SUPREME COURT OF FLORIDA

DONALD DAVID DILLBECK,
Appellant,

-vs- CASE NO.: SC05-1561

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

LEON COUNTY

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

The record on appeal consists of a five volume record relating to the post conviction proceedings at issue, including the transcript of the evidentiary hearing. This is the record as submitted in Dillbeck v State, Case #SC02-2044. This portion of the record is cited as by reference to volume number and page number. Thus (R4-99) refers to volume 4 page 99 of the record of post conviction proceedings. All pages are machine number stamped at the bottom of the page.

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

The order entered on remand is cited as "Order at ___ [page number]".

STATEMENT OF THE CASE AND FACTS

I. Course of Proceedings

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

This court affirmed the convictions and sentences by its order entered on April 21, 1994. This order was revised on motion for re-hearing denied on August 18, 1994. Thereafter, a petition for writ of certiorari was filed in the United States Supreme Court, and was subsequently denied on March 20, 1995.

On April 23, 1997, the Defendant filed his initial motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P. The motion was subsequently amended and an evidentiary hearing on the amended motion for post-conviction relief was held on April 1, 2002. On September 3, 2002, the Honorable F.E. Steinmeyer, III, entered an order denying the amended motion to vacate judgment of conviction and sentence. The court recited that the motion was "without grounds for relief" and that there would be no benefit from further recitation of the

facts or argument by this court. A timely notice of appeal was filed on September 16, 2002.

Oral argument was heard before this court on February 3, 2004. Thereafter, on August 26, 2004, this court entered its per curiam opinion affirming the trial court's denial of one ineffective assistance claim (concession of guilt without an express waiver) and remanding the remaining claims to the trial court to make findings of fact and conclusions of law as required by Florida Rule of Criminal Procedure 3.850(d). The claims to be addressed on remand were:

a) trial counsel's failure to challenge certain jurors;

b) trial counsel's failure to seek a change of venue;

c) trial counsel's introduction of the defendant's prior crimes during the penalty phase, and

d) trial counsel's concession of an aggravator.

On remand the trial court received written proposed findings of fact and conclusions of law from the state and the defendant. No additional evidence was received, nor were any further arguments presented to the court. On July 5, 2005, the trial court entered its Findings of Facts and Conclusions of Law. The order adopted virtually in toto the proposed order submitted by the state and denied all of the defendant's claims. The defendant timely filed his Notice of Appeal.

II. Statement of Facts

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

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

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

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

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

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

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

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

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

Defendant's motion sought a new trial.

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

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

On appeal to this court, the defendant did not pursue claim 3 (being forced to wear restraints during trial) and claim 7 (failure to obtain a PET scan). This court received briefs and heard oral arguments. Thereafter, this court denied relief as to claims 1 and 2 dealing with the trial attorney's concession of guilt without an express waiver by the client. On the remaining issues, claims 4, 5, 6, and 8 this court remanded to the trial court for entry of written findings of fact and conclusions of law in accordance with Florida Rule of Criminal Procedure 3.851.

On remand the trial court directed the parties to submit proposed findings of facts and conclusions of law. No further court proceedings were held nor were any other submissions authorized. In due course the trial court entered an order styled

Findings of Facts and Conclusions of Law. This order is substantively identical to the proposed order submitted by the state.

SUMMARY OF THE ARGUMENT

The court erred in adopting virtually verbatim the proposed findings of facts and conclusions of law submitted by the State. The trial court further erred in finding that Appellant's trial counsel did not render ineffective assistance of counsel based on any and/or all of the claims put forward in the Defendant's motion.

ARGUMENT AND CITATIONS OF AUTHORITY

I.

WHETHER THE COURT ERRED IN ADOPTING VIRTUALLY VERBATIM THE PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW SUBMITTED BY THE STATE.

Florida courts have disapproved of the practice of adopting a party's proposed judgment or order verbatim. *See, Perlow v. Berg-Perlow*, 875 So.2d 383, 390 (Fla. 2004); *Ross v Botha*, 867 So.2d 567, 571-573 (Fla. 4th DCA 2004); *Carlton v Carlton*, 888 So.2d 121 (Fla. 4th DCA 2004). The systemic problem with wholesale adoption of a party's proposed order is that it opens to question whether the trier of fact independently considered the issues prior to entering the order. Absent such independent review, particularly in a death case, the defendant is denied due process in violation of his rights under both the Florida and United States Constitutions.

