IN THE SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC05-1561

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

AMENDED ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

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

This is an appeal of a capital case where the trial court denied postconviction relief following a remand by this Court. 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 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; (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 no 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 the Northern District of 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).

On appeal, Dillbeck raised five claims: (1) did the trial court properly deny the ineffectiveness *per se* claim for conceding to felony murder in the guilt phase; (2) did the trial court properly deny the claim of ineffectiveness for conceding the HAC aggravator by admitting the murder was brutal; (3) did the trial court properly deny the claim of ineffectiveness for failing to conduct a proper voir dire; (4) did the trial court properly deny the claim of ineffectiveness for failing to file a motion for change of venue; (5) did the trial court properly

deny the claim of ineffectiveness for introducing mitigating evidence which opened the door to prior bad acts. The Florida Supreme Court rejected the *Nixon* claim. *Dillbeck*, 882 So.2d at 974 (stating: "we conclude, as a matter of law, that neither *Cronic* nor the *Nixon* line of cases applies to Dillbeck's claim."). Dillbeck also filed a state habeas petition raising a *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim, which this Court rejected. *Dillbeck*, 882 So.2d 976-977. The Florida Supreme Court remanded to the trial court with directions to make factual findings and legal conclusions regarding the four remaining claims raised on appeal. *Dillbeck v. State*, 882 So.2d 969 (Fla. 2004)(stating: "we affirm the circuit court's denial of one of Dillbeck's ineffective assistance of counsel claims, but we remand the remaining claims and instruct the circuit court to make findings of fact and conclusions of law as required by Florida Rule of Criminal Procedure 3.850(d).").[1]

---

[1] The State would note, in defense of the trial court's original order, that the State filed a motion for clarification in the trial court, explaining to the trial court that the rule required detailed findings and conclusions, which, no doubt, the trial court would have complied with given the opportunity. However, before the trial court could rule on the motion and enter more detailed findings, Dillbeck filed a notice of appeal. The trial court entered its original order on September 3, 2002. The State filed the motion for clarification on September 9, 2002. Dillbeck filed a notice of appeal on September 18, 2002.

Both parties submitted new proposed orders on remand. The trial court entered an order denying postconviction relief, making findings and conclusions as directed by this Court. *Dillbeck v. State*, 882 So.2d at 973 (stating: "we remand the case to the circuit court to elaborate on its order by making such findings and conclusions in a detailed and timely manner."). The trial court order's substantially adopted the State's proposed order. This is the appeal following the remand.

The trial court simply did not have the time to enter more detailed findings before jurisdiction vested in this Court.

SUMMARY OF ARGUMENT

ISSUE I

Dillbeck asserts the trial court abused its discretion by adopting substantial portions of the State's postconviction memorandum as the trial court's order denying postconviction relief. First, this issue is not preserved. Dillbeck did not object to the trial court's wording of the postconviction order in the trial court. Furthermore, the rule prohibiting the trial court from verbatim adopting the State's sentencing memorandum as its own is limited to sentencing orders. The rule does not apply in the postconviction context. A trial court may adopt the State's memorandum wholesale in the postconviction context. The trial court properly adopted the portions of the State's proposed order that it agreed with.

ISSUE II

Dillbeck 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 the penalty phase. 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 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 jurors were not subject to cause challenges 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 wanted 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 ADOPT PORTIONS OF THE STATE'S PROPOSED FINDING AND CONCLUSIONS IN ITS ORDER DENYING POSTCONVICTION RELIEF? (Restated)

Dillbeck asserts the trial court abused its discretion by adopting substantial portions of the State's postconviction memorandum as the trial court's order denying postconviction relief. First, this issue is not preserved. Dillbeck did not object to the trial court's wording of the postconviction order in the trial court. Furthermore, the rule prohibiting the trial court from verbatim adopting the State's sentencing memorandum as its own is limited to sentencing orders. The rule does not apply in the postconviction context. A trial court may adopt the State's memorandum wholesale in the postconviction context. The trial court properly adopted the portions of the State's proposed order that it agreed with.

Standard of Review

The standard of review is unclear. The trial court's wording of a postconviction order is probably reviewed for an abuse of discretion.

