IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-154

LOWER TRIBUNAL NO. 97-CF-1547

JOHN CALVIN TAYLOR, II,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Taylor's initial and second amended motion for post-conviction relief. The motions were brought pursuant to Fla. R. Crim. Pro. 3.851.

John Calvin Taylor, II will be referred to as "Mr. Taylor" "Taylor" or "Appellant." Frank J. Tassone will be referred to as "undersigned counsel."

Citations to the record on appeal from the direct appeal will be designated with the Volume number, "R" and the appropriate page number, e.g. (1 R 1.) Citations to the record on appeal from the initial 3.851 will be designated with the Volume number "PCR" and the appropriate page number, e.g. (1 PCR 1.)

STANDARD OF REVIEW

ARGUMENTS I – III. Appellate courts review a circuit court's resolution of ineffective assistance of counsel claims under Strickland with a mixed standard of review because both the performance and the prejudice of the Strickland test present mixed questions of law and fact. Sochor v. State, 883 So.2d 766 (Fla. 2004).

Although appellate courts are to give the trial court's factual findings deference, the trial court decisions must be supported by competent, substantial evidence in order for an appellate court to give same. Id.; see also Oceanic International Corp v. Lantana Boatyard, 402 So.2d 507 (Fla. 4th DCA

1981)(Holding that, "when an appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence, or that the trial court has misapplied the law to the established facts, then the decision is clearly erroneous and the appellate court will reverse because the trial court has failed to give legal effect to the evidence in its entirety.")

ARGUMENT II—Where a claim was denied as insufficiently pleaded, this case must be remanded to the trial court to allow Taylor reasonable time to bring his claim to facial sufficiency. Spera v. State, 971 So.2d 754, 761 (Fla. 2007). According to this Court in capital postconviction review of Davis v. State, 26 So. 3d 519, 527 (Fla. 2009):

> When a postconviction motion fails to comply with the pleading requirements of the rule and the court intends to deny the motion based on these easily curable technical omissions, the proper procedure is for the court to strike the motion with leave to amend within a reasonable period if the technically defective pleadings can be completed and amended in good faith.

Id. citing Spera, 971 So.2d at 761.

ARGUMENT IV-- Lower Court rulings on the constitutionality of a statute receive the *de novo* standard of review. Bush v. Schiavo, 885 So.2d 321 (Fla. 2004).

STATEMENT OF THE CASE AND FACTS

John Calvin Taylor was indicted on February 26, 1998 for first-degree murder and robbery with a deadly weapon of Shannon Holzer. (1 R 23-24.) Taylor was tried before a jury on July 19 – 23, 1999 and found guilty of both counts. (4 R 659-660)(17 R 2064.)

The defense presented 22 penalty phase witnesses in the August 13, 1999 penalty phase. Collectively, the witnesses, mostly family members and friends, testified that Taylor had a very dysfunctional family. (See e.g. 18 R 2217-41); that Taylor grew up in an impoverished environment, was abused, neglected, and discouraged from attending school. (See 18 R 2260.) Witnesses testified that although Taylor was a liar and thief he was a nice guy. (See 19 R 2406, 2429.) According to the evidence presented on Taylor's behalf, Taylor ultimately overcame hardship, became a talented carpenter, electrician, mechanic, and plumber, and enjoyed life as a family man. (See 18 R 2286.) At the conclusion of the penalty phase, the jury recommended a death sentence for Mr. Taylor. (5 R 847.) The court permitted the state and defense to present additional evidence and argument at a September 9, 1999 Spencer hearing. (5 R 965-978.)

On October 7, 1999 the trial court sentenced Mr. Taylor to death for his first-degree murder conviction and life in prison for the robbery charge. (5 R 847) (20 R 2642.) In reaching this sentence, the court found the following four

aggravating factors: (1) The defendant was previously convicted of another capital offense of a felony involving the use or threat of violence to another person; (2) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery or kidnapping; (3) The capital felony was for pecuniary gain; (4) The crime for which defendant was convicted was committed after he had previously been convicted of a felony or was under sentence of imprisonment, community control, or felony probation. (5 R 980-84.) The court merged the second and third aggravators and weighed three aggravating factors in considering the appropriate sentence for Taylor. (5 R 973-996)(20 R 2702.)

The defense did not present, nor did the trial court consider, any statutory mitigating factors. The trial court considered the following non-statutory mitigation: (1) Taylor was raised in a dysfunctional family and suffered neglect and abuse during his first eleven years; (2) By the time anyone encouraged John Taylor to be interested in school, it was too late, and he dropped out in junior high; (3) While Taylor was known as a thief throughout his life, he was never known to be violent; (4) Taylor makes friends easily, he enjoys people who also enjoy him – he has done good deeds to friends and strangers (not proven); (5) Taylor enjoys family relationships and activities (not proven); (6) Taylor is a skilled, reliable worker inside and outside of prison; (7) Taylor performs well when he has

structure in his life (not proven); Taylor has been and ay continue to be a positive influence in the lives of family members (not proven). (5 R 979-95.)

Mr. Taylor filed a direct appeal of his judgment and sentence with this Court.[1]

This Court denied relief in Taylor v. State, 855 So.2d 1, 9-13 (Fla. 2003).

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[1] (1) The trial court erred in denying Taylor's motion to suppress physical evidence seized from his house and vehicle, his statements made while detained in the back of the patrol car and at the police station, and the clothing seized after he was arrested, where the evidence and the statements were the poisoned fruit of illegal police action; (2) The trial court erred in permitting Joe Dunn, Arthur Mishoe, Alex Metcalf, and Cynthia Schermund to testify to hearsay statements made by the victim about giving Taylor a ride to Green Cove Springs; (3) The Trial court erred in admitting into evidence Taylor's credit application which included statements by Taylor that were lies; (4) The trial court erred in allowing the prosecutor to rehabilitate deputy Noble by admitting a prior consistent statement where the prior statement was made one year after any motive to fabricate arose; (5) The Trial court erred in admitting into evidence a pair of underwear found in the bag containing the clothing taken from Taylor when he was arrested, where the state presented no evidence Taylor was wearing underwear or that underwear was placed in the bag, where the bag was left unattended in a cabinet for two weeks, it was in when originally placed in the cabinet; (6) The husband/wife privilege was violated when the trial court required Taylor's wife to testify that Taylor told her Michael McJunkin needed money for a bus ticket to Arkansas; (7) The trial court erred in instructing the jury on and in finding the "under sentence of imprisonment" aggravating circumstance based upon a 1991 Arkansas prison sentence for which Taylor was never incarcerated due to an administrative error; (8) The trial court erred in finding the evidence failed to prove the mitigating factors that (i) As a child and an adult, Taylor has been known to be a thief but has not been known as a violent person, and an act of violence is out of character for him; (ii) Taylor makes friends easily, enjoys people who enjoy him ,and has done good deeds for friends and even perfect strangers; (iii) Taylor enjoys family relationships and activities; (iv) Taylor appears to perform well when he has structure in his life; (v) Taylor has been and can continue to be a positive influence in the lives of family members; (9) The death sentence is disproportionate where there were only two relatively week aggravating circumstances and copious mitigating circumstances, including a severely dysfunctional upbringing marked by daily abuse and complete lack of parental care or supervision.

Mr. Taylor filed a Petition for Writ of Certiorari with the United States Supreme Court; the Court denied the petition on March 8, 2004. Taylor v. Florida, 541 U.S. 905 (2004).

