IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG,

Appellant,

v.

APPEAL NO. SC12-103
Lt. Ct. No. 84-CF-13346

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMET

In this appeal Mr. Robert Long challenges the denial of his Amended Motion for Post-Conviction Relief pursuant to Fla. R. Crim. P. 3.851. The appellate record consists of 15 volumes. The documents supplied by the clerk are contained in Volumes I-X, pages 1-1742. References to these documents in the Initial Brief will be the volume number, "R" and page number. Volumes XI-XV, numbered pages 1-363 contain the transcripts of the proceedings, which will be referenced in the Initial Brief with the volume number, "T", and page number. Mr. Long, the appellant, will be referred to by name and the Appellee, the State of Florida, will be referred to as the State.

STATEMENT OF THE CASE AND FACTS

On November 28, 1984, the Grand Jury for the Thirteenth Judicial Circuit, in and for Hillsborough County, returned an Indictment against Mr. Long for the offenses of first degree murder, kidnapping, and sexual battery.[I,R1] The October 15, 1992 opinion of this Court outlines the procedural history of the case.[I,R31-52] The Court summarized the lower proceedings as follows:

On September 23, 1985, Mr. Long pled guilty to the three charges in this case.[I,R33] A copy of the plea

agreement was admitted into evidence in the 2011 proceedings as State Exhibit 1.[VIII,R1469-1473] In addition, Mr. Long pled guilty to 7 additional counts of first-degree murder, 7 counts of sexual battery, 8 counts of kidnapping, and one probation violation.[I,R33] The plea permitted the State to seek a death sentence through a penalty phase for this murder, but agreed to a life sentence for the other seven murders.[I,R33] The State was prohibited from using the seven murder convictions as aggravation, but any convictions entered prior to the plea agreement could be used.[I,R33] Mr. Long agreed not to contest the admissibility of his confession or of physical evidence found in his car and apartment.[I,R33]

The transcript of the September 23, 1985 plea hearing was admitted as State's Exhibit 2.[VIII,R1475-1497] Mr. Long was represented by Charles O'Connor and Craig Alldredge at the plea hearing. Mr. Long was placed under oath. Mr. Long was asked by the trial court if he had read the typed plea agreement and he responded he had.[VIII,R1478] Mr. Long later clarified that he had "read it over".[VIII,R1485] Mr. Long answered "Yes" when asked by the trial court if counsel had explained it to him.[VIII,R1478] Mr. Long agreed that he understood the

sentences he was facing and that there would be a penalty phase on one count.[VIII,R1485]

During the plea colloquy the State advised defense counsel Charles O'Connor that it intended to introduce Mr. Long's statements to police in the penalty phase.[VIII,R1481] The State also clarified that it intended to present evidence of other convictions obtained prior to the plea, but would not admit convictions obtained after the plea.[VIII,R1484]

The trial court sentenced Mr. Long to life in prison on all counts except those related to the Michelle Sims' case and revoked Mr. Long's probation.[VIII,R1487-1490]

After sentence was imposed, Mr. O'Connor stipulated to a factual basis.[VIII,R1490-1491]

The trial court then asked Mr. Long if he was under the influence of any medications.[VIII,R1492] Mr. Long said that he was not under any medications that would alter his state of mind and that he understood the proceedings.[VIII,R1492]

On September 30, 1985, Mr. Long wrote Mr. Alldredge, one of his attorneys.[VIII,R1500-1502] Mr. Long wrote Mr. Alldredge that the Hillsborough jail was not giving him the medication that he had been receiving in Florida State

Prison. Mr. Long felt his "nerves were getting bad" and the "walls are moving like they were in Dade City."[VIII,R1500] Mr. Long told Mr. Alldredge that he "needed something."[VIII,R1500]

This letter prompted Mr. O'Connor to write to the jail to seek medication for Mr. Long.[VIII,R1504] The jail responded that Mr. Long had not requested medication, but that Dr. Szabo examined Mr. Long on October 6 and would prescribe medication as necessary.[VIII,R1506]

On October 7, 1985, Mr. Long sent Mr. O'Connor a letter.[VIII,R1509-10] Mr. Long expressed dissatisfaction with the sentences he received, and advised Mr. O'Connor the sentences were different than what he was told.[VIII,R1509] Mr. Long asked Mr. O'Connor what was going on with his case and "Where are all the new Drs. you guys told me you were going to get?"[VIII,R1510] Mr. Long reiterated his dissatisfaction with the failure of Mr. O'Connor to talk with him.[VIII,R1510]

On December 11, 1985, Mr. O'Connor moved for a continuance of the penalty phase.[IX,R1621] Mr. O'Connor advised the trial court that a defense expert, Dr. Helen Morrison, was refusing to appear in Tampa.[IX,R1621] Dr. Morrison had spent over 23 hours with Mr. Long and hundreds

of hours had been spent preparing the case based on Dr. Morrison.[IX,R1621] Dr. Morrison had previously testified for Mr. Long.[IX,R1622] Her testimony was the center of the defense.[IX,R1622] She had been fully compensated for her time.[IX,R1622] The State accepted Mr. O'Connor's representation of Dr. Morrison's status and her refusal to appear in court.[IX,R1624] The trial court noted that the preceding day he, the State and Mr. O'Connor had attempted to reach Dr. Morrison. They had left messages, and the court had left his personal numbers asking Dr. Morrison to call him.[IX,R1624] Dr. Morrison had not responded.[IX,R1624] Calls were made again prior to the hearing, with no response from Dr. Miller.[IX,R1624] The trail court denied the motion for continuance.[IX,R1629]

Mr. Long then moved to withdraw his plea.[I,R34;IX,R1632] After stating that Dr. Morrison was the key to the defense, Mr. Long was questioned about his understanding of the plea agreement.[IX,R1631633-36] Mr. Long testified that he thought that further appeals as to his confession would not be jeopardized and that he was not giving up the right to appeal the confession.[IX,R1636-37] Mr. Long testified that undersigned counsel, Robert Norgard, represented him in Pasco county and he spoke with

Mr. Norgard a few days after he entered the plea.[IX,R1637] Mr. Long testified that undersigned counsel, Robert Norgard, had always told him not to enter into any plea which would jeopardize his appellate issues.[IX,R1638]

Mr. Long testified that when he came to Tampa in September, he didn't know why he was there.[IX,R1641] He didn't see his attorneys for ten or twelve days. A few days before the plea hearing Mr. O'Connor and Mr. Alldredge came to see him and they outlined the deal.[IX,R1646] There seemed to be a hurry to get it done.[IX,R1646] Mr. Long asked to think about it overnight, then told them he would plea the next day when they came to the jail.[IX,R1646] Mr. Long stated that is was never made clear to him that he was pleading to 26 life sentences for kidnapping and sexual battery. He thought the plea was to seven murders, with one penalty phase.[IX,R1647]

On the morning of the plea Mr. Long briefly spoke to his attorney's about fifteen minutes before the plea.[IX,R1641;1652] Mr. Long was given the written plea by Brian Donerly just before he entered the court-room.[IX,R1641] He glanced at it, but did not read the entire agreement.[IX,R1641;1652] He did not see the third page and was not aware that a paragraph on that page would

waive his appellate rights to challenge his confession.[IX,R1641] None of his attorneys told him that he was waiving any appellate rights.[IX,R1648] Mr. Long testified he would not have accepted the plea if he had known he was waiving his appellate rights.[IX,R1649;1652]

Mr. Norgard was called to testify.[IX,R1654] Mr. Norgard was as an assistant public defender in the 6th Judicial Circuit, and had previously represented Mr. Long on his Pasco County charges.[IX,R1655]

Mr. Norgard met with Mr. Long sometime just after September 23, 1985 in the jail in Hillsborough County about something to do with the Pasco appeal.[IX,R1655]

During that conversation Mr. Long talked about the plea he had just entered in Hillsborough county.[IX,R1656] Mr. Long stated that he believed he could appeal the confession. [IX,R1656] Mr. Norgard told Mr. Long that he would not be able to reserve the right to appeal that issue as part of a plea.[IX,R1656]

Mr. O'Connor then moved to withdraw as counsel for Mr. Long on the grounds that Mr. Long attributed the absence of Dr. Morrison to him, that Mr. Long claimed that he had rushed Mr. Long during the plea process and that he had not been properly attentive during the plea process.[IX,R1667]

The State objected and the motion to withdraw as counsel was denied.[IX,R1668]

The trial court then granted the motion to withdraw the plea based upon the actions of the Public Defender's Office and Dr. Morrison.[IX,R1679] The trial court believed that Mr. Long thought he would have someone like Dr. Morrison at penalty phase if he pled and that he would be able to appeal the confession if he pled.[IX,R1680-81]

The trial court stated that the decision whether or not to elect to withdraw the plea would rest with Mr. Long.[IX,R1682] The trial court directed Mr. Long to meet with his Hillsborough attorneys for a half hour to decide what to do.[IX,R1683] After meeting for somewhat less than an hour, trial counsel advised the trial court that Mr. Long would like 24 hours to think about his decision.[IX,R1684] The trial court adjourned to provide Mr. Long the opportunity to think overnight.[IX,R1684]

On December 12, 1985, Mr. Long elected to proceed with the plea.[I,R34] State's Exhibit 12 is the transcript of the proceedings.[IX,R1516-1536;XIII,T71] Mr. O'Connor advised the trial court that Mr. Long wished to maintain his plea and would not withdraw it.[IX,R1518] Mr. Long was placed under oath and affirmed that he wished to maintain

the plea.[IX,R1519] Mr. Long stated that he had his decision was "about all I have thought about for the last forty-eight hours."[IX,R1519] Mr. Long affirmed that he had confidence in the advice given to him by Mr. O'Connor and his associates from the Public Defender's Office.[IX,R1519]

The trial court addressed Mr. Long's understanding of his right to appeal the confession.[IX,R1522] The trial court told Mr. Long that based on the plea agreement that

> "…you are giving up your right to appeal any issues in these matters."[IX,R1523]
>
> Mr. Long: On any issue?
>
> Court: On any issue, yes sir.
>
> Mr. Long: I wasn't aware of that.
>
> Court: On any issues as to, I believe this particular, this particular plea agreement, if any appellate issues arise in the second phase you can appeal that.
>
> Mr. Long: Okay.
>
> Court: Obviously. Maybe I misworded it. Anything that is behind us.
>
> Mr. Long: Okay.
>
> Court : We are not talking about punishment issues we are going to try this week.
>
> Mr. Long: Yes sir, I understand that.

Court: Especially the matter of the confession, that you are waiving your right to appeal that. Do you understand that?

Mr. Long: Yes, yes, I do.
[IX,R1523]

The trial court advised Mr. Long that the plea agreement did not require that certain experts would be required to testify on his behalf at the penalty phase.[IX,R1524-25] Due to the inexplicable behavior of Dr. Helen Morrison, the defense expert, the trial court continued the penalty phase proceedings.[IX,R1526-1530]

When the penalty phase was held, the jury recommended death by a unanimous vote and the trial court imposed a sentence of death.[I,R32]

On direct appeal, Mr. Long challenged the validity of his guilty plea. This Court determined the plea to be valid, but vacated the death sentence due to the introduction of the Pasco murder conviction as improper aggravation. Long v. State, 529 So.2d 286 (1988)[Long I].

Mr. Long had been sentenced to death for a Pasco County homicide.[I,R32-33] This conviction and sentence was later reversed. See, Long v. State, 517 So.2d 664 (Fla. 1987), cert. denied, 486 U.S. 1017 (1988).

