SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,
Appellant,

-vs- CASE NO.: SC02-2044

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

LEON COUNTY

INITIAL BRIEF OF APPELLANT

GEORGE W. BLOW III
Florida Bar Number 320501
106 White Avenue, Suite C
Live Oak, Florida 32064

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Constitutions:

PRELIMINARY STATEMENT

Appellant was the petitioner in the court below. In this brief he is cited as the Appellant. The appellee, State of Florida, is cited as the State.

The record on appeal consists of a five volume record relating to the post conviction proceedings at issue, including the transcript of the evidentiary hearing. This portion of the record is cited as by reference to volume number and page number. Thus (R4-99) refers to volume 4 page 99 of the record of post conviction proceedings. All pages are machine number stamped at the bottom of the page.

In addition to the post conviction record, the court has been provided with seventeen volumes of transcripts from appellant's original trial. This portion of the record is prefaced by the letter 'T' followed by the page number. Thus (T.3191) refers to page 3191 of the trial transcript. Page number are those assigned by the court reporter in the original transcript and appear in the upper right hand corner of the page.

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings

Appellant was tried and convicted in the lower court of the offenses of first-degree murder, armed robbery and armed burglary. Defendant was convicted and sentenced to death on the first-degree murder charge and consecutive life sentences on the armed robbery and armed burglary charges. The Defendant timely perfected an appeal from the judgments and sentences directly to the Florida Supreme Court.

This court affirmed the convictions and sentences by its order entered on April 21, 1994. This order was revised on motion for re-hearing denied on August 18, 1994. Thereafter, a petition for writ of certiorari was filed in the United States Supreme Court, and was subsequently denied on March 20, 1995. *Dillbeck v. State*, 643 So.2d 1027 (Fla. 1994), *cert. denied*, 115 S.Ct. 1371 (1995)

On April 23, 1997, the Defendant filed his initial motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P. (R1-27-62) The motion was subsequently amended (R3-485-531) and an evidentiary hearing on the amended motion for post-conviction relief was held on April 1, 2002. (R4-554-673) On September 3, 2002, the Honorable F.E. Steinmeyer III, entered an order denying

the amended motion to vacate judgment of conviction and sentence. (R4-753-754) The court recited that the motion was "without grounds for relief and that there would be no benefit from further recitation of the facts or argument by [the] court." A timely notice of appeal was filed on September 16, 2002. (R5-758-760)

II. Statement of Facts

Appellant sought post-conviction relief from his convictions for first-degree murder, armed robbery and armed burglary. The principal basis asserted for relief was the ineffectiveness of trial counsel.

Appellant's amended motion enunciated eight allegations in support of a new trial, to-wit:

Claims 1 and 2: Defense counsel's concession of guilt without an express waiver by the Defendant;

Claim 3: Requiring Defendant to wear a physical restraint in the presence of the jury;

Claim 4: Defense counsel's concession of an aggravating factor during the penalty phase;

Claim 5: Trial counsel's failure to conduct a proper voir dire;

Claim 6: Trial counsel's failure to move for change of venue;

Claim 7: Trial counsel's failure to request a PET scan to establish a statutory

mitigating factor;

Claim 8: Trial counsel's introduction of Defendant's previous crimes to the jury during penalty phase.

Defendant's motion sought a new trial.

The trial court afforded the Defendant an evidentiary hearing on all claims submitted. After the evidentiary hearing and permitting counsel to file written memoranda, the court denied all relief.

Although Rule 3.851(f)(5)(D), Fla.R.Crim.P., requires the trial court to enter an order "ruling on each claim considered at the evidentiary hearing...making detailed findings of fact and conclusions of law with respect to each claim..." the trial court's order merely denied the motion with the terse observation that the amended motion "is without grounds for relief and that there would be no benefit from a further recitation of the facts or argument by this court."[1]

[1]Judge Steinmeyer retired shortly thereafter.

SUMMARY OF THE ARGUMENT

The court erred in finding that Appellant's trial counsel did not render ineffective assistance of counsel based any and/or all of the claims put forward in the Defendant's motion. Trial counsel was ineffective in admitting both defendant's guilt as to capital murder and the existence of an aggravating sentencing factor. Likewise, trial counsel was deficient in failing to even attempt to excuse biased jurors and not seeking a change of venue.

ARGUMENT AND CITATIONS OF AUTHORITY

I.

DEFENSE COUNSEL'S CONCESSION OF GUILT WITHOUT AN EXPRESS WAIVER BY THE APPELLANT ON THE RECORD CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL PER SE.

The United States Supreme Court has recognized that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The *Strickland* analysis requires a defendant raising a claim of ineffective assistance of counsel to present findings to meet two elements: the defendant must first show that the attorney's performance was deficient and then show that the deficient performance was prejudicial to the defendant. *Id.* at 687.

Courts have recognized that in order to render reasonably effective assistance, an attorney must present "an intelligent and knowledgeable defense" on behalf of the client. *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970). Counsel have been found ineffective for failing to impeach key state witnesses with available evidence; for failing to raise objections, to move to strike or to seek limiting instructions regarding inadmissable prejudicial testimony. *Vela v. Estelle*, 708 F.2d 954, 961-66 (5th Cir. 1983) *cert. denied*, 456 U.S. 949 (1982) (Counsel ineffective for failing to prevent

introduction of evidence of other unrelated crimes); *Pinnel v. Cauthron*, 540 F.2d 938 (8th Cir. 1976) (Counsel ineffective for taking actions which resulted in the introduction of evidence of other unrelated crimes committed by the defendant).