In the instant case, the trial court initially entered an order that denied all relief without comment beyond stating that the defendant's post-conviction motion ". . . is without grounds for relief and . . . there would be no benefit from a further recitation of the facts or arguments . . ." This, despite the clear directive of

Florida Rule of Criminal Procedure 3.850 that the court " . . . make findings of fact and conclusions of law. . ." with respect to such motions. Clearly, the trial court gave little thought and consideration to its judgment. Accordingly, on appeal, this court remanded for entry of findings of fact and conclusions of law.

On remand, the trial court directed the parties to submit proposed findings of facts and conclusions of law. The parties did so. No further court proceedings were held. In due course, the trial court entered an order that is almost a verbatim recitation of the proposed order submitted by the prosecution. The order entered appears to differ in only three ways:

1. The type font is smaller;

2. The transcript record citations are left out of the order and in their place copies of the actual transcript pages are attached as exhibits;

3. In a few places a sentence is moved from one paragraph into another.

The order as entered contains not a single finding of fact, nor a conclusion of law, not contained in the prosecution submission. Conversely, there is not a single finding of fact, nor a conclusion of law, in the prosecution submission that is not contained in the final order. The two documents are

substantively identical.

Although the trial judge had the parties submissions for an extended period of time before entry of the final order there is little reason to believe this time was utilized to "independently consider" the issues, facts and law. Rather, it seems more likely that the extended period resulted from the retirement of the trial judge and his unavailability during this period. It defies logic to believe that after several months of independent review the trial court entered an order that is virtually identical in every material respect to that submitted by the state.

This court has previously denied relief where trial courts adopted wholesale the submissions of one party so long as the findings were supported by the record. *See, Patton v State,* 784 So.2d 380 (Fla. 2000): *Valle v State,* 778 So.2d 960 (Fla. 2001).

However, in each of these instances there was some indication in the record that the trial judge had in fact independently considered all of the testimony, records and files in the case and it could be determined from the order entered ". . . that the trial court reviewed both [proposed] orders and did not simply "rubber-stamp" the State's order." *Valle* at 965. In the instant case, there is absolutely no indication in the trial court's order that anything was considered beyond the State's proposed order. The mere cosmetic changes in the order do nothing to dispel the appearance

that the trial judge did nothing more than rubber-stamp the State's order.

II.

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

The trial court found that defense counsel did not concede the heinous, atrocious and cruel factor (hereinafter "HAC"). Rather, the court found that counsel was "maintaining credibility with the jury" by being honest with them in his description of the defendant's crime in horrific terms. Further, the trial court in an exercise of omniscience, determined that there could not be any prejudice since "[t]he jury would have found this murder to be HAC without counsel's concession . . . [and] . . . the jury would have recommended death regardless of the HAC aggravator . . ." (Order at 15)

If the State seeks the death penalty in a capital case, there are statutory aggravators that the State must prove to warrant imposition of the death penalty. One of those aggravators is the heinous, atrocious and cruel factor . The HAC aggravator is the commission of a capital crime that is unnecessarily torturous to the victim or pitiless. *Douglas v. State*, 575 So.2d 165 (Fla. 1991); *McGill v. State*, 428 So.2d 649 (Fla. 1983). This aggravator requires proof beyond a reasonable

doubt of extreme and outrageous depravity. *Wickham v. State*, 593 So.2d 191 (Fla. 1991), *cert. denied*, 112 S.Ct. 303. During the penalty phase the State can only introduce evidence that seeks to prove a statutory aggravator or rebuts a mitigator the defense offers. *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986).

When a murder involves repeated blows or stabbing, the State has the burden of proving beyond a reasonable doubt that the victim received repeated stab wounds, that the victim died of a particular stab wound and that the victim had defensive wounds. *Halburton v. State*, 561 So.2d 248, 252 (Fla. 1990); *Derrick v. State*, 641 So.2d 378, 381 (Fla. 1994). The jury resolves the question of whether HAC is applicable to a particular death case. *Hansboro v. State*, 509 So.2d 1081, 1086 (Fla. 1987). In cases of repeated stabbing, the HAC factor may be found. *Nibert v. State*, 508 So.2d 1, 4 (Fla. 1987); *Johnston v. State*, 497 So.2d 863, 871 (Fla. 1986). Nevertheless, the State must prove HAC beyond a reasonable doubt to use it is a statutory aggravator. *Hamilton v. State*, 547 So.2d 630 (Fla. 1989); *King v. State*, 514 So.2d 354 (Fla. 1987). If the State fails to offer any evidence that the crime was HAC, the factor cannot be used as an aggravator during the penalty phase. *Hamilton*, 547 So.2d at 633-4.

