, the verdict of premeditated murder was the result of adversarial testing, not the "involuntary guilty plea" to felony murder.

Moreover, it is not ineffectiveness *per se* because trial counsel has not completely conceded to the charged crime. It cannot be said that counsel "entirely failed to subject the State's case to meaningful adversarial testing" when counsel vigorously disputed premeditated murder. Counsel at least partially subjected the State's case to meaningful adversarial testing by disputing premeditated murder. Because it was only a partial concession, such a claim is outside the *Cronic* realm,

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[21] Even if the jury convicts the defendant of second degree murder when counsel concedes to second degree in a first degree murder case, the jury's verdict is not the result of trial counsel's concession. In such a case, the prosecutor is going to dispute the concession either directly or by implication when he argues for a first degree murder conviction. Normally, in a true plea, the State is silent and does not dispute the degree of the crime. In this situation, the prosecutor is taking an adversarial position to the concession and the jury had to decide facts that were disputed by the parties which is the hallmark of adversarial testing. Such a verdict is not the result of a guilty plea, it is a result a true trial.

in the *Strickland* realm. Dillbeck has to prove prejudice in this situation and cannot because the jury convicted him of premeditated murder. The jury would have convicted him of first degree murder regardless of counsel's concession.

Dillbeck's reliance on *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003), is misplaced. In *Harvey*, this Court found that while counsel argued for second degree murder, his concession to the underlying facts amounted to a concession of premeditated murder. In opening, defense counsel admitted that Harvey was guilty of "murder" and acknowledged that Harvey and his coperpetrator discussed killing the victims. The *Harvey* Court found that by admitting this discussion about the murder, trial counsel, in effect, conceded premeditation and therefore, conceded first degree murder. The *Harvey* Court concluded that this concession was the functional equivalent of a guilty plea which requires the "affirmative, explicit" consent of the defendant. Relying on *Nixon II*,[22] the *Harvey* Court concluded defense counsel was ineffective. The evidentiary hearing testimony established, at best, that Harvey's counsel had obtained his consent to concede but only to second degree murder, not first degree. Furthermore, the *Harvey* Court also found that an admission that the murder occurred during the robbery was a concession to felony murder as well.

[22] The *Harvey* Court states that "[w]e are aware that Nixon did not involve a confession." This is not accurate. Nixon did involve a confession. Nixon confessed in detail on tape to the local Sheriff.

Harvey is easily distinguishable. Unlike Harvey, Dillbeck was informed that his waiver of adversarial testing had to be knowing, intelligent and voluntary prior to trial. Unlike Harvey, Dillbeck was given a specific opportunity to object to his counsel's concession prior to trial. Unlike the trial court in *Harvey*, the trial court here inquired as to Dillbeck's position prior to trial. Unlike Harvey, Dillbeck testified during the guilt phase admitting the underlying facts and felony murder in his own testimony. *Harvey* is inapposite.

Moreover, *Harvey* ignores the difference between the concepts of weight and sufficiency. When an attorney acknowledges the facts of the crime but argues for a conviction for a lesser crime, he is NOT conceding to the greater crime. Rather, he is acknowledging the sufficiency of evidence of the greater crime, not its weight. Counsel is telling the jury that, while they could vote for the greater crime, they should not vote for the greater crime based on the weight of the evidence. The fact that evidence is legally sufficient does not compel a particular result. He is arguing the weight of the evidence supports the lesser crime. This is not the functional equivalent of a guilty plea to the greater crime; rather, it is the functional equivalent of not making a motion for judgment of acquittal to the greater crime. Just as an attorney may decline to make a motion for judgment of acquittal, an attorney can admit the underlying facts but argue, given those facts, that the greater weight of the evidence supports a verdict for the lesser crime.

This is not conceding to the greater crime. This Court should recede from *Harvey*.

It is clear, both from Dillbeck's own trial testimony and the colloquy the trial court had with trial counsel during jury selection, that he knowingly, intelligently, and voluntarily consented to counsel's strategy of conceding guilt. The trial court properly denied this claim of ineffectiveness *per se* following an evidentiary hearing.

ISSUE II

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS FOR CONCEDING THE HAC AGGRAVATOR BY ADMITTING THE MURDER WAS BRUTAL? (Restated)

Dillbeck asserts his counsel was ineffective for conceding to the HAC aggravator. Dillbeck claims that when his trial counsel described the murder as "brutal" this was conceding the heinous, atrocious and cruel aggravator. The State respectfully disagrees. Describing the murder as "brutal" is not conceding the heinous, atrocious and cruel aggravator. Trial counsel argued against the HAC aggravator in his closing argument during penalty phase. Furthermore, *Nixon III* does not apply to concessions of aggravators. Trial counsel must concede that death is the appropriate penalty, not merely concede an aggravator, to raise a *Nixon* issue. *Strickland*, not *Cronic*, governs concessions of aggravators. Describing a brutal murder as brutal is not deficient performance. Counsel is maintaining credibility with the jury by being honest with them about the nature of the crime. Furthermore, there is no prejudice. The jury would have found this murder to be HAC without counsel's concession that the murder was brutal. Additionally, the jury would have recommended death regardless of the HAC aggravator based on the four remaining aggravators which included a prior conviction for the murder of a policeman. Thus, there is no prejudice. So, the trial court properly denied this claim following an evidentiary hearing.

Trial

During jury selection, trial counsel repeatedly referred to the crime as “brutal” and “terrible” to prospective jurors. Trial counsel told one prospective juror: “You will find that it was a particularly brutal crime. The woman was stabbed repeatedly.” (T. II 209). During opening statements of guilt phase, trial counsel, said that he was sure the State will do a very good job of convincing you that this was a “terrible, brutal crime.” (T. XI 1640). After describing what Dillbeck’s testimony would be, trial counsel told the jury you will get to see very graphically what he did and it is a terrible, brutal thing. (T. XI 1643). Trial counsel noted that “The State, I’m sure, will show you in graphic detail the brutality of this crime, You will see some terrible photographs. You will hear some terrible details, but I think you’ll soon see that the very brutality of this crime shows you what sort of state he was in. This wasn’t some kind of calculated, planned act. It is the kind of brutality you will see in a frenzy, someone that’s in a rage, someone who has simply lost control.” (T. XI 1645). Trial counsel told the jury, “yes it was a terrible, brutal crime”. (T. XI 1646).

In his initial closing of guilt phase, trial counsel admitted this was “a terrible, terrible crime” and there are “not enough words to express the horrible nature of what he did”. (T. XIII 2046). Trial counsel, in support of his argument that the defendant was telling the truth in his trial testimony, coming “back to the brutality, the intensity of the assault” noted that “they have some terrible pictures here in evidence”, but the

very intensity of the attack shows it was the kind of attack that would occur if the fellow was in a “frenzy, a rage” (T. XIII 2050). Trial counsel observed: he’s committed some terrible crimes here but clearly the State has not proven that it was a premeditated killing.” (T. XIII 2051). In his final closing of guilt phase, trial counsel admitted that Dillbeck committed a terrible crime and there was blood all over the place. (T. XIII 2079).

During penalty phase, the prosecutor, in his opening, urged the jury to find the HAC aggravator based on the pain involved and the length of time it took to die. (T XIV 2169). Trial counsel, in his opening in penalty phase, said: “my client is worthy of mercy” and “you should let him live”. (T. XIV 2171). Trial counsel told the jury that he was going to review Dillbeck’s life with them and they would hear a lot of details and “a lot of it is going to be bad” (T. XIV 2171). Trial counsel acknowledged that “my client has done some terrible, terrible things during the course of his life.” (T. XIV 2171). Trial counsel noted that the Indiana crime was “chillingly similar” to this murder. (T. XIV 2171). Trial counsel acknowledged by the age of fifteen Dillbeck had “caused a great deal of pain and damage.” (T. XIV 2174). Trial counsel explained that Dillbeck suffers from Fetal Alcohol Syndrome which resulted in brain damage. (T. XIV 2176-2179). Trial counsel also discussed child abuse during Dillbeck’s childhood and his father abandoning him. (T. XIV 2182-2183. Trial counsel referred to Dillbeck using drugs including the fact that Dilleck

was taking speed when he stabbed the fellow in Indiana. (T. XIV 2184). Trial counsel ended his opening with "you will see that he is deserving of mercy" and "he should be permitted to live" (T. XIV 2186). In his closing at penalty phase, trial counsel stated that life is the only fair resolution. (T. XVII 2711). Trial counsel repeatedly asked for mercy. (T. XVII 2714-2715). Trial counsel, as part of his discussion against finding the HAC aggravator, told the jury that he had said all along that it was a brutal killing. (T. XVII 2717, 2718). Trial counsel argued that Dillbeck did not "decide this would be a good way to torture somebody." (T. XVII 2717-2718). Trial counsel also argued against the HAC aggravator by pointing out, based on the pathologist's testimony, the victim had mercifully died quickly. (T. XVII 2718). He asked the jury to focus on the definition of HAC which required "some special intent to inflict a particularly tortuous sort of death". (T. XVII 2718). Trial counsel stated that the mitigating evidence showed the reasons that Dillbeck caused this pain and wasted his life. (T. XVII 2720). He argued that the mitigation made these "senseless crimes" make sense and "the reason he has done these terrible things is because he is damaged and he's mentally ill." (T. XVII 2734). Trial counsel ended penalty phase with the statement that he has committed some terrible crimes but he is entitled to mercy and then urged the jury to vote for life and let him live. (T. XVII 2741).