One of the primary guarantees of the right to be represented by counsel at trial is to ensure that defense counsel does not abandon his or her client. Representation of the client is a defense attorney's most important function; even though counsel is an officer and representative of the court, he serves only the defendant and must protect the interests of the defendant in their entirety. *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J. dissenting). At trial, defense counsel must do his utmost to make the prosecution prove its case. *United States v. Cronic*, 466 U.S. 648, 657n.19 (1984). In fact, even when the prosecution's case seems infallible and "even when the theory of defense is unavailable, if the decision to stand trial has been made, counsel must hold the prosecutor to its heavy burden of proof beyond a reasonable doubt." *Id.*

If counsel provides effective assistance at trial in some areas, a defendant is entitled to relief if counsel renders ineffective assistance in other portions of trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, *re-hearing denied*, 662 F.2d 1116 (5th Cir. 1981) *cert. denied*, 456 U.S. 949 (1982); *see also*, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Under certain circumstances even a single error by counsel may

warrant relief where the error is of constitutional dimension. *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979).

Appellant's counsel unequivocally conceded his client's guilt to capital murder at the outset of the guilt phase of the trial. (T.1640). Appellant's trial counsel stated numerous times that Appellant had committed the crime which defense counsel described as a "terrible, brutal crime." (T.1646). During jury selection, opening statement and closing statement trial counsel repeatedly conceded Appellant's guilt to the jury. By conceding guilt without his client's express consent, counsel entered the functional equivalent of a guilty plea without the safeguards required by *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 348 U.S. 1 (1966), and, thus, deprived the Appellant of his right to effective assistance of counsel as required by the Sixth and Fourteenth Amendments to the United States Constitution. *Cronic*, 466 U.S. at 656.

Under *Cronic* an ineffective assistance of counsel claim may arise whenever a criminal trial loses its adversarial nature. "When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if this process loses its character as a confrontation between the adversaries, the constitutional guarantee is violated." *Id*. at 656-57 (footnotes omitted). Moreover, "if counsel

entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. The United States Supreme Court also noted the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Id.* at 656 *quoting Anders v. California,* 386 U.S. 738, 743 (1967).

However, unlike a *Strickland* claim for ineffective assistance of counsel, prejudice is not an element of a *Cronic* claim. " There are...circumstances so likely to prejudice the accused that costs of litigating their effect in a particular case is unjustified." *Id.* at 658. Thus, when a court finds that an attorney's performance is so deficient so as to meet the *Cronic* standard, this is held to be per se ineffective assistance of counsel, and the defendant is entitled to relief without any showing of prejudice.

A plea of guilty is a decision reserved solely for a defendant. Trial court's must determine on the record that a factual basis exists supporting a defendant's concession of guilt. *Boykin v. Alabama,* 395 U.S. 238, 244 (1969). A defendant must be made well aware of the ramifications, punishments and constitutional rights waived as a result of conceding guilt. *Id.* at 243-44. The record must clearly state that defendant intentionally relinquished these constitutional rights. *Brookhart v. Janis,* 348 U.S. 1,

4 (1966). Trial court's should question a defendant in "an attempt to satisfy itself that a defendant understands the nature of the charges, ...the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences." *Id*. at 244, n.7(*quoting*, *Commonwealth ex.rel West v. Rundle*, 428 PA 102, 105-6, 237 A.2d 197-8 (PA 1968); *Koenig v. State*, 597 So.2d 256, 258 (Fla. 1992) ("the record must demonstrate "an affirmative showing that the plea was intelligent and voluntary").

Boykin discussed the acceptability and voluntariness of plea bargaining. It did not address what the procedure is when a defense counsel admits a defendant's guilt to a jury. However, the United States Supreme Court has addressed these issues and focused on what occurs when a defendant waives his constitutional right to trial. When "the record does not disclose that the defendant voluntarily and understandingly entered his plea of guilty," reversible error occurs. *Boykin*, 395 U.S. at 244 (*quoting*, *Boykin v. State*, 281 Alabama 659, 653, 207 So.2d 412, 415 (1968)(dissenting opinion in state court where three Alabama Supreme Court Justices questioned the constitutionality of the accepted plea); *Pleas v. State*, 691 So.2d 1143 (Fla. 1st D.C.A. 1997); *See also*, *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995) (holding that "because the record...is unclear as to whether [the appellant] was informed of the strategy to concede guilt...[and argue for lesser included offense], "an evidentiary hearing was required on the issue."

Just as when a defendant tenders a plea of guilty to the court and undergoes a searching colloquy to determine the acceptability and voluntariness of that plea, a similar procedure is necessary where defense counsel is admitting defendant's guilt to a jury. Even if defense counsel makes representations to the court that a defendant is aware that counsel will concede guilt, the trial counsel still must obtain an on the record approval from a defendant. Further, "if a trial judge ever suspects that [defense counsel is confessing guilt to the jury], the judge should stop the proceedings and question the defendant on the record as to whether he or she consents to counsel's strategy." *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000).

Decisional law in this state, as well as other jurisdictions, is clear in holding that a trial court must make factual findings on the record to support a defendant's understanding of defense counsel's strategy and his or her consent to that strategy. *Nixon v. State*, 572 So.2d 1336, 1339 (1990) *citing People v. Hattery*, 488 NE 2d 513 (Ill. 1985), *cert. denied*, 476 U.S. 1123, (1986). Furthermore, even though counsel may hypothesize that admitting guilt is proper, the trial court must ensure that a defendant "unequivocally understands the consequences of the admission" because an attorney may not stipulate to facts which amount to the "functional equivalent of a guilty plea without the defendant's consent." *Taylor v. State*, 695 So.2d 1293, 1295 (Fla. 4th D.C.A. 1997). The United States Circuit Court of Appeal, Sixth Circuit, also

dealt with this issue stating:

> Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, however, an attorney may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. (citations omitted).
>
> ...in those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with *Boykin*, supra. *Wiley v. Sowders*, 647 F.2d 642, 649-50 (6th Cir. 1981), *cert. denied*, 454 U.S. 1091 (1981).

The record needs to reflect that the defendant has "on the record" affirmatively consented to the defense strategy. *Lobosco v. Thomas*, 928 F.2d 1054, 1057 (11th Cir. 1991).