The entire trial process must remain an adversarial process. *U.S. v.*

Cronic, 466 U.S. 648, 656 (1984). If counsel fails to challenge the State's case, for any reason, ineffective assistance of counsel occurs. *Strickland v. Washington*, 466 U.S. 668 (1984). Even if counsel provides effective assistance of counsel at trial in some areas of that trial, a defendant is entitled to relief if counsel renders ineffective assistance in other portions of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981); *see also*, *Kimmelman v. Morrison*, 477 U.S. 365 (1986). If the error is of constitutional dimension, a single error may warrant relief. *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard.")

The Sixth Amendment provides that all defendants are afforded the right to counsel to aid in their defense. When trial counsel fails to aid in the defense of his client, and a victory is conceded, counsel has been ineffective in representing the client. *Strickland v. Washington*, 466 U.S. 668 (1984). In the instant case, trial counsel told each juror during voir dire, opening statement and closing statement, that they would find that the Appellant did commit first-degree murder and that it was a particularly brutal killing. In effect, defense counsel conceded not only that the Appellant had committed the crime, but that the Appellant had committed the crime in a brutal manner. In essence, trial counsel conceded the HAC aggravator

for the penalty phase.

The State attempted to ensure that the Appellant received the death penalty for his crime. At the penalty phase, the State's burden of proof was to show that the statutory aggravators exceeded the statutory and non-statutory mitigators. The State needed to prove beyond a reasonable doubt each aggravator the State sought to submit. When defense counsel conceded the HAC aggravator, the State's burden was vitiated. Defense counsel officially abandoned his role as an advocate. *See, Cronic*, 466 U.S. 648. Undoubtedly, defense counsel's actions prejudiced the Appellant. To prove prejudice the Appellant must show that there is a reasonable possibility, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.* Had counsel performed effectively, there is a reasonable probability that the penalty outcome would have been different, that is, that Mr. Dillbeck would have received a recommendation of a life sentence because one of the aggravators may not have been present. *See, Strickland*.

Trial counsel's concession of the aggravator was so likely to prejudice the Appellant that prejudice must be presumed. However, if prejudice needs to be demonstrated, prejudice was conclusive before trial ever began. Defense counsel conceded the State's entire case before jury selection was completed, or a single

witness was called, or a single piece of evidence was admitted. Trial counsel's concession of brutality defied effective assistance of counsel, and conveyed to the jury that the HAC aggravator was a foregone conclusion. Trial counsel not only helped the jury decide to find the Appellant guilty, he also helped the jury decide to sentence the Appellant to death. In so doing, defense counsel wholly abandoned his role as counsel and advocate. Therefore, the Appellant's request for a new trial should have been granted.

III.

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

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

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

The first of defense counsel's many deficiencies in conducting voir dire was the failure to challenge Melinda Whitley, ultimately Juror #2. The trial court, adopting the State's proposed findings, described Ms. Whitley as stating that she "was less likely than the average person to vote for a death sentence." (Order at 3) Yet, the trial court completely overlooked Ms. Whitley's description

of the death penalty as "a good thing." (T-202) On a scale of one to ten, with one being the most pro death penalty, Ms. Whitley rated herself a four. (T-206)

During voir dire, Ms. Whitley responded that she had been at the very scene of the murder not more than one or two hours before it took place. (T. 197-198) (H. 79, 103-104). Ms. Whitley stated she felt nervous and fearful as a result of being at the Gayfer's department store so close to when the attack took place. (T. 198, 210)(H. 79, 103-104). It is quite reasonable for anyone in Ms. Whitley's position to have been fearful and feel that they could have been the victim. Ms. Whitley also stated that she felt officials were negligent in allowing the Appellant to escape from prison in the first place. (T. 199). Ms. Whitley stated she believed, "he [the Appellant] obviously had no right to be out where he could so easily hurt someone." (T. 199). Ms. Whitley had already made up her mind that the Appellant should at the very least be behind bars for eternity. Despite this, defense counsel failed to challenge Ms. Whitley for cause. (T. 213). Based on Ms. Whitley's candid statements during voir dire, defense counsel clearly should have challenged her for cause. Defense counsel's failure to challenge Ms. Whitley allowed her prejudiced views to go into the jury room and affect the verdict, thereby prejudicing the Appellant.

