IN THE SUPREME COURT OF FLORIDA

ARTHUR JAMES MARTIN,
Appellant,

CASE NO.: SC18-214
Lower Tribunal No(s).:
16-2009-CF-014374AXXXMA

v.

STATE OF FLORIDA,
Appellee.

and

ARTHUR JAMES MARTIN,
Petitioner

CASE NO.: SC18-1696
Lower Tribunal No(s).:
16-2009-CF-014374AXXXMA

v.

MARK S. INCH, etc.
Respondent.
_____/

APPELLANT'S MOTION FOR REHEARING

Appellant, ARTHUR JAMES MARTIN, pursuant to Fla. R. App. P. 9.330, respectfully moves this Court to reconsider its decision of January 16, 2020, denying Mr. Martin's appeal and petition for writ of habeas corpus. As grounds for this request, Mr. Martin points out the following points of law or fact the Court has overlooked:

1. This Court concluded that trial counsel was deficient for failing to investigate Willie McGowan, yet found no prejudice. Opinion, 15-16. In a related claim

involving McGowan, this Court concluded that trial counsel was not deficient for ultimately failing to present McGowan as a witness. Opinion, 40.

In making such a finding as to prejudice, this Court overlooks the fact that trial counsel's stated defense was misidentification, and McGowan was a witness who could have been called at trial to support his misidentification defense. Opinion, 13; 15-16. In fact, there was significant prejudice in not calling McGowan, who was one of two witnesses who stated definitively that Mr. Martin was *not* the shooter. (R. 217; PCR. 2229; 3472).

This Court stated: "When a witness to a homicide states that he looked the suspect in the eye and could identify him again, and then fails to identify the defendant from photospreads, any reasonable trial counsel whose defense strategy is based upon misidentification would at least speak to that witness…". Opinion, 13. Mr. Martin could not agree more. However, this Court went on to hold that in order to demonstrate prejudice, Mr. Martin would first have to show that trial counsel's contact with McGowan would have uncovered additional information that could have influenced trial counsel's strategic decision not to call him as a witness. This Court then stated that there was no evidence suggesting that McGowan's trial testimony would have differed from his statements to police. Opinion, 16. That is precisely the point. McGowan told police that that he looked directly at the shooter and could identify him again. (R. 206). When shown two different photospreads

which included Mr. Martin, McGowan picked Mr. Martin out of both photospreads and stated, "this looks like the guy but it's not him." (R. 217). This surely would have supported a misidentification defense, nothing more needed to be uncovered.

This Court focuses on the idea that McGowan would have testified to evidence that would have been detrimental to Mr. Martin and therefore, trial counsel's ultimate strategy to not call him as a witness was reasonable. Opinion, 16-17; 39-40. Specifically, this Court points to McGowan's statements as to: the "execution-style of the shooting"; the shooter asking McGowan where he could buy some marijuana; the shooter firing at McGowan as he ran towards the vehicle to help the victim. Opinion, 16-17; 39. However, in focusing on these details, this Court ignores the fact that if the defense was misidentification, then the manner of the shooting, and whether the shooter fired at McGowan or asked McGowan where to buy drugs, is wholly irrelevant.

This Court gives deference to trial counsel, who stated that part of his strategy was to negate premeditation, and therefore, not calling McGowan as a witness was reasonable. Opinion, 39-40. In doing so, this Court overlooks the argument that it is illogical to argue these two defenses simultaneously – (1) that Mr. Martin was not the shooter; and (2) that Mr. Martin did not commit this murder with premeditation. This Court overlooks the point that Mr. Martin was prejudiced simply by trial counsel attempting to argue these incongruous defenses at the same time. Moreover,

there was already testimony about the nature of the shooting, so any further testimony by McGowan as to how the shooting occurred would not have been detrimental to Mr. Martin at trial. Furthermore, McGowan's statements that the shooter fired at him could have easily been addressed by the same argument – misidentification. Finally, trial counsel's claims that he did not call McGowan as a witness in order to avoid any mention of drugs is utterly unreasonable. Such testimony could have been addressed through a motion in limine preventing the mention of drugs. When considered in the context of a capital murder case, the mere mention of drugs is trivial, and simply cannot be outweighed by the prejudice of not presenting a witness to support a misidentification defense.