Taylor filed his initial motion to vacate judgments of conviction and sentence under the Florida Rules of Criminal Procedure 3.850/3.851 on October 27, 2004, including two claims. (1 PCR 4-13.) Taylor filed an amended 3.850/3.851 on April 26, 2007.[2]

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[2] (1) Access to files and records pertaining to Mr. Taylor's case in the possession of various state agencies have been withheld in violation of 119.01, Fla. Stat., the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the Corresponding provisions of the Florida Constitution. Mr. Taylor cannot prepare an adequate Rule 3.850 Motion until he has received public records materials and has been afforded due time to review and amend; (2) A jury must find all aggravating circumstances (other than the prior violent felony convictions) beyond a reasonable doubt; (3) Taylor's counsel was ineffective in the pretrial, guilt, and penalty phases of trial. Defendant was denied the right to a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments – PRETRIAL (a) Defense counsel was deficient in his representation of defendant due to his failure to efficiently partake in the discovery and investigation process. These actions resulted in defendant's trial counsel having insufficient knowledge of the facts surrounding defendant's case, insufficient knowledge as to the substance of the witnesses' testimony, and insufficient knowledge as to available defenses of the defendant; GUILT PHASE (a) Defense counsel was ineffective and deficient in his representation of defendant because he failed to impeach state witnesses when relevant impeachment evidence was available; (b) Defendant's counsel was deficient in his representation of defendant because he failed to file a motion for change of venue, as the defendant's case was widely publicized; (c) Defense counsel was ineffective and deficient in his representation of defendant because he failed to object to the prosecution's misconduct, including the prosecution's statements toward inflaming the passions and minds of the jury; (d) Defense counsel was deficient in his representation of defendant by failing to fully explore and present witnesses and evidence in support

The state filed a response to the amended 3.850/3.851 on June 25, 2007. (3

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of defendant's motion to suppress evidence; PENALTY PHASE (a) Defense counsel was ineffective in failing to utilize a mental health expert to effectively establish mitigating circumstances; (b) Defense counsel was ineffective and deficient in his representation of defendant by failing to object to jury instruction regarding improper aggravators and burden shifting to defendant to prove death not appropriate; (c) Defense counsel was ineffective and deficient in his representation of defendant by failing to request a curative instruction to the jury on non-aggravating circumstances; (d) Defense counsel was ineffective by failing to rebut the weight of the state's presented aggravators; (4) The State knowingly [presented] false material information which prejudiced the defendant and thereby was a violation of Giglio v. United States; (5) Defendant has newly discovered evidence of such nature to produce an acquittal or retrial. Therefore, defendant's convictions are in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; (6) The defendant's trial was fraught with procedural and substantive errors, which cannot be viewed as harmless when viewed as a whole. The combination of errors deprived defendant of a fair trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments; (7) Defendant is innocent of first-degree murder. There is insufficient evidence to support his conviction and sentence; (8) Defendant was denied a proper direct appeal from his judgments of conviction and sentences of death in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Art. 5 § 3(b)(1) of the Florida Constitution and § 921.141(4) of the Florida Statutes, due to omissions in the record. Defendant is being denied effective assistance of post-conviction counsel because the record is incomplete; (9) Defendant's sentence is unconstitutional under Ring v. Arizona; (10) Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. To the extent this issues was not properly litigated at trial or on appeal, defendant received prejudicially ineffective assistance of counsel; (11) Defendant may not be executed by lethal injection without violating the constitutions of the United States and Florida. The law enacting lethal injection is unconstitutional. The waiver provision is unconstitutional. It is an unconstitutional special criminal law. It violates the prohibition against ex post facto laws. (2 PCR 49-202.)

PCR 229-303.) Following the October 31, 2007 Huff[3] hearing, the court granted an evidentiary hearing on certain subclaims of Claim Three (ineffectiveness of trial counsel at guilt and penalty phases), Claim Four (Giglio violations); and Claim Five (newly discovered evidence of a different perpetrator). (6 PCR 972-73.)

STATEMENT OF THE ISSUES

I. Whether the trial court erred in finding that trial counsel was not deficient in failing to properly utilize a mental health expert in Taylor's penalty phase proceedings to correlate the presented mitigation to the facts and circumstances of the crime and establish statutory and non-statutory mitigation resulting in prejudice to Taylor?

II. Whether the trial court erred in summarily denying Taylor's claim that trial counsel was deficient in failing to move for a change of venue and that this failure resulted in a due process violation where Taylor did not have an impartial jury?

III. Whether the trial court erred in its determination that counsel was not ineffective in failing to object to prosecutorial misconduct which inflamed the passions and minds of the jury?

IV. Whether Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona because it does not require the jury to make the findings of fact

[3] Huff v. State, 622 So.2d 982 (Fla. 1993).

necessary to impose a death sentence?

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL WAS NOT DEFICIENT IN FAILING TO PROPERLY UTILIZE A MENTAL HEALTH EXPERT IN THE PENALTY PHASE TO ESTABLISH MENTAL MITIGATION (INCLUDING STATUTORY MITIGATION) AND CORRELATE THE REQUESTED NON-STATUTORY MITIGATORS TO THE FACTS AND CIRCUMSTANCES OF THE CRIME

Taylor's trial attorney and the prosecutor both described Taylor's childhood as the worst they had ever heard. Despite the horrific nature of Taylor's childhood and the abundance of evidence presented at penalty phase demonstrating Taylor's dysfunctional upbringing, the jury, voiced a resounding "so what?" and sentenced Taylor to death with a 10 to 2 vote.

Counsel was deficient in failing to present the testimony of a mental health expert to correlate Taylor's tragic upbringing to the facts and circumstances of the crime. Furthermore, counsel should have requested that its mental health expert determine whether Taylor qualified for the statutory mitigators of extreme emotional disturbance and ability to conform his conduct to the requirements of the law and presented evidence in support of these statutory mitigators at trial.

This failure of counsel to present expert testimony on Taylor's behalf in penalty phase cannot be considered strategic because counsel was worried about anti-social personality disorder. This is especially true in the instant case where

the mental health expert who evaluated Taylor specifically found that Taylor was not anti-social.

Taylor was prejudiced by his counsel's failure to present statutory and non-statutory mental mitigation through the testimony of a mental health expert in penalty phase. Had counsel presented a mental health expert to correlate the migitation that was presented at penalty phase to the facts of circumstances of the crime; discuss new non-statutory mental mitigation; and establish two statutory mental mitigators of extreme emotional disturbance and inability to conform conduct to the requirements of the law, there is a reasonable probability that the outcome of the penalty phase would have been different.

II. THE TRIAL COURT ERRED IN SUMMARILY DENYING TAYLOR'S CLAIM THAT TRIAL COUNSEL WAS DEFICIENT IN FAILING TO MOVE FOR A CHANGE OF VENUE, THEREBY PREJUDICING TAYLOR BY PROHIBITING TAYLOR FROM SELECTING AN IMPARTIAL JURY

Shannon Holzer's murder was the talk of the small community where she and her extended family lived and worked. Ms. Holzer worked at her family's business, Buddy Boy's Kountry Store outside of St. Augustine Florida, which was a local gathering place on the Clay County/St. Johns' County border. Ms. Holzer and her parents were close friends of the deputy who investigated the case upon Holzer's disappearance. (7 R 137)(3 R 425-26.) There was heavy media coverage of the Holzer murder in the media in St. Johns County where Holzer lived and

worked, and Clay County where her body was discovered, where the trial took place, and where the jury pool originated.