Preservation

This issue is not preserved. Dillbeck did not object to the similarities between the trial court's sentencing order and the State's proposed order in the trial court. *Blackwelder v. State*, 851 So.2d 650, 652 (Fla. 2003)(finding a claim that the trial court abdicated its responsibility by copying the State's sentencing memorandum as its sentencing order was not preserved because the defendant did not object in the trial court); *Ray v. State*, 755 So.2d 604, 611 (Fla. 2000)(holding a similar issue was not preserved for appellate review and therefore, was procedurally barred where the trial court's sentencing order, with a few minor exceptions, was taken verbatim from the State's proposed order). As in *Blackwelder* and *Ray*, this issue is not preserved.

Merits

This Court has held that, because a sentencing order is a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors which is the foundation for this Court's proportionality review, a trial judge may not delegate the preparation of the sentencing order to the State.[2]

---

[2] *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003)(rejecting a claim that the trial court abdicated its responsibility where the sentencing order copied almost verbatim parts of the State's sentencing memorandum because the

However, this Court has explained that this holding is limited to a sentencing order and does not apply to a postconviction order. *Patton v. State*, 784 So.2d 380, 388-389 (Fla. 2000)(rejecting a *Patterson v. State*, 513 So.2d 1257 (Fla. 1987) claim in the postconviction context because an "order on postconviction is not a sentencing order"); *Glock v. Moore*, 776 So.2d 243, 249 n.8 (Fla. 2001)(recognizing the distinction between the adoption of proposed sentencing orders and the adoption of orders on a postconviction motion); *Valle v. State*, 778 So.2d 960, 965, n.9 (Fla. 2001)(noting "a distinction exists

---

differences indicate that the trial court did not simply rubber-stamp the State's sentencing memorandum, but independently weighed the aggravating and mitigating factors and personally evaluated the case, but warning trial judges that they should avoid copying verbatim a State's sentencing memorandum); *Walton v. State*, 847 So.2d 438, 447 (Fla. 2003)(finding no error where the State simply submitted a sentencing memorandum to the trial court for its consideration, which the trial court subsequently considered before writing its sentencing order citing *Patton v. State*, 784 So.2d 380, 388 (Fla. 2000)(citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), for the proposition that "even when the trial court adopts proposed findings verbatim, the findings are those of the court.") in a case where there was no *ex parte* communication.); *Morton v. State*, 789 So.2d 324, 333-335 (Fla. 2001)(affirming a sentencing order although the resentencing judge used substantial portions of the original judge's sentencing order because there were significant differences between the two orders, this demonstrated that the resentencing judge performed an independent weighing and personal evaluation of the evidence establishing that the judge engaged in the solemn obligation to independently evaluate the aggravating and mitigating circumstances in making this life or death decision but cautioned resentencing judges against adopting a prior sentencing order from the original sentencing judge).

between the adoption of proposed orders after a postconviction evidentiary hearing and the adoption of proposed sentencing orders . . .”). It is the importance of the sentencing order’s findings of aggravators and mitigators in this Court’s proportionality review that makes it improper for a judge to copy the State’s sentencing memorandum. But a postconviction court is not making any such findings. *Valle v. State*, 778 So.2d 960, 965, n.9 (Fla. 2001)(explaining in the sentencing context, the reason for this limitation is that because the evaluation of the aggravating and mitigating factors is the basis for the imposition of a sentence of life or death, “[t]he sentencing order must be sufficiently detailed to allow this Court to perform its proportionality review, the review which may ultimately determine whether a person lives or dies” and is a procedure governed by section 921.141 but this logic and statute does not apply to a motion for postconviction relief).

There are no due process notice or opportunity to be heard concerns present in this case. Neither is the specter of *ex parte* communication present in this case. Both parties submitted proposed orders following the remand and both parties received copies of the other parties proposed order. Therefore, no *ex parte* communication occurred.

Moreover, here, the trial court did not adopt the State's memorandum wholesale. While the State acknowledges that much of the wording and substance is the same, the trial court did make several additions and deletions. For example, the State argued in its proposed order that the claim regarding voir dire should be ruled to have been forfeited because postconviction counsel did not establish that there was extensive pretrial publicity at the evidentiary hearing, but the trial court, in its order, while noting that there was no record evidence of extensive pre-trial publicity, did not conclude that the claim was forfeited.