Defense counsel also failed to challenge Cynthia Krell, Juror #4. Like

Ms. Whitley, the trial court embraced the State's proposed finding that Ms. Krell was less likely than the average person to vote for a death sentence. (Order at 3) Ms. Krell had read newspaper stories about the stabbing. (T. 394). Ms. Krell related she had knowledge an escaped prisoner stabbed a woman to death in an attempt to steal her car. (T. 394). While knowledge alone is not enough to exclude a juror, Ms. Krell also made statements evidencing bias. Ms. Krell stated she could not vote for a life sentence, even if mitigating circumstances outweighed the aggravating circumstances, because the crime was "very disturbing". (T. 406) (H. 105). Had the trial court reviewed the record, rather than merely adopting the State's findings, it would have been apparent that Ms. Krell could not be impartial. Defense counsel should have challenged Ms. Krell for cause, based upon her equivocal statements. Allowing Ms. Krell to remain on the jury was another instance of ineffective assistance of counsel. The majority of the potential jurors knew about the case from the media, and many believed the Appellant was guilty, including: Horacine Lawrence, Joan Phillips, Roseanne Fletcher, Cynthia Luten, Nancy Marcus, Larry Davis (ultimately Juror #5), Dr. Barnett Harrison, Douglas Stewart, Michael Murphy, Lonnie Ash, Cynthia Ann Porter (ultimately Juror #8), Robert Ussery (ultimately juror #10), Mytrice Jordan, Constance Kundrat and several other jurors. (T. 5, 80, 132, 266-7, 273, 379, 429, 493, 571, 653-654,

705, 742, 874, 905-6, 925, 1023-4). Defense counsel's performance was deficient in allowing a tainted jury to be empaneled. Another juror, Jason Zippay, also knew details of the case. (T. 799). Mr. Zippay had already made up his mind about the case, and stated "assuming everything I read in the newspaper was true, I am sure that he is guilty.". (T. 799)(H. 106-107). Defense counsel was ineffective in failing to challenge Mr. Zippay, because he stated that based on the facts of the case appearing in the newspaper, he was sure the Appellant was guilty. Nothing reflects that defense counsel's failure to challenge for cause Mr. Zippay and the other jurors was a part of any trial strategy.

Juror #11, John Marshall, knew the Appellant was a prison escapee who had previously committed a murder. (T. 969). Even though Mr. Marshall exhibited animosity toward the Appellant, defense counsel also failed to challenge him for cause. (T. 981, H. 83).

Ruth Tadlock, ultimately an alternate juror, was yet another venire person that defense counsel did not challenge. Ms. Tadlock was equivocal in her belief that she believed the Appellant to be guilty, based on the publicity surrounding the trial. Ms. Tadlock stated that she was unsure if she could put her previous knowledge aside and base her verdict solely on the evidence presented at trial. (H. 84). While courts, at their discretion, sometimes give credit to potential

jurors assurances that they will decide the case based on the evidence presented at trial, Ms. Tadlock stated she could not make such an assurance. Clearly, defense counsel should have challenged Ms. Tadlock for cause, because she was not only prejudiced against the Appellant, she stated it was very likely her prejudice would affect the trial's outcome. One biased juror can alter the outcome of a trial, and defense counsel's deficiency in conducting a proper voir dire allowed a number of biased jurors to remain on the panel. Defense counsel clearly rendered ineffective assistance of counsel in repeatedly failing to challenge jurors for cause.

Defense counsel also did not challenge Michelle Holocomb, an employee of Gayfer's department store. Ms. Holocomb was working at the Gayfer's store on the very day of the murder, yet Ms. Holocomb stated she knew nothing about this highly publicized murder. It is hard to believe someone working at a store on the very day a sensational crime occurs could know nothing about it given the extensive news coverage. Any reasonable person would doubt Ms. Holocomb's credibility. Despite this, defense counsel did not challenge Ms. Holocomb. (H. 85).