Taylor was prejudiced by the deficiency of his counsel in failing to move for a change of venue. Had counsel requested a change of venue in pre-trial proceedings it is likely the motion would have been granted and the juror who admitted to believing that Taylor was guilty before the trial even began would not have been responsible for determining Taylor's guilt and appropriate punishment.

III. THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT WHICH INFLAMED THE PASSIONS AND MINDS OF THE JURY

Taylor's trial counsel failed to object where the state's misconduct in the guilt stage of Taylor's trial made the proceedings presumptively unreliable and unfair. Therefore, a new trial should be granted because the prosecutorial misconduct might have influenced the jury to reach a more severe verdict that it would have otherwise

IV. FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER RING V. ARIZONA BECAUSE IT DOES NOT REQUIRE THE JURY TO MAKE THE FINDINGS OF FACT NECESSARY TO IMPOSE A DEATH SENTENCE

The jury's 10-2 death recommendation in Mr. Taylor's case was not specific in that it does not tell us how many, if any, of the aggravators were found beyond a reasonable doubt by a majority of the jurors. The ten jurors who recommended

death could have split on which aggravators they believed had been proved beyond a reasonable doubt. They could have been so split over the three factors that none of the factors were found proved by a majority. Ring has been violated, Florida's sentencing scheme for death penalty cases is unconstitutional, and Mr. Taylor is entitled to be resentenced to life.

ARGUMENT I

THE TRIAL COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL WAS NOT DEFICIENT IN FAILING TO PROPERLY UTILIZE A MENTAL HEALTH EXPERT IN THE PENALTY PHASE TO ESTABLISH MENTAL MITIGATION (INCLUDING STATUTORY MITIGATION) AND CORRELATE THE REQUESTED NON-STATUTORY MITIGATORS TO THE FACTS AND CIRCUMSTANCES OF THE CRIME

The relative effectiveness or deficiency of capital defense counsel cannot be measured by the volume of penalty phase witnesses alone, but by the quality of information presented and its usefulness and relevance to the jury's decision. Counsel presented a variety of witnesses from Taylor's childhood who, despite the brutal murder that Taylor had been convicted of, said that Taylor was kind, nice to people, had a bad childhood but overcame the challenging obstacles.

Defense counsel presented nothing to correlate Taylor's horrible childhood and upbringing with the instant crimes. Defense counsel offered no statutory mitigation, though it existed and could have been used to explain why Taylor could have committed the crimes. Because of counsel's failure to present useful, relevant tools to the jury in reaching its momentous decision, the jury determined

with a 10 to 2 vote that Taylor deserved to die for his crime despite that his childhood was, as conceded by the prosecutor, "dysfunctional" "awful" and "terrible." (20 R 2602.)

Defense counsel requested only seven non-statutory mitigating factors, and court found the existence of only three of those non-statutory mitigating factors. In its sentencing order, the trial court specifically wrote that there was "*relatively insignificant non-statutory circumstances established by this record*." (6 R 995)(emphasis added).

I. Deficient Performance

Trial counsel for Taylor was deficient under Strickland v. Washington, 466 U.S. 668 (1984) for failing to effectively utilize a mental health expert at trial to correlate the mitigation presented at penalty phase to the facts and circumstances of the crime and establish non- statutory mental mitigation. Additionally, a mental health expert should have been presented to show that Mr. Taylor committed the capital felonies while "under the influence of extreme mental or emotional disturbance," and that Taylor's, "capacity… to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See Fla. Stat. 921.141 (6)(b) and (6)(f), respectively.

Florida courts have consistently recognized that a trial counsel's failure to find and present statutory and non-statutory mental mitigation in the penalty phase

of a capital trial may constitute a deficient performance. See e.g. Blackwood v. State, 946 So 2d 360 (Fla. 2006)(FSC upholds trial court determination that counsel was deficient, in part, based on his failure to present mental health mitigation witness who established a number of non-statutory mental mitigating factors and to the statutory mitigator that defendant suffered an extreme mental or emotional disturbance at the time of the crime.)

A. Defense counsel failed to present quality mitigation to outweigh three aggravating factors

At the penalty phase of Taylor's trial, the state requested the aggravating factors of prior capital felony; felony murder—the murders occurred during the commission of a robbery or kidnapping; the murder was committed while Taylor had been previously convicted of a felony and was under sentence of imprisonment, or was placed on community control, or was on felony probation. (6 R 983.)

Defense counsel for Taylor was aware of the state's intent to prove four[4] aggravating factors, yet counsel requested no statutory mitigation. Although Taylor was evaluated by Dr. Krop, a mental health expert, counsel, like Blackwood's trial attorney above, did not present Dr. Krop's testimony in penalty phase. Because counsel did not present the testimony of a mental health expert, counsel could not

[4] The state sought and proved four aggravators, but only three were used as the felony murder and pecuniary gain aggravators merged. (6 R 983.)

request or establish statutory mental mitigation of extreme emotional disturbance and inability to conform one's conduct to the requirements of the law. Given the number of aggravating circumstances, defense counsel had a duty to present equally powerful statutory mitigation where available.

B. Counsel was deficient in failing to link Taylor's traumatic childhood to the facts and circumstances of the crime

Although in the words of trial counsel, "[Taylor] had one of the - - one of the worst childhoods I think I have ever seen," (7 PCR 1099) counsel failed to properly use this information in conjunction with expert testimony to demonstrate to the jury how evidence of Taylor's terrible childhood related to the crime of which Taylor was convicted.

A mental health expert did not take the stand and inform the jury that not only did Taylor have the sort of childhood horror movies are based on, but Taylor committed his crimes as a result of that childhood; that his childhood caused him to suffer from an extreme mental or emotional disturbance at the time of the crime; and that because of his childhood he was not equipped with the tools to conform his conduct to the requirements of the law at the time the crime was committed.

Trial counsel consulted with Jacksonville-based mental health expert, Dr. Krop for the purposes of establishing mitigation in Taylor's case. Based on this consultation, "[Defense counsel was] pretty certain from the beginning we didn't

have anything useful from Dr. Krop…" (7 PCR 1126.) Although counsel was "certain from the beginning" that Dr. Krop would not be helpful, counsel did not request the appointment of another mental health expert. Additionally, it is likely that Dr. Krop was not helpful because counsel did not provide enough documentation or ask the right questions. There is no mention in the notes of trial counsel or Dr. Krop that this expert was asked to look for statutory mitigation or that he knew what the statutory mitigators are. In his introduction letter to Dr. Krop counsel did not request a review for statutory mitigation and set Dr. Krop up for failure before even had the opportunity to meet Taylor:

WHAT I NEED FROM YOU

> John seems to be fairly intelligent and there is no obvious psychiatric problem. He also denies this offense. However, in case he is convicted, I need psychological testing to see if there is a problem I am missing. He has had drug and alcohol problems in the past, and has had problems with lying and stealing. Friends who know him say he would steal from you, but he would never hurt you. This violence crime really surprises those who know him. The only other mitigation that jumps out of his record is the family situation that existed during his childhood. It was not very stable.

(9 PCR 1395.) Where counsel did not ask his mental health expert to determine whether or not Taylor qualified for statutory mental mitigators, counsel was deficient in conducting an investigation into mental health mitigation.

When questioned about mental mitigation at evidentiary hearing, trial counsel testified:

> Trial counsel: We used Roger Such [sic] who I *guess you could loosely classify as a mental health expert*. He was a therapist licensed clinical social worker, but I don't remember consulting with anybody who was a psychiatric expert other than Dr. Krop.