Dillbeck's reliance on *Perlow v. Berg-Perlow*, 875 So.2d 383, 390 (Fla. 2004) and *Carlton v. Carlton*, 888 So.2d 121 (Fla. 4th DCA 2004), is misplaced. In *Perlow*, this Court held that the trial court reversibly erred by adopting a party's proposed order verbatim without giving opposing party opportunity to comment or object. *Perlow*, 875 So.2d at 390. *Perlow* is inapplicable where, as here, both parties submit proposed orders and the trial court gives opposing counsel an opportunity to respond to the proposed orders. See *Mobley v. Mobley,* 920 So.2d 97, 102 (Fla. 5th DCA 2006)(finding *Perlow* inapplicable where trial court adopted the former wife's proposed order verbatim where former wife's attorney submitted the proposed order midway through the hearing and the trial court gave the former husband

an opportunity to respond); *DeMello v. Buckman*, 916 So.2d 882, 891 (Fla. 4th DCA 2005)(concluding there was no violation of *Perlow* where the trial court gave each side the opportunity to submit proposed final judgments); *In re T.D.*,924 So.2d 827 (Fla. 2d DCA 2005)(finding no error where the trial court requested both parties submit proposed orders and then adopted the department's proposed order and explicitly rejecting a claim that the mere adoption of a proposed order of one of the parties is error). Nor is *Perlow* a postconviction case; it was a marriage dissolution proceeding that involved, among other matters, custody of a child. It is this Court's precedent regarding postconviction orders in capital cases, not marriage dissolution cases, that controls.

Harmless error

Dillbeck does not point to any factual conclusions that are erroneous. *Phillips v. State*, 705 So.2d 1320, 1324, n.3 (Fla. 1997)(noting that the trial court's sentencing order, which was "virtually identical" to the State's sentencing memorandum, was supported by evidence in the record). Remanding for a new postconviction order that merely reworded the old order would be mere legal churning. *State v. Rucker*, 613 So.2d 460, 462 (Fla. 1993)(commenting that a remand for more specific findings on an

undisputed point "would be mere legal churning."). Here, unlike *Rucker*, this Court would be remanding for entry of a new order, not to make more specific findings or different conclusions of law, but merely to reword the order. In any new order, the fact-finding and the ultimate legal conclusions would remain the same.

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 the penalty phase. 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.

Standard of review[3]

The standard of review is *de novo*. *Morris v. State*, - So.2d. - , 2006 WL 1027108, *2 (Fla. April 20, 2006)(explaining that "when reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of fact and law.").

Ineffectiveness[4]

---

[3] Because all four remaining claims are ineffectiveness claims, the standard of review is the same for all four issues. In the interest of brevity, the standard of review will not be repeated for each issue.

[4] Because all four remaining claims are ineffectiveness claims, the legal standard is the same for all four issues. In the interest of brevity, the legal standard for ineffectiveness will not be repeated for each issue.

As this Court recently explained in *Ferrell v. State*, 918 So.2d 163, 169-170 (Fla. 2005):

> . . .to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. In reviewing counsel's performance, the reviewing court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Ferrell, 918 So.2d at 169-170 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Trial counsel, Assistant Public Defender Randy Murrell, is now the federal Public Defender for the Northern District of 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). He has been board certified in criminal trials since 1993. As the trial judge who presided at the original trial observed, 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 and that trial counsel's preparation "has been totally without fault". (T. III 331).

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 argument 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 argument 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 argument, 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 argument 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 never vote for life, given the circumstances of the crime, which he wanted 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).

The trial court's ruling on remand

> Dillbeck asserts his counsel was ineffective for conceding the HAC aggravator. Dillbeck claims that when his trial counsel described the murder as "brutal" this was conceding the heinous, atrocious and cruel aggravator. However, describing the murder as "brutal" is not conceding the heinous, atrocious and cruel aggravator when trial counsel is attempting to argue to the jury that even a terrible murder could result in a life sentence.
>
> During jury selection, trial counsel repeatedly referred to the crime as "brutal" and "terrible" to prospective jurors. 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).
>
> 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).

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).

Trial counsel testified at the evidentiary hearing that while he admitted the killing was brutal, he did not concede the HAC aggravator. He argued that the murder was NOT heinous, atrocious and cruel. While he thought that the jury would find the HAC aggravator, he argued that the State had not proven it. He knew that the State would be seeking the HAC aggravator. 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, never vote for life, which he wished to know and excuse those jurors. He also wanted the jurors to understand even a "terrible", "horrible" murder could still result in a life sentence. Trial counsel described the crime as brutal during voir dire because he thought it was best to confront difficult issues as soon as possible.