Evidentiary hearing

Dillbeck testified at the evidentiary hearing that trial counsel did not tell him that he was going to concede that the crime was a particularly brutal crime or concede the HAC aggravator. (EH 4 562). Dillbeck admitted that the victim was stabbed numerous times, there was a prolonged struggle and it took the victim a while to die. (EH 4 592).

Trial counsel, Randy Murrell, testified that while he admitted the killing was brutal, he did not concede the HAC aggravator. (EH 4 628). He argued that the murder was NOT heinous, atrocious and cruel. (EH 4 628). While he thought that the jury would find the HAC aggravator, he argued that the State had not proven it. (EH 4 628). He knew that the State would be seeking the HAC aggravator. (EH 4 628). He gave the prospective jurors a series of hypotheticals during jury selection because he thought that some jurors would, given the circumstances of the crime, could never vote for life, which he wished to know and excuse those jurors (EH 4 629). He also wanted the jurors to understand even a “terrible”, “horrible” murder could still result in a life sentence. (EH 4 629). Trial counsel described the crime as brutal during voir dire because he thought it was best to confront difficult issues as soon as possible. (EH 4 627).

Merits

First, trial counsel describing the murder as “brutal” is not conceding to the heinous, atrocious and cruel aggravator. They are not equivalent. Trial counsel argued against the HAC

aggravator in his closing argument during penalty phase. Trial counsel did not concede to the HAC aggravator.

Nixon III does not apply to concessions of aggravators. Even if trial counsel had conceded to this aggravator, which he did not, conceding to an aggravator is not the same as agreeing that the death penalty is the appropriate sentence. If counsel admits the aggravator exists, he is not conceding death is the appropriate penalty. *Nixon III* would only apply if trial counsel conceded that death was the appropriate sentence in the penalty phase. Trial counsel did not concede that death was the appropriate penalty. Trial counsel repeatedly argued for life.

A defendant may only raise a typical *Strickland* ineffectiveness claim when trial counsel merely concedes to an aggravator rather than conceding to the death penalty. Under *Strickland*, Dillbeck must show both deficient performance and prejudice.

It is not deficient performance for trial counsel to describe a particularly brutal murder as particularly brutal. As this Court has noted, it is common for defense counsel to make some halfway concessions to the truth to give the appearance of reasonableness and candor to gain credibility with the jury. *Atwater v. State*, 788 So. 2d 223,230 (Fla. 2001)(quoting *McNeal v. State*, 409 So. 2d 528, 529 (Fla. 5th DCA 1982). Common practices are by definition not deficient performance. Deficient performance means no reasonable attorney would engage in the conduct. When a practice is common among the defense bar, that

means that numerous attorneys are engaging in the practice. A common practice is not deficient performance.

In *Atwater v. State*, 788 So. 2d 223 (Fla. 2001), the Florida Supreme Court held that counsel was not ineffective for conceding to second-degree murder in closing. During closing arguments, Atwater's trial counsel argued in favor of second-degree murder, displayed gruesome crime scene photographs, argued the crime was one of malice, and rejected any consideration of manslaughter because the facts supported a more serious offense. Atwater contended that defense counsel's actions were more like those of a prosecutor than a defense attorney. The Florida Supreme Court explained that sometimes concessions of guilt is a good trial strategy designed to gain credibility with the jury. When defense counsel is faced with overwhelming evidence, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to give the appearance of reasonableness and candor and to thereby gain credibility. The *Atwater* Court held that defense counsel properly made a strategic decision to argue that the facts showed second-degree murder, not first-degree murder. In light of the overwhelming evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid. Therefore, the trial court properly denied Atwater's claim that defense counsel was ineffective for making certain concessions without Atwater's consent.

In *Brown v. State*, 846 So. 2d 1114, 1125 (Fla 2003), this Court rejected an ineffective assistance of counsel claim based

on arguments defense counsel made during opening and closing. Brown alleged that his trial counsel was ineffective due to remarks he made in his opening statement. In opening, his counsel said:

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

The trial court found that counsel made a tactical decision to make the statements that he did, for the purpose of trying to dilute some of the damaging testimony the jury would hear later. The trial court observed that defense counsel was explaining the real world the defendant lived in. The trial court also concluded that prejudice had not been established. The Florida Supreme Court found no error in the trial court's conclusions. Brown also alleged that trial counsel was ineffective as a result of stating that the victim was "gurgling" on his own blood. Counsel’s comment is consistent with his explanation at the evidentiary hearing that he was trying to point out the overdramatization of the prosecutor’s argument. The trial court found that counsel’s statement did not prejudice Brown. The Florida Supreme Court agreed, reasoning that “we will not second-guess counsel's strategic decisions on collateral attack and trial counsel's comment, when weighed against the two-part test in *Strickland,* does not satisfy either prong. Though the word "gurgling" may have shock value, it does not rise to the level required by *Strickland,* particularly where, as here, trial counsel chose to use the word as a method of rebutting and

minimizing the State's argument." Brown also asserted that counsel was ineffective for admitting that Brown had "turned bad" in his closing argument in the penalty phase. At the evidentiary hearing, counsel testified that his purpose in making such a statement was to be honest with the jury about what type of person they were dealing with. The trial judge found that this statement was a reasonable trial tactic on counsel's part, that he was just being honest with the jury, and that it was not ineffective or deficient. The Florida Supreme Court agreed. They noted that the comment was made during the penalty phase, a point at which Brown had already been found guilty of first-degree murder. At that point, counsel sought to lessen negative juror sentiment against Brown, and appealing to the jurors by pointing out Brown's real life shortcomings was a tactic geared toward Brown's benefit. The *Brown* Court noted that any claim that this particular statement led the jurors to vote to recommend the death penalty is wholly speculative. Accordingly, the *Brown* Court rejected this ineffectiveness claim.

Just as trial counsel could describe the crime as one of "malice" in *Atwater* without being ineffective, trial counsel may describe the murder as "brutal" without being ineffective. Here, as in *Atwater*, defense counsel properly attempted to maintain credibility with the jury by being candid. Just as trial counsel may admit that the defendant had "turned bad" in his closing argument in *Brown*, trial counsel may admit a murder is brutal without being ineffective. Here, as in *Brown*, counsel was trying to dilute some of the damaging testimony the jury would hear

later. The jury was going to conclude the murder was brutal based on the evidence that they would hear during the State's case and trial counsel is not ineffective for realizing this and facing, in his words, the "difficult" issues as quickly as possible. Furthermore, as counsel testified, he used the term during jury selection to explain to the prospective jurors that even brutal, terrible murders do not automatically warrant the death penalty.

Moreover, there was no prejudice as required by ***Strickland***. The outcome would have been the same regardless of trial counsel's description of the murder as brutal and terrible. The jury would have found the HAC aggravator whether trial counsel described the murder as brutal or not. Just as this Court found the evidence sufficient to support HAC in the direct appeal, the jury would have found the evidence sufficient to find this stabbing murder to be HAC. ***Dillbeck***, 643 So.2d at n.3 (rejecting without comment a claim that the trial court erred in finding the HAC aggravator). Moreover, regardless of the HAC aggravator, Dilleck would have still been sentenced to death. There were four remaining aggravators regardless of the HAC aggravator: (1) sentence of imprisonment; (2) previously been convicted of another capital felony; (3) the murder was committed during the course of a robbery and burglary; (4) the murder was committed to avoid arrest or effect escape. Dillbeck had previously been convicted for the murder of a policeman. The jury would have recommended death and the judge would have sentenced Dillbeck to death based on the four remaining aggravators. Thus, there is no

prejudice from trial counsel’s acknowledging that the murder was brutal.

ISSUE III

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS FOR FAILING TO CONDUCT A PROPER VOIR DIRE? (Restated)

Dillbeck contends that trial counsel was ineffective for failing to strike numerous jurors for cause. The State respectfully disagrees. Two of the complained of jurors were alternates only who did not participate in the jury's verdict. Obviously, Dillbeck cannot show prejudice based on alternate jurors that never served. The remaining seven actual complained of jurors were not subject to cause challenge because, while most of them were exposed to pre-trial publicity, each assured the trial court that they could decide the case based solely on the evidence. None of the actual jurors knew of the prior capital felony conviction. Trial counsel was not ineffective for failing to challenge jurors who were not actually biased. Thus, the trial court properly denied this claim following an evidentiary hearing.

Trial

The entire first week of trial was devoted almost exclusively to jury selection. (Feb 18-Feb 22, 2001). Over 85 prospective jurors were subjected to individual voir dire outside the presence of other prospective jurors. (T. I 25,0 29; T. I-IX). At the conclusion of individual voir dire, potential jurors were placed in the jury box in small groups and subjected to group voir dire (T. IX 1376). Prior to individual voir dire, all prospective jurors were instructed not to discuss anything about

the case to anyone, including other prospective jurors. (T. I 26).