In *Monson v. State*, 750 So.2d 722, 723 (Fla. 1st D.C.A. 2000), defense counsel was also found to be ineffective for failing to properly conduct voir dire. In *Monson*, defense counsel did not challenge for cause jurors biased by

their ties to or knowledge of law enforcement. *Id.* The court found Monson's claims facially sufficient and ordered an evidentiary hearing, or, in the alternative, for the trial court to attach to its order portions of the record conclusively refuting his claims. *Id.* Whether the bias by ties to a certain group of people, prior knowledge from the media or personal opinions regarding the case, defense counsel should challenge each juror who exhibits a prejudice. *See, e.g. Robinson v. State*, 659 So.2d 444, 445-6 (Fla. 2nd D.C.A. 1995) (claim prospective white juror's comments allegedly taint a jury pool found facially sufficient.). All partial jurors must be challenged for cause. *See, Smith v. State*, 699 So.2d 629, 636 (Fla. 1997). Failure to challenge partial or prejudiced jurors is ineffective assistance of counsel.

Similarly, in *Gordon v. State*, 469 So.2d 795, 797 (Fla. 4th D.C.A. 1985), Gordon also alleged his defense counsel was ineffective in numerous instances, including failing to challenge biased jurors. Like the instant case, Gordon's defense counsel allowed a juror to remain on the jury who had prior knowledge and admitted she had prejudice against the defendant. The court found the Appellant showed defense counsel's deficient performance reasonably could have altered the outcome of the trial. *Id.* at 798. *See, also Strickland*, 466 U.S. at 2068-9. The court set aside the verdict and remanded the case for a new trial. *Gordon*, 469 So.2d at 798.

In the instant case, Appellant's defense counsel failed to properly conduct voir dire. As a result of defense counsel's ineffectiveness in conducting voir dire, the Appellant suffered prejudice affecting the trial's outcome. Defense counsel repeatedly failed to challenge jurors who had prior knowledge and/or biased views of the case. Defense counsel allowed jurors with prior knowledge to remain on the jury, therefore, tainting the jury and the entire verdict that they reached. Defense counsel had no reason to conserve challenges for the most biased jurors, because the trial court allowed the defense's challenges and awarded more preemptory challenges when needed. In fact, the Court announced he would grant a challenge for cause people who knew the Appellant had been in jail for murder. (H. 84). Still, defense counsel kept these individuals on the jury.

Further, and most telling, defense counsel failed to challenge jurors for cause who flat out stated they had prejudiced views of the case. Similar to *Monson* and *Gordon*, defense counsel repeatedly allowed biased and partial jurors to remain on the jury. Moreover, defense counsel's failure to challenge the jurors was not based upon reasonable trial strategy. In this case, any such strategy involving not challenging biased jurors would be wholly unreasonable. Impaneling a jury tainted with prior knowledge and prejudice cannot be considered effective assistance of counsel under reasonable standards of professional conduct. Therefore, defense

counsel's performance was clearly ineffective in failing to conduct a proper voir dire and to challenge biased jurors. Defense counsel was deficient and ineffective in failing to challenge the jurors showing such biases and those with prior knowledge of the case. Accordingly, the Appellant suffered prejudice and was denied his right to an impartial jury as the result of his counsel's deficient performance. *See*, U.S. Constitution Amendments VI & XIV. *See also, Irvin*, 366 U.S. at 722; *McMann*, 397 U.S. at 771; *Coleman*, 778 F.2d at 1489. There is a reasonable probability the outcome of Appellant's trial could have been different had defense counsel properly conducted voir dire. The Appellant's judgment and sentence must be vacated and this case remanded for a new trial.

IV.

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

The trial court, adopting the State's proposed order, found that Dillbeck's trial counsel was not deficient in failing to move for a change of venue. While finding trial counsel's explanation of strategy "credible," the trial judge seemed far more influenced by the lack of prejudice. The court determined there was no prejudice by the simple expedient of finding that "[i]f trial counsel had filed a motion for change of venue, the trial court merely would have denied it." (Order at 7)

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

strategic position and Appellant was prejudiced thereby.