In the instant case, no statements were elicited from the Appellant regarding his understanding nor his consent to his attorney's admission of guilt. On the second day of jury selection, the State requested the trial court establish from the Appellant whether he consented to defense counsel's strategy, because the defense was conceding guilt and informing potential jurors that the Appellant's acts were brutal. (T. 325-326). The defense attorney explained that the Appellant was aware of the strategy, but the record is devoid of any reference to whether the Appellant consented to the strategy. (T. 329). The court noted the Appellant's presence at the earlier voir

dire proceeding, and his failure to object to his attorney's questions. The court also stated "it is inconceivable to me that Mr. Murrell could be accused of being ineffective counsel." (T. 331). The State noted that defense counsel's admission of guilt was the functional equivalent of a guilty plea and some sort of colloquy should have occurred to ensure that the Appellant was aware of and consented to the strategy. However, the trial court declined to conduct such a colloquy.

When the trial commenced, Appellant's counsel told the jury, during opening statements, that his client had killed the alleged victim. Counsel further advised the jury that the only issue during the guilt phase of the trial was whether the Appellant had committed first-degree premeditated murder or felony murder. (T. 1640). Immediately thereafter, ***at a bench conference***, the Assistant State Attorney opined to the trial court that the judge should enquire as to whether the Appellant consented to counsel's admission of guilt. (T. 1647). While Appellant's trial attorney stated "I have discussed all of this with my client,", he never explained what he had told the appellant nor that the Appellant had knowingly consented to counsel's strategy. (T. 1648). The trial judge responded that the defense attorney was good and ethical and the strategy was sound given the facts of the case. (T. 1648-1652). All of this discussion took place at a bench conference outside the presence of the defendant. (T.1647).

Once again, the trial court never asked the Appellant any questions and relied

upon defense counsel's representations that he had discussed trial strategy with his client. The trial court, in so doing, ignored the law when it failed to conduct the colloquy, similar to a plea colloquy, that questioned the Appellant's understanding of defense counsel's strategy and his overt approval of the strategy. *See*, *Taylor*, 695 So.2d at 1295. No factual findings were made and the Appellant was never asked, on the record, whether he consented to this strategy. *See*, *Nixon*, 572 So.2d at 1239. Given the possible ramifications of a guilty verdict, the trial court needed to ensure that the Appellant was aware of what was occurring, understood the potential consequences of what was taking place, and knowingly consented to that strategy.

Were the Appellant before the trial court for entry of a plea to the most insignificant of crimes, the trial judge would have been required to establish that Appellant understood that he was waiving his right to a trial, waiving his right to confront witnesses against him and accepting any lawful sentence that could be imposed upon him. *See*, *Thornton v. State*, 747 So.2d 439, 441 (Fla. 4th D.C.A. 1999). Although during a plea colloquy the defendant's counsel stands at his side, the trial court must nonetheless engage in a dialogue with the defendant directly and not simply with counsel. It is necessary for the trial court to determine that the plea is being entered knowingly and voluntarily by the defendant.

In the case at bar, the trial court was aware that defense counsel was telling the

jury that the Appellant was guilty of a brutal murder, as well as an armed robbery and armed burglary. The trial court found that because Appellant was represented by an attorney that the court deemed to be a good and ethical attorney, it was not necessary to conduct a colloquy directly with the Appellant. Defense counsel's admission of guilt was tantamount to entering a plea of guilty to an offense carrying a potential death penalty, and yet, there was less enquiry of the Appellant regarding his understanding of that tacit plea than would have been required of any other defendant entering a plea to a misdemeanor offense.

In the instant case, Appellant sat silently, while the trial court and the defense attorney discussed Appellant's understanding of what counsel was doing. The first discussion, during voir dire, was in the defendant's presence. However, the second was at a bench conference, outside the presence of the defendant. As defense counsel confessed his client's guilt to virtually every member of the venire during voir dire, and as defense counsel again conceded the Appellant's guilt during opening statement and closing argument, the trial court had an obligation to conduct such an enquiry, because counsel's actions were tantamount to a guilty plea. Due process requires an on the record enquiry directly of the defendant. *See, Boykin; see also, Faretta v. California*, 422 U.S. 806 (1975). Without the trial court's colloquy, there is no evidence that the Appellant knowingly consented to this strategy. Therefore, the

Appellant is entitled to post-conviction relief. *See, Boykin, supra*.

Appellant testified that his court-appointed attorney had not informed him prior to trial that he would tell each juror "you will find my client guilty,...and that this crime was committed in a particularly brutal manner." (R4-560). At no time did Appellant authorize counsel to concede guilt during either voir dire, opening statements or closing arguments. (R4-562). Appellant never agreed to the strategy of conceding guilt. (R4-562). When the issue was discussed in the defendant's presence (during voir dire), Appellant stood mute. Appellant did so for three reasons. First, he had never been to trial before and he did not know if defense counsel was acting appropriately. (R4-588). Second, he was following the example set by his own attorney of refusing to divulge attorney-client conversations to the court. (R4-327-333). Finally, he believed his attorney to be in control of the matter. (R4-572, 585).

At no time did the trial court in this cause conduct the enquiry required by *Nixon*. The record at trial is devoid of any testimony from the Appellant relating to his acceptance of the strategy being employed by his trial attorney. Defense counsel entered the functional equivalent of a guilty plea on behalf of the Appellant without Appellant's consent and without the court conducting any on the record colloquy as required by *Boykin* or *Nixon*. Appellant never explicitly agreed to the concession of guilt. While the Appellant remained silent when perhaps he should have spoken up,

silent acquiescence is not enough. There must be an "affirmative, explicit acceptance" by the defendant, consistent with the requirements outlined in *Boykin*, *supra*, and *Nixon*, *supra*. There was none. Under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice must be presumed and Mr. Dillbeck should be granted a new trial.

II.

THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S CONCESSION OF AN AGGRAVATING FACTOR.