This Court finds Mr. Murrell's testimony to be credible. This Court finds that counsel did not concede to the HAC aggravator. This Court finds that a description of crime as being "brutal" is not a concession to an aggravator.

Strickland, not *Cronic*, nor *Nixon III* governs concessions of aggravators. The Florida Supreme Court in its opinion in this case noted that "such a claim should be analyzed under the two-pronged standard of *Strickland* rather than the presumed-prejudice standard of *Cronic*" and "in order to prevail on this claim, as well as on the other claims which we remand to the circuit court, Dillbeck must satisfy both prongs of the *Strickland* test".[5] *Dillbeck*, 822 So.2d at 972, n.9

---

[5] The Florida Supreme Court wrote regarding this claim:

> The United States Supreme Court's recent decision in *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), suggests that such a claim should be analyzed under the two-pronged standard of *Strickland* rather than the presumed-prejudice standard of *Cronic*. Although *Cronic* held that "[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," 466 U.S. at 658, 104 S.Ct. 2039, one of which is when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," id. at 659, 104 S.Ct. 2039, in

Describing a brutal murder as brutal is not deficient performance. *Brown v. State*, 846 So. 2d 1114, 1125 (Fla 2003)(rejecting an ineffective assistance of counsel claim based on arguments defense counsel made during opening and closing which included a statement that the victim was "gurgling" on his own blood); *Yarborough v. Gentry*, 124 S.Ct. 1 (2003)(finding counsel was not ineffective in closing argument when he referred to the defendant as a

---

> *Bell* the Court stressed that "the attorney's failure must be complete." 535 U.S. at 697, 122 S.Ct. 1843 (emphasis added). In *Bell*, the Court rejected the defendant's claim that *Cronic*'s presumption of prejudice should apply where counsel failed to introduce mitigating evidence and did not make a closing argument at the penalty phase; the Court held that "[t]he aspects of counsel's performance challenged by [the defendant] ... are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." 535 U.S. at 697-98, 122 S.Ct. 1843. The Court's holding rested on the distinction it drew between "counsel['s] fail[ure] to oppose the prosecution throughout the sentencing proceeding as a whole" and "counsel['s] fail[ure] to do so at specific points." Id. at 697, 122 S.Ct. 1843. "For purposes of distinguishing between the rule of Strickland and that of *Cronic*, this difference is not of degree but of kind." Id.
>
> Even assuming, as we do for the moment, that Dillbeck's counsel did concede the applicability of the "heinous, atrocious, or cruel" aggravating circumstance, Dillbeck alleges only that "counsel failed to [challenge the prosecution's case] at specific points." Id. He does not allege that "counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole." Id. (emphasis added). Therefore, in order to prevail on this claim, as well as on the other claims which we remand to the circuit court, Dillbeck must satisfy both prongs of the *Strickland* test by demonstrating that counsel's performance was deficient and that he was prejudiced by the deficient performance. See *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Dillbeck, 822 So.2d at 972, n.9.

> "bad person, lousy drug addict, stinking thief, jail bird"). Counsel was maintaining credibility with the jury by being honest with them about the nature of the crime. *Atwater v. State*, 788 So. 2d 223 (Fla. 2001)(rejecting a claim of ineffectiveness where defense counsel admitted the crime was one of malice because sometimes concessions are a good trial strategy designed to gain credibility with the jury.). This Court finds the admission that the crime was brutal to be a reasonable trial strategy. As counsel testified, it is best to confront difficult issues rather than ignore them. As such, there is no deficient performance.
>
> Nor is there any 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.

(Attachments excluded; footnotes included but renumbered).

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. There can be no deficient performance for doing something that counsel did not do.

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). Defense counsel attempted to maintain credibility with the jury by being candid.

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 appeal to the

jurors by pointing out Brown's real life shortcomings. This 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.

In *Yarborough v. Gentry*, 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003), the United States Supreme Court found that trial counsel was not ineffective in closing argument. Trial counsel referred to the defendant as a "bad person, lousy drug addict, stinking thief, jail bird" but argued that these traits were irrelevant to the issues before the jury. The Ninth Circuit had found ineffectiveness based on counsel's "gratuitous swipe at Gentry's character." The *Yarborough* Court disagreed, reasoning while confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. The Court observed that this is precisely the sort of calculated risk that lies at the heart of an advocate's discretion and that by candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p. 10 (1992-1996)("[I]f

you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). The Court also observed that the same criticism could be leveled at famous closing arguments such as Clarence Darrow's closing argument in the Leopold and Loeb case: " 'I do not know how much salvage there is in these two boys.... [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind."