A. **Juror Melinda Whitley**

During questioning by the prosecutor, Ms. Whitley expressed concern about the negligence of prison officials in allowing Dillbeck to walk away from a prison work program. Contrary to Dillbeck's assertions, there is nothing in the record to support a conclusion that "Ms. Whitley had already made up her mind that [Dillbeck] should be at the very least behind bars for eternity." IB at 24. Despite her concerns about prison officials responsible for Dillbeck's security, Ms. Whitley told trial counsel she did not believe she had formed any opinions about what happened in this case. She also stated she believed she could lay any opinions aside as to whether prison officials were negligent in letting Dillbeck out of custody and decide whether he was guilty of the crime charged based on what she hears in the courtroom. (T. II 200). Additionally, while Ms. Whitley was present at Gayfer's about an hour and a half prior to the murder, she knew little about the murder. She remembered it involved a woman in a car and that her children were in the store when it happened. (T. II 198). She also told the prosecutor she had read some later articles concerning why Dillbeck was out of prison. Ms. Whitley stated she did not know why Dillbeck had been incarcerated. (T. II 198-199). She did not believe she had come to any opinion as to whether Dillbeck was guilty of the crime charged. (T. II 205). Although she believed in the death

penalty, she thought she would be less likely to vote for the death penalty than the average Floridian. (T. II 208). Trial counsel told Ms. Whitley the crime was a particularly brutal one during which a woman was stabbed repeatedly. Ms. Whitley testified that, even knowing this, she would vote for a life sentence if she found the law required a vote for life. (T. II 209). Even though she was present at the murder scene shortly before the crime with her children and was afraid when she heard it occurred, she did not think it would be harder for her to vote for a life sentence as a result (T. II 210). As he did with each juror, trial counsel posed several hypothetical "murders" to Ms. Whitley. Trial counsel's hypothetical murders involved a (1) rape/murder; (2) a murder in which multiple victims were murdered; (3) a case in which a person was on trial for a second murder; (4) a murder involving a person who had been in prison for one murder, escaped and committed another murder; and (5) a murder where a policeman was killed.[23] Counsel asked Ms. Whitley whether, given each of these particular aggravated murders, she would still be able to vote for life if she found there were sufficient mitigating factors to support a vote for life. In response to the rape/murder hypothetical, Ms. Whitley said she

[23] Trial counsel explained that though these hypothetical situations "may or may not apply to this case" he was posing them to "sort of probe your feelings about the death penalty." (T. II 210). At times during the voir dire examination of various jurors, trial counsel seemed to pose the hypothetical regarding the murder of a policeman as a stand alone murder. At other times, he seemed to include the policeman as one of the victims in the scenario involving an initial murder, an escape from prison, and a subsequent murder.

could still vote for a life sentence if there were sufficient mitigating factors to support a vote for life. (T. II 210-211). When trial counsel posed a question about multiple contemporaneous killings, Ms. Whitley initially expressed some doubt about her ability to vote for life stating "that would be extremely hard." (T. II 211). She stated, that in such a case, she believed she could still vote for life if mitigating circumstances were sufficient. (T. II 211). When trial counsel asked whether she could still vote for life if the defendant had killed somebody before and then killed the present victim after escaping from jail, Ms. Whitley said she could. (T. II 211-212). Ms. Whitley told trial counsel that if the person killed was a police officer, that while it would be harder, she could still vote for life if the mitigating circumstances were sufficient. (T. II 212).

B. **Juror Cynthia Krell**

During individual voir dire, Ms. Krell told trial counsel that she read an article in the paper about an incident involving a man who stabbed a woman in the Tallahassee Mall Gayfers parking lot and tried to steal her car. She told trial counsel she could not remember reading any follow-up articles or hearing anything more about it on television or on the radio. (T. III 394). She also remembered reading the person who allegedly committed the crime had escaped from prison. (T. III 395). Ms. Krell did not know why the man had been in prison. She also felt she could put aside anything she heard about the case out of her mind and make her decision based only on what she heard in the courtroom. (T.

III 395). When questioned by trial counsel about whether Ms. Krell had made any decision as to whether Dillbeck was guilty of the crime charged, she reported she had not heard enough about it. (T. III 402). She told trial counsel that while she was not familiar with the death penalty, she thought she would be "maybe a little less" likely to vote for a death sentence than would the average person. (T. III 405). When trial counsel then pointed out that the crime was a brutal killing where a woman was stabbed repeatedly, Ms. Krell told counsel that she could not vote for life because the crime was "very disturbing." (T. III 406). Immediately thereafter, during the colloquy between trial counsel and Ms. Krell, trial counsel asked her again whether she could vote for life if the law seemed to call for such a vote. Though initially she told counsel that "it would depend on the circumstances", she stated she could vote for life if that is what the law would require (T. III 406-407). When counsel posed his hypothetical aggravated murders to Ms. Krell, she stated she could still vote for life if the mitigating circumstances outweighed the aggravating factors or the mitigating circumstances seemed to require a vote for life (Vol. III 408).[24]

C. **Juror Jason Zippay**

During individual voir dire, Mr. Zippay told the prosecutor that he had read about the crime in the newspaper and that

[24] Ms. Krell's responses to trial counsel's rape/murder and second murder hypotheticals were apparently not audible. Trial counsel noted that Ms. Krell's response to the latter question was apparently yes, that she could still vote for life if the mitigating circumstances outweighed the aggravating circumstances. (T. III. 408).

"assuming everything I read in the newspaper was true, I am sure he is guilty." (T. VI 799). He told the prosecutor he had not formed any opinion about what the appropriate penalty would be and would keep an open mind until he heard all the evidence concerning the aggravating and mitigating circumstances (T. VI 800, 803). Mr. Zippay had read the killer had been in prison and had escaped from a work program but could not remember why he was in prison (T. VI 801). He told the prosecutor he felt he could put whatever he had heard about this case out of his mind and make a decision solely on what he heard in the courtroom. (T. VI 799). When questioned by trial counsel, Mr. Zippay told trial counsel he did not think anything he read in the paper would interfere with his ability to reach a decision based solely on the evidence presented in court. (T. VI 807). He said that while he believed that someone who killed someone should not live in society, whether a life or death sentence is appropriate "would depend on the particular case" (T. VI 808). He said that he would be about as likely to recommend a death sentence as the average person. He told trial counsel that even if the crime was a particularly brutal murder, he could still vote for life if he found the mitigating circumstances outweighed the aggravating circumstances. (T. VI 810). When trial counsel posed his hypothetical murders for Mr. Zippay's consideration, Mr. Zippay stated unequivocally, in each case, he could vote for life if the mitigating circumstances warranted a life recommendation. (T. VI 811-812).

D. **Juror John Marshall**

Contrary to Dillbeck's allegations, Mr. Marshall knew nothing about why Dillbeck was incarcerated before he escaped and murdered Faye Vann. Nor did Mr. Marshall ever express any animosity toward Dillbeck. Mr. Marshall recalled hearing about a case in which an inmate, on some sort of work release, had escaped and committed a murder. He did not know what the inmate had been in prison for and that he had not formed any opinion about the instant case. (T. VII 970). Mr. Marshall told the prosecutor he could put anything he had previously heard about the case out of his mind and decide the case solely on what he heard in the courtroom. (T. VII 970). He also said he could go into the penalty phase of the trial without any preconceived notion as to what an appropriate sentence would be and that he would listen to all the aggravating and mitigating circumstances before making up his mind. (T. VII 973). When questioned by trial counsel, Mr. Marshall told counsel he was somewhere in the middle regarding his views on the death penalty and did not feel particularly opposed or strongly in favor of the death penalty. Mr. Marshall agreed with trial counsel's suggestion he was a person who took the average view. (T. VII 975). When asked whether he was more likely or less likely than the average person to vote for the death penalty, he said would have to wait and see what the situation presents. (T. VII 977). When trial counsel posed his hypothetical murders to Mr. Marshall, he reassured counsel that in each instance he could still vote for life if he found that mitigating factors outweighed evidence in aggravation. (T. VII. 978-979).

E. **Alternate juror Michelle Holcomb**

Dillbeck alleges trial counsel should have challenged Ms. Holcomb for cause because she stated she did not know anything about the case. Though working at Gayfers on the day of the murder, Ms. Holcomb stated she did not know anything about the case. While Dillbeck essentially accuses Ms. Holcomb of lying under oath, Ms. Holcomb explained that she was on her lunch break and not in the store at the time of the murder, does not read the newspapers, and does not usually watch TV. She told trial counsel the only thing she heard was a lady was killed in the parking lot. She stated she did not hear anything about Dillbeck at all. (T. VII 1114). She stated she had formed no opinion about this case because "I don't know enough about it at all. I don't know anything, pretty much." She also stated she had mixed feelings about the death penalty. (T. VII 1115). Ms. Holcomb told the prosecutor that if the death penalty could be avoided at all it should be. She said that if a prisoner could be rehabilitated, such a result would be much better than the death penalty. (T. VII 1116). Ms. Holcomb also told the prosecutor it would be very hard for her to sentence someone to death. She thought she could, however, if the law required it. (T. VII 1116). Though she was somewhat reticent to express a view in the hypothetical, Ms. Holcomb told trial counsel she was probably less likely to vote for the death penalty than the average person. (T. VII 1127). When asked her views when measured against a 1-10 scale[25], she told trial counsel she would be

[25] One being strongly in favor, ten being strongly against.

somewhere in the middle or leaning away from it. She followed up with a comment that she would prefer not to have it, though it is necessary sometimes. (T. VII 1124). She also thought that if a person could be locked up for the rest of their life upon conviction for first degree murder, that would lessen the need for the death penalty. (T. VII. 1124). She assured trial counsel that even in the face of a "particularly brutal murder" where a "woman was stabbed repeatedly", she could vote for a life sentence if she felt the mitigating circumstances outweighed the aggravating circumstances. Like the other jurors at issue here, Ms. Holcomb agreed she could vote for life even if considering one of the hypothetical murders posed by trial counsel. (T. VII 1127-1129). In any event, Ms. Holcomb did not participate in the deliberations.