Prior to the second penalty phase, Mr. Long moved, *pro se*, to withdraw his plea in the trial court.[I,R34] Mr. Long claimed that the consequences of the plea had not been fully explained to him.[I,R34] The motion was denied.[I,R35] Mr. Robert Fraser was Mr. Long's court-appointed counsel and he also filed a Motion to Withdraw the Plea. A hearing was conducted o the motion to withdraw the plea. The transcript of the February 10, 1989 hearing is State's Exhibit 13. [IX,R1538-1580;XIII,T71]

Mr. Long testified that he was represented by Mr. O'Connor at the time of the 1985 plea.[IX,R1541] Mr. Long testified that he had not read the entire four page document at any time prior to the entry of the plea.[IX,R1546;1548;1558] Mr. O'Connor described the plea agreement to him verbally, but did not show it to him.[IX,R1546] Even after the 24 hour period he was given to decide about whether to withdraw the plea, Mr. Long did not get a chance to read the plea agreement or have the actual written plea explained to him by counsel.[IX,R1558;1587] Mr. Long didn't understand all of the plea agreement until he read the Florida Supreme Court opinion reversing his Tampa case.[IX,R1549] Mr. Long thought it would have been important for him to read the

plea agreement because it contained waivers of his rights that he didn't know he was waiving.[IX,R1559] Mr. Long did not know that he waived an appeal from the evidence from his apartment, his car, and the knife until after he read the opinion.[IX,R1559-60]

Mr. Long took the plea because he didn't want to go through eight trials and to limit his exposure to the death penalty.[IX,R1554-57] Mr. O'Connor explained to him that the plea would limit his exposure to the death penalty.[IX,R1557]

Mr. Long believed that Mr. O'Connor wanted him to plea because Mr. O'Connor didn't want to have to go through eight or nine murder trials.[IX,R1557]

Based on what he was told by Mr. O'Connor, Mr. Long believed he pled to seven murders, each with a life sentence, and to one additional murder for which that the State would be able to seek the death penalty.[IX,R1546] Mr. O'Connor told him that the other murders could not be used against him in court, so Mr. Long believed that would include the Pasco conviction for murder.[IX,R1547;1550] Mr. Long testified that all the murder charges were used against him during his trial in the Pasco case.[IX,R1547]

Charles O'Connor testified that he represented Mr. Long in

September 1985.[IX,R1567] Pursuant to his advice, Mr. Long pled to numerous charges on September 23, 1985 as part of a plea bargain with the State.[IX,R1567]

Mr. Long had already been sentenced to death in Pasco county at that time.[IX,R1568]

Mr. O'Connor testified he went over the plea with Mr. Long. He believed that he explained to Mr. Long that if there was a penalty phase for the death of Ms. Simms, then evidence from the Pasco murder conviction could be relied on for aggravation.[IX,R1568] The other convictions from Hillsborough could not be used.[IX,R1568]

When Mr. Long asked to withdraw his plea in December 1985, Mr. O'Connor asked the judge for Mr. Long to be given a 24 hour option to think about it.[IX,R1569] During that period of time Mr. O'Connor talked to Mr. Long about the plea.[IX,R1569] Other lawyers, including Mr. Norgard, who represented Mr. Long in Pasco county, were present.[IX,R1570] The next day Mr. Long elected to continue with the plea.[IX,R1570]

Mr. O'Connor claimed he went over the plea with Mr. Long before Mr. Long signed it.[IX,R1570] His foremost concern in getting Mr. Long to take the deal was to avoid Mr. Long getting four or five more death sentences and "the

potential option of pushing at it until one of them stuck."[IX,R1571] Mr. O'Connor wanted to minimize Mr. Long's exposure to the death penalty.[IX,R1571]

Mr. O'Connor told Mr. Long that the pleas could not be used in the Simms/Tampa case.[IX,R1572] At the time Mr. O'Connor was unaware of any other place they might be used, so that was not brought up.[IX,R1572] Mr. O'Connor wasn't thinking Pasco county because he thought the conviction in Pasco County would be sustained by the Florida Supreme Court.[IX,R1577] Mr. O'Connor didn't know if he limited the use of the pleas to just Hillsborough county.[IX,R1576] He didn't think he used the word "court" in such a "global" sense.[IX,R1576]

At the time of this plea, Mr. O'Connor knew there was some problem with the admission of Mr. Long's confession.[IX,R1573] The confession was the primary evidence in Pasco county.[IX,R1578] Mr. O'Connor had been at the Pasco trial and knew the admissibility of the confession due to a comment made by Mr. Long during questioning was being litigated.[IX,R1573] Mr. O'Connor was "very apprehensive" that the confession would be sustained.[IX,R1573;1579] Other lawyers disagreed with Mr. O'Connor and felt the conviction would be overturned.

[IX,R1579]

Mr. O'Connor was aware of other evidence that could be used to convict Mr. Long absent his confession.{IX,R1574] He identified that evidence as carpet fibers, the brand of tires and a tire impression, and hairs from the victims.[IX,R1574]

Mr. Long told the court that when Mr. O'Connor claimed he went over the plea agreement withhim in September 1985, Mr. O'Connor did not read it to him.[IX,R1583] Mr. O'Connor "counted off on his fingers" the particulars of the agreement.[IX,R1583] Mr. O'Connor wanted him to decide right away, but Mr. Long wanted to think about it and talk with his family.[IX,R1583] Mr. O'Connor never left him a copy of any plea agreement.[IX,R1584]

Mr. Long did not see the written agreement until the following Monday morning when he went to court to enter the plea.[IX,R1583] About ten minutes before court was to start, Mr. O'Connor, Craig Alldredge, and Brian Donerly came into the cell area and gave him a big packet.[IX,R1585] There was a lot more than just the four pages.[IX,R1585] Mr. Long skimmed the packet, but did not time to read everything before going before the judge.[IX,R1585]

The Court denied the Motion to Withdraw Plea.

A new penalty phase was then conducted.[I,R35-42] The jury recommended death by a unanimous vote.[I,R42] The trial court sentenced Mr. Long to death, finding four aggravating factors, including HAC and CCP.[I,R42] The trial court found both statutory mental health mitigators.[I,R42] The trial court found that the aggravation outweighed the mitigation and sentenced Mr. Long to death.[I,R42]

The validity of the plea and sentence of death were affirmed. See, Long v. State, 610 So.2d 1268 (Fla. 1992) [Long II]

Mr. Long's first Motion for Post-Conviction Relief was filed on December 29, 1994.[I,R53-86] The motion was denied as facially insufficient on August 1, 1995.[I,R99-155] Mr. Long appealed to this Court, which dismissed the appeal pursuant to the State's motion.[I,R162]

Years of litigation then ensued over the public records requests generated by Mr. Long's collateral counsel. A status report dated September 4, 1997, outlines continuing litigation over public records and the status of CCRC.[II,R315-321] Ultimately, in 1998, this Court tolled

the time for the filing of motions due to funding constraints during the establishment of the three district Capital Collateral Regional Counsel Offices.[II,R365-371]

On October 25, 1999, CCRC-Middle District was removed from representing Mr. Long and counsel from the Registry, Byron Hileman, was appointed.[IV,R576]

An Amended Motion to Vacate Judgments of Conviction and Sentence was filed by Mr. Hileman on March 13, 2003. [V,R764-795] A second Amended Motion to Vacate Judgments of Conviction and Sentence was filed on March 31, 2003.[V,R797-828] The motion raised claims for relief as follows: Claim 1- Mr. Long never actually entered a lawful plea [V,R800-803]; Claim 2- Mr. Long is severely brain damaged, thus requiring special care in order to understand the plea agreement, and that defense counsel was ineffective in failing to explain to Mr. Long the full consequences of the plea, did not go over the written plea agreement point by point, did not provide Mr. Long with a written copy of the plea agreement, did not provide Mr. Long an adequate opportunity to read the plea agreement prior to the entry of the plea [V,R803-809]; Claim 3- The plea was never formally accepted, no factual basis for the plea exists in the record, the plea was not voluntarily,

knowingly, and intelligently made, and the plea agreement has been repeatedly violated [V,R809-816]; Claim 4- trial counsel was ineffective because an adversarial testing of the State's case did not occur due to counsel's failure to file a motion to suppress, and that the convictions and death sentence are unreliable [V,R816-819]; Claim V- prosecutorial misconduct rendered the convictions and sentences fundamentally unfair [V,R819-822]; Claim VI- counsel was ineffective in failing to pursue a motion to suppress [V,R822-823]; Claim VII-the court and prosecutor misled the jury as to sentencing responsibility [V,R824]; Claim XIII (as labeled in the motion)- second penalty phase counsel was ineffective in failing to investigate, obtain, and present evidence of four witnesses to support the withdrawal of the plea [V,R824-826].

Mr. Hileman moved to amend the Amended Motion for Postconviction Relief on February 9, 2004.[V,R847] The amendment sought to include two substantive issues asserting ineffective assistance of appellate counsel.[V,R847-848] The State's Answer to Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence was filed on January 7, 2004.[X,R1693-1740]

A *Huff* hearing was conducted by the trial court on

February 9, 2004.[V,R874-914]

The trial court entered an order granting an evidentiary hearing on claims II and III-3 of the motion, denying all other claims, and denying the motion to amend.[V,R856-873] The trial court's order is summarized as follows:

Claim I: Mr. Long never actually entered a guilty plea. The issue was previously addressed unsuccessfully on direct appeal.[V,R859]

Claim II: Evidentiary hearing granted.[V,R862]

Claim III: (1) Court never accepted the plea. Trial court failed to ascertain whether a motion to suppress had been filed to challenge the legality of Mr. Long's confession.[V,R861] The issue was previously addressed on direct appeal.[V,R862] (2) Lack of factual basis for plea in the record.[V,R862] The issue was previously addressed on direct appeal.[V,R863] (3) Evidentiary hearing granted.[V,R863] (4) The plea agreement was repeatedly violated.[V,R864] The issue was previously addressed on direct appeal.[V,R864]

Claim IV: Trial counsel was ineffective in failing to file a motion to suppress challenging the legality of Mr. Long's confession.[V,R865] Mr. Long would not have

ultimately prevailed despite initial success, as the Florida Supreme Court eventually overruled Long v. State, 517 So.2d 664 (Fla. 1987).[V,R865] Mr. Long failed to demonstrate prejudice. A claim of an improper pretextual stop was waived by virtue of the plea.[V,R866]

Claim V: Prosecutorial misconduct occurred during arguments in the second penalty phase.[V,R866] Claims of prosecutorial misconduct should be raised on direct appeal, thus are procedurally barred.[V,R867] The argument that the issues were not properly preserved for appeal and thus cognizable was previously argued in Issues VII and VIII of the direct appeal and found to be without merit.[V,R867]

Claim VI: Mr. O'Connor promised Mr. Long that he would file a motion to suppress, but did not do so.[V,R868] Mr. O'Connor failed to challenge an illegal stop.[V,R868]. A motion to suppress the confession would ultimately not have been successful due to change in the law.[V,R868] The election to plead guilty waived any challenges to the stop.[V,R869]

Claim VII: The jury's role in sentencing was impermissibly denigrated in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The failure to preserve the claim was ineffective assistance of counsel.[V,R870]

Claim should have been raised on direct appeal, but was not, thus is procedurally barred.[V,R870] Florida's standard instruction has been upheld as constitutional.[V,R870]

Claim VIII: Counsel was ineffective in failing to call and present testimony in 1989 of witnesses to establish that Mr. Long's plea was not voluntary.[V,R871] Whether or not Mr. Long should have been able to withdraw his plea in 1989 was raised unsuccessfully on direct appeal, thus Mr. Long may not relitigate this claim.[V,R871]

The trial court further denied Mr. Long's motion to amend as both proposed amendments alleged claims that appellate counsel was ineffective and such claims must be litigated in a habeas petition with the appellate court.[V,R872]

A bifurcated evidentiary hearing was held on Claims II and III-3. The first two days of testimony were held on May 9-10, 2011.[XIII] Mr. Robert Fraser testified that he is currently employed with the Public Defender's Office and he represented Mr. Long in the 1980's.[XIII,T60] Mr. Fraser took over after Mr. Ellis Rubin withdrew.[XIII,T61] Mr. Long had entered pleas to eight murders and was to have

a single penalty phase when Mr. Fraser took over.{XIII,T61] The case was on remand after a reversal by this Court for a new penalty phase.[XIII,T61] Mr. Fraser had read the first penalty phase, but had no recollection of the testimony, including the mental health testimony.[XIII,T70]

Mr. Fraser had no memory of filing a motion to withdraw the plea, but records indicated he had done so.[XIII,T62] Mr. Long wanted him to file this motion, but Mr. Fraser did not want to do this.[XIII,T62-3] Mr. Long wanted to attack the plea on a broad level, but Mr. Fraser felt that because of the law of the case doctrine this could not be done, and for this reason sought to withdraw the plea on very narrow grounds.[XIII,T66]

Mr. Fraser wrote Mr. Long a letter at the time indicating the motion to withdraw the plea was filed in order to preserve habeas corpus issues down the road.[XIII,T63] The same letter indicated that Mr. Fraser was aware that the Pasco conviction had been reversed and he had spoken with Mr. Long’s Pasco county attorney, Bill Eble, about the case. [XIII,T65] Mr. Fraser had no recollection of doing this.[XIII,T65]

Mr. Fraser had no recollection of who Mr. Long asked him to call as witnesses for the hearing on the motion to

withdraw.[XIII,T67] Mr. Fraser had no recollection of Mr. Long filing a *pro se* motion for rehearing after the motion to withdraw the plea was denied.[XIII,T67]