It is true that certain cases naturally result in extensive publicity, which can make it impossible to select an impartial and unprejudiced jury without prior knowledge of the case. In the instant case, Tallahassee was so saturated by inflammatory and hostile publicity surrounding the case that Appellant was inherently prejudiced. *Murphy v. Florida*, 421 U.S. 794, 798-9 (1975); *Bundy v. Dugger*, 850 F.2d 1402, 1424 (Fla. 1988); *Coleman*, 778 F.2d at 1490. Inherent prejudice makes selecting a jury without actual prejudice nearly impossible. Actual prejudice, such as the Appellant suffered here, arises when jurors at the defendant's trial are prejudice. *See, Heath v. Jones*, 941 F.2d 1127, 1132 (11th Cir. 1991).

Prejudice is found especially where the publicity is inflammatory or hostile, instead of straightforward and factual. *See, Murphy*, 421 U.S. at 798-99; *Bundy*, 850 F.2d at 1424. Defense counsel should also consider the length of time between the crime and trial, and when the publicity occurred during that time; whether the State's or the police's version of the case has been publicized instead of the defendant's version; the size of the community; and whether all of the defense's peremptory challenges have been used. *See, Rolling v. State*, 695 So.2d 278, 285 (Fla. 1997). Defense counsel should also consider the extent and nature of the pre-trial publicity and difficulty counsel may encounter in selecting a jury. *Id.*

citing Murphy v. Florida, 421 U.S. 794 (1975). When these factors are present and there is a risk of prejudice, due process requires defense counsel move for a change of venue. Const. amend VI & XIV; *see, Irvin*, 366 U.S. at 722. A failure by defense counsel to file a motion for change of venue is deemed ineffective assistance of counsel.

In the instant case, defense counsel admitted the case proceeded to trial fairly quickly; and while reports of the incident appeared to be accurate, there were also reports concerning Appellant's prior conviction for murder and his escape, and the majority of the potential jurors and those ultimately selected not only stated they had knowledge of the case, but they also knew about the Appellant's prior murder conviction and escape. (H. 79, 83). Juror #4, Cynthia Krell, had read newspaper stories about the crime and stated that she would not be able to vote for a life sentence, even if the mitigating circumstances outweighed the aggravating circumstances. (H. 104) Juror #9, Jason Zippay, admitted he already believed Appellant was guilty based upon what he had read and the only issue would be insanity. (H. 81) Defense counsel, however, selected Mr. Zippay, even though insanity was never an issue in the case. (H. 107).

Defense counsel acknowledged that he had been concerned that this case occurred in a popular shopping mall where almost all Tallahassee residents

have shopped, and this made the case even more difficult, because the jurors would more readily identify with the victim. (R4-641) In fact, Juror #2, Melinda Whitley, admitted she had been at the scene of the murder with her children merely an hour or two before it occurred and was still frightened at having been there. (H. 77). Juror Michelle Holocomb was even working at the store on the date of the incident. (H. 85).

In *Provenzano v. Singletary*, 3 F.Supp.2d 1353, 1362 (MD Fla. 1997), *aff'd*, *Provenzano v. Singletary*, 148 F.3d 1327 (11th Cir. 1998), the petitioner challenged defense counsel's failure to renew its motion for change of venue. While this case is distinguishable, because Provenzano's counsel actually moved for a change of venue, it provides some insight into the review of such claims. *See*, *Id*. at 1363. In *Provenzano*, defense counsel initially made an oral motion for change of venue on the first day of trial. *Id*. at 1362. Although the trial judge stated he "was inclined to grant a change of venue", defense counsel later made the strategic decision not to make a follow-up request for a change of venue. *Id*. at 1362. (Whether trial counsel's actions were a result of trial strategy is a question of fact; whether those actions were reasonable is a question of law to be reviewed de novo). *See also*, *Tafero v. Wainwright*, 796 F.2d 1314, 1321 (Fla. 11th Cir. 1986); *Rolling v. State*, 695 So.2d at 283; *Kelley v. State*, 569 So.2d 754, 760 (Fla.

1990)(tactical decision to not request a change of venue; peremptory challenges not all used; and no problem seating a jury; *Buford v. State*, 492 So.2d 355, 359 (Fla. 1986)(decision to not move for change of venue was tactical and petitioner failed to establish 3.850 claim). *See, generally, Oakley v. State*, 677 So.2d 879, 880 (Fla. 2nd D.C.A. 1996).