If the State seeks the death penalty in a capital case, there are statutory aggravators that the State must prove to warrant imposition of the death penalty. One of those aggravators is the heinous, atrocious and cruel factor (hereinafter "HAC"). The HAC aggravator is the commission of a capital crime that is unnecessarily torturous to the victim or pitiless. *Douglas v. State*, 575 So.2d 165 (Fla. 1991); *McGill v. State*, 428 So.2d 649 (Fla. 1983). This aggravator requires proof beyond a reasonable doubt of extreme and outrageous depravity. *Wickham v. State*, 593 So.2d 191 (Fla. 1991), *cert. denied*, 112 S.Ct. 303. During the penalty phase the State can only introduce evidence that seeks to prove a statutory aggravator or rebuts a mitigator the defense offers. *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986).

When a murder involves repeated blows or stabbing, the State has the burden of proving beyond a reasonable doubt that the victim received repeated stab wounds, that the victim died of a particular stab wound and that the victim had defensive wounds. *Halburton v. State*, 561 So.2d 248, 252 (Fla. 1990); *Derrick v. State*, 641

So.2d 378, 381 (Fla. 1994). The jury resolves the question of whether HAC is applicable to a particular death case. *Hansboro v. State*, 509 So.2d 1081, 1086 (Fla. 1987). In cases of repeated stabbing, the HAC factor may be found. *Nibert v. State*, 508 So.2d 1, 4 (Fla. 1987); *Johnston v. State*, 497 So.2d 863, 871 (Fla. 1986). Nevertheless, the State must prove HAC beyond a reasonable doubt to use it is a statutory aggravator. *Hamilton v. State*, 547 So.2d 630 (Fla. 1989); *King v. State*, 514 So.2d 354 (Fla. 1987). If the State fails to offer any evidence that the crime was HAC, the factor cannot be used as an aggravator during the penalty phase. *Hamilton*, 547 So.2d at 633-4. The entire trial process must remain an adversarial process. *U.S. v. Cronic*, 466 U.S. 648, 656 (1984). If counsel fails to challenge the State's case, for any reason, ineffective assistance of counsel occurs. *Strickland v. Washington*, 466 U.S. 668 (1984). Even if counsel provides effective assistance of counsel at trial in some areas of that trial, a defendant is entitled to relief if counsel renders ineffective assistance in other portions of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981); *see also*, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). If the error is of constitutional dimension, a single error may warrant relief. *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard.") The Sixth Amendment provides that all defendants are afforded the right to counsel

to aid in their defense. When trial counsel fails to aid in the defense of his client, and a victory is conceded, counsel has been ineffective in representing the client. *Strickland v. Washington*, 466 U.S. 668 (1984). In the instant case, trial counsel told each juror during voir dire, opening statement and closing statement, that they would find that the Appellant did commit first-degree murder and that it was a particularly brutal killing (T.1646). In effect, defense counsel conceded not only that the Appellant had committed the crime, but that the Appellant had committed the crime in a brutal manner. In essence, trial counsel conceded the HAC aggravator for the penalty phase. Trial counsel did so without having obtained the express consent of Mr. Dillbeck as required by *Nixon*.

The State attempted to ensure that the Appellant received the death penalty for his crime. At the penalty phase, the State's burden of proof was to show that the statutory aggravators exceeded the statutory and non-statutory mitigators. The State needed to prove beyond a reasonable doubt each aggravator the State sought to submit. When defense counsel conceded the HAC aggravator, the State's burden was vitiated. Defense counsel officially abandoned his role as an advocate. *See*, *Cronic*, 466 U.S. 648. Undoubtedly, defense counsel's actions prejudiced the Appellant. To prove prejudice the Appellant must show that there is a reasonable possibility, but for counsel's errors, the result of the proceedings would have been different. *Strickland*,

466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.* Had counsel performed effectively, there is a reasonable probability that the penalty outcome would have been different, that is, that Mr. Dillbeck would have received a recommendation of a life sentence because one of the aggravators may not have been present. *See, Strickland*.

Trial counsel's concession of the aggravator was so likely to prejudice the Appellant that prejudice must be presumed. However, if prejudice needs to be demonstrated, prejudice was conclusive before trial ever began. Defense counsel conceded the State's entire case before jury selection was completed, or a single witness was called, or a single piece of evidence was admitted. Trial counsel's concession of brutality defied effective assistance of counsel, and conveyed to the jury that the HAC aggravator was a foregone conclusion. Trial counsel not only helped the jury decide to find the Appellant guilty, he also helped the jury decide to sentence the Appellant to death. In so doing, defense counsel wholly abandoned his role as counsel and advocate. See, *Cronic and Nixon v. Singletary*. Therefore, the Appellant's request for a new trial should have been granted.

III.

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO CONDUCT A PROPER VOIR DIRE.

Under the United States and Florida Constitutions every defendant has the right to effective assistance of counsel and a trial by an impartial and indifferent jury. U.S. Const. amend. VI & XIV. *See, Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985). The *Strickland* case states, "the proper standard for judging attorney performance is that of reasonably effective assistance considering all of the circumstances." A defendant who did not receive effective assistance of counsel has a claim when: (1) defense counsel's performance is deficient under reasonable professional standards, and (2) the defendant suffered prejudice as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 688-9 (1984). Conduct is viewed in light of counsel's perspective of the circumstances at the time, not in hindsight. *Id., see Martinez. v. State*, 655 So.2d 166, 168 (Fla. 3rd D.C.A. 1995)

Appellant acknowledges that some claims of ineffective assistance of counsel involve trial strategy, and courts will not second-guess defense counsel's trial strategy,

unless it was unreasonable. In *Provenzano v. Singletary*, 3 F.Supp.2d 1353, 1362 (MD Fla. 1997), the court found counsel's strategy was reasonable, and the defendant received adequate representation at trial. The court based its decision, in part, on the trial court and defense counsel having questioned potential jurors extensively about any biases that may have resulted from pre-trial publicity, and the potential jurors who exhibited biases were challenged for cause. *Id.* Consequently, Provenzano was unable to demonstrate he suffered any prejudice as a result of voir dire, so the court denied his claim for ineffective assistance of counsel. *Id.* However, had defense counsel failed to challenge jurors exhibiting prejudices against Provenzano, the court may have held differently. Unlike *Provenzano*, Appellant's defense counsel did not request to excuse jurors who exhibited bias.