F. **Alternate Juror Ruth Tadlock**

During individual voir dire, Ms. Tadlock told counsel she knew about the case from newspaper articles she read at the time it happened. She related details including the place of the crime, the name[26] and approximate age of the victim, and the time of the year. She read that Mr. Dillbeck was on a work release program in Quincy at the time of the murder and had escaped from the detail. (T. VII 1059). She also thought she had read that Dillbeck had murdered someone else. Initially, Ms. Tadlock

[26] Ms. Tadlock thought the victim's name was Faye Lamb. The victim's name was Faye Lamb Vann.

stated that based on what she read, it sounded pretty conclusive that Dillbeck was guilty. (T. VII 1060). She told the prosecutor that she had formed no opinion on what would be an appropriate sentence. She stated she could not be sure she could put out of her mind the things she had heard and start afresh with just the evidence she heard in the courtroom. (T. VII. 1060). She told the prosecutor she had scruples against imposition of the death penalty and did not feel she could make a judgment of whether this person deserves to die and this one doesn't. (T. VII 1062). Nonetheless she testified that despite her personal feelings concerning the death penalty, she would be willing to vote for the death penalty if she believed the aggravating factors outweighed the mitigating factors in the case. (T. VII 1062-1063).

Ms. Tadlock told trial counsel that she could not be absolutely sure she could set aside what she had previously heard about this case and decide the case solely on what she hears in the courtroom. (T. VII 1067-1068). She did say, however, that she had reached no conclusions about whether this was a premeditated murder or a felony murder. She told trial counsel that she had also reached no opinion as to what the penalty should be in the case. (T. VII. 1068). Ms. Tadlock told trial counsel that in spite of the fact this case involved a brutal crime where a woman was repeatedly stabbed, she could vote for a life sentence if she believed the mitigating factors outweighed the aggravating factors. (T. VII 1069). Ms. Tadlock also told trial counsel she could still vote for life even if the case

involved a rape/murder or a second murder committed by an escaped murderer (Vol VII. 1070).

G. **Juror Robert Ussery**

Mr. Ussery told the prosecutor, during individual voir dire, he had read something about the case in the media. He related he recalled that an inmate walked off a release program in Quincy, a couple of days later a lady was stabbed at the Tallahassee Mall, and the inmate was arrested. He told the prosecutor he did not recall why the inmate was incarcerated and he believed he could set aside anything he heard before and decide the case solely on the what he heard in the courtroom (T. VI 861-862). He also related he thought he would be able to go into the penalty phase of the trial without any preconceived notion of what the penalty should be. When trial counsel inquired, Mr. Ussery replied unequivocally that he had not formed an opinion about a sentence in this case. He also related he had no strong feelings about the death penalty one way or the other. He noted that he thought it was justified and should be carried out in the right circumstances. (T. VI 868). Mr. Ussery told trial counsel he thought that if an sentence could result in someone being locked away for life, it would probably lessen the need for the death penalty. (T. VI 869). While stating he might be more likely to vote for the death penalty than the average person, he really didn’t know. (T. VI. 871). He also related that even in the face of a particularly brutal murder involving the repeated stabbing death of a woman, he believed he could vote for life if he felt the mitigating factors outweighed the aggravating factors. He

also noted he would follow the judge's instructions. (T. VI. 872). For each of the hypothetical murders, Mr. Ussery told trial counsel he could vote for a life sentence if the mitigating circumstances outweighed the aggravating circumstances. (T. VI. 872-873).

H. **Juror Cynthia Ann Porter**

Ms. Porter told the prosecutor she had heard of the case only from friends who talked about the case. She related she heard a lady had been killed at the Tallahassee Mall by a guy who escaped from prison. She told the prosecutor that she did not know why "the guy" was in prison. Ms. Porter also told the court she would be able to put aside anything she had heard before and base her decision solely on the facts she hears from the witness stand (T. V 742). She also said she would have an open mind going into any penalty phase of the trial and would not make any decision as to what the penalty should be until she heard all the aggravating and mitigating circumstances (T. V 745). When trial counsel questioned Ms. Porter, she told him that she would be about as likely to vote for the death penalty as the average person and agreed that even in the worst cases, a life sentence could be an appropriate penalty. When trial counsel posed the same hypothetical "murders" he posed to the other jurors, Ms. Porter unequivocally stated she could vote for life if the mitigating circumstances outweighed the aggravating factors (T. V 753-754).

I. **Juror Larry Davis**

Mr. Davis remembered only that a woman was killed in the parking lot by some man that was on work release. (T. III 429).

He stated he did not know why the man was in prison. When asked whether he had formed an opinion about whether or not Dillbeck was guilty, Mr. Davis stated “Well, I don’t know, I don’t even know the guy.” (T. III 430). He said he believed he could set aside facts he got from the paper and decide the case solely on what he heard from the witness stand. He also promised to keep an open mind in the penalty phase of the trial. (T. III 433). When trial counsel outlined the same hypothetical murder cases he posed to other jurors, Mr. Davis unequivocally said he could vote for life in each case if the mitigating circumstances outweighed the aggravating factors. Mr. Davis did not think Dillbeck was guilty based on what he heard prior to trial. Mr. Davis knew very little about the details of the crime.

Evidentiary hearing

Trial counsel, Mr. Murrell, testified that he approached jury selection with a genuine concern that “a lot of people would be inclined maybe automatically for death given the circumstances of the case” (EH 4 629). Mr. Murrell testified that “it was pretty clear to me that Mr. Dillbeck was going to get convicted of first degree murder.” He went on to testify he hoped that “maybe we could get felony murder as opposed to premeditated murder...[and] convince a jury to recommend a life sentence.” (EH 4 619). Mr. Murrell testified he approached jury selection with any eye toward getting rid of those you think will be unfavorable and to end up with a jury you have a chance with (EH 4 635). Although he talks to his client about potential jurors, he believes the

final decision is up to him. As trial counsel explained, jury selection is a give and take. "Your best hope is just to get rid of those you think that will be unfavorable, and to typically end up with something you hope is at least neutral or that you have got a chance with." (EH 4 635).

Dillbeck testified at the hearing that the "couple [of] people" he had a question about were excused. (EH 4 594). When asked whether he had questions about any other juror, Mr. Dillbeck testified he did not believe he did. (EH 4 595).

Merits

To show that a failure to exercise a challenge for cause was deficient performance under the *Strickland* standard, Dillbeck must show that trial counsel had a reasonable basis to assert the cause challenge. *Reaves v. State*, 826 So.2d 932, 939 (Fla. 2002). To show prejudice, it is not enough to show that a challenge for cause would have been granted as to a particular juror. Rather, Dillbeck must show that trial counsel's failure to exercise a challenge for cause resulted in a biased juror serving on the jury. *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995)(finding no ineffectiveness for failing to strike a juror who had been related by marriage to the victim but who said that he could be fair and explaining that a defendant must show that the juror was actually biased to show prejudice for failure to strike a juror, citing *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1981)); *Jenkins v. State*, 824 So.2d 977, 982 (Fla. 4th DCA 2002)(rejecting an ineffectiveness claim for failing to

challenge a juror who was initially uncomfortable with reasonable doubt but who stated that he could be fair and impartial and explaining that only where a juror's bias is patent from the face of the record is there prejudice). A juror's doubt as to her own impartiality in voir dire is not equivalent to actual bias. The United States Supreme Court has upheld the impaneling of jurors who doubted, or disclaimed outright, their impartiality in voir dire. In *Patton v. Yount*, 467 U.S. 1025, 1032, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984), the Court found no manifest error in seating jurors, who were exposed to pretrial publicity and had, at one time, formed opinions as to guilt. The Court noted that the potential jurors, who retained fixed opinions as to guilt, were disqualified. The actual jurors who served, while initially making ambiguous, and at times contradictory statements, regarding guilt, testified that they could set their opinion aside and decide the case based on the evidence. The *Patton* Court explained that the mere fact that the majority of veniremen remembered the case, without more, was "essentially irrelevant".

While some of the actual jurors here had been exposed to pre-trial publicity, each of them testified that they could lay aside anything they heard outside of court and decide the case based solely upon the evidence they heard in court. Each of the complained about jurors was competent to sit as a juror in this case. Because each of the jurors was competent, trial counsel had no reasonable basis to challenge them. There is no deficient performance for not challenging jurors when there is no legal

basis for doing so. Nor is there any prejudice. Each juror was questioned carefully to discover any potential bias and none was found. Dillbeck has made no showing that any of the jurors who deliberated in this case was actually biased.

Additionally, trial counsel's testimony at the evidentiary hearing establishes that counsel's strategy throughout the entire trial was to avoid a sentence to death. In *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995), this court recognized that attempting to seat jurors likely to recommend a life sentence can constitute a reasonable trial strategy. Harvey argued his counsel was ineffective during voir dire for failing to challenge a juror who stated she could not be impartial because she had read in the newspaper and heard on television that Harvey had confessed to the crime. Harvey's trial counsel, who was an experienced capital trial lawyer, testified at the evidentiary hearing, based on the strong evidence of guilt including Harvey's confession, that there was no chance of obtaining an acquittal. Because the juror at issue, when questioned about her beliefs, had given an answer indicative of her disapproval of the death penalty, Harvey's counsel decided to accept her as a juror and concentrate on the penalty phase of the trial. This Court refused to find counsel ineffective for attempting to seat jurors more likely to recommend life over death.