Just as trial counsel may admit that the defendant had “turned bad” in closing argument, as in *Brown*, and may admit that the defendant was a "bad person, lousy drug addict, stinking thief, jail bird", as in *Yarborough*, 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 was 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. There was no deficient performance.

Moreover, there was no prejudice. 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. 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) 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. Dillbeck had previously been convicted for the murder of a policeman, he escaped and then murdered this victim. 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. The trial court properly denied this claim of ineffectiveness.

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 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 jurors were not subject to cause challenges 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

Juror Melinda Whitley did not believe she had formed any opinions about what happened in this case. She also stated she believed she could decide whether Dillbeck was guilty of the crime charged based on what she hears in the courtroom. (T. II

200). Ms. Whitley, who was present at Gayfer's about an hour and a half prior to the murder, 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. In response to the rape/murder hypothetical, Ms. Whitley said she 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).

Juror Cynthia Krell 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 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). 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).

Juror Jason Zippay had read about the crime in the newspaper and that “assuming everything I read in the newspaper was true, I am sure he is guilty.” (T. VI 799). 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). Mr. Zippay 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. 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, Mr. Zippay stated unequivocally, in each case, he could vote for life if the mitigating circumstances warranted a life recommendation. (T. VI 811-812).

Juror John 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 he had not formed any opinion about the case. (T. VII 970). Mr. Marshall stated that 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 stated 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. (T. VII 977). When trial counsel posed a series of 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).

Juror Robert Ussery told the prosecutor he had read something about the case in the media. He recalled that an inmate walked off a release program in Quincy and a couple of days later a lady was stabbed at the Tallahassee Mall. 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). When trial counsel inquired, Mr. Ussery replied 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 a 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).

Juror Cynthia Ann Porter 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 set of hypothetical murders he posed to the other jurors, Ms. Porter stated she could vote for life if the mitigating circumstances outweighed the aggravating factors (T. V 753-754).

Juror Larry Davis remembered 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 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.

Neither alternate juror Michelle Holcomb nor alternate Juror Ruth Tadlock served on the jury. (T. VII 1114-1129; 1059-1070).

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).

The trial court's ruling after remand

> Dillbeck contends that trial counsel was ineffective for failing to strike numerous jurors for cause. Dillbeck asserts that counsel repeatedly failed to challenge juror who had prior knowledge and/or biased views of the case.
>
> 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" 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." 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. 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."

Dillbeck testified at the hearing that there were a "couple [of] people" he had a question about but they were excused. When asked whether he had questions about any other juror, Mr. Dillbeck testified he did not believe he did.

This Court finds Mr. Murrell's testimony regarding jury selection to be credible. This Court also finds that none of the jurors were biased due to their exposure to pre-trial publicity, and thus, this Court would not have granted the cause challenges had counsel made such challenges. The seven actual jurors were not subject to for 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 biased.[6]

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). Dillbeck has not established a reasonable basis to challenge any of the jurors. 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

---

[6] 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.

challenging jurors when there is no legal basis for doing so.

Additionally, trial counsel's testimony at the evidentiary hearing establishes that counsel's strategy in choosing a jury was to avoid a death sentence. *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995)(rejecting an ineffectiveness claim 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 the defendant had confessed to the crime because the juror disapproved of the death penalty and recognizing that attempting to seat jurors more likely to recommend life over death is a reasonable trial strategy). 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. Trial counsel's decision to seat a jury more likely to recommend leniency was 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. This Court concludes that not attempting to strike these jurors was reasonable trial strategy.

This Court also concludes that there was no prejudice because each juror was questioned carefully to discover any potential bias and none was found. Each juror 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. Accordingly, trial counsel was not ineffective.

(Attachments excluded; footnotes included but renumbered).

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. *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, including jury selection, was to avoid a sentence

of death. *Harvey v. Dugger*, 656 So.2d 1253, 1256 (Fla. 1995)(recognizing that attempting to seat jurors likely to recommend a life sentence can constitute a reasonable trial strategy).

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. For instance, both Ms. Whitley and Ms. Krell 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.