The United States Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) held that certain "structural defects in the constitution of the trial mechanism" are not subject to harmless error analysis. The principles of *Fulminante*, a direct appeal, were applied to post-conviction relief in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In such cases, the second prong of *Strickland* need not be satisfied. Prejudice is presumed. *Williams v. Taylor*, 529 U.S. 362 (2000). The Sixth Circuit has concluded that allowing a biased juror to sit is a structural defect which does not require a showing of prejudice under *Strickland*. *Hughes v. U.S.*, ___ F.3d ___,

2001 WL 761343 (6th Cir., Jul. 9, 2001). *See also, Quintero v. Bell*, ___ F.3d ___, 2001 WL 726271 (6th Cir., Jun. 29, 2001). In the instant case, Appellant's trial counsel's errors were far more egregious.

The first of defense counsel's many deficiencies in conducting voir dire was the failure to challenge Melinda Whitley, ultimately Juror #2. During voir dire, Ms. Whitley responded that she had been at the very scene of the murder not more than one or two hours before it took place. (T. 197-198) (R4-633, 657-658). Ms. Whitley stated she felt nervous and fearful as a result of being at the Gayfer's department store so close to when the attack took place. (T. 198, 210)(R4-633, 657-658). It is quite reasonable for anyone in Ms. Whitley's position to have been fearful and feel that they could have been the victim. Ms. Whitley also stated that she felt officials were negligent in allowing the Appellant to escape from prison in the first place. (T. 199). Ms. Whitley stated she believed, "he [the Appellant] obviously had no right to be out where he could so easily hurt someone." (T. 199). Ms. Whitley had already made up her mind that the Appellant should at the very least be behind bars for eternity. Despite this, defense counsel failed to challenge Ms. Whitley for cause. (T. 213). Based on Ms. Whitley's candid statements during voir dire, defense counsel clearly should have challenged her for cause. Defense counsel's failure to challenge Ms. Whitley allowed her prejudiced views to go into the jury room and affect the verdict, thereby

prejudicing the Appellant.

Defense counsel also failed to challenge Cynthia Krell, Juror #4. Ms. Krell had read newspaper stories about the stabbing. (T. 394). Ms. Krell related she had knowledge an escaped prisoner stabbed a woman to death in an attempt to steal her car. (T. 394). While knowledge alone is not enough to exclude a juror, Ms. Krell also made statements evidencing bias. Ms. Krell stated she could not vote for a life sentence, even if mitigating circumstances outweighed the aggravating circumstances, because the crime was "very disturbing". (T. 406) (R4-659). Ms. Krell, clearly, could not be impartial. Defense counsel should have challenged Ms. Krell for cause, based upon her equivocal statements. Allowing Ms. Krell to remain on the jury was another instance of ineffective assistance of counsel.

The majority of the potential jurors knew about the case from the media, and many believed the Appellant was guilty, including: Horacine Lawrence, Joan Phillips, Roseanne Fletcher, Cynthia Luten, Nancy Marcus, Larry Davis (ultimately Juror #5), Dr. Barnett Harrison, Douglas Stewart, Michael Murphy, Lonnie Ash, Cynthia Ann Porter (ultimately Juror #8), Robert Ussery (ultimately juror #10), Mytrice Jordan, Constance Kundrat and several other jurors. (T. 5, 80, 132, 266-7, 273, 379, 429, 493, 571, 653-654, 705, 742, 874, 905-6, 925, 1023-1024). Defense counsel's performance was deficient in allowing a tainted jury to be empaneled. Another juror, Jason Zippay,

also knew details of the case. (T. 799). Mr. Zippay had already made up his mind about the case, and stated "assuming everything I read in the newspaper was true, I am sure that he is guilty.". (T. 799)(R4-660-661). Defense counsel was ineffective in failing to challenge Mr. Zippay, because he stated that based on the facts of the case appearing in the newspaper, he was sure the Appellant was guilty. Nothing reflects that defense counsel's failure to challenge for cause Mr. Zippay and the other jurors was a part of any trial strategy.

Juror #11, John Marshall, knew the Appellant was a prison escapee who had previously committed a murder. (T. 969). Even though Mr. Marshall exhibited animosity toward the Appellant, defense counsel also failed to challenge him for cause. (T. 981, R4-637).

Ruth Tadlock, ultimately, an alternate juror, was yet another venire person that defense counsel did not challenge. Ms. Tadlock was equivocal in her belief that she believed the Appellant to be guilty, based on the publicity surrounding the trial. Ms. Tadlock stated that she was unsure if she could put her previous knowledge aside and base her verdict solely on the evidence presented at trial. (R4-638). While courts, at their discretion, sometimes give credit to potential jurors assurances that they will decide the case based on the evidence presented at trial, Ms. Tadlock stated she could not make such an assurance. Clearly, defense counsel should have challenged Ms.

Tadlock for cause, because she was not only prejudiced against the Appellant, she stated it was very likely her prejudice would affect the trial's outcome. One biased juror can alter the outcome of a trial, and defense counsel's deficiency in conducting a proper voir dire allowed a number of biased jurors to remain on the panel. Defense counsel clearly rendered ineffective assistance of counsel in repeatedly failing to challenge jurors for cause. Defense counsel also did not challenge Michelle Holocomb, an employee of Gayfer's department store. Ms. Holocomb was working at the Gayfer's store on the very day of the murder, yet Ms. Holocomb stated she knew nothing about this highly publicized murder. It is hard to believe someone working at a store on the very day a sensational crime occurs could know nothing about it given the extensive news coverage. Any reasonable person would doubt Ms. Holocomb's credibility. Despite this, defense counsel did not challenge Ms. Holocomb. (R4-639).