Provenzano's defense counsel informed the court they wished to continue the trial in the same venue for strategic reasons, and because they planned to put on an insanity defense. *See, Provenzano*, 3 F.Supp.2d at 1362. Provenzano argued defense counsel's decision not to renew the motion for change of venue was an unreasonable strategy. *See*, 148 F.3d at 1330. Unlike the instant case, Provenzano had no problems selecting a jury and he did not exhaust his peremptory challenges. *See*, 3 F.Supp.2d at1363; *Kelley*, 569 So.2d at 760 (large number of jurors did not even live in the county at the time of the crime). The court found defense counsel's decision not to renew the motion for change of venue was part of a reasonable trial strategy. *Id*. The court noted all jurors who exhibited any possible prejudice were removed for cause, and all peremptory challenges were not used. *Id*. Therefore, defense counsel's assistance was effective. *Id*. Since Provenzano did not allege facts sufficient to prove he suffered prejudice as a result of defense counsel's actions, the court did not determine whether there was a

reasonable possibility the outcome of the trial could have been different. In contrast, Appellant has alleged sufficient facts proving he was prejudiced and there is a reasonable possibility the outcome of the trial could have been different.

Finally, not only did defense counsel use all of his peremptory challenges, but he had to request additional challenges - only two of which were granted. Still, even though selecting a jury was proving to be extremely difficult, trial counsel did not make a motion for change of venue. Unlike defense counsel's strategy in *Provenzano,* defense counsel's excuse for failing to file a motion for change of venue, because he was unsure where the trial would be held, is unreasonable. (H. 87-88, 102-103). While it may be reasonable to assume a jury will ultimately hear the facts of a case, it is unreasonable to believe jurors will remain impartial, who have not only been prematurely exposed to those facts, but who have also been exposed to Appellant's prior murder conviction and prison escape as well.

It is extremely doubtful that the panel could have been more biased, no matter where the trial was held. However, had a motion for change of venue been granted, Appellant's jury would certainly not have consisted of individuals who had been exposed to inflammatory publicity, including the Appellant's prior criminal record. Appellant's jury would certainly not have consisted of individuals who had

frequented the very same shopping mall. Perhaps, most importantly, Appellant's jury certainly would not have consisted of individuals who had been in the very same area, either at the same time or very shortly before the incident occurred, and who still felt personal fear at the time of trial. Moreover, unlike Provenzano's jury, Appellant's jury consisted of individuals who had exhibited prejudice. Again, Juror #4, Ms. Krell, stated she would not be able to vote for a life sentence, even if the mitigating factors outweighed the aggravating factors. (H. 105). Likewise, Juror 9, Jason Zippay, stated his only issue was the Appellant's sanity, and Appellant's sanity was never raised. (H. 106-107). Defense counsel appeared unconcerned that Appellant's jury consisted of people not only living in the community at the time of the offense, but also people who frequented the shopping area and stated they were personally afraid. Given the prevalence of obvious partiality, defense counsel's strategic decision was unreasonable and Appellant was prejudiced. Defense counsel's failure to file a motion for change of venue was an unreasonable strategic decision and Appellant was prejudiced thereby.

Similarly, in *Miller v. State*, 750 So.2d 137, 138 (Fla. 2nd D.C.A. 2000), the Court held the petitioner's allegations of ineffective assistance of counsel for failing to file a motion for change of venue, due to prejudicial publicity, should have been given more than a summary denial. (Enormous) pre-trial publicity

surrounded Miller's trial. *Id.* at 137. Miller alleged defense counsel was deficient in failing to request a change of venue, because the community was saturated with inflammatory publicity, much like Tallahassee was in the Appellant's case. *Id.* However, unlike the Appellant's defense counsel, Miller's did not use all of his peremptory challenges. *Id.* at 138. This was a factor in the trial court' s summary denial of the petitioner's claim of ineffective assistance of counsel. *Id.* Miller countered that defense counsel's failure to use his peremptory challenges was evidence of counsel's ineffectiveness. *Id.* The court found Miller's claim of ineffective assistance of counsel was not refuted by the record and sufficiently prejudicial to meet the *Strickland* standard. Since the petitioner's claims were facially sufficient, the court reversed and remanded the case. *See, Miller,* 750 So.2d at 138.

The petitioner in *Romano v. State*, 562 So.2d 406, 407 (Fla. 4th D.C.A. 1990), also alleged defense counsel was ineffective in failing to move for a change of venue due to media reports regarding the case. Similar to *Miller*, the court found Romano's claim of ineffective assistance of counsel facially sufficient. The court reversed and remanded for an evidentiary hearing or for attachment of portions of the record that refuted Romano's allegations. 562 So.2d at 407.