Mr. Fraser did not feel that Mr. Long was incompetent to proceed or make decisions during his representation of him.[XIII,T72] He came across no evidence that would support an insanity defense.[XIII,T72] Mr. Long understood discussions on legal issues, although he did not always agree with what Mr. Fraser told him.[XIII,T73]

Mr. Long testified via telephone from prison.[XIII,T89-90] In 1984, Mr. Long had a pending homicide charge in Pasco County and eight pending homicide charges in Hillsborough County.[XIII,T91] Mr. Long had additional pending charges besides the homicide charges in Hillsborough County, Pasco County, and Pinellas County.[XIII,T93] Mr. Long was represented by Mr. Norgard and Randy Grantham in Pasco County and by Charles O'Connor and Brian Donerly in Hillsborough County.[XIII,T91-2] An investigator was working with Mr. O'Connor.[XIII,T91]

Mr. Long had served in the military from 1972-1974. This was about ten years before his arrest.[XIII,T121] He was involved in a very serious motorcycle crash in 1974 that resulted in skull fractures and numerous other medical

issues.[XIII,T121] Mr. Long was ultimately discharged from the military with rated disabilities for traumatic brain injury, as well as knee, foot, and ankle injuries.[XIII,T122] Litigation over the years has documented the brain injuries Mr. Long has been diagnosed.[XIII,T123]

Mr. Long was prescribed certain medications while in Florida State Prison.[XIII,T120] He believed he took Sinequan or Vistaril.[XIII,T120] The county jail at first put him on a different medication, Librium, and at some point, either Vistaril or Sinequan.[XIII,T118] The jail at first did not give him what he was taking at FSP.[XIII,T120] At the time, Mr. Long thought the drugs did not have any effect on him other than for sleep, but he also didn’t think the drugs were helping him with decision making, thinking processes, or judgment.[XIII,T124;143]

The Pasco case went to trial first and was on appeal at the time of the plea in the Hillsborough cases.[XIII,T92]

Mr. Long was transported to Hillsborough County Jail in late 1985.[XIII,T96] This surprised him and he didn’t see anyone for a day or so.[XIII,T96] Mr. O’Connor and Mr. Donerly then came to see him at the jail.[XIII,T96] Mr.

O'Connor started to talk to him about a plea. Mr. O'Connor counted off the terms of the plea offer on his fingers.[XIII,T97;100] The terms required Mr. Long to plea to all eight murders, but have only one penalty phase.[XIII,T97] He would receive a life sentence on seven of the murders.[XIII,T97] Mr. O'Connor promised to get Helen Morrison and Dorothy Lewis, the two expert witness Mr. Long wanted, if he took the deal.[XIII,T97] It had seemed to Mr. Long that Mr. O'Connor hadn't been much interested in either witness before the plea offer.[XIII,T98-9] Mr. O'Connor promised "one hell of a penalty phase" and Mr. Long believed him.[XIII,T97;99]

Mr. Long thought that Mr. O'Connor seemed in a big rush to get this done.[XIII,T97] The meeting was very brief.[XIII,T100] Mr. Long testified that he and Mr. O'Connor did not get along very well.[XIII,T100] Virtually every meeting they had ended with Mr. O'Connor storming out and slamming the door within a few minutes.[XIII,T100] A serious point of contention between them was Mr. Long's desire that Mr. O'Connor file a motion to suppress his confession.[XIII,T100] Every time Mr. Long asked Mr. O'Connor to file a motion to suppress, Mr. O'Connor would tell him that "no Florida court will ever suppress Bob Joe

Long's confession."[XIII,T104] Mr. O'Connor said that "they would change the law before they did that."[XIII,T105]

Mr. Long knew that a motion to suppress his confession had been litigated in Pasco county.[XIII,T112] He believed that Mr. O'Connor had been present for that hearing.[XIII,T112] Mr. Long knew the issue was based on his equivocal request for counsel.[XIII,T112] Mr. Long believed that the law at the time required the police to stop questioning and clarify the request.[XIII,T113;140]

Mr. Long felt his only option was to take the plea or have eight trials and eight death sentences.[XIII,T106]

Mr. Long next saw Mr. O'Connor in the courthouse just before he entered the plea.[XIII,T101] For the first time Mr. Long was given a written copy of the plea just before going into the courtroom.[XIII,T102] Mr. Long believed that the investigator, Tony Webb, gave him a copy.[XIII,T102] Mr. Long had a chance to scan over it, but didn't have a chance to read it and no one explained it to him.[XIII,T102-4] No attorney went over each paragraph with him and explain the consequences of each paragraph.[XIII,T104] Mr. Long was not given a personal copy.[XIII,T103]

Mr. Long thought the plea agreement would allow him to appeal his confession.[XIII,T105] He thought the plea would still permit him to suppress physical evidence seized from his apartment and car as well as a knife.[XIII,T105] Mr. Long was not told that the plea agreement required him to waive any challenges or appeals of these issues.[XIII,T106] Mr. Long did not understand that he was waiving any issues that might have been developed through the guilt phase of a trial and that no one ever explained this to him.[XIII,T106]

Mr. Long agreed that the September 23, 1985 transcripts reflected that he told the trial court he had read the plea agreement and it was explained to him by counsel.[XIII,T146-7]

On September 26, 1985, Mr. Long wrote a letter to Craig Alldredge, another one of his Hillsborough lawyers, in which he asked for assistance in getting medication to take the edge off.[XIII,T125] Mr. Long indicated that the "walls were moving like they did in Dade City" and that Librium had previously helped.[XIII,T125] Mr. Long was very stressed out about the jail and plea.[XIII,T125] He was trying to get medication to sleep.[XIII,T125]

Mr. Long learned of the waivers during the jury

selection for the single penalty phase when he overheard Mr. Donerly and Mr. O'Connor talking about it while he was in the holding cell.{XIII,T107] When Mr. Long confronted them, a loud argument ensued.[XIII,T107] When they returned to the courtroom Mr. O'Connor requested that Mr. Long be permitted to withdraw the plea.[XIII,T108] The trial court held a hearing and heard the testimony of Mr. Long, Mr. O'Connor, and Mr. Norgard.[XIII,T109] The court agreed to let Mr. Long withdraw the plea.[XIII,T110]

Mr. Long recalled that after the request, he went into a room with the Hillsborough lawyers, Mr.Norgard, and Randy Grantham.[XIII,T110] Mr. Long recalled that the Hillsborough lawyers thought he should keep the plea.[XIII,T111] The prosecutor kept sending Tony Webb in to say that he promised eight trials if the agreement was withdrawn.[XIII,T112] Undersigned counsel and Mr. Grantham kept telling Mr. Long to withdraw the plea because of the waiver of the confession portion.[XIII,T112] Mr. O'Connor and the other Hillsborough lawyers argued that the confession would never be suppressed.[XIII,T113;117] Nothing else about the plea was really discussed.[XIII,T115]

Mr. Long was not shown the written agreement during the discussions.[XIII,T116] No one went over the entire plea with him line by line.[XIII,T116]

After a long time, maybe over an hour, Mr. Long reached the conclusion that Mr. O'Connor was not going to be his lawyer any more.[XIII,T114] The judge indicated he wanted a decision and it was agreed that Mr. Long would have overnight to think things through because Mr. Long didn't know what to do.[XIII,T114]

Mr. Long went back to the jail thinking that a lawyer would come talk to him, but no one did.[XIII,T117] At some point he called a lawyer named Jenny Greenburg that he had heard about.[XIII,T126] Mr. Long told Ms. Greenburg what was going on and she thought he should get out of the plea.[XIII,T127] He slept a little.[XIII,T117] Mr. Long had not be given his sleeping medication in the jail.[XIII,T117-18]

Mr. Long thought that based on what had happened that Mr. O'Connor wouldn't be able to represent him anymore.[XIII,T127] Mr. Long thought that he would get a new lawyer and that lawyer could advise him about whether to keep the plea.[XIII,T127] Mr. Long thought if his new lawyer recommended getting out of the plea, he could pursue

it that way.[XIII,T127]

Mr. Long did get a new lawyer, Ellis Rubin.[XIII,T127] Mr. Long started writing Mr. Robin immediately after he kept the plea.[XIII,T128] The trial court would only agree to appoint Mr. Rubin if two preconditions met: (1) Mr. Long had to agree not to withdraw the plea agreement and (2) there would be no continuances.[XIII,T129]

Mr. Rubin took over the case and represented Mr. Long at the penalty phase.[XIII,T130] Mr. Long was sentenced to death, but that sentence was overturned on appeal.[XIII,T130]

Mr. Fraser represented Mr. Long in the Hillsborough case after it was reversed on appeal.[XIII,T94] Early on in the case he met with Mr. Fraser in person, perhaps for a total of five times.[XIII,T95] Mr. Long and Mr. Fraser communicated by letter when Mr. Long was in state prison.[XIII,T95]

It took Mr. Long a long time to get Mr. Fraser to file a motion to withdraw the plea.[XIII,T130] Mr. Fraser made it clear that he had no intention of winning the motion, but was only filing the motion to preserve an appellate issue.[XIII,T130] Mr. Fraser thought the plea was a great thing and that Mr. O'Connor was a great lawyer for getting

the deal.[XIII,T130] Mr. Long believed that if Mr. O'Connor had challenged the evidence in the Hillsborough cases as had been done on the Pasco case, the cases would have eventually been thrown out.[XIII,T133]

The Pasco conviction was ultimately thrown out on appeal because there was insufficient evidence to sustain a conviction.[XIII,T131-32]

Mr. Long currently does not take any medication for mental health issues.[XIII,T138] He has not taken any medication for 15 or 20 years.[XIII,T138] His organic brain damage did not impact his ability to understand the 2011 evidentiary hearing proceedings.[XIII,T139]

Tony Webb testified that he worked as an investigator for the Public Defender's office in 1984-85.[XIV,T205] Mr. Webb was assigned to work on Mr. Long's case.[IXV,T206] During the initial interview, Mr. Long admitted to Mr. Webb that he committed each of the charged offenses.[XIV,T207] In addition to working professionally on Mr. Long's case, Mr. Webb undertook personal work for Mr. Long such as managing his financial affairs.[XIV,T207-8] Mr. Webb frequently visited Mr. Long at the jail.[XIV,T209]

Mr. Long was housed in one man cell in the jail that was very maximum security.[XVI,T208] During his time in

the jail, Mr. Long was found to be “hoarding” pills, after which he was put on “lock down” status.[XIV,T208]

Mr. Webb characterized Mr. Long as being “above-average in verbal skills”.[XIV,T209] Mr. Long had some type of radiology job and a junior college degree.[IXV,T209] Mr. Webb believed Mr. Long was of above-average intelligence.[IXV,T209] Mr. Webb knew that the attorneys had Mr. Long evaluated for mental health purposes, but he was not present during the evaluations of Mr. Long.[XIV,T211]

Mr. Webb was present for the entire Pasco County trial.[XIV,T210] He took notes and reported his observations to Mr. O’Connor.[XIV,T210] Mr. Webb was familiar with the motion to suppress the confession that had been filed in Pasco County.[XIV,T211]

Mr. Webb was present when the plea offer was presented to Mr. Long.[XIV,T212] This occurred less than a week before September 23.[XIV,T217] Mr. Webb thought that Mr. O’Connor and Mr. Alldredge were the attorneys who told Mr. Long about the plea offer.[XIV,T213] The attorneys had not received an actual written offer at the time of this meeting.[XIV,T217] Mr. Webb recalled that Mr. O’Connor was very explicit in telling Mr. Long that everything that “has

been said can come in, but this is the only time it can be done" and the State was limited to one shot at the death penalty.[XIV,T214-15;221] Mr. Webb believed that the waiver of the right to contest the admissibility of the confession was talked about, but Mr. Webb also believed that Mr. Long understood he could appeal.[XIV,T214;222] Mr. Webb thought that Mr. Long understood the terms of the plea.[XIV,T215] Mr. Webb believed that Mr. Long wanted to avoid numerous trips and trials in Hillsborough County.[IXV,T216]

Mr. Webb acknowledged that Mr. Long wasn't getting medication in the jail and he was harder to deal with for this reason.[XIV,T215] Mr. Webb explained that Mr. Long was not as cooperative, his tone changed, and he was not as open.[XIV,T223] Mr. Webb was not aware of State Exhibit 7, which is the letter dated September 26, 1985 that Mr. Long sent to Mr. Alldredge in which Mr. Long expressed his need for medication.[XIV,T220] Mr. Webb did not go over to the jail to asses Mr. Long in response to the letter.[XIV,T220]