In *Monson v. State*, 750 So.2d 722, 723 (Fla. 1st D.C.A. 2000), defense counsel was also found to be ineffective for failing to properly conduct voir dire. In *Monson*, defense counsel did not challenge for cause jurors biased by their ties to or knowledge of law enforcement. *Id.* The court found Monson's claims facially sufficient and ordered an evidentiary hearing, or, in the alternative, for the trial court to attach to its order portions of the record conclusively refuting his claims. *Id.* Whether the bias by

ties to a certain group of people, prior knowledge from the media or personal opinions regarding the case, defense counsel should challenge each juror who exhibits a prejudice. *See, e.g. Robinson v. State*, 659 So.2d 444, 445-446 (Fla. 2nd D.C.A. 1995) (claim prospective white juror's comments allegedly taint a jury pool found facially sufficient.). All partial jurors must be challenged for cause. *See, Smith v. State*, 699 So.2d 629, 636 (Fla. 1997). Failure to challenge partial or prejudiced jurors is ineffective assistance of counsel.

Similarly, in *Gordon v. State*, 469 So.2d 795, 797 (Fla. 4th D.C.A. 1985), Gordon also alleged his defense counsel was ineffective in numerous instances, including failing to challenge biased jurors. Like the instant case, Gordon's defense counsel allowed a juror to remain on the jury who had prior knowledge and admitted she had prejudice against the defendant. The court found the Appellant showed defense counsel's deficient performance reasonably could have altered the outcome of the trial. *Id.* at 798. *See, also Strickland*, 466 U.S. at 2068-2069. The court set aside the verdict and remanded the case for a new trial. *Gordon*, 469 So.2d at 798.

In the instant case, Appellant's defense counsel failed to properly conduct voir dire. As a result of defense counsel's ineffectiveness in conducting voir dire, the Appellant suffered prejudice affecting the trial's outcome. Defense counsel repeatedly failed to challenge jurors who had prior knowledge and/or biased views of the case.

Defense counsel allowed jurors with prior knowledge to remain on the jury, therefore, tainting the jury and the entire verdict that they reached. Defense counsel had no reason to conserve challenges for the most biased jurors, because the trial court allowed the defense's challenges and awarded more preemptory challenges when needed. In fact, the Court announced he would grant a challenge for cause people who knew the Appellant had been in jail for murder. (R4-638). Still, defense counsel kept these individuals on the jury. Further, and most telling, defense counsel failed to challenge jurors for cause who flat out stated they had prejudiced views of the case. Similar to *Monson* and *Gordon*, defense counsel repeatedly allowed biased and partial jurors to remain on the jury. Moreover, defense counsel's failure to challenge the jurors was not based upon reasonable trial strategy. In this case, any such strategy involving not challenging biased jurors would be wholly unreasonable. Impaneling a jury tainted with prior knowledge and prejudice cannot be considered effective assistance of counsel under reasonable standards of professional conduct. Therefore, defense counsel's performance was clearly ineffective in failing to conduct a proper voir dire and to challenge biased jurors. Defense counsel was deficient and ineffective in failing to challenge the jurors showing such biases and those with prior knowledge of the case. Accordingly, the Appellant suffered prejudice and was denied his right to an impartial jury as the result of his counsel's deficient performance. *See*, U.S.

Constitution Amendments VI & XIV. *See also, Irvin*, 366 U.S. at 722; *McMann*, 397 U.S. at 771; *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1985). There is a reasonable probability the outcome of Appellant's trial could have been different had defense counsel properly conducted voir dire. The Appellant's judgment and sentence must be vacated and this case remanded for a new trial.

IV.

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS TRIAL ATTORNEY'S FAILURE TO MOVE FOR A CHANGE OF VENUE.

Trial counsel rendered ineffective assistance of counsel by failing to move for a change of venue, due to extensive and inflammatory pre-trial publicity. Defense counsel's ineffective representation in failing to move for a change of venue affected the outcome of Appellant's trial. Defense counsel should have moved for a change of venue due to the vast amount of publicity surrounding the case , resulting in almost every prospective juror having knowledge of the case. Defense counsel's failure to move for a change of venue was not a reasonable strategic position and Appellant was prejudiced thereby.

It is true that certain cases naturally result in extensive publicity, which can make it impossible to select an impartial and unprejudiced jury without prior knowledge of the case. In the instant case, Tallahassee was so saturated by inflammatory and hostile publicity surrounding the case that Appellant was inherently prejudiced. *Murphy v. Florida*, 421 U.S. 794, 798-9 (1975); *Bundy v. Dugger*, 850 F.2d 1402, 1424 (Fla. 1988); *Coleman v. Kemp*, 778 F.2d 1489, 1490. Inherent prejudice makes selecting a jury without actual prejudice nearly impossible. Actual prejudice, such as the

Appellant suffered here, arises when jurors at the defendant's trial are prejudice. *See, Heath v. Jones*, 941 F.2d 1127, 1132 (11th Cir. 1991).

Prejudice is found especially where the publicity is inflammatory or hostile, instead of straightforward and factual. *See, Murphy*, 421 U.S. at 798-99; *Bundy*, 850 F.2d at 1424. Defense counsel should also consider the length of time between the crime and trial, and when the publicity occurred during that time; whether the State's or the police's version of the case has been publicized instead of the defendant's version; the size of the community; and whether all of the defense's peremptory challenges have been used. *See, Rolling v. State*, 695 So.2d at 285. Defense counsel should also consider the extent and nature of the pre-trial publicity and difficulty counsel may encounter in selecting a jury. *Id., citing Murphy v. Florida*, 421 U.S. 794 (1975). When these factors are present and there is a risk of prejudice, due process requires defense counsel move for a change of venue. Const. amend VI & XIV; *see, Irvin*, 366 U.S. at 722. A failure by defense counsel to file a motion for change of venue is deemed ineffective assistance of counsel.

In the instant case, defense counsel admitted the case proceeded to trial fairly quickly; and while reports of the incident appeared to be accurate, there were also reports concerning Appellant's prior conviction for murder and his escape, and the majority of the potential jurors and those ultimately selected not only stated they had

knowledge of the case, but they also knew about the Appellant's prior murder conviction and escape. (R4-633-637). Juror #4, Cynthia Krell, had read newspaper stories about the crime and stated that she would not be able to vote for a life sentence, even if the mitigating circumstances outweighed the aggravating circumstances. (R4-658) Juror #9, Jason Zippay, admitted he already believed Appellant was guilty based upon what he had read and the only issue would be insanity. (R4-635) Defense counsel, however, selected Mr. Zippay, even though insanity was never an issue in the case. (R4-661).