(7 PCR 1097)(emphasis added.) Although trial counsel may have "loosely classified" Mr. Szuch as a mental health expert, Mr. Szuch was not a mental health expert and was unable to render opinions based on his expertise. Furthermore, Mr. Szuch never met Mr. Taylor. (19 R 2458) Mr. Szuch testified that based on his review of Taylor's family (from documents and interview notes) Taylor's family during his youth qualified as "severely dysfunctional." (19 R 2481). Mr. Szuch did not and could not opine how the childhood trauma, abuse, neglect, early sexual exposure, etc. specifically affected Mr. Taylor, manifested in his adult life, and resulted in the first-degree murder of which he was convicted. Mr. Szuch did not possess the requisite experience or credentials to opine whether Taylor suffered from an extreme mental or emotional disturbance or was able to conform his conduct to the requirements of the law at the time of the crimes.

C. Counsel's omission cannot be validated as strategic in nature

There was no strategic reason not to call a mental health expert to testify on Taylor's behalf at trial. If counsel had presented the testimony of a mental health expert at penalty phase, two statutory mitigating factors would have been established and the jury would have learned why all of the information they

learned about Taylor's nightmarish background was relevant to the crimes he purportedly committed.

In Blackwood, the court found that the defendant "was denied the effective assistance of counsel because trial counsel failed to adequately investigate and prepare mitigation evidence and because he was deprived of the adequate assistance of a mental health expert." Id. Blackwood's attorney retained a mental health expert and a competency evaluation was conducted. Id. However, the FSC found that where there was no evidence that trial counsel had discussed non-statutory mental health mitigation evidence with an expert, this was grounds for reversal even upon counsel's contention that his decision not to present mental health mitigation was strategic in nature. Id. at 971-973.

Moreover, counsel's "rationale" for failing to present Dr. Krop was that Dr. Krop determined that Taylor **may** have some anti-social traits is without merit. (7 PCR 1126.) After conducting a battery of tests Dr. Krop did not diagnose Taylor with anti-social personality disorder. (6 R 1404.) To the contrary, Dr. Krop's summary report states:

> Mr. Taylor has a history of involvement in the criminal justice system but, despite his history of anti-social behaviors, the current evaluation, particularly his Minnesota Multiphasic Personality Inventory – 2 is inconsistent with any significant psychopathology. In this regard, the testing **does not reflect anti-social tendencies** as it appears that Mr. Taylor's earlier involvement in the criminal justice system was, to a large part related to his immaturity and poor impulse control.

(9 PCR 1404)(emphasis added). While anti-social personality disorder may be viewed negatively by a jury, Dr. Krop **never made this diagnosis**, therefore the fear that a jury would hear that Taylor had anti-social personality disorder cannot be viewed as a valid strategic reason to forgo the powerful testimony of a mental health expert.

The deficient performance of Taylor's trial attorneys in failing to present available evidence in support of two powerful statutory mitigating factors cannot be considered strategic simply because the jury may have heard some negative information about Taylor during the presentation of mental mitigation. As discussed by the USSC in Sears v. Upton, 130 S. Ct. 3259 (2010), where the evidence presented in post-conviction also showed some adverse information, this did not rule out prejudice:

> [T]he fact that Sears' brother is a convicted drug dealer and user, and introduced Sears to a life of crime…actually would have been consistent with a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills, who may have desired to follow in the footsteps of an older brother…
>
> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising…given that counsel's initial mitigation investigation was constitutionally inadequate. **Competent counsel should have been able to turn some of the adverse evidence into a positive -- perhaps in support of a cognitive deficiency mitigation theor**y. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking…[and] "profound personality disorder…" **This evidence may not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his**

> **horrendous acts - - especially in light of his purportedly stable upbringing.**

Id. at 3263-64 (emphasis added). Like Sears, counsel for Taylor should have been able to tie any negative information about Taylor, including any anti-social traits, into a cohesive mitigation theory.

***

Counsel's failure to present a mental health expert in penalty phase to testify with regard to mitigation of the weightiest order on Taylor's behalf was outside the bounds of reasonable, constitutionally sufficient capital representation.

II. Prejudice

The jury and the trial court were unsympathetic with Taylor as demonstrated by the jury's 10 to 2 vote for death following penalty phase proceedings and the trial court's sentencing order which stated that the three established non-statutory mitigating circumstances were "relatively insignificant." (6 R 995.) If counsel had presented powerful, available mental health mitigation at Taylor's penalty phase to establish statutory mitigation and tie Taylor's traumatic childhood to the facts and circumstances of the case the outcome of the penalty phase would have been different.

Given that the state could prove four aggravators and was seeking three, Taylor was prejudiced by his counsel's failure to seek even one statutory mitigating factor where the FSC has consistently found that one aggravating factor

can support a death sentence where minimal mitigating evidence is established. See e.g. Rogers v. State, 948 So.2d 655, 670 (Fla. 2006)(When the mitigation is not substantial, we have found death sentences to be proportional even when there is but a single aggravator); Butler v. State, 842 So.2d 817, 833 (Fla. 2003). Had a mental health expert testified during Taylor's penalty phase, the defense would have established the statutory mitigators of extreme emotional disturbance and inability to conform conduct to the requirements of the law.

In its Sentencing Order, the court found each of the requested aggravating factors and applied three (having merged the two robbery-related aggravators) when determining the appropriate sentence for the death of Shannon Holzer. The three aggravating factors when considered collectively, "greatly outweigh the relatively insignificant nonstatutory circumstances established by this record." (6 R 995.)

This Court in Hurst found "mental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial." Hurst v. State, 18 So.3d 975, 1014 (Fla. 2009). This Court in Hurst reversed for a new penalty phase where it found that "testimony could have been presented to the jury to augment the 'negligible' and 'minimal' mitigation noted by this Court on direct appeal." Id.

Like Hurst, Taylor's mitigation at penalty phase was "relatively insignificant." (6 R 995.) Rather than presenting evidence that Taylor had a very difficult, abusive, and impoverished childhood but that he rose above this hardship, was a loving family man, and was capable of being a productive member of society, counsel should have presented the truth:

Taylor grew up in extreme poverty. Because of his background he was irrationally obsessed with money and material possessions and became highly agitated in tough financial situations. Taylor, who was subjected to horrific abuse and neglect as a child, behaved violently in stressful situations as a result of his upbringing. Taylor's Moody Hollow family had a complete disregard for social and societal rules—a disregard which Taylor learned and emulated from a young age. Taylor, who was without discipline or guidance during critical stages of his development, grew up to make poor decisions and suffer with impulse control issues.

An accurate, complete portrayal of Taylor, such as that described above was not presented to the jury. Had the jury heard a mental health expert provide the critical nexus between Taylor's childhood and his crimes and had the jury learned that Taylor suffered an extreme emotional disturbance and inability to conform his conduct to the requirements of the law, there is a reasonable probability that the outcome of the penalty phase would have been different.

For these reasons, the trial court erred in its determination of this issue below and this Court should reverse and remand on this issue for a new penalty phase.

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING TAYLOR'S CLAIM THAT TRIAL COUNSEL WAS DEFICIENT IN FAILING TO MOVE FOR A CHANGE OF VENUE, THEREBY PREJUDICING TAYLOR BY PROHIBITING TAYLOR FROM SELECTING AN IMPARTIAL JURY

I. Background

Taylor presented a claim that counsel was ineffective in failing to move for a change of venue within Claim 3 of his 3.850/3.850 to the trial court. (2 PCR 86-91.) The trial court summarily denied the issue stating, "This claim is insufficiently pled as the Defendant does not provide citations to the record to establish that it was difficult to seat a jury, or that the actual jurors in the case were exposed to the articles in the case." (6 PCR 985.) The trial court also stated, "the newspaper articles relied on by the Defendant were from during trial, rather than pre-trial. As jurors are instructed not to read the newspaper during trial, the Defendant has failed to establish ineffective assistance of counsel on the part of trial counsel." (6 PCR 986.)