Attorney Craig Alldredge was asked to work on Mr. Long's case in a very limited manner beginning in September 1985 through December 1985.[XIV,T225] Mr. Alldredge's role was to help with the psychological testimony and the

development of mental health mitigation.[XIV,T225;227] No mental health defenses such as intoxication or insanity could be developed.[XIV,T228] The mental health mitigators of extreme emotional disturbance and ability to conform his conduct were established.[XIV,T228] Mr. Long was diagnosed with some degree of brain impairment and mental illness at the time of the offenses.[XIV,T228] Mr. Alldredge did not observe any impairment with Mr. Long's cognitive abilities.[XIV,T229]

Mr. Alldredge was aware of the litigation involving the Pasco County case.[XIV,T227] He knew that Mr. O'Connor had attended the hearings related to the motion to suppress.[IXV,T227]

In addition to Mr. Alldredge, Mr. O'Connor and Mr. Brian Donerly were very active in the case during this period of time.[XIV,T229] Mr. Long and Mr. Alldredge did not have a good relationship.[XIV,T230] Part of Mr. Alldredge's job was to get Mr. Long to cooperate with Mr. O'Connor.[XIV,T230]

Mr. Alldredge recalled that there were problems getting Mr. Long medication while he was in the county jail.[IXV,T236] The jail didn't want to give him anything.[XIV,T236] Mr. Alldredge didn't recall the

September 26, 1985 letter that Mr. Long wrote to him, but he did remember the problem.[XIV,T236] Mr. Alldredge believed that he gave Mr. Long's letter to Mr. O'Connor.[XIV,T237] He believed that Mr. O'Connor wrote to the jail to try to get Mr. Long some medication.[XIV,T237] Because of the letter Mr. Long wrote Mr. Alldredge three days after the plea was entered, Mr. Alldredge believed that Mr. Long was evaluated by Dr. Berland.[XIV,T239]

Mr. Alldredge believed that Mr. Long was a very disturbed man and a mentally ill man.[XIV,T238] Mr. Long was anxious, paranoid, demanding, and manipulative.[XIV,T238] He was a very difficult client to deal with.[XIV,T238] Mr. Alldredge was aware that Dr. Berland diagnosed Mr. Long with a psychotic disturbance that was worsening during incarceration, paranoid thinking, and exhibiting inappropriate emotions to the circumstances.[XIV,T249]

Mr. Alldredge believed that Mr. Donerly and Mr. O'Connor presented the plea offer to Mr. Long. He did not recall being present.[XIV,T229] Mr. Alldredge recalled discussing the plea with Mr. O'Connor. Mr. Alldredge was aware of the conditions of the plea, but he did not recall ever meeting with Mr. Long to discuss it with

him.[XIV,T230;235]

Mr. Alldredge recalled that after the plea was entered, Mr. Long would often talk to him about whether he did the right thing be entering the plea.[XIV,T231;241] Mr. Long didn't express that he didn't know what he was doing.[XIV,T231] Mr. Alldredge opined that the plea was knowingly and voluntarily made.[XIV,T231]

Mr. Alldredge recalled that there was a time when the trial court permitted Mr. Long the opportunity to withdraw his plea.[XIV,T232] Mr. Alldredge was not really involved in the subsequent discussions with Mr. Long about what he should do.[XIV,T232] Mr. Alldredge has been told by others that he was there, but he has only a vague recollection of being present at that meeting.[XIV,T240]

In February 1986, Mr. Alldredge received a letter from Mr. Long in which Mr. Long wrote "I've been thinking a lot about the plea agreement. We gave up the right to appeal the confession. What exactly does that mean?" [XIV,T241] Mr. Alldredge did not ever have a discussion with Mr. Long where this was explained.[XIV,T242]

Mr. Alldredge testified that he spent his career in criminal defense.[XIV,T243] Mr. Alldredge opined that when a client was presented with a plea agreement as complicated

as the one in this case, it would be incumbent on the attorney to meet with the client more than once, to provide the client with a copy of the agreement, and to make absolutely certain that the client understood every part of the agreement prior to an entry of a plea.[XIV,T244] This agreement was very complex, with a lot of parts to it and a lot of ramifications.[XIV,T244] The plea presented a very difficult decision for Mr. Long to make.[XIV,T244] The gist about what was pled to was straightforward, but the ramifications as to the confession and the appellate rights affected were more complex than the average plea and "certainly needed to be gone into with him."[XIV,T245]

Mr. Alldredge testified that he would have gone through each paragraph with Mr. Long to make sure it was understood.[XIV,T245] It is the responsibility of the attorney to ensure that the client understands the full consequences of how the plea will impact him.[XIV,T246] These considerations are only enhanced with a client who has mental health issues.[XIV,T247] In light of Dr. Berland's report on Mr. Long, Mr. Alldredge agreed that it may take more time to explain the terms of a plea agreement such as this one.[IXV,T249] While Mr. Alldredge did not question Mr. Long's ability to understand at the time, he

now questioned whether he should have.[XIV,T250]

Dr. Robert Berland is a practicing forensic psychologist.[XIV,T252] Dr. Berland evaluated Mr. Long in November 1985 for the purpose of developing mitigation for penalty phase.[XIV,T254;269] Dr. Berland was not asked to asses Mr. Long's mental state at the time he entered the plea.[XIV,T272] Mr. Long had described his mental state during that time period as being "on edge."[XIV,T272] Dr. Berland noted that Mr. Long was "quite manic" during October 1985 when he was evaluated, which could lead Mr. Long to believe he was having trouble with his nerves.[XIV,T273]

Over the course of four days, Dr. Berland interviewed and administered psychological tests to Mr. Long.[XIV,T254-55] Dr. Berland reviewed and considered a report prepared by a neuropsychologist, Dr. Hal Smith. [XIV,T257] Mr. Long's IQ was in the high average range.[XIV,T257] Dr. Berland diagnosed Mr. Long as psychotic with evidence of mild to moderate organic brain injury with an inherited component potentiated by brain damage from head injuries and use of amphetamines.[XIV,T259-61;279] Dr. Berland prefers the generic diagnosis over the more specific diagnosis under the DSM-III.[XIV,T259] Dr. Berland noted

that Mr. Long had paranoid thinking, some of which was exhibited toward his attorney, Mr. O'Connor.[XIV,T277] Mr. Long had severe character disturbances.[XIV,T281] Mr. Long's psychotic thinking was classified as mild to moderate.[XIV,T283] Mr. Long had delusional beliefs, indologenous mood disturbance expressed in manic and depressive episodes, and inappropriate affect.[XIV,T283] According to the MMPI, Mr. Long also had hallucinations.[XIV,T283] Perceiving walls moving would be consistent with hallucinations.[XIV,T283] These issues predated the homicides.[XIV,T286]

Dr. Berland did not actually address competency, and he had nothing that he could point at to whether Mr. Long was competent or incompetent.[XIV,T261-3] Dr. Berland had nothing he could point to on the question of whether Mr. Long could knowingly and voluntarily enter a plea.[XIV,T264-65]

Dr. Berland's report contained a notation that in October 1985 Mr. Long reported that he was not being given his medication at the jail, but that his attorney had written a letter to the jail.[XIV,T267] Mr. Long reported he was taking Librium and a drug similar to Valium.[XIV,T267]

Dr. Randy Otto, a forensic psychologist, was hired by the State to evaluate and review the prior psychological testing and other documents supplied by the prosecutor.[XIV,T292] Dr. Otto conducted a face-to-face interview with Mr. Long.[XIV,T293] Dr. Otto conducted some testing which indicated that Mr. Long was not feigning memory impairment.[XIV,T303] Dr. Otto did not make any attempts to diagnose Mr. Long's psychiatric or mental health problems.[XIV,T307]

Dr. Otto reviewed some documents from DOC and State Exhibits 5 and 6, which were inconsistent with the claim in Mr. Long's Motion that he was on medication at the time of the hearings in 1985.[XIV,T296] Dr. Otto reviewed some letters written by Mr. Long to his attorneys in 1985 which indicated that Mr. Long needed medication and wasn't getting it.[XIV,T319-323] Dr. Otto didn't ask Mr. Long about these because he didn't get them until after his interview of Mr. Long.[XIV,T319]

Dr. Otto did not find evidence that Mr. Long's ability to understand and participate in the plea process was impaired.[XIV,T299] Dr. Otto looked at psychiatric disturbance, cognitive impairment, and drugs.[XIV,T301]

Dr. Otto observed that whether or not a defendant

understands a plea is often determined by what the attorney tells him.[XIV,T302] Dr. Otto had no idea what Mr. O'Connor, Mr. Alldredge, or other attorneys said to Mr. Long, therefore he had no opinion on whether they said enough.[XIV,T302] Dr. Otto stated that if what Mr. Long described about the information he was given about the plea by his attorney's was accurate, he had a very good argument that it was not adequate legal counsel regarding the plea.[XIV,T325-26]

Mr. Long described a very problematic relationship with Mr. O'Connor.[XIV,T308] Dr. Otto's review of various letters corroborated this assertion by Mr. Long.[XIV,T308]

Mr. Long told Dr. Otto that he had very little time to review the plea agreement, maybe ten minutes.[XIV,T310-312] Dr. Otto did not go through the plea agreement with Mr. Long.[XIV,T310] Mr. Long believed that Mr. O'Connor wanted to get rid of his case "cheaply and quickly".{XIV,T311]

Dr. Otto stated that his opinion of the December 12′ 1985 transcript was that Mr. Long had no appeal rights.[XIV,T313] When asked to review the statements on page 8, line 6 of the transcript where the prosecutor states that "On any issues as to—I believe this particular—this particular plea agreement, if any appellate issues

arise in the second phase you can appeal that.", Dr. Otto responded that it was hard to understand.[XIV,T314] Dr. Otto reviewed the entire transcript that dealt with the appeal issue and stated that he did not know what was meant by reference to "other issues".{XIV,T316] The sentence seemed to indicate that Mr. Long had other appeal issues.[XIV,T316] Dr. Otto agreed that his statement in his report regarding the appeal rights was incorrect.[XIV,T317]

Dr. Otto testified that as a layperson with 20 years experience and teaching as an adjunct at Stetson Law School, he would understand that pursuant to the plea agreement he would be giving up the right to appeal a confession and understand the ramifications of that and fully know what that means.[XIV,T318]

On June 27, 2011, the trial court heard testimony from attorney Randall Grantham.[XV,T335] Mr. Grantham represented Mr. Long in Pasco County with Mr. Norgard in 1985.[XV,T337;339] Mr. Grantham's primary responsibility was the motion to suppress Mr. Long's confession.[XV,T337]

The suppression issue revolved around Mr. Long's right to counsel and his equivocal request for counsel.[XV,T337] Mr. Grantham researched both federal and state law that was

applicable at that time.[XV,T338] Mr. Grantham litigated the motion to suppress and believed that both Mr. Alldredge and Mr. O'Connor were present during the proceedings.[XV,T339] Mr. Grantham believed that Mr. Alldredge and Mr. Donerly had attended some of the depositions and Mr. Grantham had provided them with his material because all the cases were related.[XV,T343] The motion was denied and Mr. Long went to trial.[XV,T340]

A unanimous Florida Supreme Court reversed the ruling on the motion to suppress, resulting in a new trial in Pasco County.[XV,T340] Twelve years later, in 1997, the Florida Supreme Court receded from the holding.[XV,T353]

Mr. Grantham was not present when Mr. Long entered his plea on September 23, 1985.[XV,T350] He could not recall if he had any contact with Mr. Long between the April 1985 Pasco trial and the plea in Hillsborough County.[XV,T350] Mr. Grantham was not present when the plea was discussed by Mr. O'Connor.[XV,T350]

Mr. Grantham and Mr. Norgard went to Hillsborough County to observe the proceedings.[XV,T341] Mr. Grantham recalled talking to Mr. Long while he was in the holding cell.[XV,T341] At that time Mr. Grantham learned that Mr. Long had entered a plea and there was some discussion

whether the plea was going to be maintained.[XV,T341]

Court was convened and there was a hearing on a motion to withdraw the plea.[XV,T341] Ultimately the trial court decided to allow Mr. Long to withdraw the plea and permitted him to consult with his lawyers before giving his final decision.[XV,T341] Mr. Long, the Hillsborough attorneys, Mr. Grantham, and Mr. Norgard went into an adjoining room to discuss what should be done.[XV,T342]

Mr. Grantham recalled that the lawyers present were Mr. O'Connor, Mr. Alldredge, Linda Shiflet, and possibly Mr. Donerly.[XV,T342-33] This Tampa team was insisting that the motion to suppress had no validity, had no basis, would never be granted, and there was no way in hell any judge would grant it.[XV,T343] The Tampa team did not believe the Florida Supreme Court would ever reverse.[XV,T343;352] The discussion centered on Mr. Long giving up the right to appeal the confession.[XV,T352] Mr. Grantham specifically recalled the female attorney was an appellate attorney and he specifically talked to her.[XV,T344] Mr. Grantham didn't think she was very familiar with the facts in this case or the law at that time.[XV,T344]

