IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-237

THOMAS M. OVERTON

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This first petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Overton was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as follows:

"R" ----- record on direct appeal to this Court;
"T" ----- transcript of original trial proceedings;
"PCR" -- record on postconviction appeal;
"PCT" - -transcript of postconviction proceedings.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const. The petition presents issues that directly concern the constitutionality of Mr. Overton's convictions and sentences of death.

Jurisdiction in this action lies in the Court, see, e.g. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Overton's direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Overton requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court of the Sixteenth Judicial Circuit, Monroe County, entered the judgments of convictions and sentences under consideration.

Mr. Overton was indicted on October 10, 1996 for two counts of first-degree murder, and killing of an unborn child (R.10-15), and an Information was filed charging burglary of a dwelling with assault or battery on occupant, and with sexual battery with force likely to cause serious bodily injury (R. 8-9), arising from the murders of Michael MacIvor and his wife, Michelle MacIvor.

On August 22, 1991, Michael MacIvor and his wife Susan MacIvor were found murdered in their Tavernier Key home. Michael MacIvor had

been strangled and suffered blunt head trauma. Susan MacIvor, who was eight-months pregnant, was found naked, bound and strangled in the bedroom (R. 1). Police collected the bedding for DNA testing. Hair also was collected (T. 3852-3; 3856-7). Tire tracks and shoe prints were found in the sand outside the home and castings were made (T. 3208, 3253-4). Partial palm prints were found on a pipe in the kitchen (T. 3256). Latent fingerprints were found on a cellophane tape wrapper police believed was used by the perpetrator (T. 3309, 3030-4262). A .22 caliber shell casing was found in the home, and a bullet hole discovered in the wall (T. 3309, 4510).

A large-scale investigation began, involving the Monroe County Sheriff's Office, Florida Department of Law Enforcement (FDLE), Federal Drug Enforcement Administration (DEA), U.S. Customs, the Federal Bureau of Investigation (FBI) and other agencies (T. 4400-1; 4413; R. 768). The crime became one of the most highly publicized cases in Florida Keys history (R. 742-834). Numerous newspaper articles, TV crime re-enactments and billboards were published offering rewards for information on the crime (T. 4426; R.768, 777, 831). Authorities held "brainstorming" sessions to come up with names of people to eliminate as suspects. Forensic evidence was sent to a psychic in Orlando for her assessment of the killer (T. 3513-4).

Police received many leads, and most revealed that the murders were drug-related (R.786). Before the murders, Michael MacIvor flew to Belize to buy an airplane the government had seized in a drug trafficking bust (T. 4326, 4331, 4358). Mr. MacIvor was to return to Belize the day after the murder to retrieve the plane (T. 4331). One of Mr. MacIvor's neighbors, Joiy Holder, testified that the last time he saw Michael he intimated that he needed to borrow money, but he ultimately did not (T. 3075). Police could not trace the $13,000 that MacIvor had used to purchase the airplane in Belize (T. 4432).

Police interviewed a friend of MacIvor in Belize and learned he had traveled to a jungle airstrip and remained there for several days (T. 4361). The police were told MacIvor went to see "pyramids or something" in a park (T. 4361).

Two separate sources revealed to police that Colombian brothers, Nestor and Ivan Clavejo, purchased a Cessna 404 Titan plane from MacIvor. He purportedly received a down payment of $250,000 from the Clavejo brothers, but MacIvor's bank records showed no such deposit in this amount (T. 4402, 4429-4430). Police were never able to locate the Clavejos (T. 4420). One primary source for this lead, Mr. Codekas, later told police he

had provided false information to secure a deal from the government (T. 4403, 4430).

Over the years, numerous suspects were investigated. Authorities investigated and eliminated the MacIvor handyman, Larry Herlth; their neighbor, Joiy Rae Holder, John Golightly and several others (T. 4404, 4408-14, 4426).

Thomas Overton was on a list of possible suspects early on because he was known as a "cat burglar," but he had no history of sexual offenses. He was a suspect in the murder of Rachel Surrett, but was never charged in that crime (T. 513-14; 1188).