As in *Harvey*, the trial record, as well as trial counsel's testimony at the evidentiary hearing, establishes that trial counsel's strategy was to seat jurors more likely to recommend a life sentence. As in *Harvey*, trial counsel, here, was an

experienced capital litigator. As in *Harvey*, Dillbeck has made no showing that seating a jury more likely to recommend leniency was not a reasonable trial strategy. Ms. Whitley and Ms. Krell for instance both stated they were probably less likely than the average person to vote for a death sentence. Both Ms. Holcomb and Ms. Tadlock had scruples against imposition of the death penalty. Mr. Marshall and Mr. Zippay, though more middle of the road than jurors Whitley and Krell, had no difficulty in considering a life sentence even in the face of trial counsel's aggravated murder hypotheticals. Likewise, jurors Ussery, Porter, and Davis expressed no reservations about recommending a life sentence if the mitigating circumstances warranted such a recommendation. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE IV

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS FOR FAILING TO FILE A MOTION FOR CHANGE OF VENUE? (Restated)

Dillbeck asserts that his trial counsel was ineffective for failing to move for change of venue. The State respectfully disagrees. There is no deficient performance. Trial counsel made a reasonable tactical decision not to file a motion for change of venue. As trial counsel testified at the evidentiary hearing, Tallahassee is a good place for the defense. Moreover, as trial counsel recognized, if granted a change of venue, the trial would likely to be moved to a location with more conservative jurors which would be more likely to recommend death. Nor is there any prejudice. Any motion for change of venue would have been denied. Motions for change of venue are only granted where there are significant difficulties encountered in attempting to seat a jury. There were no significant difficulties in seating a jury in this case. Therefore, the trial court properly denied the claim of ineffectiveness following an evidentiary hearing.

Trial

The trial judge agreed to trial counsel's request for individualized voir dire to prevent members of the venire from tainting others with any prior knowledge of the case (T. XX 3319). He also agreed to grant any of trial counsel’s challenges against jurors who knew about Dillbeck’s prior murder conviction (EH. 4 638)

On January 16, 2001, a little over a month before jury selection began, the trial court held a hearing to review with counsel a proposed jury questionnaire. (T. XVII). The court agreed to provide counsel an opportunity to review and provide input to his cover letter that would accompany the questionnaire. The trial judge informed counsel he intended to include a request in the letter that potential jurors avoid reading or listening to anything about the case or the trial. (T. XVII 4). He also informed counsel he would consider sequestering the jury during the trial to shield them from media reports during the course of the trial (T. XX 3322).

Ms. Tadlock, the alternate testified that she "believed Dillbeck had murdered someone else at one time" (T. VII 1059). Foreperson, Elizabeth Hill, testified she read that Dillbeck had committed prior crimes, was on work release, and escaped. She told the prosecutor she did not know the nature of the crime that caused Dillbeck to be incarcerated (T. I 169). Likewise, jurors Brandewie, Davis, Krell, Marshall, Porter, Ussery, Whitley, and Zippay did not know why Dillbeck had been in prison prior to his escape (T. II 199; III 341, 395, 430,448; IV 536; V 742; VI 801, 861; VII 970, 1042). Ms. Canady knew nothing about the crime at all except that a woman was stabbed in her car in Gayfers' parking lot (T. VII 1042). Ms. Rigdon reported that she knew nothing about the case at all except the name of the defendant. She told the prosecutor during voir dire that, at the time of the incident, she was going through a custody battle and was "not concerned with the newspaper." (T. III 448). She reported she

did not watch TV or read the newspaper (T. III 448). Ms. Ayers heard that a black man committed the crime and stated during voir dire that she had heard nothing about the crime from the newspapers or TV. Her only source of knowledge was from a friend who worked at the mall. (T. VI 536).

Evidentiary hearing

Trial counsel, PD Randy Murrell, testified that he did not move for a change of venue. (EH 4 656). He thought about filing a motion but decided against it. (EH 4 656). He did not move for change of venue after jury selection. (EH 4 662). Trial counsel testified that the newspapers reports that he saw were accurate and did not distort the facts. (EH 4 639). He was not concerned about prospective jurors who knew the facts of the crime because that was "all going to come out" during the trial. (EH 4 639). He was concerned because the crime occurred at a popular shopping area where anybody who lives in Tallahassee has been, which could cause the jurors to identify with the victim, but at the same time, Tallahassee is a "good place to try a case from the defense standpoint". (EH 4 641). Trial counsel was also concerned about the place that the case would be transferred to because any other place, other than Gadsden County, in the panhandle you are going to have a "much more conservative jury, a jury much more likely to vote for death". (EH 4 641). Trial counsel testified that "the odds are you are not going to wind up in a place that is better than Tallahassee" (EH 4 641-642). Trial counsel again

explained that he was not concerned about the facts of the case because “all the facts that were in the paper were facts that were going to come out during the trial and noted that this was not a case where the confession had been suppressed but published in the newspapers. (EH 4 642). He was concerned about jurors knowing about the prior murder conviction prior to the guilt phase. (EH 4 642). Trial counsel testified that he did not think he had legally adequate grounds to request a change of venue. (EH 4 642). He was aware that if he had a lot of trouble selecting a jury, he could then request a change of venue after unsuccessfully attempting to empanel a jury. (EH 4 642). He did not think the law supported a change of venue motion and that there was no merit to one, so he did not raise it. (EH 4 643). He was concerned about the murder occurring at Gayfers, a common shopping spot, but he felt he could deal with that. (EH 4 643).

Dillbeck testified that he made only one suggestion to trial counsel and that was asking about a change of venue. (EH 4 580). Dillbeck testified that he wanted a change of venue due to the publicity (EH 4 582). The publicity portrayed him as a serial killer. (EH 4 595). They discussed the pros and cons of a change of venue. (EH 4 581). Dillbeck testified that trial counsel preferred to keep the trial in Tallahassee. (EH 4 581). Trial counsel told Dillbeck that Tallahassee was a “better place” for lenient jurors. (EH 4 581). Trial counsel told Dillbeck that they were more likely to get a more liberal jury pool in Leon County. (EH 4 582). Dillbeck testified that they talked about other places where the case could be tried if they filed for a

change of venue and it was granted including Jacksonville. (EH 4 581).

Forfeiture

There is no record support for the claim that there was extensive and inflammatory pre-trial publicity. IB at 31. Dillbeck, although granted an evidentiary hearing on this claim, did not introduce any newspaper articles reporting the prior murder. Collateral counsel did not attach the newspaper articles that referred to Dillbeck's prior conviction to his initial post-conviction motion nor his amended motion. Nor did he introduce any such articles at the evidentiary hearing. While appellate counsel notes the test for determing whether a change of venue should be granted based on pretrial publicity examines a number of circumstances, he did not supply the trial court with any of this information. *State v. Knight*, 28 Fla. L. Weekly S647 (Fla. August 21, 2003)(explaining that those circumstances include whether the publicity was made up of factual or inflammatory stories or favored the prosecution's side of the story). Neither the trial court nor this Court has sufficient information to address this claim. This issue is forfeited because Dilleck did not sufficiently factually develop this claim at the evidentiary hearing. *Meeks v. Moore*, 216 F.3d 951, 964 (11th Cir. 2000), *cert. denied*, 531 U.S. 1159, 121 S. Ct. 1114, 148 L. Ed. 2d 983 (2001)(finding no evidentiary support for ineffectiveness for failing to file a change of venue claim where collateral counsel

introduced four newspaper articles which were meager and mundane).

Merits

There is no deficient performance. The decision of whether to seek a change of venue is usually considered a matter of trial strategy by counsel, and therefore not generally an issue to be second-guessed on collateral review. *Chandler v. State*, 848 So. 2d 1031, 1037 (Fla. 2003)(citing *Rolling v. State*, 825 So.2d 293, 298 (Fla. 2002)); *Buford v. State*, 492 So. 2d 355, 359 (Fla. 1986)(concluding that trial counsel's failure to move for a change of venue was a tactical decision not subject to collateral attack).

It is not deficient performance to balance the possibility that local jurors will be familiar with the case with the advantage of a liberal jury pool and decide to stay put. *Rolling v. State*, 695 So.2d 278, 285 (Fla. 1997)(rejecting an ineffectiveness claim for failing to move for change of venue where trial counsel testified at the evidentiary hearing that he made an informed tactical decision to initially attempt to have the case tried in Alachua County, notwithstanding the pretrial publicity surrounding the case, based on the view that Alachua County's venire are "more open-minded, more understanding, and more willing to consider life recommendations as opposed to death sentences" than other areas); *Weeks v. Jones*, 26 F.3d 1030, 1046 n.13 (11th Cir. 1994)(rejecting an ineffectiveness claim for failing to move for change of venue, despite the considerable

pretrial publicity, because counsel thought that he still had the best chance for acquittal in that county based on his testimony that the county has a "history of bending over backwards for defendants" and "it's good to practice in if you're a defense lawyer"). It is perfectly reasonable for trial counsel to choose to remain in an area known for its liberal outlook rather than risk a change of venue that is likely to result in the trial being held in an area with a more conservative jury that is more likely to recommend death. As trial counsel testified, if he made a motion for change of venue that was granted, the odds were that he would end up in a worse location. This was a perfectly reasonable trial strategy and therefore, is immune from collateral attack.