Mr. Grantham estimated they were together for about 45

minutes.[XV,T344] Mr. Long was vocal during the meeting, but Mr. Grantham couldn't recall what he said.[XV,T344] Mr. Long seemed more agitated than usual.[X,T351] Mr. Long did not seem incompetent to make decisions.[XV,T351]

Mr. Grantham had never seen the written plea agreement.[XV,T345] Mr. Grantham could not recall anyone ever going over the plea agreement with Mr. Long.[XV,T345] Mr. Grantham did not recall the discussion being about anything but the merits of the motion to suppress and that if Mr. Long did not plea, he would face eight trials and eight possible death sentence.[XV,T345-6]

After the meeting ended Mr. Grantham did not have any more contact with Mr. Long.[XV,T346] Mr. Grantham did not visit Mr. Long at the jail.[XV,T346] When Mr. Grantham left he had the impression Mr. Long was going to withdraw the plea.[XV,T347]

Mr. Grantham did not believe that Mr. Long was incompetent for trial, but there were mental health issues.[XV,T348] No insanity defense was presented in Pasco County.[XV,T348] He did not recall Mr. Long taking any psychotropic medications during the Pasco trial.{XV,T354]

Following the Evidentiary Hearing, the trial court's

Final Order Denying Defendant's Amended Motion to Vacate Judgments and Sentences was entered on November 28, 2011.[VII,R1175-1210] A summary of the order is as follows:

Claim II and III-3: The trial court addressed these claims together because the factual allegations were the same.[[VII,R1175] The Court noted that in Claim II Mr. Long contends his plea was involuntary because counsel failed to fully explain its consequences, review the written agreement or allow Mr. Long to read it, and carefully assess whether, in light of Mr. Long's brain damage, medications, and mental illness, was able to adequately understand and appreciate the consequences of the terms of the plea agreement.[VII,T1176] The Court also noted that in Claim II Mr. Long contends trial counsel was ineffective for utilizing undue, intense, and inappropriate emotion pressure to persuade Mr. Long to enter the plea and then maintain the plea.[VII,T1176-77] Trial counsel was ineffective in failing to advise Mr. Long how his history of brain damage and other "disorders" could be used as a defense.[VII,T1176] In Claim III-3 Mr. Long incorporated the same factual basis outlined in Claim II and alleged his plea was involuntary due to brain damage, mental illness,

other disorders, psychotropic medication and impaired ability to make a rational decision about the guilty plea.[VII,T1177]

As to Claim II, the trial court found that Mr. Long failed to prove that trial counsel performed deficiently.[VII,T1205] The trial court found that Mr. Long did not establish that any mental health defenses existed based on the testimony of Mr. Fraser, Mr. Alldredge, and Mr. Grantham coupled with the mental health reports that Mr. Long was not insane, incompetent or intoxicated at the time of the offenses.[VII,T1205]

The trial court further found that Mr. Long failed to establish that counsel failed to adequately review the conditions and consequences of the plea agreement or that trial counsel should have taken extraordinary measures with Mr. Long.[VII,T1206] The trial court noted that even if Mr. Long did not understand the confession waiver issue at the time of the plea, he did at the time he chose to maintain the plea.[VII,T1206] The testimony at the evidentiary hearing reflected that Mr. Long was capable of entering a knowing, voluntary, and intelligent plea.[VII,T1206] The evidence did not establish that Mr. Long was on medication at the time of the plea.[VII,T1207]

Though contentious, the relationship between Mr. Long and Mr. O'Connor did not result in a coerced or pressured plea.[VII,T1207]

The trial court further found that Mr. Long failed to establish prejudice.[VII,T1207] Mr. Long failed to establish that but for counsel's deficient performance, he would have gone to trial.[VII,T1208] Mr. Long failed to establish he had any mental health defenses, the plea limited his exposure to only one death sentence, and Mr. Long understood the appeal ramifications of the plea regarding the confession.[VII,T1208]

Incorporating the factual findings from Claim II, the trial court denied Claim III-3 as well.[VII,T1209] The trial court found that although Mr. Long had mental health issues, those issues related to penalty phase and did not impair his ability to enter a plea.[VII,T1209-10]

A timely Notice of Appeal was filed on December 13, 2011.[VII,T211-1247]

SUMMARY OF THE ARGUMENT

Issue I: The trial court erred in denying Mr. Long's claim that his plea was not voluntary due to the deficient performance of trial counsel in failing to adequately advise Mr. Long about the waiver of appellate rights and

the full ramifications of those waivers.

Issue II: The trial court erred in denying Mr. Long's claim of prosecutorial misconduct without an evidentiary hearing on the ground that this issue had been raised on direct appeal where this claimed raised instances of prosecutorial misconduct in opening statement and the direct appeal raised only instances of prosecutorial misconduct during closing arguments. An evidentiary hearing on this claim is required.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF ON MR. LONG'S CLAIMS THAT HIS PLEA WAS INVOLUNTARY DUE TO THE DEFICINET PERFORMANCE OF TRIAL COUNSEL AND THAT MR. LONG WOULD HAVE GONE TO TRIAL ABSENT THE DEFICIENT PERFORMANCE.

In Claims II and III-3 of his Amended Motion for Post-Conviction Relief filed pursuant to Fla. R. Crim. P. 3.851, Mr. Long argued that he was entitled to relief because of deficiencies of trial counsel in 1985 surrounding the entry of a plea in the Circuit Court in Hillsborough County to eight first-degree murder charges, as well as other multiple felony charges. In particular Mr. Long challenges the entry of the plea in Case No. 84-013346, in which Mr.

Long pled to a capital murder charge as to guilt, but agreed to allow the State to conduct a penalty phase. Mr. Long contends that trial counsel, Mr. O'Connor, provided ineffective assistance of counsel when he failed to fully explain to Mr. Long the consequences of the plea, specifically the ramifications on Mr. Long's right to challenge the legality of his confession and the legality of the search of his residence and automobile through a motion to suppress and to pursue any appellate relief on the same grounds. Mr. Long contends that if Mr. O'Connor had adequately and competently explained these provisions of the plea, Mr. Long would have withdrawn the plea at the December 1985 hearings. Mr. Long was not aware of the ramifications of the plea regarding his right to pursue motions to suppress evidence. The evidence presented at the three day evidentiary hearing warrants reversal of the trial court's order denying relief.

At the time of the hearing, the parties agreed that three of Mr. Long's prior attorneys were now deceased: Charles O'Connor [lead defense counsel at the time the plea was entered in September 1985 and at the December 1985 hearings] and Brian Donerly [co-counsel during the relevant time period with O'Connnor who was brought in primarily for

his “brilliance with the law” [XII,T45] and Ellis Rubin. Mr. Rubin represented Mr. Long after Mr. O’Connor was removed from the case subsequent to the entry of the plea and subsequent to the hearing on whether the plea would be withdrawn. [XIII,T46]

Testifying during the hearing were two attorneys who represented Mr. Long in 1985: Mr. Craig Alldredge, who represented Mr. Long in conjunction with Mr. O’Connor and Mr. Donerly from September 1985 through the appointment of Ellis Rubin [XIII,T188-197] and Mr. Randy Grantham, who represented Mr. Long in the Pasco County case in 1985 that was pending in the Florida Supreme Court in the fall of 1985.[XV,T330-358]

Attorney Robert Fraser, who represented Mr. Long in 1989 after the penalty phase conducted by Mr. Rubin was reversed by the Florida Supreme Court, also testified. [XIII,T60-79]

Additional testimony was taken from Tony Webb, an investigator who was assigned to Mr. Long’s case in the fall of 1985[XIV,T169-180], Dr. Berland, who conducted psychological testing on Mr. Long in 1985 [XIV,T216-250], and Dr. Otto, who primarily reviewed Dr. Berland’s results.[XIV,T253-267]

Mr. Long testified extensively about the events in 1985.[XIII,T54-157]

In addition to testimony, the trial court took judicial notice of the appellate record and court file in this case.

September 1985 Plea Hearing, and December 1985 Hearings and Background of Pasco proceedings and Hillsborough cases

Mr. Long testified that in 1984 he was charged with multiple homicides and other related offenses in Hillsborough and Pasco counties.[XIII,T90-1] He was represented by Mr. Norgard and attorney Randy Grantham in Pasco County. He was represented by Charles O'Connor in Hillsborough County. Mr. O'Connor was assisted by an investigator, Tony Webb.[XIII,T91] After a period of time a second attorney, Brian Donerly was working on the Hillsborough cases.[XIII,T92]

The testimony from Randy Grantham, Mr. Long, Craig Alldredge, and Tony Webb established that the by the fall of 1985 the Pasco county case was much further along. Randy Grantham had prepared, filed, and litigated a motion to suppress Mr. Long's statements and other evidence seized on the grounds that Mr. Long should have been provided counsel after an equivocal request for counsel.[XV,T337-

340] The testimony established that Mr. O'Connor was not only aware of the motion, but had been present in the courtroom during the hearing.[XIV,T210-11,227;XV,T339] The motion was denied. Mr. Long proceeded to trial, was convicted, and an appeal was pending in the Florida Supreme Court.[XV,T340] Tony Webb confirmed that he was present during the Pasco trial and reported his observations to Mr. O'Connor.[XIV,T210-11]

The suppression issue in the Pasco case was raised in the appellate proceedings in the Florida Supreme Court. [XV,T340] Ultimately, the Florida Supreme Court reversed Mr. Long's conviction, finding that his confession and evidence seized as a result thereof should have been suppressed.[XV,T340]

Mr. Long testified that he asked Mr. O'Connor several times to file a similar motion to suppress in the Hillsborough cases.[XIII,T104,142] Mr. O'Connor would not do so, often telling Mr. Long that "no court will ever suppress Bobby Joe Long's confession" and "they would change the laws before they did that".[XIII,T104-5]

Public Defender investigator Tony Webb testified that worked on Mr. Long's case the entire period of time that he was represented by the public defender. Mr. Webb also

performed some personal services for Mr. Long.[XIII,T205-08]

LATE SEPTEMBER-SEPTEMBER 23, 1985: THE PLEA

Mr. Long testified that in late 1985 he was transported to Hillsborough County jail from Florida State Prison. Mr. Long was on death row due to the Pasco conviction.[XIII,T96] He was in the jail for one day and the next day he was visited by Mr. O'Connor and Mr. Donerly.[XIII,T96] Mr. O'Connor told him that the State had made a plea offer. Mr. O'Connor "counted off" on his fingers the elements of the offer- Long would plead guilty to all eight Hillsborough murder, seven would receive a life sentence, and the State would get one shot at a death sentence with a penalty phase.[XIII,T97-100] Mr. O'Connor promised Mr. Long he would procure the services of two witnesses that Mr. Long was interested in and would put on "one hell of a penalty phase."[XIII,T97-8] The other option was eight trials and eight death sentence according to Mr. O'Connor.[XIII,T105-6] Mr. O'Connor did not explain that guilt phase issues would be waived if a plea was entered.[XIII,T105,108-09] Mr. O'Connor wanted to move on this quickly.[XIII,T97,99-100,119] The meeting was fairly brief. [XIII,T100]

Mr. Long testified that his relationship with Mr. O'Connor was not good.[XIII,T99-100] Most meetings ended with Mr. O'Connor storming out, often because he disagreed with Mr. Long's desire to pursue a Motion to Suppress.[XIII,T100]

Mr. Alldredge confirmed that the relationship between Mr. Long and Mr. O'Connor was not "on good terms."[XIV,T230] Mr. Alldredge was supposed to try to get Mr. Long to go along with the defense that Mr. O'Connor was advancing.[XIV,T230]

Mr. Long testified that at no time did Mr. O'Connor or Mr. Donerly give him a written copy of the plea during the initial meeting prior to the entry of the plea.[XIII,T101, Mr. O'Connor did not inform Mr. Long that he would give up his rights to pursue a motion to suppress the statement and evidence and any potential appellate rights relating to that issue and Mr. Long did not know that was a consequence of his plea.[XIII,T99-101,104-05]

Tony Webb was present at the meeting between Mr. Long and Mr. O'Connor when the plea was discussed.[XIV,T212] The meeting occurred less than a week before September 23, 1985.[XIV,T217] Webb believed that Mr. Alldredge was also present.[XIV,T213] Mr. Alldredge couldn't recall if he was

at this meeting or not. He may have been present.[XIV,T230] Mr. Alldredge discussed the plea with Mr. O'Connor.[XIV,T230]

Webb thought that Mr. Long understood the ramifications of the single penalty phase- "one bite out of the apple".[XIV,T213-14,221] Webb thought the waiver of the confession issue was talked about, but he also thought that Mr. Long was told and understood that he could have an appeal.[XIV,T213,222] Mr. Webb testified that his recollection of the confession was that it could only be used once during the single penalty phase.[XIII,T221]

Mr. Webb acknowledged that Mr. Long did not see the written plea during this discussion because the State had not given anything in writing to the attorneys.[XVI,T217] Mr. Webb's testimony is consistent with Mr. Long's testimony that he was not shown a written plea agreement before the day the plea was to be entered on September 23, 1985.