Dillbeck's reliance on *Monson v. State*, 750 So.2d 722 (Fla. 1st DCA 2000) and *Gordon v. State*, 469 So.2d 795, 796 (Fla. 4th

DCA), *rev. denied*, 480 So.2d 1296 (Fla. 1985), is misplaced. The First District, in *Monson*, did not find counsel was ineffective for improperly questioning three prospective jurors regarding their ties to law enforcement; it merely remanded for an evidentiary hearing or attachment of records on the issue. Indeed, the First District affirmed the trial court's denial of this claim after the remand. *Monson v. State*, 781 So.2d 1087 (Fla. 1st DCA 2001). Here, the trial court granted Dillbeck an evidentiary hearing on this claim. The Fourth District, in *Gordon*, found ineffectiveness on two grounds. One was jury selection. A juror stated she had heard of this particular case and was biased. She further indicated that she had a prejudice against the defense counsel which would affect her decision. The trial judge offered to remove the juror for cause if requested. Defense counsel permitted her to sit as a juror. The Court also noted the 104 instances where defense counsel failed to object to improper questions or improper comments by the prosecutor. Together, the Fourth District found "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Here, unlike *Gordon*, none of these jurors admitted any bias and none indicated any prejudice against the defense counsel. Here, unlike *Gordon*, the trial court expressly noted

that it would not have excused any of these jurors for cause. *Gordon* is inapposite. 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, who was an alternate juror, 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 except a woman was stabbed in her car in Gayfers' parking lot. (T. VII 1042). Ms. Rigdon reported that she knew nothing about the case 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 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 a motion for a change of venue and it was granted. (EH 4 581).

Forfeiture

There is no record support for the claim that there was extensive and inflammatory pre-trial publicity. 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. The test for determining whether a change of venue should be granted based on pretrial publicity examines a number of circumstances, including whether the publicity was made up of factual or inflammatory stories, Dillbeck did not supply the trial court with any of this information. *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003)(rejecting an ineffective assistance of appellate counsel claim for failing to raise a change of venue issue and explaining that the test for granting a change of venue based on pre-trial publicity includes 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).

The trial court's ruling after remand

> Dillbeck asserts that his trial counsel was ineffective for failing to move for change of venue due to extensive and inflammatory pretrial publicilty. Dillbeck has established neither deficient performance nor prejudice regarding this claim. Trial counsel made a reasonable tactical decision not to file a motion for change of venue.
>
> Trial counsel testified that he did not move for a change of venue. He thought about filing a motion but decided against it. 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. He did not move for change of venue after jury selection. Trial counsel testified that the newspapers reports that he saw were accurate and did not distort the facts. 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. 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. He further testified that 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". He was concerned about the murder occurring at Gayfers, a common shopping spot, but he felt he could deal with that. 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". 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 testified that he did not think he had legally adequate grounds to request a change of venue. 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.

Dillbeck testified that he made only one suggestion to trial counsel and that was asking about a change of venue. Dillbeck testified that he wanted a change of venue due to the publicity. The publicity portrayed him as a serial killer. They discussed the pros and cons of a change of venue. Dillbeck testified that trial counsel preferred to keep the trial in Tallahassee. Trial counsel told Dillbeck that Tallahassee was a "better place" for lenient jurors. Trial counsel told Dillbeck that they were more likely to get a more liberal jury pool in Leon County. 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. (EH 4 581).

There is no record evidence that there was extensive and inflammatory pre-trial publicity. 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. *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003)(explaining test for determining whether a change of venue should be granted based on pretrial publicity examines a number of circumstances including whether the publicity was made up of factual or inflammatory stories or favored the prosecution's side of the story). Dillbeck did not supply the trial court with any of this information and thus, did not sufficiently factually develop this claim at the evidentiary hearing. *Meeks v. Moore*, 216 F.3d 951, 964 (11th Cir. 2000)(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).

This Court finds Mr. Murrell's testimony regarding change of venue to be credible. This Court also finds that Dillbeck's jury was selected without undue difficulties and therefore, this Court would not have granted any motion for change of venue had one been made. Accordingly, counsel was not ineffective for failing to move 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. 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). 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. 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. 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 reasonable trial strategy.

Nor is there any prejudice. To prove prejudice, Dillbeck must prove, at least, that the motion would have been granted. *Meeks v. Moore*, 216 F.3d 951, 961-964 (11th Cir. 2000)(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); *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 observing "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury"). As 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). 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. *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). Any motion for change of venue would have been denied and therefore, Dillbeck has not established prejudice.