Nor is there any prejudice. To prove prejudice, Dillbeck must prove, at least, that the motion would have been granted.[27] As

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[27] *Chandler v. State*, 848 So. 2d 1031, 1034-1037 (Fla. 2003)(rejecting an ineffectiveness claim for failing to file a second motion for change of venue and observing that decision regarding whether to seek a change of venue is usually considered a matter of trial strategy and the defendant did show that there was any difficulty encountered in selecting his jury); *Meeks v. Moore*, 216 F.3d 951, 961-964 (11th Cir. 2000), *cert. denied*, - U.S. -,121 S. Ct. 1114, 148 L. Ed. 2d 983 (2001)(rejecting an ineffectiveness claim for failing to move for change of venue where some of jurors were exposed to pretrial publicity which was essentially factual and noting that to establish ineffectiveness, petitioner must show, at a minimum, that the trial court would have or should have granted a change of venue motion which, in turn, requires him to show actual or presumed prejudice on the part of jurors); *Tafoya v. Tansy*, 9 Fed. Appx. 862, 871-872 (10th Cir. 2001)(rejecting a claim of ineffectiveness for failing to move for change of venue where the allegations were of presumed prejudice based on pretrial newspaper articles, because the allegations do not approach the high standard necessary to warrant a change in

trial counsel recognized, there was no legal basis to file a motion for change of venue. If trial counsel had filed a motion for change of venue, the trial court merely would have denied it. If the jurors can assure the court during voir dire that they can be impartial despite their extrinsic knowledge about the case, they are qualified to sit on the jury and a change of venue is not necessary. *Rolling v. State*, 695 So.2d 278, 285 (Fla. 1997). In this case, each of the twelve jurors expressed their belief that they could do so. The jurors who knew anything about the case agreed they could put what they heard outside the courtroom out of their mind and base their decision solely on the evidence presented at trial and the law as it was given to them. (T. II 200; III 341, 395, 430,448; IV 536; V 742; VI 800, 862; VII 970, 1042). While Dillbeck asserts a majority of the seated jurors knew that he had previously been convicted of murder, the true fact is that none of the jurors who deliberated upon Dillbeck's fate did. Furthermore, a motion to change venue is not ripe for resolution until an attempt is made to select a jury. *Henyard v. State*, 689 So.2d 239 (Fla. 1996). Dillbeck's jury was selected with relative ease. Any motion for change of venue would have

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venue because simply showing that all the potential jurors knew about the case and that there was extensive pretrial publicity does not suffice to demonstrate that an irrepressibly hostile attitude pervaded the community); *Provenzano v. Dugger*, 561 So. 2d 541, 545 (Fla. 1990)(concluding that counsel was not ineffective for failing to renew the motion for change of venue because it was a tactical decision and because "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury").

been, and should have been, denied and therefore, Dillbeck had not established prejudice.

Dillbeck's reliance on *Provenzano v. Singletary*, 3 F.Supp.2d 1353, 1362 (MD Fla. 1997), aff'd, *Provenzano v. Singletary*, 148 F.3d 1327 (11th Cir. 1998), is misplaced. The district court denied habeas relief and the Eleventh Circuit affirmed. The issue in *Provenzano,* according to the Eleventh Circuit, was not that counsel's decision not to seek a change of venue was not a reasonable trial tactic, which was acknowledged to be reasonable, but the failure to provide petitioner with an evidentiary hearing on the matter. *Provenzano*, 148 F.3d at 1329-1332. Dillbeck had an evidentiary hearing on this issue at which he failed to establish that trial counsel's decision was not reasonable. Furthermore, the Eleventh Circuit rejected the claim, in substantial part, because the decision was made by experienced criminal defense counsel who had been lead counsel in nine capital cases. *Provenzano*, 148 F.3d at 1332. Here, trial counsel had been lead counsel in 19 first degree murder cases most of which were capital cases. Trial counsel had practiced for years in the Tallahassee area and was familiar with Tallahassee juries.

Dillbeck's reliance on *Miller v. State*, 750 So. 2d 137, 138 (Fla. 2d DCA 2000), and *Romano v. State*, 562 So.2d 406 (Fla. 4th DCA 1990), is equally misplaced. Both cases merely reverse the trial court's summary denial of a motion for postconviction relief and remand for an evidentiary hearing. Dillbeck has had an evidentiary hearing on this issue. Thus, trial counsel was

not ineffective and the trial court properly denied this claim following an evidentiary hearing.

ISSUE V

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS FOR INTRODUCING MITIGATING EVIDENCE WHICH OPENED THE DOOR TO PRIOR BAD ACTS? (Restated)

Dillbeck asserts his trial counsel was ineffective for discussing during the penalty phase his criminal history which included crimes for which no conviction was ever obtained. The State respectfully disagrees. There is no deficient performance. Collateral counsel fails to acknowledge that, if trial counsel wanted to introduce mental health mitigation, he had to acknowledge the prior bad acts. As trial counsel testified, presenting the mental mitigation opened the door to the prior bad act of the Indiana stabbing. Moreover, if trial counsel want to present model inmate mitigation, he had to acknowledge the incidents in prison. Trial counsel's only alternative was to present no mitigating evidence at all. There was no "clean" mitigation evidence available to trial counsel. Furthermore, trial counsel's anticipatory rebuttal is not deficient performance. The State introduced this evidence to rebut trial counsel's mental mitigation and to rebut the model prisoner mitigation. Once the door is open to evidence, it is perfectly reasonable and a common trial practice for defense counsel to introduce the evidence himself. Nor is there any prejudice. If no mitigation was presented the jury would have been faced with a defendant who they had convicted of stabbing a woman to death who also had a prior conviction for the murder of a law enforcement officer. If trial counsel had presented no mitigating evidence, the jury still would have voted for death.

Indeed, the jury probably would have voted for death more quickly if no mitigation evidence was presented. Nor can there be any prejudice from trial counsel referring to the evidence prior to the State introducing it. It was solely a matter of timing. Either way the jury was going to hear this rebuttal evidence. Therefore, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Penalty Phase[28]

During opening statement of penalty phase, the prosecutor told the jury that Dillbeck had previously pled to first degree murder while discussing under sentence of imprisonment and the prior capital felony aggravators. (T. XIV 2168). During opening statement of penalty phase, trial counsel referred to the stabbing in Indiana. (T. XIV 2171-2172). He explained that Dillbeck was running from authorities due to the stabbing when he shot the deputy. (T. XIV 2172-2173). Trial counsel noted that Dilleck would testify that the murder of the deputy, like the murder in Tallahassee, happened spontaneously. Trial counsel argued that Dillbeck was a good inmate while acknowledging an escape attempt and an inmate stabbing which he suggested was self-defense during his incarceration. (T. XIV 2174). Trial counsel suggested the reason for these senseless acts was Fetal Alcohol Syndrome.

[28] This is not a complete description of all witnesses and testimony presented at penalty phase. Only the evidence relevant to this issue is covered.

The State introduced the testimony of the prosecutor who prosecuted the first degree murder case where Dillbeck had shot the deputy sheriff in 1979. (T. XIV 2186-2206). The State introduced a certified copy of the judgment and sentence. (T. XIV 2188). The State also introduced a transcript of the plea colloquy. (T. XIV 2190-2191). Dillbeck murdered Deputy Sheriff Lynn Hall by shooting him twice, once in the face and once in the back, with the deputy's gun. (T. XIV 2195). The State rested. (T. 2244)

Dillbeck testified three times during penalty phase. (T. XV 2272-2306; 2333-2334). Dillbeck testified that he stabbed a man in the chest in Indiana. Dillbeck broke into a car to steal a CB. Dillbeck testified he stabbed the owner of the car. (T. XV 2275). Dillbeck explained he stabbed the car owner to get away after the owner threatened him. (T. XV 2275). He knew that the police were looking for him. (T. XV 2276). He ran away to Ft. Myers Florida by stealing a car. Dillbeck testified that he killed the deputy after the deputy placed him under arrest for possession of a hash pipe and marijuana. Dillbeck told the jury that when the deputy started searching him against his car, Dillbeck hit him "in his nuts and took off running". When the deputy pursued him and tackled him, Dillbeck took the deputy's gun and shot the deputy twice. (T. XV 2278). Dillbeck testified to being raped while in Sumpter Correctional Institution. (T. XV 2280). Dillbeck also testified that he was given psychological testing by DOC but no medication. (T. XVI 2506-2507). He was given drug counseling.

Dr. Berland, a board certified forensic pathologist, testified for the defense. (T. XV 2336). He administered the MMPI and WAIS IQ tests. (T. XV 2345). Dillbeck's IQ was 98 to 100 which is average. (T. XV 2406). He took a social history from Dillbeck. (T. XV 2378-2379). He testified that Dillbeck had a mild psychotic disturbance. (T. XV 2388). He testified that Dillbeck murdered the victim while "overwhelmed with panic" and that the stabbing was "nearly a reflex kind of reaction." (T. XV 2390). Dr. Berland testified that Dillbeck's "explosive kind of response" was a result of Dillbeck's mental illness. (T. XV 2393). The prosecutor, during cross-examination, raised the Indiana stabbing. (T. XV 2399). The expert admitted that if Dillbeck had to open the knife before stabbing the Indiana victim, it suggested Dillbeck thought about it. (T. XV 2400). Dr. Berland testified that neither statutory mental mitigator applied but that Dillbeck was, definitely and significantly, impaired. (T. XV 2407-2408,2411-2412).

A classification officer at Quincy Vocational testified for the defense. (T. XV 2418). He testified that Dillbeck had two, possibly three, disciplinary reports, which was "very good" and remarkable. (T. XV 2419-2420). On cross, the officer testified that Dillbeck had a felony conviction for an attempted escape while in prison. (T. XV 2420-2421). A sergeant at Quincy Vocational also testified for the defense. (T. XV 2423). He testified the Dillbeck was a good inmate; he never had a problem with him and that Dillbeck would do whatever he was asked to do. (T. XV 2424).