Although Mr. Webb thought he had been present for additional discussion about the plea between Mr. Long and Mr. O'Connor at the county jail a week or two before the above discussion, Mr. Long had not been transported to the county jail during that time period. [XIV,T218-19]

Obviously Mr. Webb was mistaken about any other plea discussions taking place.

Mr. Long did not see Mr. O'Connor again until he went to court to enter the plea on September 23, 1985.[XIII,T101] Mr. Long saw the written agreement for the first time just before he went into the courtroom, when possibly Mr. Webb brought it back to him. It was several pages in length.[XIII,T101-2] Mr. Long scanned the document, but did not have time to read it carefully.[XIII,T103] No attorney went over the written plea with him at this time.[XIII,T103-4]

A plea hearing was conducted and Mr. Long entered a plea of guilty to all eight homicide charges.[State's Exhibit 2, VIII,T1475-1497]

Mr. Long's testimony regarding the deficient performance of Mr. O'Connor in fully explaining the plea and its consequences was accurate. His description of the relationship he had with Mr. O'Connor was confirmed by Mr. Alldredge. It was undisputed that Mr. Long did not review a written plea agreement with his lawyers prior to entering his plea. Mr. Long's claim that Mr. O'Connor failed to fully advise him of the consequences and ramifications of the plea is supported by the record.

The subsequent events on December 11, 1985 confirm the veracity of Mr. Long's claims regarding the deficient performance of Mr. O'Connor. Mr. O'Connor did not adequately or thoroughly explain to Mr. Long the consequences of the plea agreement and the waivers on the motion to suppress the confession, other suppression issues related to the search of the car and residence, and any potential appellate review of those issues prior to and including the day of the plea. The trial court held in 1985 that Mr. Long would be permitted to withdraw his plea due to the actions of the Public Defender and Dr. Morrison and because the trial court believed that Mr. Long believed that he would be able to appeal his confession.[IX,T1679-81]

SEPTEBMER 24-DECEMBER 10,1985: EVENTS AFTER THE PLEA

Three days later, on September 26, 1985, Mr. Long wrote Mr. Alldredge a letter in which he indicated that he was not receiving medication, his nerves were bad and "the walls are moving like they were in Dade City" and he did better if he received Librium.[XIII,T124-6] Mr. Alldredge passed the letter on to Mr. O'Connor, but he didn't know if there was any success in getting Mr. Long his medication.[XIV,T235-7] Mr. Long testified he couldn't

recall writing the letter, but that he was “pretty stressed out.”[XIII,T126] He was trying to get medication to sleep.[XIII,T126]

Mr. Long testified that at Florida State Prison just before he was transported to Hillsborough County prior to the plea he was taking 50 milligrams of Sinequan or Vistaril.[XIII,T120] Leading up to the trial he was taking 10 milligrams of Librium.[XIII,T118] The main effect of the drugs was to help him sleep.[XIII,T120] Mr. Long didn’t think the medication affected his judgment in 1985, but now he wasn’t sure.[XIII,T123-4]

Mr. Alldredge believed that Mr. Long was mentally ill, but not incompetent.[XIV,T237] Mr. Alldredge described Mr. Long as paranoid, manipulative, demanding, and a very difficult client to deal with.[XIV,T238] Subsequent to the September 26 letter, Mr. Long was evaluated by Dr. Berland.[XIV,T239]

Dr. Berland is a forensic psychologist who was associated with this case to conduct forensic testing on Mr. Long to be used as mitigation at penalty phase.[XIV,T254;233] He met with Mr. Long on October 25, 26, and 27, 1985.[XIV,T254] In addition to talking with Mr. Long he conducted a series of test.[XIV,T254-55]

Dr. Berland concluded that Mr. Long tested in the high average range on intelligence.[XIV,T257]. Dr. Berland diagnosed Mr. Long as psychotic with evidence of brain injury and severe character disorders.[XIV,T259-62] Dr. Berland diagnosed Mr. Long with delusional beliefs, indologenous mood disturbance [manic and depressive episodes], and inappropriate affect.[XIV,T273-286] The testing indicated that Mr. Long had hallucinations, although Mr. Long did not report this.[XIV,T283] The psychotic disturbance was "gradually worsening during the defendant's incarceration."[XIV,T284]

The level of neurological impairment was mild to moderate.[XIV,T279,283] Mr. Long had paranoid trends in his thinking.[XIV,T275] Mr. Long also had a "disturbed affect", likely anger, indignant, self-righteousness, and increased intensity as a result of the paranoid trends.[XIII,T274-77] These behaviors were most clearly expressed when Mr. Long described the conflicts in his relationship with Mr. O'Connor.[XIV,T277] Mr. Long thought Mr. O'Connor had a "flip" attitude with him.[XIV,T277]

Mr. Long was not incompetent nor did he meet the criteria for insanity.[XIV,T262-3;265]

Mr. Long was not receiving his medication in the

county jail during this time period.[XIV,T267] He spoke very rapidly.[XIV,T266] Dr. Berland couldn't remember if he was given Mr. Long's September 26 letter.[XIV,T270] The statement that "my nerves are on edge" could be a reflection of his "quite manic" state at the time.[XIV,T273]

The State called Dr. Randy Otto in an attempt to discredit Dr. Berland. Dr. Otto was not associated with this case until 2008 when he was hired by the State.[XIV,T292] Although Dr. Otto did no work during this time period, for ease of reference his testimony will be summarized in this section of the argument.

Dr. Otto reviewed documents provided by the State and conducted a two and one half hour interview with Mr. Long.[XIV,T293] Dr. Otto did not believe that Mr. Long was feigning any memory problems in recounting the events from 1985.[XIV,T303]

Mr. Long told Dr. Otto that he and Mr. O'Connor had a highly problematic relationship.[XIV,T308;311-12] The letters that Dr. Otto reviewed that were written by Mr. Long 25-30 years ago corroborated the difficulties between them.[XIV,T308]

Dr. Otto didn't find anything in the documents he

reviewed to verify that Mr. Long was on medication in 1985.[XIV,T296] Dr. Otto did admit that Mr. Long wrote a letter on May 7, 1985 to counsel telling his attorney that he needed medication and was not getting it.[XIV,T319] The letters that Mr. Long wrote from May to December 1985 and in February 1986 were indicative of stress for sure, and of someone who was asking for medication.[XIV,T322]

Dr. Otto felt that Dr. Berland's report didn't match that of some other experts, but he would acknowledge that some of what Dr. Berland reported would suggest psychiatric symptoms that would impair competency in 1985.[XIV,T299] Dr. Otto did not believe that Mr. Long had any drug, cognitive, or psychiatric disturbances.[XIV,T300-01]

Dr. Otto would not be surprised to discover that Mr. Long has been diagnosed with atypical psychosis. [XIV,T307] Dr. Otto heard about paranoia, bipolar disorder, and organic brain damage during the hearing. [XIV,T307] Dr. Otto admitted that he did not attempt to diagnose Mr. Long.[XIV,T307] He also admitted that Mr. Long's impairments were not newly developed.[XIV,T314]

Dr. Otto did not review the prior sentencing orders in this case, including the judicial findings regarding Mr. Long's mental health diagnosis.[XIV,T306]

Dr. Otto admitted he had no idea what any of the lawyers- O'Connor, Alldredge, or any others- said to Mr. Long about the plea and its consequences.XIV,T302,325] What was told to him would be a question of fact as to whether Mr. Long had adequate information.[XIV,T302] Mr. Long told Dr. Otto that had only ten minutes or so to review the plea agreement on September 23, 1985.[XIV,T309] Dr. Otto did not go over the written plea with Mr. Long.[XIV,T310]

Dr. Otto opined that Mr. Long understood his appellate rights based on the plea colloquy of September 23, 1985.[XIV,T313] However, when Dr. Otto was asked to read the portion of the colloquy that addressed the appellate rights he admitted he was unsure what it might mean as to other issues in the case other than appellate rights as applied to capital sentencing.[XIV,T313-317]

Dr. Otto admitted that if what Mr. Long recounted to him about the advice he received about the plea was accurate, Mr. Long had "made a very good argument to that effect during his interview with me; if he was accurate in what occurred, as a layperson."[XIV,T326]

DECEMBER 11 AND 12, 1985: THE REQUEST AND HEARING ON THE MOTION TO WITHDRAW THE PLEA

On the morning of December 11, 1985, Mr. Long was in the holding cell waiting to go into the courtroom for jury selection for penalty phase. Mr. Long overheard Mr. O'Connnor and Mr. Donerly talking to each other in the cell area about the waiver of the confession.[XIII,T107] Mr. Long had no idea what they were talking about, so he asked.[XII,T107] A loud argument ensued when Mr. Long was told for the first time that by entering the plea he had waived his right to challenge the legality of his confession.[XIII,T107] Mr. Long also had a brief opportunity to speak with undersigned counsel and Randy Grantham about what was going on before going into the courtroom.[XIV,T108]

Initially, the absence of Dr. Morrison consumed the attention of the parties and trial court. Due to Dr. Morrison's absence, Mr. O'Connor moved for a continuance, which was denied.

Mr. O'Connor then told the trial court that Mr. Long wished to withdraw his plea because he had not known about the waiver aspects of the plea at the time of the plea hearing.[XIV,T109] The trial court then conducted a hearing into the issue of whether Mr. Long had been properly advised by Mr. O'Connor about the ramifications of

the plea. After taking testimony from Mr. Long and Mr. Norgard, the trial court ruled that Mr. Long had not been properly advised and would have an opportunity to withdraw his plea.[IX,R1679-81]

The trial court eventually gave Mr. Long 24 hours to make a decision on the withdrawal of his plea. Prior to this, Mr. Long was taken into a vacant adjoining courtroom to meet with his Hillsborough lawyers.[XIV,T110] Craig Alldredge and Randy Grantham were present in that meeting, as was Mr. Norgard.

Mr. Grantham testified that he had come to Tampa that morning to observe Mr. Long's trial. He had no idea that a plea had been entered. [XV,T341] Mr. Grantham talked to Mr. Long before the hearing briefly, and was present during the meeting between all the attorneys.[XV,T341]

Mr. Grantham testified that the Hillsborough Public Defender team comprised of Mr. O'Connor, Mr. Donerly, Mr. Alldredge and an appellate attorney named Linda Shiflet were present. [XV,T342] Robert Norgard was present. [XV,T342] Mr. Grantham thought the meeting lasted about 45 minutes.[XV,T344]

Mr. Grantham described a situation where there were two camps. The Hillsborough lawyers were adamant in telling

Mr. Long that the motion to suppress had no hope, would never be granted, would never win on appeal and he should take the deal.[XV,T343;352] They were trying to talk Mr. Long into keeping the plea.[XV,T352] Mr. Grantham remembered talking with Ms. Shiflet about the suppression issue and giving her some facts. Mr. Grantham did not believe that she fully understood the issue.[XV,T344] Mr. Grantham advocated withdrawing the plea.[XIV,T342].