In 1991, Mr. Overton lived on Tavernier Key and worked at an Amoco gas station near the MacIvor home (T. 4428; 4431). He was on the FBI "brainstorming" list in 1992 (T. 4385-86; 4413). Police, however, took no steps to investigate whether Mr. Overton was working at the Amoco station on the night of the crimes (T. 4388; 4414-5). Amoco destroyed its 1991 employee records in 1993 (T. 4428).

All of the leads proved fruitless (T. 4404-14, 4426). Nevertheless, law enforcement focused on Mr. Overton for the MacIvor murders. Trial counsel argued that it was retaliation for Mr. Overton filing an internal affairs complaint against Monroe County Detective Charles Visco in 1990

for illegally confiscating his car. Detective Visco was one of the investigating detectives on the MacIvor case (T. 4196-7, 4300).

Detective Visco knew and had contacted Mr. Overton's girlfriend, Lorna Swaybe, six times in less than six months for reasons that were never explained (T. 4348, 4364-5). According to Visco, these contacts took place in 1990 or 1991 (T. 4364-5). Ms. Swaybe died of AIDS in April 1994 (T. 4418-20). Trial counsel argued that Detective Visco may have been the officer who collected the used condoms from Ms. Swaybe in order to plant Mr. Overton's semen on the bed sheets (T. 4734-6).

Police had no probable cause to arrest Mr. Overton for the MacIvor murders and could not force him to give them a DNA sample (T. 503-4, 514). In 1993 or 1994, police began using confidential informants in its efforts to implicate Mr. Overton in unrelated criminal matters for the purpose of obtaining a blood sample (T. 516-17; 3316). One informant was wired as he tried to sell Mr. Overton an illegal "Uzi" firearm. The scheme failed (T. 3316-17).

In October, 1996, a confidential informant assisted police in arresting Mr. Overton for the burglary of a trailer while under police surveillance (T. 503-4). Police said they would release him in exchange for a blood sample

for DNA testing. Mr. Overton declined. Mr. Overton faced life in prison for the armed burglary of the trailer.

Mr. Overton was locked in an isolation cell under suicide watch because he had been diagnosed with depression and had attempted suicide in the past (T. 525, 560, 573). Mr. Overton requested a razor blade and was given one. He cut a deep gash in his neck while in the shower (T. 526, 535-6, 553). Police pressed towels to Mr. Overton's wound and sent bloody towels to FDLE for DNA testing (T. 512, 537). Police never informed Mr. Overton he was suspected in the MacIvor murders (T. 505).

Mr. Overton was arrested on November 19, 1996, five years after the crimes. The State's evidence against Mr. Overton included two DNA tests that matched his blood to the semen found on the MacIvor bed sheets and the testimony of two jailhouse informants (T. 3701-3808; 3863-4122; 4139-4244).

Mr. Overton repeatedly maintained his innocence (R2). His theory of defense at trial was that the DNA tests were incorrect or that the police had planted his DNA on the samples of the bedding (T. 1166). The defense argued that the 1991 crime scene evidence had been mishandled, contaminated and compromised. Trial counsel argued that the semen stains FDLE tested might have been supplied by a spermicidal condom given to

police by Lorna Swaybe and planted on the bed sheet clippings (T. 3936; 4364-5; 4729; 4730; 4734-6).

In preparation for trial, the State requested DNA testing. In June, 1993, FDLE serologist Dr. Robert Pollack, received bed sheet clippings from the Monroe County Sheriff's Office. He used the RFLP (restriction fragment length polymorphism) method of DNA testing to extract DNA from the bed sheet (T. 3890-1). He extracted DNA from two of ten cuttings and developed a DNA profile at 5 loci that were eventually compared to Mr. Overton's blood sample (T. 3876-7; 3942; 3953-4). Using computer imaging, Dr. Pollack decided the profile from the bed sheet cuttings "matched" Mr. Overton (T. 3949-50; 3955-6). He opined that the chance of an unrelated individual having the same profile was one in six billion (T. 3960; 4021).