Trial counsel presented Dr. Woods, a neuro-psychologist, who was a professor at Bowman Gray School of Medicine. (T. XV 2429). He was an expert in developmental disorders. (T. XV 2432-2433). He examined Dillbeck and concluded that he suffers from a disorder that resembles schizophrenia referred to as schizotypal personality disorder. (T. XV 2433-2434). He administered half a dozen tests to Dillbeck who scored very poorly. (T. XV 2436,2439,2444). Dillbeck's test results were consistent with a person who suffers from Fetal Alcohol Syndrome but this was not his area of expertise. (T. XV 2446). He does not process effectively interpersonal or social information. (T. XV 2452). Dillbeck is vulnerable to true psychotic episodes. (T. XV 2453). He can completely blow up and become "totally crazy". (T. XV 2453). The two disorders interact making the disorder worse. (T. XV 2453). Dr. Woods referred to a psychological assessment from DOC which said "pretty much the same thing" and which defense counsel introduced. (T. XV 2454). Dr. Wood discussed the instant murder with Dillbeck and Dillbeck's description of the murder, while "almost unspeakably cold", was predictable with a person with this type of disorder. (T. XV 2455-2456). Dr. Woods testified that Dillbeck was under the influence of an extreme mental disturbance. (T. XV 2463-2464). Dr. Woods also testified that Dillbeck's capacity to conform his conduct to the requirements of the law was substantially impaired. (T. XV 2464). Dr. Wood analogized Dillbeck's condition to a car whose brakes don't work. (T. XV 2465). The prosecutor cross-examined the expert about the Indiana stabbing as well. (T. XV 2469-2471).

Dillbeck had described the Indiana stabbing to the expert. (T. XV 2469). Dillbeck lost control and was determined to get out of the situation at any cost. (T. XV 2470).

Trial counsel also presented the testimony of Dr. Thomas, a geneticist, via videotape, who testified regarding Fetal Alcohol Syndrome. (T. XV 2492-2493).

Trial counsel presented the testimony of Lt. Black of the Leon County Jail who testified that there were no formal complaints against Dillbeck while he was incarcerated there. (T. XVI 2500). There would have been such reports if Dillbeck caused discipline problems. (T. XVI 2501). Trial counsel introduced Dillbeck's final report from Sumpter Correctional Institution. (T. XVI 2503-2504). Trial counsel also introduced Dillbeck's progress reports from DOC from 1979 through 1989. (T. XVI 2504). Trial counsel also introduced a disciplinary report dated August 19, 1984. (T. XVI 2504).

Trial counsel presented that testimony of Mr. Zerniak who was a security administrator with DOC. (T. XVI 2511). He generates reports on assaults on officers by inmates and assaults on inmates by other inmates. (T. XVI 2513). Trial counsel introduced a report from 1980-1981 which showed that Sumpter had the second highest assault rate of prisons in Florida. (T. XVI 2513-2514,2519). From 1979 through 1983, Sumpter had the highest inmate upon inmate assault rates in the state. (T. XVI 2518).

Trial counsel presented that testimony of Mr. Welch who was an Administrator with DOC. (T. XVI 2520). He generated progress reports on inmates. (T. XVI 2520). The report on Dillbeck from

December 1979 stated that Dillbeck was “a good influence on other inmates.” (T. XVI 2521). It noted that Dillbeck had a clean disciplinary record. (T. XVI 2521). He explained the numerous minor infractions that would led to a disciplinary report. (T. XVI 2522-2523). One of the progress reports noted the Dillbeck was a good worker and “displayed very good behavior” and a “very good attitude” (T. XVI 2524). Another progress report noted Dillbeck’s good attitude toward his counselor and that he got along well with other inmates. (T. XVI 2525). Another noted that he was “exceptionally well-behaved” with respect for authority. (T. XVI 2526). Another report stated that Dillbeck was an outstanding orderly. (T. XVI 2528). There was a administrative confinement due to an escape attempt in 1982. (T. XVI 2530-2531). Dillbeck was also rated outstanding in his work at the law library. (T. XVI 2532,2533). There was a disciplinary report for a violation of 1.1 on August 19, 1984. (T. XVI 2533). There was a second disciplinary report for a violation of 9.8 on March 18, 1985. (T. XVI 2535). The second DR was for intoxication. (T. XVI 2535). One report noted his one year consecutive sentence for an attempted escape conviction. (T. XVI 2536-2537). Dillbeck’s housekeeping work was also rated outstanding. (T. XVI 2537,2538,2539). The defense rested. (T. XVI 2561).

In rebuttal, the State was going to introduce a videotape deposition of the victim of the Indiana stabbing. (T. XVI 2509). Trial counsel objected admitting that “I suppose that some of it might be admissible” but argued that the nature of the victim’s injuries were not relevant or admissible. (T. XVI 2509). Trial

counsel pointed out that the Indiana stabbing was not an proper aggravator and its only relevance was to Dillbeck's behavior during the murder of the deputy. The trial court overruled the objection. The prosecutor noted that defense counsel had presented mental health experts to testify as to Dillbeck's impulsiveness and lack of control. The prosecutor noted that the experts introduced the Indiana incident and he just wanted to present it fully so the jury could evaluate the experts' testimony. (T. XVI 2510). The prosecutor explained that he was introducing it in rebuttal to "all those hours of psychiatric and psychological testimony we heard yesterday" (T. XVI 2510). The trial court noted that the stabbing was also relevant to the credibility of Dillbeck's testimony. (T. XVI 2510). The trial court ruled the video was in rebuttal to the defense case. (T. XVI 2511). The trial court ruled the videotape testimony of the victim of the Indiana stabbing was admissible. (T. XVI 2511).

Before the State played the videotape testimony of the victim of the Indiana stabbing in its rebuttal case, trial counsel renewed his objection. (T. XVI 2566). Trial counsel admitted that the video was relevant to why Dillbeck shot the deputy and that it rebutted the defense's position that the deputy's murder was a panic action. (T. XVI 2566). Trial counsel noted the State's position was that Dillbeck shot the deputy because he was trying to escape from the incarceration that would result from the Indiana stabbing if the deputy succeeding in arresting him, not as a result of panic. (T. XVI 2566). The prosecutor explained that the defense's mental health experts had based

their opinions on the defendant's version of the stabbing and the jury was entitled to hear the victim's version as well as the defendant's version. (T. XVI 2568). The prosecutor noted that he was going to argue to the jury that the experts' diagnosis were based on incorrect facts regarding the Indiana stabbing provided by Dilleck and therefore, the "diagnosis can't be correct" (T. XVI 2520). The prosecutor also noted that Dillbeck's testimony was that he stabbed the victim in the stomach and but, in fact, Dillbeck stabbed the victim in the heart and therefore, it went to Dillbeck's credibility. (T. XVI 2568). The trial court ruled that the fact of the stabbing was admissible but that the recuperation period was not. (T. XVI 2568-2569).

The videotape of the testimony of the victim of the Indiana stabbing was played for the jury. (T. XVI 2572). Trial counsel was present at the earlier videotaping. (T. XVI 2572). The victim testified that the stabbing occurred in March of 1979. (T. XVI 2574).[29] That night at approximately 9:00 pm, the victim, Mr. Reeder, was at home with his wife and friends. (T. XVI 2574). He went out to get some groceries out of his 1978 Chevy Blazer, and when he opened the truck's door, he noticed Dillbeck was in his truck. (T. XVI 2574). His truck was parked in the driveway in front of the garage door. (T. XVI 2576). He grabbed Dillbeck, who was "just a young boy", by the arm and was going to take Dillbeck into his house to give "him a good talking to". (T. XVI 2576). He saw Dillbeck's right arm coming across into his body

[29] According to the police report, the stabbing occurred on March 30, 1979.

and looked down and there was blood gushing out of his chest. (T. XVI 2580). The victim did not actually see Dillbeck's knife. (T. XVI 2581). The left ventricle of the victim's heart was injured. (T. XVI 2581).

Next, in its rebuttal case, the State called Dr. Harry McClaren, a forensic psychologist. (T. XVI 2582). Dr. McClaren testified about the "suitcase full of documents" he reviewed regarding Dillbeck including the videotape of the Indiana stabbing. (T. XVI 2588,2590). Dr. McClaren testified that he interviewed Dillbeck for approximately 8 hours. (T. XVI 2591). Dr. McClaren administered several tests including the WAIS IQ test, the MMPI and the Bender-Gestalt test. (T. XVI 2591). Dillbeck had an average IQ. (T. XVI 2591-2592). Dr. McClaren testified that he found no evidence of schizophrenia or related syndromes. (T. XVI 2593). Dr. McClaren diagnosed Dillbeck with anti-social personality disorder. (T. XVI 2594). Dr. McClaren explained anti-social personality disorder. (T. XVI 2594-1598). Dr. McClaren testified Dillbeck "absolutely" did not have schizoid personality disorder. (T. XVI 2599). Dr. McClaren testified Dillbeck did not suffer from lack of impulse control based on his lack of difficulties in controlling his behavior while incarcerated. (T. XVI 2600-2601). Dr. McClaren testified, based on his review of Dillbeck's prison records, that if Dillbeck suffered from impulse control there would have been many more disciplinary reports than the two reports there actually were. (T. XVI 2601-2602). Dr. McClaren testified that Dillbeck was engaged in purposeful goal oriented behavior during the

murder of the instant victim including buying a knife and selecting a victim. (T. XVI 2615-2618). Dr. McClaren testified that Dillbeck was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of the law. (T. XVI 2619). On cross, Dr. McClaren admitted that his test result on the schizophrenia scale was even higher than Dr. Berland's result. (T. XVI 2624-2625). Dr. McClaren also admitted that Dillbeck has a degree of brain disfunction. (T. XVI 2626). Dr. McClaren also admitted that there was a suggestion of organisity in the digit symbol test. (T. XVI 2627). The State rested. (T. XVI 2638).