Mr. Taylor's case was highly publicized within the small community where the crimes occurred. (2 PCR 150-202.) The victim, Ms. Holzer, was a beloved

member of her small community – her death resulted in public outcry and protest. News of Ms. Holzer's death and trial was publicized in several local newspapers and online. (2 PCR 150-202.) The officers from the St. John's County Sheriff's Office who handled the case were close personal acquaintances of the victim and her family. (3 R 425-26.) Contrary to the trial court's assertion that the newspaper articles provided by Taylor were only "from during trial" Taylor provided the court with 50 pages of specific articles documenting the crimes from the time of the murder through the trial proceedings. (2 PCR 150-202.)

II. Deficiency of counsel

Ineffective assistance of counsel based on the failure to file a motion to change venue has been recognized as a viable form of relief in a 3.850 Motion. See Provenzano v. Dugger, 561 So.2d 542 (Fla. 1990). Both the Florida Constitution and Florida Rules of Criminal Procedure provide that an accused has the right to an impartial jury. Fla. Const. Art. 1, Sect. 16; Fla. R. Crim. P. 3.851.

When a motion for change of venue is filed a trial court should evaluate "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." Rolling, 695 So.2d at 285. Furthermore, the existence of pretrial publicity in a case does not necessarily lead to an inference of partiality or require a change of venue; rather, pretrial publicity must be examined with attention to a number of circumstances, including (1) when the publicity occurred

in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community exposed to the publicity; and (5) whether the defendant exhausted all of his peremptory challenges in seating the jury. See Foster v. State, 778 So.2d 906, 913 (Fla. 2001); Rolling, 695 So.2d at 285. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. Granting a change in venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it is determined that the venue should have been changed. See Manning v. State, 378 So.2d 274 (Fla. 1979).

In the instant case counsel was deficient in failing to move for a change of venue where the crimes of which Taylor was ultimately convicted were highly publicized within the small community where Taylor was tried and where the victim lived:

Clay Today included at least two articles with respect to the Holzer murder. (2 PCR 87, 151-53.) Clay today reached approximately 10,000 individuals in its daily circulation and serves the communities of Orange Park, Middleburg, Penney Farms, Keystone Heights, Green Cove Springs, Lake Asbury, Doctor’s Inlet,

Fleming Island, and Argyle. Additionally, the paper has a corresponding website.

The St. Augustine Record covered the story extensively during the investigation and trial proceedings. (2 PCR 88, 155-57.) The St. Augustine Record covers the new of St. Augustine and St. John's County and it estimated to that 45,000 people read this paper daily. This paper also has a corresponding website.

The Florida Times-Union which reaches approximately 170,000 individuals daily in Duval, Clay, Nassau, and St. John's Counties covered the story. (2 PCR 88, 182-87.) The pre-trial articles contain details about the murder and Taylor's alleged role in the crimes, including:

- "Holzer's family members told police Taylor knew she was going to make a bank deposit at the Barnett Bank in Green Cover Springs and asked her for a ride, saying he wanted to rent a car there. Friends said Taylor pumped gas into Hozer's car before they left." Carin Burmeister, Kathleen Sweeney, *St. John's woman found slain*, The Time-Union, Thur. Jan. 1, 1998, at B1. (2 PCR 185.)
- "The victim appeared to have been viciously stabbed repeatedly in the chest." Gerry Walsh, *Body of slain St. John's woman found in Clay*, Clay County Today, Wed. Jan. 7, 1998, at 8. (2 PCR 152.)
- "Taylor had been in prison in Arizona and was supposed to be transferred to an Arkansas prison in April. But according to an Arizona prison official, an

Arkansas official requested instead that the accused murdered be released. He migrated to St. John's County following his release and then met the victim." Gerry Walsh, *Body of slain St. John's woman found in Clay*, Clay County Today, Wed. Jan. 7, 1998. (2 PCR 152.)

- "Taylor…lived on Palmo Fish Camp Road, which is near the store where Holzer worked. He had about $4,000 in cash when he was arrested in St. John's County on Wednesday." Mike Grogan, *Suspect in Holzer murder held in Clay County jail*, St. Augustine Record, Jan. 2, 1998. (2 PCR 155.)
- "The alleged killer of Shannon Holzer, a 30 year old wife, mother, and popular store manager, should have been in an Arkansas prison. The normally peaceful and serene Colee Cove community, in nearby St. John's county, has been rocked by Shannon Holzer's murder. Now grieving friends and family are left reeling with the new of an apparent snafu in the prison system which allowed this outrage to occur." Ann Williamson, *Slaying suspect's Son Charged with Murder*, Clay Today. (2 PCR 156.)
- "She was a victim…She was an innocent victim. He took a lot from us and took a lot from our community." Carin Burmeister, Kathleen Sweeney, *St. John's woman found slain*, The Time-Union, Thur. Jan. 1, 1998, at B1. (2 PCR 185.)
- "Neighbors said they can't remember the last time a violent crime has happened

in their quiet community. It's a place they said, where anyone will do anything for anyone." Carin Burmeister, Kathleen Sweeney, *St. John's woman found slain*, The Time-Union, Thur. Jan. 1, 1998, at B1. (2 PCR 185.)

- "Taylor, 37, should be in an Arkansas prison for violating his 1993 parole on a sentence for aggravated robbery, burglary, and theft, corrections officials said. 'He, in theory, should be here, locked up,' said George Brewer, spokesman for the Arkansas Department of Corrections in Little Rock. 'I don't know how he slipped through. Somewhere, something happened.'" Carin Burmeister, *Arkansas had a 'hold' on Clay slaying suspect*, The Time-Union, at A1. (2 PCR 183-84.)

    - "She was a beautiful, beautiful child…everyone here just loved her." Carin Burmeister, Kathleen Sweeney, *St. John's woman found slain*, The Time-Union, Thur. Jan. 1, 1998, at B1. (2 PCR 185.)

50 perspective jurors comprised the initial jury pool for Taylor's case. During voir dire one-fifth of prospective jurors admitted to having knowledge of the Holzer murder:

(1) Todd Millard recalled hearing "a story of a young lady disappearing with - - taking the bank deposit…" (9 R 406.) (2) Richard Seamon recalled reading a story in the newspaper about "a young lady I believe was going to the bank in Green Cove. She stopped I believe to give somebody a ride, if I'm not mistaken,

and I believe at that point disappeared and was killed. (9 R 408.) When asked if he had a feeling about what should happen in the case Mr. Seamon stated, "I mean, to be honest, to me, if someone's arrested most of the time there's not - - they didn't arrest them for no reason. I believe if somebody's arrested they probably had good cause to arrest those people." (9 R 412.)

(3) Sidney Fields that he was aware of the Holzen murder case. (9 R 413.) He stated that he was aware of the case due to newspaper reports, stating, "If I'm not mistaken, the son murdered the girl and the father covered it up." (9 R 413.) Fields engaged in the following dialogue in individual voir dire:

Defense Counsel:	Have you formed an impression in your own mind about what should happen to the people who were arrested for this?
Mr. Seamon:	Only the fact that they're guilty.
Defense Counsel:	That was the impression you formed in your own mind?
Mr. Seamon:	Well, I'm an advocate of the death penalty.