On cross-examination, Dr. Pollack conceded that RFLP testing cannot measure the exact size or composition of the DNA fragments and that a match is declared when the bands are "close enough" in size to fit within a particular laboratory's "match window." (T. 3981). The "match window" varies depending on the laboratory, and some laboratories refuse to interpret bands in the "upper region" where they exceed 10,000 base pairs in length.

One of the five loci examined in Mr. Overton's case exceeded the 10,000 base pair limit (T. 3997; 4018-9).

As a result, the State sought a second DNA test in June, 1998 by Bode Technology, a private laboratory. The second test involved a newer method called STR DNA or short tandem repeats (T. 462, 1068-9). Both parties agreed to have access to the bed sheet clippings. The agreement was that the State would conduct the first STR DNA test and the defense would then perform its own testing on the remaining evidence for the presence of nonoxynol, a substance found in spermicidal condoms. The defense believed the presence of nonoxynol would prove that the semen had been planted on the bed sheet (R843; T. 592-3; 773; 815-16; 4493-4).

Philip Trager, an expert in testing pharmaceutical products, was retained by the defense to test the bed sheet clippings per the agreement of the parties before the Bode laboratory testing.

He found that the bed sheet clippings made by Doc Pope, the former veterinarian/serologist with the Monroe County Sheriff's Department, contained 53 micrograms of nonoxynol-9 (T. 696; 4436-9). Another defense expert, Dr. Ronald Wright, a forensic crime scene expert, testified that it was "highly unusual" for a perpetrator in a sexual assault crime to use a condom. He concluded that the presence of 53 micrograms of nonoxynol-9 on the bed

sheets suggested that the semen was obtained from a condom and planted on the bed sheets (T. 4493-95).

However, in late November, 1998 two months before trial, the State, unbeknownst to the defense, made new cuttings from the bed sheets and sent them to defense expert Trager for nonoxynol testing (T.653; T. 752, 809). On November 20, 1998, the State listed a new witness, Dr. Richard Oliver, a chemist employed by the company that manufactures nonoxynol-9 (R837; T. 950, 4589-91). On December 16, 1998, the State finally disclosed its test results. One test was positive for nonoxynol. A second test found no detectable levels of the substance (R.653; T. 1189-90, 4440-41). The State intended to show that nonoxynol was a common ingredient in commercial products such as laundry detergent. It also intended to show that the defense testing of nonoxynol did not distinguish between laundry detergent and spermicide from a condom (T. 956). Failure to disclose this information, defense counsel argued, precluded them from ruling out the MacIvor's household products as a source (T. 1189-90).

Trial commenced on January 20, 1999 (T. 2991). At the conclusion Mr. Overton was found guilty of all counts (R. 8-15, T. 4882).

The penalty phase was conducted on February 4, 1999. Mr. Overton refused to allow presentation of any evidence in mitigation. He refused any

objections made on his behalf or any closing argument to be made to the jury (T. 4896; 4960; 4998).

During the penalty phase, the State presented testimony from the victims' mothers and siblings (T. 4930-4956). The defense presented no evidence (T. 4998).

The jury recommended a death sentence by a vote of eight to four (8-4) for Michael MacIvor's death and nine to three (9-3) for Susan MacIvor's death (T. 5017). The judge sentenced Mr. Overton to death on both counts (R. 1190-1199).