The trial court instructed the jury that although you have heard evidence of other crimes committed by the defendant you may not consider these as aggravating circumstances. (T. XVII 2744).

Evidentiary hearing

Dillbeck testified at the evidentiary hearing that he did not consent to trial counsel admitting evidence relating to other crimes. (EH 4 564). Dillbeck admitted that none of the evidence relating to his past crimes was inaccurate. (EH 4 598). Dillbeck testified that he thought that it was unreasonable for trial counsel to introduce his past criminal conduct first in an attempt at a preemptive strike because that was the State's job. (EH 4 598). Dillbeck opined that the State would not have been able to introduce some of the evidence because it was not admissible. He acknowledged that his prior arrest record was a matter of public record. Dillbeck described his prior criminal

arrests that did not result in convictions (EH 606-609). He noted that trial counsel discussed these arrests in the penalty phase. (EH 606-609).

Trial counsel, Public Defender Randy Murrell, testified that he thought that the crime in Indiana was admissible because it was the motive for the murder of the deputy sheriff which he was going to put in issue. Dillbeck was fleeing from the stabbing in Indiana when he shot the deputy. (EH 4 644). The State had already videotaped the stabbing victim prior to the trial to admit during the penalty phase. (EH 4 644). He thought it was "better for us to own up to it" and address it than to have it come in as a revelation introduced by the State. (EH 4 644-645). He thought this evidence was admissible because he was going to open the door to it by going into the question of why he shot the deputy, which would make the evidence that he was fleeing to Florida from an Indiana crime admissible. (EH 4 648). Trial counsel was attempting to present as mitigating evidence that Dillbeck had a good prison record and had behaved in prison and that he was not threat to others so long as he was in prison which he knew the State would attempt to rebut. (EH 4 645). He explained that by the defense presenting evidence that he was a good inmate, it opened the door to the State presenting prior incidents in prison. (EH 4 848). The State already had Dillbeck's prison records. (EH 4 645). What had happened in prison was "not a secret" (EH 4 645). He wanted to address those things before the State revealed them to undercut his argument that Dillbeck was a good prisoner.(EH 4 645-646). Trial counsel

did not think that he would have admitted this information if he did not think that it was admissible by the State. (EH 4 647). He explained that by introducing mitigating evidence, he had to accept some "not so favorable" rebuttal evidence by the State. (EH 4 648). Trial counsel thought that because his mitigating was going to open the door to this rebuttal evidence by the State, it was better to reveal the damaging rebuttal evidence himself than to have the State do it. (EH 4 648).

Merits

Contrary to collateral counsel's assertion that trial counsel gave no strategic reasons for admitting this evidence, trial counsel gave two reasons at the evidentiary hearing. First, he knew that presenting mental mitigation would open the door to the stabbing in Indiana and presenting the model prisoner mitigation would open the door to the escape attempt and the stabbing in prison. Secondly, as trial counsel testified, he introduced this evidence in anticipatory rebuttal.

There is no deficient performance. If trial counsel wanted to introduce mental health mitigation, he had to acknowledge the prior bad acts. As trial counsel testified, presenting the mental mitigation opened the door to the prior bad act of the stabbing in Indiana.[30] Moreover, if trial counsel wanted to

[30] Trial counsel is correct that his presenting mental mitigation to explain the reason for the shooting of the deputy opened the door to the prior crime even though no conviction was obtained. *Hildwin v. State*, 531 So. 2d 124, 128 (Fla. 1988)(finding the admission of a sexual battery for which no conviction was obtained to be proper where the evidence was not

present model inmate mitigation, he had to acknowledge the escape attempt and the disciplinary reports. The escape attempt and other incidents in prison were admissible to rebut the *Skipper* evidence,[31] regardless of whether any conviction was obtained, because they occurred while Dillbeck was in prison.[32] Trial counsel's only alternative was to present no mitigating evidence

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used to establish an aggravator but rather to rebut mitigation); *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989)(explaining that, while lack of remorse may not be introduced by the State because it amounts to non-statutory aggravator, lack of remorse may be presented by the State to rebut mitigating evidence of remorse and finding no error where defense counsel opened the door to the remorse evidence); *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989)(finding evidence of drug activity to be admissible even though there was no conviction obtained as rebuttal to defense mitigation of no significant history of prior criminal activity citing *Washington v. State*, 362 So. 2d 658 (Fla. 1978)); *Booker v. State*, 397 So. 2d 910 (Fla. 1981)(observing that when the defendant elects to testify during penalty phase, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity); Cf. *Robinson v. State*, 707 So. 2d 688, 696-697 & n.11 (Fla. 1998)(rejecting an ineffectiveness claim for not presenting mitigating evidence based on the observation that presenting the mitigating evidence would have opened the door to the State presenting an armed robbery and rape for which no conviction was obtained).

[31] *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

[32] *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991)(noting that where the defense presented evidence that the defendant would be a good prisoner, "it is clear that the State could introduce rebuttal evidence of specific prior acts of prison misconduct and violence" and holding it was proper for the State to cross-examine witnesses, who testified regarding his prison behavior, about specific incidents in prison for which he had not been convicted); *Valle v. State*, 705 So. 2d 1331, 1334 (Fla. 1997)(observing that the defense's introduction of *Skipper* evidence opened the door for the State to present evidence of an escape attempt during his incarceration).

at all. There was no “clean” mitigation evidence available to trial counsel. The best trial counsel could do was to mitigate the State’s rebuttal evidence which he did.

Trial counsel, quite understandably, wanted to explain this murder and the prior capital felony aggravator in an attempt to mitigate this murder and dilute the aggravator by presenting expert mental health testimony that Dillbeck was damaged goods from birth due to Fetal Alcohol Syndrome. Trial counsel presented expert mental health testimony to establish that Dillbeck kills out of impulsiveness due to his brain damage which was a result of Fetal Alcohol Syndrome. Trial counsel used this theory to explain not only the instant murder but the shooting of the deputy which was introduced by the State as an aggravator. Once trial counsel presented this theory, the State was entitled to rebut this theory with its theory that Dillbeck kills in an effort to escape and its own expert who diagnosed Dillbeck with anti-social personality disorder. The State’s theory was that, just as the instant murder resulted from Dillbeck’s desire to escape from prison, the murder of the deputy resulted from Dillbeck’s desire to escape prosecution for the Indiana stabbing. The State’s view was that Dillbeck’s motive for both murders was his freedom, not any mental illness. Moreover, the experts based their opinions on records which included the Indiana stabbing. Counsel is not ineffective for presenting testimony that opens the door to rebuttal evidence, if experienced counsel makes that tactical decision after considering all of the evidence against his client and after considering all the other alternatives.

Shere v. State, 742 So. 2d 215, 220-221 (Fla. 1999)(rejecting an ineffectiveness claim for presenting evidence which experienced counsel recognized as a double-edged sword because the only alternative to mounting some kind of defense was to rest and the evidence as it stood portrayed the defendant as a cold and ruthless killer).

Furthermore, trial counsel's anticipatory rebuttal is not deficient performance. First, trial counsel did not introduce the Indiana stabbing, the escape conviction or the prison stabbing; the prosecutor did. While trial counsel referred to these matters in opening of penalty phase, the prosecutor actually introduced this evidence in rebuttal. The State introduced this evidence to rebut trial counsel's mental mitigation and to rebut the model prisoner mitigation. Once the door is open to the evidence, it is perfectly reasonable, and a quite common trial strategy, for defense counsel to refer to the evidence himself first. Anticipatory rebuttal is a common defense tactic. Indeed, it is so common that the practice has a name. Common practices cannot, by definition, be deficient performance. *Cf. State v. Early*, 853 P.2d 964, 969 (Wash App. Ct. 1993) (noting that use of investigators to interview witnesses and victims is common practice and does not suggest counsel's performance fell below an objective standard of reasonableness).

Nor is there any prejudice. If no mitigation was presented the jury would have been faced with a defendant who they had convicted of stabbing a woman to death who also had a prior conviction for the murder of a law enforcement officer. If trial

counsel had presented no mitigating evidence, the jury still would have voted for death. Indeed, the jury probably would have voted for death more quickly if no mitigation evidence was presented. The jury did not use the crimes for which no conviction was obtained as aggravation. They were specifically instructed not to so do. *Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991)(rejecting a claim that the possibility of parole was used as a aggravator because the State was not trying to establish the possibility of parole as an aggravating factor, but was rebutting the defense's assertion of a mitigating factor and the judge instructed the jury that it should not consider eligibility for parole when recommending a sentence).

Furthermore, there is no prejudice from trial counsel beating the State to the punch by referring to the rebuttal evidence first. Either way, the jury was going to hear this evidence. There can be no prejudice from defense counsel referring to evidence first that the State definitely was going to introduce later. Trial counsel knew that the State was planning on introducing the victim of the Indiana stabbing via videotape because he attended the videotaping. Thus, the trial court properly denied this claim following an evidentiary hearing.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to George W. Blow, III Esq., 106 White Avenue, Suite C, Live Oak, Tallahassee, FL 32064 this 24th day of September, 2003.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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