Defense counsel acknowledged that he had been concerned that this case occurred in a popular shopping mall where almost all Tallahassee residents have shopped, and this made the case even more difficult, because the jurors would more readily identify with the victim. (R4-641) In fact, Juror #2, Melinda Whitley, admitted she had been at the scene of the murder with her children merely an hour or two before it occurred and was still frightened at having been there. (R4-631). Juror Michelle Holocomb was even working at the store on the date of the incident. (R4-639).

In *Provenzano v. Singletary*, 3 F.Supp.2d 1353, 1362 (MD Fla. 1997), *aff'd*, *Provenzano v. Singletary*, 148 F.3d 1327 (11th Cir. 1998), the petitioner challenged defense counsel's failure to renew its motion for change of venue. While this case is distinguishable, because Provenzano's counsel actually moved for a change of venue,

it provides some insight into the review of such claims. *See, Id*. at 1363. In *Provenzano*, defense counsel initially made an oral motion for change of venue on the first day of trial. *Id.* at 1362. Although the trial judge stated he "was inclined to grant a change of venue", defense counsel later made the strategic decision not to make a follow-up request for a change of venue. *Id.* at 1362. (Whether trial counsel's actions were a result of trial strategy is a question of fact; whether those actions were reasonable is a question of law to be reviewed de novo). *See also*, *Tafero v. Wainwright*, 796 F.2d 1314, 1321 (Fla. 11th Cir. 1986); *Rolling v. State*, 695 So.2d at 283; *Kelley v. State*, 569 So.2d 754, 760 (Fla. 1990)(tactical decision to not request a change of venue; peremptory challenges not all used; and no problem seating a jury; *Buford v. State*, 492 So.2d 355, 359 (Fla. 1986)(decision to not move for change of venue was tactical and petitioner failed to establish 3.850 claim). *See, generally*, *Oakley v. State*, 677 So.2d 879, 880 (Fla. 2nd D.C.A. 1996).

Provenzano's defense counsel informed the court they wished to continue the trial in the same venue for strategic reasons, and because they planned to put on an insanity defense. *See, Provenzano*, 3 F.Supp.2d at 1362. Provenzano argued defense counsel's decision not to renew the motion for change of venue was an unreasonable strategy. Unlike the instant case, Provenzano had no problems selecting a jury and he did not exhaust his peremptory challenges. *See*, 3 F.Supp.2d at1363;

Kelley, 569 So.2d at 760 (large number of jurors did not even live in the county at the time of the crime). The court found defense counsel's decision not to renew the motion for change of venue was part of a reasonable trial strategy. *Id.* The court noted all jurors who exhibited any possible prejudice were removed for cause, and all peremptory challenges were not used. *Id.* Therefore, defense counsel's assistance was effective. *Id.* Since Provenzano did not allege facts sufficient to prove he suffered prejudice as a result of defense counsel's actions, the court did not determine whether there was a reasonable possibility the outcome of the trial could have been different. In contrast, Appellant has alleged sufficient facts proving he was prejudiced and there is a reasonable possibility the outcome of the trial could have been different.

Finally, not only did defense counsel use all of his peremptory challenges, but he had to request additional challenges - only two of which were granted. Still, even though selecting a jury was proving to be extremely difficult, trial counsel did not make a motion for change of venue. Unlike defense counsel's strategy in *Provenzano*, defense counsel's excuse for failing to file a motion for change of venue, because he was unsure where the trial would be held, is unreasonable. (R4-641-642, 656-657). While it may be reasonable to assume a jury will ultimately hear the facts of a case, it is unreasonable to believe jurors will remain impartial, who have not only been prematurely exposed to those facts, but who have also been exposed to Appellant's

prior murder conviction and prison escape as well. It is extremely doubtful that the panel could have been more biased, no matter where the trial was held. However, had a motion for change of venue been granted, Appellant's jury would certainly not have consisted of individuals who had been exposed to inflammatory publicity, including the Appellant's prior criminal record. Appellant's jury would certainly not have consisted of individuals who had frequented the very same shopping mall. Perhaps, most importantly, Appellant's jury certainly would not have consisted of individuals who had been in the very same area, either at the same time or very shortly before the incident occurred, and who still felt personal fear at the time of trial. Moreover, unlike Provenzano's jury, Appellant's jury consisted of individuals who had exhibited prejudice. Again, Juror #4, Ms. Krell, stated she would not be able to vote for a life sentence, even if the mitigating factors outweighed the aggravating factors. (R4-659). Likewise, Juror 9, Jason Zippay, stated his only issue was the Appellant's sanity, and Appellant's sanity was never raised. (R4-660-661). Defense counsel appeared unconcerned that Appellant's jury consisted of people not only living in the community at the time of the offense, but also people who frequented the shopping area and stated they were personally afraid. Given the prevalence of obvious partiality, defense counsel's strategic decision was unreasonable and Appellant was prejudiced. Defense counsel's failure to file a motion for change of venue was an unreasonable

strategic decision and Appellant was prejudiced thereby.

Similarly, in *Miller v. State*, 750 So.2d 137, 138 (Fla. 2nd D.C.A. 2000), the Court held the petitioner's allegations of ineffective assistance of counsel for failing to file a motion for change of venue, due to prejudicial publicity, should have been given more than a summary denial. [Enormous] pre-trial publicity surrounded Miller's trial. *Id.* at 137. Miller alleged defense counsel was deficient in failing to request a change of venue, because the community was saturated with inflammatory publicity, much like Tallahassee was in the Appellant's case. *Id.* However, unlike the Appellant's defense counsel, Miller's did not use all of his peremptory challenges. *Id.* at 138. This was a factor in the trial court' s summary denial of the petitioner's claim of ineffective assistance of counsel. *Id.* Miller countered that defense counsel's failure to use his peremptory challenges was evidence of counsel's ineffectiveness. *Id.* The court found Miller's claim of ineffective assistance of counsel was not refuted by the record and sufficiently prejudicial to meet the *Strickland* standard. Since the petitioner's claims were facially sufficient, the court reversed and remanded the case. *See, Miller,* 750 So.2d at 138.