(9 R 414-16.) (4) Leticia Nelson admitted during vior dire that she had knowledge of the Taylor's case. (9 R 417.) Nelson's brother, Ernest Knight, was in jail with Taylor. (9 R 417.) (5) Hugh Altman admitted to having knowledge of the case. (9 R 420.) He read about the case in the newspaper. (9 R 420.) (6) Robert Forbis had prior knowledge of the case. (9 R 426.) (7) Judy Waters stated that she knew about the case going into voir dire. (9 R 429.) She read about the case in the newspaper.

(9 R 429.) (8) William Redfearn had prior knowledge of the case. (9 R 431.) He read about the case and saw the story on the news. (9 R 431.) (9) Dianne Obriant knew about the case prior to the trial. (9 R 433.) She thinks she worked at the Green Cove Springs Bank at the time the crime occurred and remembers hearing about it at work. (9 R 434.)

(10) Robert Pfenning had knowledge of the case prior to trial. (9 R 429.) He heard the story on the radio and TV and read about it in the newspaper. (9 R 429.) He stated that while he did not have an opinion about whether Taylor was guilty at the time of voir dire, he "might have at the time [of hearing the media accounts]." (9 R 439.)

Robert Pfenning was seated on the jury. (11 R 884.)

At evidentiary hearing, counsel conceded that the murder was highly publicized among local circles and that a motion for change of venue was not filed:

> Undersigned: Did you file a motion for change of venue:
>
> Trial counsel: I don't think so.
>
> Undersigned: And I didn't see one in the file. I am not trying to - - and my question is was the case highly publicized?
>
> Trial counsel: Yeah. It happened - - you know, it's a smaller town. It wasn't - - it didn't receive the volume of publicity of some of my other cases in Jacksonville just because it didn't - - the circulation and the T.V. stations aren't as active, I guess, in a smaller town. But was it known to the people around

> here? Yes. Absolutely. Buddy Boy's Store [the victim's place of employment, owned by the victim's parent's] was a very popular store in St. John's County and also I think people from Clay County going over there so a lot of people knew about that knew about the murder.

(7 PCR 1102.) Based on the proceeding information and the fact that numerous vernire-people admitted to having heard of the Holzer murder case prior to setting foot in courtroom for Taylor's trial, counsel was deficient in failing to move for change of venue.

III. The deficiency of counsel prejudiced Taylor

When applying the prejudice prong to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, "bring forth evidence demonstrating that the trial court would have, or at least should have, granted a motion for change of venue if [defense] counsel had presented such a motion to the court." Dillbeck v. State, 964 So.2d 95, 103 (Fla. 2007), (quoting Wike v. State, 813 So.2d 12, 18 (Fla. 2002)).

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. Rolling v. State, 695 So.2d 278, 284 (Fla. 1997) (quoting McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977).

The victim in this case, Shannon Holzer, was young, vibrant, beloved character in her community. She worked at her family's business Buddy Boy's Kountry Market, a local landmark and popular gathering place. Her murder was a source of public outrage and upset. The law enforcement officers who initially investigated her case were her close friends, and friends of her parents. Buddy Boy's was approximately 10 miles from Green Cove Springs, where the Clay County Courthouse is located, where Holzer was murdered, and where Taylor's trial for the murder of Shannon Holzer occurred.

News of Holzer's death and Taylor's subsequent arrest was broadcast in each of the local newspapers: the St. Augustine Times, Clay County Today, and the Florida Times-Union. As stated by prospective jurors, the story appeared on radio and television. One-fifth of the 50 person jury pool conceded to having knowledge of the case prior to Taylor's trial. Of the people that admitted knowledge, one sat on the jury – Mr. Pfenning. Mr. Pfenning conceded during individual questioning that he likely had an opinion of Taylor's guilt at the time that he heard the news stories implicating Taylor. (9 R 439.)

At least one of the jurors on Taylor's jury was influenced by the media accounts of Shannon Holzer's death. Mr. Pfenning admitted that he had a preconceived notion of Taylor's guilt at the time he read the articles.

It is likely that had counsel filed a motion for change of venue, it would have

been granted due to the media coverage in the tight-knit county where the trial took place and the result of Taylor's trial would have been different had counsel requested a change of venue.

IV. Summary denial

To the extent that this court finds, as the trial court determined, that this claim was insufficiently pleaded, this case must be remanded to the trial court to allow Taylor reasonable time to bring his claim to facial sufficiency. Spera v. State, 971 So.2d 754, 761 (Fla. 2007). According to this Court in capital postconviction review of Davis v. State, 26 So.3d 519, 527 (Fla. 2009):

> When a postconviction motion fails to comply with the pleading requirements of the rule and the court intends to deny the motion based on these easily curable technical omissions, the proper procedure is for the court to strike the motion with leave to amend within a reasonable period if the technically defective pleadings can be completed and amended in good faith.

Id. citing Spera, 971 So.2d at 761. The trial court did not alert Taylor of the deficiency in his claim nor provide Taylor the opportunity to provide the purportedly-required information in an amended motion.

Taylor requests this court reverse his case and remand to the trial court for a new trial on this issue or in the alternative remand to the trial court for the opportunity to correct any facial deficiency in his post-conviction claim.

CLAIM III

THE CIRCUIT COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT WHICH INFLAMED THE PASSIONS AND MINDS OF THE JURY

Taylor argued to the trial court in Claim III of his 3.850/3.851 that his trial counsel was ineffective in failing to object to instances of prosecutorial misconduct during the guilt phase of his trial. (2 R 91.) The State's misconduct included extremely inflammatory remarks about Taylor to incite the jury's emotions, making the proceedings presumptively unreliable and unfair. Due to the prosecutorial misconduct committed by the state during its closing argument and the ineffective assistance of defense counsel in failing to object, Taylor was denied a fundamentally fair trial guaranteed by the United States and Florida constitutions and a new trial should be granted.

I. Background and Law

An ineffective assistance of counsel claim based on counsel's failure to object to improper comments made by the prosecution is a cognizable claim in 3.850/3.851 appeal. See Rachel v. State, 780 So.2d 192 (Fla. 2d DCA 2001) (holding that an evidentiary hearing must be held because it was improper for the trial court to deny Defendant's 3.850 motion regarding counsel's failure to object to the prosecution's closing arguments when the trial court did not conclusively refute Defendant's claim with the record attachments.); see also Ross v. State, 726

So.2d 317 (Fla. 2d DCA 1998). Under Strickland v. Washington, ineffective assistance of counsel is proven when a defendant illustrates that counsel was deficient and that such deficiency prejudiced the defendant at trial. Strickland v. Washington, 466 U.S. 688 (1984). Deficiency of legal counsel must rise to a level that counsel was not functioning as guaranteed by the Sixth Amendment and such deficiency must not have been the result of reasonable professional judgment under prevailing professional norms. Id. In order to establish prejudice a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id.

The United States Supreme Court ("USSC") has recognized that prosecutorial misconduct can rise to a level of invasiveness which warrants new proceedings. In Greer v. Miller, 483 U.S. 756, 765 (1987) the Supreme Court stated:

> This Court has recognized that **prosecutorial misconduct** may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the **prosecutorial misconduct** must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); United States v. Bagley, 473 U.S. 667, 676 (1985). In Darden v. Wainwright, 477 U.S. 168, 181 (1986), the USSC set forth the Standard of Review to use in assessing the impact of prosecutorial misconduct:

> It is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Id. citing Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983); Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (internal citations omitted).

II. Improper Remarks by the Prosecutor

In the State's opening remarks of closing arguments during the guilt phase of Taylor's trial, it improperly inflamed the passions and minds of the jury on multiple occasions.