In the instant case, the Appellant contends that defense counsel

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

V.

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

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

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

> "It is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior violent felony conviction involving the use or threat of violence to the person rather than the bare admission of conviction. Testimony concerning the events which resulted in the conviction assist the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence. *Jones v. State,* 748 So.2d 1012, 1026 (Fla. 2000), *citing, Rhodes v. State,* 547 So.2d 1201, 1204-05 (Fla. 1989)..

The court went on to say, "however, the line must be drawn when the testimony is not

relevant, gives rise to a violation of the defendant's confrontational rights, or the prejudicial value outweighs the probative value." *Id.* Another controlling principle regarding the introduction of such evidence at the penalty phase has been, "We caution the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceeding." *Rodriguez v. State*, 753 So.2d 29, 44 (Fla. 2000), *citing*, *Finney v. State*, 650 So.2d 674, 683-84 (Fla. 1995).

In the instant case we have a unique situation because it was the Appellant's counsel himself who introduced the evidence of Appellant's prior felony convictions, as well as numerous other offenses that the Appellant was never charged with nor convicted of, and Appellant's counsel went into detail in some of those matters during the penalty phase. Appellant's trial counsel stated, during his opening statement of the penalty phase, "my client has done some terrible things during the course of his life...when he was fifteen years old in Indiana, he stabbed a fellow, an incident chillingly similar to the one you heard at trial." (T. 2171-72). He also stated that the Appellant committed a burglary of a conveyance, grand theft and a grand theft auto to get to Florida, where he was also arrested for possession of marijuana. (T. 2171-72). Trial counsel also described Appellant's 1983 prison

escape attempt to the jury. (T. 2174). He also described a 1984 incident wherein the Appellant stabbed an inmate in prison. (T. 2175). Counsel also told the jury the Appellant stabbed a man in Indiana while he was high on drugs. (T. 2184). Of these offenses, the Appellant was only convicted of the prior attempted escape. None of the other offenses were ever charged against the Appellant. Appellant's counsel also failed to object when the State went over in detail the same crimes that were already described by Appellant's counsel. (T.2290-92; 2294-2300).

Appellant's counsel rationalized the introduction of this evidence as his way of anticipating the prosecution's rebuttal of mitigation evidence. The trial court found this explanation credible. (Order at 9)

Appellant's counsel was ineffective for introducing details of Appellant's prior violent felonies at the penalty phase. This court has permitted the State to introduce evidence of a defendant's prior convictions for violent felonies through the hearsay statement of a law enforcement officer. *Jones v. State*, 748 So.2d 1012, 1025 (Fla. 2000); *see also, Lockhart v. State*, 655 So.2d 69 (Fla. 1995); *Jones v. State*, 732 So.2d 313 (Fla. 1999); *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989). However, in every one of those cases it was the State who presented the evidence of the defendants' previous convictions for violent felonies to the jury. Moreover, the Florida Supreme Court has detailed explicit rules that govern exactly

what evidence the State may introduce so as to prevent the State from making evidence of prior crimes a feature of the penalty phase proceedings. *Rodriguez,* 753 So.2d at 44, *citing Finney v. State,* 660 So.2d 674, 683-84 (Fla. 1995). It is clear that these rules are in place to ensure that a defendant is not denied his due process rights and not sentenced to death based on evidence of his prior crimes, which are likely to prejudice the jury against the defendant. Thus, it becomes evident that Appellant's counsel was clearly ineffective for introducing evidence at the penalty phase, which the State itself may not have been able to introduce to the jury under Florida law.

CONCLUSION

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

Alternatively, the defendant has been denied due process in his post-conviction relief hearing. First, by the trial court's failure to enter a proper order making findings of fact and conclusions of law. The error was then compounded upon remand by the trial court's artifice of simply rubber-stamping the State's proposed findings of fact and conclusions of law. If not afforded a new trial, the defendant should be afforded a new evidentiary hearing before a new judge.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via U.S. Mail to Charles J. Crist, Jr., Esq., Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; this 13th day of March 2006.

CERTIFICATE OF COMPLIANCE

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

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GEORGE W. BLOW III