Mr. Long testified that the judge let him meet in a side courtroom with four or five Hillsborough lawyers including Mr. O'Connor, Mr. Donerly, and a lady appellate lawyer.[XIII,T110] Mr. Grantham and Mr. Norgard were present.[XIII,T110]

Mr. Long testified that all the Hillsborough lawyers were telling him not to withdraw the plea.[XIII,R110-11] Tony Webb kept coming in and saying that prosecutor was promising eight capital murder trials.[XIII,T111] Mr. Grantham and undersigned counsel were telling Mr. Long to withdraw the plea.[XIII,T112]

Mr. Grantham recalled that Mr. Long spoke during the meeting, but couldn't recall what he said.[XIII,T344] Mr. Grantham felt Mr. Long was "a little more agitated than usual", but didn't seem incompetent.[XV,T351]

Mr. Long testified that every time he asked about the suppression issue Mr. O'Connor would say that the court would change the law before they'd suppress Mr. Long's statement.[XIII,T113] The whole issue about the merits of the suppression were not spoken of much by the Hillsborough team.[XIII,T113]

Mr. Grantham did not see the written plea agreement during the meeting.[XV,T345] At no time did he show the agreement to Mr. Long or go over it with him in any way.[XV,T345] Mr. Grantham testified that during that meeting no on actually talked to Mr. Long and went over the specific plea agreement with him.[XV,T345] Mr. Long testified that he did not see or review the written plea agreement during the meeting.[XIII,T116] No one went over it with him item by item.[XIII,T116]

Mr. Grantham felt it was obvious that there had been some discussion about the plea, so "they didn't so much dwell on the details as much as yes or no, keep it or pull it, and what were the chances of success on appeal."[XV,T353] Basically there was talk about giving up the right to challenge the confession.[XV,T352] Mr. Grantham's recollection is consistent with Mr. Long's recollection.[XIII,T113-115]

Mr. Grantham did not have any contact with Mr. Long after the meeting ended.[XV,T346] He did not go to the jail or to the court proceedings the next day.[XV,T346] Mr. Grantham left with the impression Mr. Long was going to withdraw the plea.[XV,T346]

Mr. Long left the meeting with the belief that Mr. O'Connor would no longer be his lawyer.[XIII,T114] Mr. Long returned to his cell for the night thinking that one of the lawyers would come to the jail that night.[XIII,T117] No one came.[XIII,T117]

Mr. Long testified he hardly slept.[XIII,T117]

Mr. Long testified he didn't know what to do- one group of lawyers told him one thing, others told him something else.[XIII,T114,172] Eventually he called a lawyer named Jenny Greenberg at the Volunteer Lawyer Resource Center just to get an outside opinion.[XV,T126] Ms. Greenberg told him he might want to get out of the plea agreement.[XIII,T126;173]

Mr. Long knew he couldn't trust Mr. O'Connor anymore.[XIII,T127;178-9] He thought if he got a new lawyer that lawyer could tell him whether or not he should get out of the plea agreement.[XIII,T127;171] No one told Mr. Long he would get a new lawyer, but he assumed that he

would.[XIII,T176] When he got the new lawyer, he could raise the withdrawal of the plea issue and the confession issue.[XIII,T188]

Mr. Alldredge testified that he was told he was present at this meeting, but he didn't remember it beyond a vague recollection.[XIV,T240] He had no further contact with Mr. Long after the meeting in the courthouse.[IXV,T232] He was not present the next day when the plea was entered.[XIV,T232] Mr. Alldredge wasn't in charge of the plea, his role was second phase.[XIV,T240]

The next day, December 12, 1985, Mr. Long did not withdraw his plea.[State Exhibit 12; IX,R1516-1536] During the colloquy the trial court asked Mr. Long if he understood he was "giving up your right to appeal on any issues in these matters?", to which Mr. Long responded "On any issues?"[XIII,T185] The court said "On any issues, yes, sir." Mr. Long responded " I wasn't aware of that."[XIII,T185] The prosecutor then attempted to clarify that the waiver applied to "this particular plea agreement", but that Mr. Long could appeal any issues in the second phase.[XIII,T185] Mr. Long testified that at this point in time he had still not seen the actual written plea agreement.[XIII,R186] Mr. Long thought in 1985 that if

the confession came up in the second phase, he could appeal it.[XIII,R187]

The trial court then told Mr. Long that he wasn't waiving an appeal on penalty issues, but "Especially the matter of the confession that you are waiving your right to appeal that. Do you understand?"[XIII,R186] Mr. Long testified that he understood the confession part, but because he had not read the written plea agreement and because his lawyers had not talked to him about the other waivers, he didn't know he was waiving issues related to the search of his car and residence.[XIII,T186-7]

POST-DECEBMER 12, 1985

Mr. Long did get a new lawyer, Mr. Ellis Rubin, but not without great cost to his constitutional rights. [XIII,T128-131] The trial court would only agree to appoint Mr. Rubin under two conditions which required Mr. Long to waive his rights: Mr. Long could not withdraw the plea agreement and there would be no more continuances in the case, no matter what.[XIII,T129-30]

Mr. Alldredge testified that Mr. Long would "talk often about whether he did the right thing by entering the plea."[XIV,T231;241] Whether or not Mr. Long understood the plea didn't come up. Mr. Long didn't express that he

did not understand.[XIV,T231]

Mr. Alldredge received a letter from Mr. Long written on February 12, 1986.[XIV,T241] In the letter Mr. Long wrote "I've also been thinking a lot about the plea agreement. We gave up the right to appeal the confession. Exactly what does that mean?"[XIV,T241] Mr. Alldredge never had any discussion or conversation with Mr. Long about what the waiver meant.[XIV,T242]

Attorney Robert Fraser was appointed to represent Mr. Long in 1988-89 after the penalty phase that Ellis Rubin conducted was reversed on appeal by the Florida Supreme Court.[XIII,T61] Mr. Fraser filed a motion to withdraw Mr. Long's plea.[XIII,T62] Mr. Fraser took this action in response to a letter that Mr. Long wrote to him.[XIII,T62] Mr. Long wanted Mr. Fraser to file the motion to withdraw the plea.[XIII,T62] Mr. Long testified it took "much motivation" from Mr. Long, but Mr. Fraser did file a motion to withdraw the plea.[XIII,T130]

Mr. Fraser reviewed a letter dated March 23, 1989 that he wrote to Mr. Long.[XIII,T63] In that letter Mr. Fraser told Mr. Long the motion was being filed in order to preserve the record for habeas corpus purposes down the road.[XIII,T63] Mr. Fraser did not think the motion to

withdraw the plea was frivolous.[XIII,T64]

Mr. Fraser reviewed the motion he filed because he could not recall the specifics.[XIII,T64-67] Mr. Fraser could not recall talking to Bill Eble, Mr. Long's Pasco county attorney despite a reference in a letter which referred to their conversations.[XIII,T65]

Mr. Fraser expressed his opinion in a letter written contemporaneously at the time the motion to withdraw the plea was filed that the grounds he could use were very narrow.[XIII,T66] Mr. Fraser believed that Mr. Long had wanted to attack the plea on a very broad level, but Mr. Fraser felt he couldn't do that.[XIII,T66]

After the motion was denied, Mr. Long filed a motion for rehearing.[XIII,T67]

Mr. Fraser was aware that the confession Mr. Long gave had been suppressed by the Florida Supreme Court in the Pasco case.[XIII,T69] The confession in the Hillsborough cases was the same as the suppressed Pasco county confession.[XIII,T69]

THE TRIAL COURT ERRED IN DENYING RELIEF

The standard of appellate review of ineffective assistance of counsel claims related to the trial phase of capital cases is a mixed standard of review. The appellate

court defers to the factual findings of the trial courts so long as those findings are supported by competent, substantial evidence, but reviews the legal conclusions *de novo*. Lynch v. State, 2 So.3d 47 (Fla. 1008), quoting, Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

The standard for trial-phase ineffectiveness claims with regards to pleas was set forth in Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Under Lockhart the performance of counsel is evaluated under the same standard as the first prong of Strickland v. Washington, 466 U.S. 668 (1984), but the prejudice prong requires the defendant to establish that, but for the defective performance, he would not have pled, but would have gone to trial.

Under the deficient performance prong of Strickland the defendant must identify acts or omissions by the lawyer that are shown to be outside the broad range of reasonably competent counsel under the prevailing professional norms.

In Grosvenor v. State, 874 So.2d 1176, 1179-1181 (Fla. 2004), this Court held that in order to establish a claim of ineffective assistance of counsel after a plea a defendant must first specifically identify acts or omissions of counsel that were manifestly outside the wide

range of reasonably competent performance under prevailing professional norms. Second, a defendant must establish that, but for the deficient performance, he would have gone to trial. A defendant is not required to establish that he would have prevailed at trial in order to prevail on a claim of ineffective assistance of counsel related to a plea.

Grosvenor further identified several factors that are to be considered when determining whether, under the totality of the circumstances, a defendant would have gone to trial but for the inadequate advice of trial counsel. Those factors surrounding the plea include the likelihood of success at trial/ whether a defense was likely to succeed, the colloquy between the trial court and the defendant at the plea, and the difference between the sentence imposed and the maximum possible sentence the defendant faced at trial. Id., at 1181-1182.

The failure of counsel to adequately advise the defendant of the full ramifications and direct consequences that will result from a plea is deficient performance. See, Woodall v. State, 39 So.3d 419 (Fla. 5th DCA 2010), Elbert v. State, 20 So.3d 961 (Fla. 2d DCA 2009); Brown v. State, 943 So.2d 899 (Fla. 5th DCA 2006). In particular, the Second

District Court of Appeal has found that counsel can be deemed ineffective when the defendant is not advised that by entering a plea he waives the right to pursue motions to suppress and the appellate rights attached thereto. See, Nelson v. State, 966 So.2d 950 (Fla. 2d DCA 2008).

The trial court in this case found that Mr. Long did not establish that Mr. O'Connor's performance was deficient.[VII,R1242] The trial court found that Mr. Long failed to establish any mental health deficiencies existed and that Mr. O'Connor adequately explained the consequences and ramifications of the plea offer, if not at the time of the plea in September, then during the December 1985 proceedings.[VII,R1243] The trial court further found that Mr. O'Connor did not coerce Mr. Long into entering or maintaining the plea.[VII,T1244] The trial court's conclusion overlook critical testimony, which if considered, establish prejudice. Thus, Mr. Long submits, the trial court's order on this point is not supported by competent, substantial evidence and should be reversed by this Court.

The testimony established that Mr. O'Connor and the other attorneys from the Hillsborough office failed to provide competent performance within the broad range of

reasonably competent performance under the prevailing professional norms. In 1985 the trial court found that Mr. Long should be given the opportunity to withdraw his plea based on the actions of the Hillsborough Public Defender's Office and because the record established that Mr. Long was not told that he was waiving his appellate rights when he entered the plea on September 23, 1985. The question is whether or not these deficiencies as well as the other deficiencies related to the plea were cured during the forty-five minutes that Mr. Long spent in an adjoining courtroom on December 11, 1985. Mr. Long submits that trial counsel's failures were not adequately remedied during this meeting on December 11, 1985.

The testimony during the evidentiary hearing from Mr. Long and Mr. Grantham is critical. Mr. Grantham testified that during the meeting he did not believe that anyone showed Mr. Long the written plea agreement or went over it with him. Mr. Grantham did not do this. According to Mr. Grantham, the heated discussions between the lawyers revolved around the viability of the appeal of the denial of the motion to suppress would have. Mr. Grantham recalled that Mr. Long participated in the discussion, but he could not recall any specifics. Mr. Grantham testified

that he spent time talking with the female appellate attorney from Hillsborough and he did not believe that she understood the issue. Mr. Long's testimony is consistent with Mr. Grantham's testimony. Mr. Long testified that the lawyers argued about the motion to suppress, that he participated in the conversation, but that no one showed him the written plea agreement or went over it with him. The consequences and the ramifications of the entire plea agreement were not discussed with Mr. Long.

Mr. Long's response to the trial court on the following day is indicative of this. During the plea colloquy between Mr. Long and the trial court on December 12, 1985, the trial court asked Mr. Long if he understood that he was giving up his rights to appeal any issues in these matters.[XIII,T185] Mr. Long responded "On any issues?", to which the trial court responded "On any issues, yes, sir."[XIII,T185] Mr. Long responded "I wasn't aware of that."[XIII,T185] The remaining exchange between the trial court and Mr. Long did not clear up the questions about the extent and full ramifications of the appellate waivers contained in the plea agreement that Mr. Long had barely seen. The later exchange between the State and the trial court where Mr. Benito told Mr. Long that he could

appeal any issues that arose in the second phase only added to the confusion.[XIII,T187]

The trial court's order failed to address the testimony of Mr. Long's attorney, Mr. Alldredge, who testified directly as to the complexity of the plea agreement and what would be expected of counsel in presenting such a plea agreement to a client with mental health disabilities like Mr. Long. Mr. Alldredge provided useful information relevant to the prevailing professional norms that was omitted from consideration by the trial court. See, Lynch v. State, 2 So.3d 47 (Fla. 2008).