2. This Court concluded that trial counsel was deficient for failing to cross-examine Sebastian Lucas, yet found no prejudice. Opinion, 29. In making such a finding, this Court fails to consider such deficient performance in the context of a misidentification defense.

Despite finding that "[t]he change in Lucas's version of events is dramatic – from seeing nothing to providing compelling testimony of an execution-style murder" and that "there was no reasonable basis for [trial counsel] not to address these inconsistencies", this Court still held that Mr. Martin could not demonstrate prejudice because three other witnesses identified Mr. Martin as the shooter. Opinion, 29.

This reasoning overlooks how such testimony would have affected trial counsel's misidentification defense. Despite trial counsel arguing misidentification to the jury, he failed to present any evidence supporting this defense. As argued *supra*, he failed to call a witness who would have said that Mr. Martin was not the shooter. Here, he failed to show that one of the witnesses who testified at trial that Mr. Martin was the shooter, initially gave a dramatically different statement to police. This was evidence which would have supported a misidentification defense. Trial counsel would have been able to argue that Lucas initially could not identify Mr. Martin as the shooter. In other words, he could have argued that there was reasonable doubt as to whether Mr. Martin was the shooter. This evidence of reasonable doubt regarding the identity of the shooter undermines confidence in the outcome of the guilt phase.

3. In concluding that there was no cumulative error, this Court has overlooked the impact of its findings that trial counsel was ineffective *and* the prosecutor made "concerning" comments during the guilt-phase closing arguments. Opinion, 57. The prejudicial effect of trial counsel's failure to present any evidence to support his misidentification defense was further compounded by the prosecutor's improper arguments mocking defense counsel, telling the jury that Martin turned the victim into "target practice", and arguing that the presumption of innocence "has now been blown away just like [Martin] did to Javon Daniels." Opinion, 57. Additionally, the

prosecutor's use of the term "you", invited jurors to put themselves in the victim's place, thereby crossing the line and becoming impermissible Golden Rule argument. Opinion, 58-59. *See Ruiz v. State*, 743 So. 2d 1, 8-9 (Fla. 1999). Furthermore, even though this Court found that Mr. Martin's claim regarding the use of racial stereotypes by the prosecution is procedurally barred, jurors in Mr. Martin's case were nonetheless exposed to this inappropriate language. Opinion, 53. *Wallace v. State*, 768 So. 2d 1247, 1250 (Fla 1st DCA 2000)("We are not suggesting that the jurors were affected by the prosecutor's appeal to racial prejudice … The point is that no jury should be exposed to an argument like the one made in this case.").

The prosecutor has a duty to serve as "a minister of justice and not simply an advocate." R. Regulating Fla. Bar 4-3.8. And there is a reason for the stringent requirement that prosecutors play fair. Prosecutors "invoke[] the immense power, prestige, resources of the State" and jurors know it. *Ruiz*, 743 at 8-9. This Court has a duty to protect capital defendants, like Mr. Martin, from overly aggressive prosecutors who cross the line and violate their duty to seek justice and instead seek victory at all costs.

It is a prosecutor's responsibility "to fairly present the evidence and permit the jury to come to a fair and impartial verdict". *Pendarvis v. State*, 752 So. 2d 75, 77 (Fla. 2d DCA 2000). Between trial counsel's deficient conduct and the overzealous and inappropriate arguments made by the prosecution, Mr. Martin did

not receive a fair trial. It is not reasonable to conclude that Mr. Martin's guilt phase deliberations were not affected by these "concerning" comments, or that a reasonable juror who was presented with an effective defense closing argument, supported by evidence of the defense theory of misidentification, could have concluded that Mr. Martin was not guilty of first-degree murder.

WHEREFORE, Mr. Martin respectfully requests this Court to rehear this case, withdraw its January 16, 2020, opinion, and issue a revised opinion granting Mr. Martin's appeal and petition for writ of habeas corpus.

Respectfully submitted, this 31st day of January, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day January 31st, 2020, via electronic service to Lisa A. Hopkins, Assistant Attorney General, at Lisa.Hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Dawn B. Macready
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