The petitioner in *Romano v. State*, 562 So.2d 406, 407 (Fla. 4th D.C.A. 1990), also alleged defense counsel was ineffective in failing to move for a change of venue due to media reports regarding the case. Similar to *Miller*, the court found Romano's

claim of ineffective assistance of counsel facially sufficient. The court reversed and remanded for an evidentiary hearing or for attachment of portions of the record that refuted Romano's allegations. 562 So.2d at 407.

In the instant case, the Appellant contends that defense counsel rendered ineffective assistance of counsel for failing to move for a change of venue due to extensive and inflammatory pre-trial publicity and the fact that almost every prospective juror had knowledge of the case. Even though motions for change of venue are not always successful, it was unreasonable for defense counsel to fail to move for a change of venue in this situation. Defense counsel's ineffective representation in failing to move for a change of venue affected the outcome of the Appellant's trial, and Appellant suffered prejudice as a result.

V.

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY INTRODUCED DETAILS OF APPELLANT'S PREVIOUS CRIMINAL ACTIVITY TO THE JURY DURING THE PENALTY PHASE.

Section 921.141(5)(b), F.S., provides for the aggravating circumstance of "the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person."

The Florida Supreme Court, having been presented with the issue on numerous occasions, has set forth rules governing the admission of prior felonies in penalty phase proceedings:

> "It is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior violent felony conviction involving the use or threat of violence to the person rather than the bare admission of conviction. Testimony concerning the events which resulted in the conviction assist the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. *Jones v. State*, 748 So.2d 1012,1026, (Fla. 2000), *citing, Rhodes v. State*, 547 So.2d 1201, 1204-1205 (Fla. 1989).

The court went on to say, "however, the line must be drawn when the testimony is not relevant, gives rise to a violation of the defendant's confrontational rights, or the prejudicial value outweighs the probative value." *Id.* Another controlling principle

regarding the introduction of such evidence at the penalty phase has been, "We caution the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceeding." *Rodriguez v. State*, 753 So.2d 29, 44 (Fla. 2000), *citing Finney v. State,* 650 So.2d 674, 683-84 (Fla. 1995).

In the instant case we have a unique situation because it was the Appellant's counsel himself who introduced the evidence of Appellant's prior felony convictions, as well as numerous other offenses that the Appellant was never charged with nor convicted of, and Appellant's counsel went into detail in some of those matters during the penalty phase. Appellant's trial counsel stated, during his opening statement of the penalty phase, "my client has done some terrible things during the course of his life...when he was fifteen years old in Indiana, he stabbed a fellow, an incident chillingly similar to the one you heard at trial." (T. 2171-72). He also stated that the Appellant committed a burglary of a conveyance, grand theft and a grand theft auto to get to Florida, where he was also arrested for possession of marijuana. (T. 2171-72). Trial counsel also described Appellant's 1983 prison escape attempt to the jury. (T. 2174). He also described a 1984 incident wherein the Appellant stabbed an inmate in prison. (T. 2175). Counsel also told the jury the Appellant stabbed a man in Indiana while he was high on drugs. (T. 2184). Of these offenses, the Appellant was only convicted of the prior attempted escape. None of the other offenses were ever

charged against the Appellant. Appellant's counsel also failed to object when the State went over in detail the same crimes that were already described by Appellant's counsel. (T.2290-92; 2294-2300).

Appellant's counsel was ineffective for introducing details of Appellant's prior violent felonies at the penalty phase. This court has permitted the State to introduce evidence of a defendant's prior convictions for violent felonies through the hearsay statement of a law enforcement officer. *Jones v. State,* 748 So.2d 1012, 1025 (Fla. 2000); *see also, Lockhart v. State,* 655 So.2d 69 (Fla. 1995); *Jones v. State,* 732 So.2d 313 (Fla. 1999); *Rhodes v. State,* 547 So.2d 1201 (Fla. 1989). However, in every one of those cases it was the State who presented the evidence of the defendants' previous convictions for violent felonies to the jury. Moreover, the Florida Supreme Court has detailed explicit rules that govern exactly what evidence the State may introduce so as to prevent the State from making evidence or prior crimes a feature of the penalty phase proceedings. *Rodriguez,* 753 So.2d at 44, *citing Finney v. State,* 660 So.2d 674, 683-84 (Fla. 1995). It is clear that these rules are in place to ensure that a defendant is not denied his due process rights and not sentenced to death based on evidence of his prior crimes, which are likely to prejudice the jury against the defendant. Thus, it becomes evident that Appellant's counsel was clearly ineffective for introducing evidence at the penalty phase, which the State itself may not have been

able to introduce to the jury under Florida law. Counsel did not suggest that there was any strategic reason for offering this inadmissible evidence to the jury. Appellant was prejudiced as a result of this action.

CONCLUSION

From the inception of this trial, that is to say from the voir dire proceedings right through to the trial's conclusion, the penalty phase, the Defendant was prejudiced by the ineffective assistance of trial counsel. Counsel conceded the Defendant's guilt, conceded the aggravating factor of the brutality of the crime, and brought before the jury evidence of other wrongful conduct for which the Defendant had never been charged and which would not have been admissible if offered by the State. All of this was laid before a jury that in the voir dire proceedings had demonstrated its bias and prejudice against the Defendant. The failings of counsel are numerous, inexplicable and prejudicial beyond doubt. The Defendant's conviction should be reversed and he should be afforded a new trial on the merits.

GEORGE W. BLOW III
Florida Bar No. 320501
106 White Ave. , Ste. C
Live Oak, Florida 32064
(386) 362-6930

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via U.S. Mail to Charles J. Crist, Jr., Esq., Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; this ___ day of June 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been typed in Times New Roman 14-point type.

_____
GEORGE W. BLOW III