"A prosecutor must confine closing argument to evidence in the record, and must refrain from comments that could not be reasonably inferred from the evidence." Ford v. State, 702 So.2d 279, 280 (Fla. 4th DCA 1997)(citing Huff v. State, 437 So.2d 1087, 1090 (Fla. 1983))(granting a new trial because remarks made by the prosecutor during closing arguments went beyond any reasonable construction of the evidence). To require a new trial based on improper comments by a prosecutor, the comments must "be so inflammatory that they *might have influenced the jury to reach a more severe verdict that it would have otherwise*." Id. at 6-7 (emphasis added). A new trial will be granted where a prosecutor makes personal attacks upon the accused or refers to testimony or items not in evidence. Rosso v. State, 505 So.2d 611, 614 (Fla. 3rd DCA 1987).

In its closing argument, the State asserted that Defendant greedily killed Ms.

Holzer specifically so he could go on a "spending spree" with her "blood money," then he left her in the palmetto bushes in the most undignified manner in which any individual could have been left. (16 R 1909-1910.) In making this inflammatory remark the State also argued facts not in evidence by adding:

> State: [Taylor's] out laughing his way through a spending spree for which he sacrificed that young woman's life. He took her life's blood and as she bled out in those woods with no one knowing where she was, he with a big grin on his face was depositing money into his bank account.

(16 R 1909-10.) Additionally, the state continuously inflamed the passions of the jury by asserting that Michael McJunkin was too ignorant to have committed the crimes, so Taylor, by default must have been responsible:

> State: As stupid as Michael McJunkin was, and you got to see him in his full glory for two full days, as stupid as he was, do you really think that he could have gotten the better of Shannon Holzer or of anybody? Is he smart enough to plan and carry out a crime like this? Does he even know where that dirt road is two miles off the beaten path? He had only been in this area for three or four weeks. He was completely unfamiliar with it. How would he even know that in order to kill Shannon Holzer he would get her down that dirt - - that there would conveniently be a dirt road."

(16 R 1936.) The state continued with its tirade:

> State: No, ma'am, ladies and gentlemen. The man that lives here, that man that worked here, the man that knew this territory is the one that knew just where to take her, just far enough away from that bank where that $6,666 should have gone in. He knew just where it was isolated enough to take her and kill her. Because Michael

> McJunkin was too stupid and Shannon probably could have fought him back.

(16 R 1936-37.) And the state continued to denigrate Michael McJunkin to benefit its case:

> State: A reasonable doubt would be to say, we don't think he's guilty because of this reason. And what is it? That Michael McJunkin did it? We've been through all of this. He's too stupid to have done it, for one thing.

(16 R 1950.)

The comments of the prosecutor were highly inflammatory, were not supported by the evidence, and attacked the defendant personally. The comments falsely characterized the actions and behaviors of the Appellant, notably telling the jury that he was smiling and happy after allegedly killing the victim. These attacks alone, unsupported by evidence, clearly could have affected the jury's mind in the guilt or penalty phase and might have influenced the jury to reach a more severe verdict that it would have otherwise.

II. Trial Counsel was deficient in failing to object to the State's improper comments

Taylor's trial counsel's failure to object to the state's improper statements made during closing arguments was a deficient performance which resulted in prejudice to Taylor in violation of Strickland, and its progeny, as well as the rights to Due Process and Effective Assistance of Counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article

One, §§ Nine and Sixteen of the Florida Constitution.

In failing to object to the prosecutor's statement in closing argument, Taylor's trial counsel did not alert the trial court's attention to the improper comments. Thus, the trial court did not make a ruling on the improper remarks or address the remarks to the jury. Additionally, this deficiency procedurally barred Taylor from arguing the issue on direct appeal. See Knight v. State, 710 So.2d 648 (Fla. 2d DCA 1998).

Further, during the 3.850/3.851 evidentiary hearing at the circuit court, Taylor's trial counsel admitted that he should have objected to the prosecutorial misconduct during closing arguments:

> Postconviction counsel: Sir, I want to direct your attention to - - to comments made by the state - - some of the comments made by the state in connection with this case. In the course of the opening statement of the guilt phase of the state talked about how Mr. McJunkin - - excuse me, Mr. Taylor went on a spending spree with blood money. In your opinion, sir, using the word blood money prosecutorial misconduct?
>
> Trial counsel: I don't know if its prosecutorial misconduct. I think it's inflammatory.
>
> Postconviction counsel: And objectionable?
>
> Trial counsel: I think in hindsight probably, yes.
>
> Postconviction counsel: Okay. And I know you probably haven't reviewed the record in this. If you had not

	objected to that statement - - should you have objected at that time?
Trial counsel:	My opinion?
Postconviction counsel:	Yes, sir.
Trial counsel:	My opinion is I should object to everything that's even close to being bad, being wrong.

(7 PCR 1102-03.)

In denying the Appellant's 3.851 motion, the circuit court relied almost solely on the opinion of trial counsel's testimony at the evidentiary hearing. (6 PCR 986.) However, the circuit court failed to address the evidentiary hearing testimony specifically noted above. Further, the circuit court relied almost exclusively on trial counsel's opinion without discussing whether trial council's opinion was reasonable regarding whether he should have objected to specific statements. (6 PCR 986.)

IV. Taylor was prejudiced by his trial counsel's deficiency

Prosecutorial misconduct occurs where the remarks have prejudicially affected the defendant's substantive rights. Brown v. State, 754 So.2d 188, 190 (Fla. 5th DCA 2000)(citing United States v. Wilson, 149 F. 3d 1298 (11th Cir. 1998)). "A defendant's substantive rights are prejudiced if there is a reasonable probability that "but for" the remarks, the outcome would have been different." Id.; see also, Ross v. State, 601 So.2d 1190 (Fla. 1992).

Generally, an alleged error based on improper argument to the jury will not be considered by an appellate court absent a timely objection. Pait v. State, 112 So.2d 380, 385 (Fla. 1959) "However, when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge." Id. (internal citations omitted)

In denying the Appellant's 3.851 motion, the trial court did not address the ramifications regarding the prosecutor's behavioral characterizations of the Appellant, which were highly prejudicial and not supported by the record. (6 PCR 986.) The prosecutor's closing argument statements that the Appellant was "out laughing his way through a spending spree" and "with a big grin on its face was depositing money into his bank account" improperly characterized the Appellant's attitude toward the victim to the jury. (16 R 1909-10.) Additionally, statements that the Appellant went on a "spending spree" with victim's "blood money" further impassioned the jurors emotions and thoughts. Any non-sociopathic member of the jury would have felt sympathy toward the victim and extreme dislike for the Appellant based on the unsubstantiated and untrue facts not in evidence that were argued by the prosecutor in closing arguments. As a result, Taylor was prejudiced by the failure of trial counsel to object to this prosecutorial misconduct. An

objection would have allowed the trial court, at the very least, to have instructed the jury on regarding the comments.

Taylor's trial counsel failed to object where the state's misconduct in the guilt stage of Taylor's trial made the proceedings presumptively unreliable and unfair. Therefore, a new trial should be granted because the prosecutorial misconduct might have influenced the jury to reach a more severe verdict that it would have otherwise.