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.[7] As

---

[7] *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)(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 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

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

---

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").

change of venue would have 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. IB at 28-29. 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, as an Assistant Public Defender, 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. IB at 31-32. 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 wanted 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[8]

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.

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

---

[8] This is not a complete description of all witnesses and testimony presented at penalty phase. Only the evidence

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 Sumter 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

---

relevant to this issue is covered.

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 neuropsychologist, 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 Sumter 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 Sumter had the second highest assault rate of prisons in Florida. (T. XVI 2513-2514,2519). From 1979 through 1983, Sumter had the highest inmate upon inmate assault rates in the state. (T. XVI 2518).

Trial counsel presented the 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 lead 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 an 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 a 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 properly admitted 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 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).[9] 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 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).

---

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

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 dysfunction. (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 a 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 mitigation 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).

The trial court's ruling after remand

> 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. Dillbeck has failed to establish deficient performance and prejudice.

Dillbeck testified at the evidentiary hearing that he did not consent to trial counsel admitting evidence relating to other crimes. Dillbeck admitted that none of the evidence relating to his past crimes was inaccurate. 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. 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. He noted that trial counsel discussed these arrests in the penalty phase.

Trial counsel 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. The State had already videotaped the stabbing victim prior to the trial to admit during the penalty phase. 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. 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. Also, 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. 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. The State already had Dillbeck's prison records. What had happened in prison was "not a secret". He wanted to address those things before the State revealed them to undercut his argument that Dillbeck was a good prisoner. Trial counsel did not think that he would have admitted this information if he did not think that it was admissible by the State. He explained that by introducing mitigating evidence, he had to accept some "not so favorable" rebuttal evidence by the State. Trial counsel thought that because his mitigation 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.

This Court finds Mr. Murrell's testimony to be credible. This Court finds that counsel's decision to present mitigation, although it necessarily opened the door for the State to attempt to rebut that mitigation, was a reasonable trial strategy and thus, counsel was not ineffective.

If trial counsel wanted to introduce mental health mitigation, he had to acknowledge the prior bad acts. As trial counsel testified at the evidentiary hearing, presenting the mental mitigation opened the door to the prior bad act of the Indiana stabbing. 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. Trial counsel's anticipatory rebuttal is not deficient performance. Once the door is open to evidence, it is perfectly reasonable and a common trial practice for defense counsel to introduce the evidence himself.

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 since 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).

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 probably would have voted for death more quickly. 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, this claim of ineffectiveness is denied.

Merits

There is no deficient performance. Trial counsel did object to the videotape of the Indiana stabbing victim arguing that it was not a proper aggravator. (T. XVI 2509-2510). Moreover, 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.[10] Moreover, if

---

[10] 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 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

trial counsel wanted to 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,[11] regardless of whether any conviction was obtained, because they occurred while Dillbeck was in prison.[12] Trial counsel's only alternative was to present no mitigating evidence at all. There was no "clean" mitigation evidence available to trial counsel.

---

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).

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

[12] *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*

This was a reasonable strategic decision from a very experienced capital litigator who has had only one death sentence imposed in his entire career. Counsel was faced with a bad choice and a worse choice - he could either present mental mitigation that the State could rebut with damaging evidence or present no mitigation at all. Collateral counsel completely ignores this dilemma. 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.

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

---

evidence opened the door for the State to present evidence of an

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

---

escape attempt during his incarceration).

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.

Most of the statements that collateral counsel complains of, such as stealing the car to get to Florida and being arrested for marijuana, Dillbeck himself testified about at the penalty phase. *Dillbeck*, 882 So.2d at 975 (rejecting a *Nixon* claim where Dillbeck himself made the same concession during his testimony as counsel's concession).

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. 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,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED ANSWER BRIEF has been furnished by U.S. Mail to George W. Blow, III Esq., 106 White Avenue, Suite C, Live Oak, FL 32064 this 27th day of July, 2006.

_____

Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

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

_____

Charmaine M. Millsaps
Attorney for the State of Florida

[F:\Users\Cap_Coll\charmain\death\DILLBECK\PC appeal in FSC\FSC PC appeal\dillbeckPCinFSCafterremandbafinalshortversion.wpd --- 8/4/06,1:52 PM]