Mr. Alldredge testified that he had reviewed the written plea agreement in this case at the time of the 2011 hearing.[XIV,T242] Based upon his 30 plus years practicing criminal defense he testified how he would handle a plea of this nature.[XIV,T242-247] Mr. Alldredge characterized this plea as a "relatively complex agreement with a lot of parts to it, a lot of ramifications." [XIV,T244] In particular, the portions of the plea that dealt with the waiver and appellate waivers was more complex than the average plea and "certainly needed to be gone into with him."[XIV,T245] Whether to enter the plea would be a very difficult decision to make, particularly for Mr. Long.[XIV,T242;244]

Mr. Alldredge testified that that given the "import, length, and complexity, you know, I would certainly meet with them on more than one occasion and I would provide them with a copy of it."[XIV,T244] Mr. Alldredge would have gone over each and every paragraph of the written agreement to make sure that it was understood because "a person who enters into such a plea had bloody well know what he was doing in every degree."[XIV,T245]

Mr. Alldredge believed that reasonably competent defense counsel would go through the plea thoroughly to make sure the client had a full understanding of the consequences of the plea.[XIV,T246] If the client has the types of personality disturbances that Dr. Berland found Mr. Long to have, the attorney should take the time necessary to ensure a complete understanding of the plea.[XIV,T247-250]

The State presented no testimony to rebut Mr. Alldredge's testimony. At most, the State presented the testimony of Dr. Otto, who believed that if Mr. Long's rendition of the events surrounding the plea was correct, then he had made "a very good argument" for relief.

Mr. Long's testimony regarding the failure of the Hillsborough attorneys to adequately convey to him the

consequences of the plea to ensure that it was voluntary is not only unrebutted, it is supported by the testimony of Randy Grantham and Craig Alldredge. Mr. Long has consistently maintained through out the proceedings that he was never provided an opportunity to adequately review the written agreement, that none of his lawyers ever took the time to go over the agreement with him line by line, or fully explain to him that he would never be able to challenge his confession in the Hillsborough cases, let alone pursue other suppression issues related to the searches. At the critical juncture in this case, December 11, 1985, no one went over that plea agreement with Mr. Long. Randy Grantham and Craig Alldredge testified that during the one hour or so meeting neither of them went over the agreement with Mr. Long and they saw no one else do so. Mr. Long testified that he was not seen by any of his attorneys that evening. No evidence rebuts this. On the morning of December 12, 1985, Mr. Long had no more understanding of that plea that he had on September 23, 1985. He was caught in a maelstrom with the set of attorneys who represented him on the Hillsborough cases arguing for withdrawal and those who represented him on other charges, who hand fully litigated the suppression

issue, arguing against the plea. Mr. Long knew that it would not be Mr. Grantham and Mr. Norgard representing him at trial in Hillsborough County. Mr. Long knew that if he chose to go to trial it might likely be with an attorney who he distrusted, an attorney who refused to file a motion to suppress his confession and other physical evidence, an attorney who did not want to go through eight trials, an attorney who had not been able to procure the attendance of a critical penalty phase witness, and with whom he had a contentious relationship and whose actions led the trial court to conclude that he had not been properly advised about the ramifications of the plea.

All Mr. Long hoped for was for someone to help him understand the plea fully so he could decide what to do. That did not happen. Mr. Long testified that during the events of December 11-12, 1985, that he hoped that Mr. O'Connor would have to be removed from his case, so he agreed to maintain his plea until he could get a new lawyer that would explain things to him and then he could decide what to do. Under the totality of the circumstances, the trial court's finding that Mr. O'Connor performance was not deficient is not supported by competent, substantial evidence.

The second prong of Strickland requires the showing of prejudice. The testimony at the hearing has conclusively established that Mr. Long was prejudiced as a result of his lawyer's omissions. The trial court's finding that Mr. Long was not prejudiced because he would not have gone to trial but for counsel's deficient performance is not supported by competent, substantial evidence and the trial court improperly focused on the likelihood of success at trial as a requirement of establishing prejudice.

Prejudice is established under the totality of the circumstances. The Grosvenor opinion identified three areas of consideration that can be used to evaluate prejudice when the claim is that trial counsel failed to advise the defendant of a defense: the likelihood of a defense's success at trial, the colloquy between the defendant and trial court at the plea, and the difference between the sentence imposed and the maximum sentence that could have been imposed. Ibid., at 1181. In Grosvenor the issue was whether or not counsel was ineffective in failing to advise the defendant of a defense that could be used at trial. In this case the issue does not revolve around counsel's failure to advise of a defense at trial, the question is whether or not the discussions regarding the

plea agreement were adequate.

In denying relief, the trial court found that Mr. Long had not established prejudice because Mr. Long failed to establish that he had a mental health defense that would have succeeded at trial and the possible defense of challenging his confession did not demonstrate that "he would not have received a death sentence in any of the eight cases absent that confession."[VII,T1245] The trial court's focus on the likely outcome if Mr. Long had gone to trial is not the determinative factor in establishing prejudice. See, Grosvenor v. State, 874 So.2d 1176, 1181 (Fla. 2004); Lawrence v. State, 969 So.2d 294, 307 (Fla. 2007). The viability of the defenses at trial can be used to evaluate credibility of the defendant's assertions that he would have gone to trial, but a defendant is not required to establish he would have been successful at trial. The prejudice results from the waiver of the constitutional right to trial, and any related appellate issues.

Mr. Long did not assert in these proceedings that he had a viable mental health defense for the guilt phase of trial, and he has never asserted that he would have raised a defense of insanity in the Hillsborough cases had he gone

to trial. Rather, Mr. Long asserted that his mental health issues and medication issues impacted the degree to which trial counsel should have explained the plea agreement and its consequences to him. The trial court's focus on Mr. Long's mental health as a guilt phase defense is misplaced and should not be considered as a component of the totality of circumstances test.

In this case the crucial issue wasn't success at trial or the failure to raise a guilt phase defense based on mental health, but rather the appellate preservation of the issue of suppression of the confession, which was the found by this Court to be viable and ultimately led to the judicial acquittal of Mr. Long of the Pasco charges. At the time relevant to these charges, this Court found that Mr. Long's confession should have been suppressed. Had Mr. O'Connor preserved Mr. Long's appellate rights in the Hillsborough cases by filing a motion to suppress and going to trial, and then asserting the illegality of the confession on appeal, the tenor of the prosecution would have been drastically altered when the appellate results in the Pasco County case were applied to the Hillsborough cases.

The second consideration relevant to the totality of

the circumstances test outlined in Grosvenor is the colloquy between the trial court and the defendant. The colloquy between the trial court and Mr. Long on December 12, 1985, establishes that there was still much confusion in Mr. Long's mind on the appellate waivers and the ramification of those waivers. Mr. Long was unclear as to the extent of the waivers, whether the waiver applied to just the confession or to challenging the searches of his apartment and vehicle, and the extent to which any challenges could be made during second phase. The trial court's conclusion that the December 12 hearing left no doubt that Mr. Long understood the full nature and consequences of the plea agreement is incorrect.[VII,T1245]

The third consideration under Grosvenor is the difference between the sentence imposed and the maximum sentence which could have been imposed at trial. Mr. Long received eight life sentence and one death sentence under the plea. He faced the possibility of nine death sentences without the plea. The reality of the situation is he can only be executed once. The limitation of exposure to the death penalty is of little consequence with a death sentence. Had Mr. Long gone to trial, thus preserving any appellate challenges to any potential death sentence he

might have received, the results could well have been very different.

In addition to the three considerations that Grosvenor sets forth that should be considered as discussed above in the context of the facts of this case, Mr. Long submits that under the totality of the circumstances standard, other factors must be considered that are present in this case. The fractious relationship with Mr. O'Connor must be evaluated.

Mr. Long's relationship with Mr. O'Connor was clearly not one which would have supported continued representation. Mr. Long, not surprisingly, did not trust Mr. O'Connor. Mr. Alldredge agreed with Mr. Long's assessment of the attorney/client relationship. Mr. Long thought that if Mr. O'Connor were to be removed, a new conflict free lawyer would be able to advise him what to do. Sadly, Mr. Long was required to choose between pursuing his suppression issues in order to protect his right to counsel when the trial court required him to forgo any further litigation surrounding the plea withdrawal before new counsel would be appointed. Mr. Long's belief that he was entitled to conflict free counsel was not misplaced. See, Carter v. State, 22 So.3d 793 (Fla. 1st DCA 2009);

Gonzalez v. State, 21 So.3d 169 (Fla. 2d DCA 2009).

The failure of Mr. O'Connor, Mr. Donerly, and Mr. Alldredge, to take the time to go over the plea agreement with Mr. Long point by point and to explain to him the ramifications and consequences of the entry of the plea. led Mr. Long to accept an agreement which foreclosed him from pursuing motions to suppress, including suppression of his confession.

Mr. Long was clearly prejudiced as a result. If counsel had performed within a reasonable standard of professionalism, the current proceedings would have never occurred. If Mr. Long had been properly advised of the contents of the plea, he would not have entered the plea and when given the opportunity to withdraw the plea he would have done so. Mr. Long would have effectively pursued his rights to challenge the guilt phase evidence against him at trial. He would not have waived his constitutional right to a jury trial, and his related appellate rights.

ISSUE II

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS TO CLAIM V- PROSECUTORIAL MISCONDUCT IN OPENING STATEMENTS

In Claim V of his Amended Motion to Vacate Judgments of Conviction and Sentence Mr. Long argued that the

prosecutorial misconduct during penalty phase rendered Mr. Long's sentence of death unfair and unreliable.[V,R819] In paragraph 56 Mr. Long identified four statements made during opening statements and two additional comments made by the prosecutor which were "irrelevant, argumentative, and violated Rule 4-3.4 of the Rules of Professional Conduct".[V,R820] Mr. Long further argued that the comments "(2) were not supported by admissible evidence; (3) were improper comments on the credibility of a witness; (4) equated Mr. Long's burden of showing statutory mitigation with proof of incompetency and/or insanity; (5) and/or not relevant, or if relevant, the prejudicial effect outweighed by any probative value."[V,R820]

The trial court's order of April 6, 2004, denied relief on Claim V without an evidentiary hearing.[V,R867] The trial court found "On direct appeal Mr. Long argued such authorities in allowing the State to make closing arguments that were not based on evidence in the case and by the scope of the jury deliberations in issues VII and VIII or his direct appeal and the Florida Supreme Court found such arguments as not meriting discussion. See Long v. State, 610 So.2d 1268, 1274 (Fla. 1992). Since the allegation was raised and addressed on direct appeal Mr.

Long is therefore precluded from relitigating the claim by couching it as ineffective assistance of counsel. As such, no relief is warranted as to this portion of ground V of Mr. Long's Motion."[V,R867-8]

The trial court's order denying an evidentiary hearing on this claim must be reversed. The trial court was correct that Mr. Long raised instances of prosecutorial misconduct during closing arguments in his direct appeal. However, Claim V did not raise a claim of prosecutorial misconduct during closing arguments- each instance of indentified prosecutorial misconduct raised in Claim V occurred during opening statement. No appellate issue was previously raised which addressed the comments which were the basis of Claim V. The trial court's finding that Mr. Long was procedurally barred from raising Claim V is incorrect.

The instances of prosecutorial misconduct that Mr. Long identified in Claim V occurred during the opening statements. Defense counsel Fraser did not object. Thus, the issue of prosecutorial misconduct as to these six instances was not preserved for appellate review. See, Perez v. State, 717 So.2d 605 (Fla. 3rd DCA 1998); Walker v. State, 990 So.2d 1119 (Fla. 3rd DCA 2008). Appellate

counsel cannot be faulted for failing to argue unpreserved error.

The failure to object to improper comments raises the specter of ineffective assistance of counsel. See, Lewis v. State, 613 So.2d 115 (Fla. 4th DCA 1993). Claims of ineffective assistance of counsel are not generally cognizable on direct appeal. See, Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Thus, appellate counsel was not required to raise the issues presented on Claim V in the direct appeal.

The trial court's denial of an evidentiary hearing on this claim cannot be sustained. First, the trial court erroneously found that the issue of prosecutorial misconduct in opening statements had been raised on appeal when it had not been. Second, the trial court erroneously concluded that no evidentiary hearing was required, when a hearing is necessary to why trial counsel did not properly and timely object to improper statements and comments outlined in Claim V. Remand is necessary.

CONCLUSION

Based on the forgoing argument and citations of law as well as other authorities, the trial court's order denying relief should be reversed and the case remanded for further

proceedings in which Mr. Long should be afforded the opportunity to withdraw his plea and other such relief as is deemed appropriate. Remand for an evidentiary hearing on Claim V is required.

Respectfully submitted,

_____
ROBERT A. NORGARD
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Closing Argument of the Defendant has been furnished by U.S. Mail to the Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607 and the Office of the State Attorney, 800 East Kennedy Blvd., Tampa, FL 33602 this ___ day of August, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210(a)(2).

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