CLAIM IV

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER RING V. ARIZONA BECAUSE IT DOES NOT REQUIRE THE JURY TO MAKE THE FINDINGS OF FACT NECESSARY TO IMPOSE A DEATH SENTENCE

Ring v. Arizona, 536 U.S. 584 (2002), prohibits a trial judge, sitting without a jury, from finding an aggravating circumstance necessary for imposition of the death penalty. Florida's capital sentencing scheme allows a judge, regardless of the jury's recommendation, to impose the death penalty based on aggravating factors not found beyond a reasonable doubt by a jury. On June 20, 2011 in Evans v. McNeil, 08 cv 14402, the federal district court of the Southern District of Florida agreed with this position and held Florida's Death Penalty Statute unconstitutional.

I. Ring v. Arizona analysis

In Ring v. Arizona, the Supreme Court of the United States held that an Arizona capital sentencing scheme that assigned the judge responsibility for the

findings of fact to determine whether a defendant was eligible for the death penalty was unconstitutional. Ring v. Arizona, 536 U.S. 584 (2002). The Court extended and clarified its decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J. concurring). Thus, because aggravating factors operate as "'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." See Ring, 536 U.S. at 609 (quoting Apprendi, 530 U.S. at 494, n.19).

The Ring Court emphasized that, when applying Apprendi, "the dispositive question . . . is one not of form, but of effect." Id. at 602. The proper inquiry cannot be whether a first degree murder conviction carried a maximum sentence of death or whether the aggravating circumstances are "sentencing factors" or "elements"—otherwise, Apprendi "would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. at 604 (quoting Apprendi, 530 U.S. at 541 (O'Connor, J., dissenting)). Instead, the dispositive question must be whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone" are found by a jury. Id. at 605.

II. Ring applied to Florida's Sentencing Scheme

Both the current Florida statute and the Arizona statute at issue in Ring require that a death sentence be supported by factual findings of the judge—not those of the jury. Section 775.082(1), Florida Statutes, provides that a defendant convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in §921.141 result in finding by the court that such person shall be punished by death…" Cf. Ring, 536 U.S. at 592-93 (describing the Arizona death penalty statute.) Section 921.141 (3) Florida Statutes, provides that "notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, the judge must make "specific written findings of fact based up on the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." Id. If the judge fails to "make the findings requiring the death sentence" within a specified period of time, "the court shall impose a sentence of life." Id.

Thus, in Florida, although the maximum possible sentence for first-degree murder is death, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact that must be made by a judge-not by a jury. See Bottoson v. Moore, 833 So.2d 693 (Fla. 2002).

III. The Holding in Evans v. McNeil

The Federal District Court, in Evans v. McNeil, 2:08-cv-1402-JEM (S.D. Fla. June 20, 2011), held that Florida's sentencing scheme violates the United States Supreme Court's decision in Ring v. Arizona. It found it is impossible to judge whether a majority of the nine jurors who recommended death had found one of the two aggravating factors, nor which if any they found. Evans at 84. The Court found that the statute violates the mandates of Ring: "Without a special verdict form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for a defendant based on an invalid aggravator, i.e., an aggravator not found by the jury. This cannot be reconciled with Ring." (Evans at 91).

The court notes that in Ring, the Supreme Court identified four states with "hybrid" death penalties similar to but not identical to Arizona's. Ring, 536 U.S. at 608 n.6. The "hybrid" states provided for advisory verdicts from juries but left ultimate sentencing determinations to the judge. Ring, 536 U.S. at 608 n. 6. Those states were Florida, Alabama, Delaware, and Indiana. Id. Of those four states, two--Delaware and Indiana-- require that juries make unanimous findings regarding particular, specified aggravating factors. See 11 Del. Code. § 4209 ("In order to find the existence of a statutory aggravating circumstance...beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory

aggravating circumstance. As to any statutory aggravating circumstances...which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstances....the Court shall discharge that jury after it has reported its findings and recommendation") (emphasis added); Ind. Code Ann. § 35-50-2-9 ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt...and shall provide a special verdict form for each aggravating circumstance alleged"). Alabama, which presently requires at least ten jurors to recommend the death penalty, has proposed legislation pending that would commit the sentencing decision entirely to the jury. See 2011 Alabama Senate Bill No. 247. Florida law, which requires a mere majority for a death penalty recommendation and forecloses special verdict forms to record specific findings by the jury, is an outlier.

The court also noted in footnote 35 on page 93: "Further, under the current Florida statute, the judge can reject the jury's recommendation and find for death even when the jury finds the existence of facts that do not support a death sentence. This emphasizes how the jury's "factual findings" at the sentencing phase—to the extent they are findings—are meaningless. The jury could fail to find any aggravating circumstances at all, and the judge could nevertheless find the jury's

recommendations unreasonable, make findings, and impose a death sentence based on those findings. See Fla. Stat. §921.141(3). This too cannot be reconciled with the Constitutional requirements of Ring because a defendant is entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. However, as this is not the factual scenario before the Court, that issue is left for another day."

While that might not have been the factual situation in Evans, the court's concerns are applicable to Mr. Taylor's case. The "hybrid" nature of Florida's death penalty sentencing scheme does not satisfy the Sixth Amendment jury trial requirement. A Florida jury's recommendation, like the one in Mr. Taylor's case, is not a verdict for Sixth Amendment purposes. The jury's recommendation is not binding, the advisory jury does not make findings of fact, the jury's recommendation need not be unanimous, and the jury's recommendation need not be made beyond a reasonable doubt. Moreover, the Florida jury's role during sentencing violates the evolving standards of decency doctrine under the Eighth Amendment.

Further, in State v. Steele, this Court asked the Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms. State v. Steele, 921 So.2d 538, 548-49 (Fla. 2005). No legislative action has been taken. Since the Legislature has rejected this Court's

request to make changes that would have cured the unconstitutionality, the Florida Death Penalty statute is unconstitutional.

IV. Mr. Taylor's Case

The trial court's order found that the Court has established four aggravating circumstances, two of which merge, thus leaving three aggravators: 1. The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to some person; 2. The crime for which the defendant is to be sentence was committed while he was engaged in the commission of the crime of robbery or kidnapping; The capital felony was committed for pecuniary gain (merged); 3. The crime was committed while Mr. Taylor had been previously convicted of a felony and was under sentence of imprisonment, or was placed on community control, or was on felony probation.

Without a specific verdict showing how each juror found each aggravator to be proven beyond a reasonable doubt, there is no way of knowing how many aggravators were found by at least a majority of jurors, let alone by a unanimous jury, nor is there a showing that the jurors did or did not rely on an aggravator specifically rejected by the trial court.

The jury's 10-2 death recommendation in Mr. Taylor's case was not specific in that it does not tell us how many, if any, of the aggravators were found beyond a reasonable doubt by a majority of the jurors. As noted in Evans, the ten jurors who

recommended death could have split on which aggravators they believed had been proved beyond a reasonable doubt. They could have been so split over the three factors that none of the factors were found proved by a majority. Ring has been violated, Florida's sentencing scheme for death penalty cases is unconstitutional, and Mr. Taylor is entitled to be resentenced to life.

CONCLUSION

Wherefore, Appellant respectfully requests this Honorable Court to reverse and remand the trial court's denial of Appellant's 3.851 Motion for Postconviction relief, entitling Appellant to a new trial and/or penalty phase.

RESPECTFULLY SUBMITTED,

__/s/ Frank Tassone_____
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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

__/s/ Frank Tassone____
A T T O R N E Y

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via hand to the Office of the State Attorney, Clay County Courthouse, Green Cove Springs, FL 32043 and sent via U.S. Mail to Assistant Attorney General, Charmaine Millsaps, at PL-01, The Capitol, Tallahassee FL 32399 on this _21st__ day of October, 2011.

_____/s/Frank Tassone___
A T T O R N E Y