Notice of Appeal was filed on April 22, 1999 (R. 1256). Mr. Overton's convictions and sentences were affirmed on direct appeal.[1]

[1] Nine issues were raised on direct appeal: 1) The trial court erred in denying defense challenges for cause as to prospective jurors Russell and Heuslein (rejected, "Although we conclude that the trial court should have excused Mr. Russell for cause, we do not reach the same conclusion as to Mr. Hueslein. Accordingly, appellant has failed to demonstrate that any error as to this issue warrants reversal for a new trial." Overton v. State, 801 So. 2d 877, 895 (Fla. 2001)); 2) The trial court erred in not compelling discovery of certain DNA documents and in not granting a continuance so that defense counsel could review them (rejected, "the trial court did not abuse its discretion by not finding a discovery violation or by denying the motions for continuance." Id. at 896); 3) The trial court erred in not appointing an additional defense expert to rebut the State's evidence relating to the presence of Nonoxynol-9 in the bedding found at the MacIvor home (rejected, "the trial court did not abuse its discretion." Id. at 897); 4) The trial court erred in denying defendant's motion for mistrial after the prosecutor made statements during the State's rebuttal closing argument that the defense had requested only one Nonoxynol test, while the prosecution sought additional testing (rejected, "Accordingly, we do not conclude that the trial court abused its discretion in denying the motion for mistrial because the prosecutor's statements were a proper comment on the evidence and any potential error was not "so prejudicial as to vitiate the entire trial." Id. at 898); 5) The trial court erred in allowing the State to improperly bolster the testimony of Zientek through the testimony of the prison chaplain (rejected, "we conclude that any error which

Overton v. State, 801 So.2d 877 (2001). Certiorari was denied on May 13, 2002. Overton v. Florida, 535 U.S. 1062 (2002).

On April 30, 2003, Mr. Overton timely filed his initial postconviction motion pursuant to Rule 3.851, Fla. R. Crim. P. (PCR. 534-607).

On October 31, 2003, counsel for Mr. Overton filed a Second Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend (PCR. 935-1022).

A case management conference was held on March 26, 2004, pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) (PCR. 1198-1267). The court granted an evidentiary hearing on some claims and denied others (PCR. 1178-1182).

On October 8, 2004, Mr. Overton filed his Third Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend (PCR. 2261-2338). This Third Amended Motion, filed on October 8, 2004, contained an amended version of a previously pled claim

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may have occurred was harmless beyond a reasonable doubt." Id. at 899); 6) The trial court erred in precluding defense counsel from establishing that the defendant had filed an internal affairs complaint against Officer Visco to show this officer's bias and motive to plant evidence, by improperly finding that this testimony would open the door to evidence of other crimes (rejected, "we conclude that the trial court did not abuse its discretion in ruling as it did." Id. at 901); 7) The trial court's HAC finding was improper (rejected, Id. at 901); 8) The trial court erred in not instructing the jury that it should use great caution in relying on the informants' testimony (rejected, "Accordingly, no error, much less that of a fundamental nature, occurred." Id. at 902); and 9) The trial court erred in failing to consider available mitigating evidence (rejected, "Based on this record, we conclude that the trial court committed no error with respect to its consideration and evaluation of the available mitigating evidence." Id. at 905).

that had been denied an evidentiary hearing and also contained a new claim. Immediately before the commencement of the evidentiary hearing, the Court held a Case Management Conference on the claims presented in Mr. Overton's Third Amended Motion (PCT. 8-24).

The evidentiary hearing was conducted in November 2005, and the trial court entered an order denying relief on January 14, 2005 (PCR. 2823-2948).

Mr. Overton appealed the denial of his motion for postconviction relief, and his Initial Brief has been filed with this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE NUMEROUS MERITORIOUS ISSUES ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA, WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCE OF DEATH.

A. INTRODUCTION

Mr. Overton had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right is not

adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to allegations of ineffective assistance of trial and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Overton's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Overton's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Overton's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Counsel's failure to present the meritorious issues discussed in this petition demonstrates that her representation of Mr. Overton involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

In Wilson, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165.

In Mr. Overton's case appellate counsel failed to act as a "zealous advocate," and Mr. Overton was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise a number of issues to this court.

As this Court stated in Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985):

> The criteria for proving ineffective assistance of appellate counsel parallels the Strickland standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines). Guideline 11.9.2 of the 1989 ABA Guidelines is clear that "Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules." ABA Guideline 11.9.2 Duties of Appellate Counsel (1989). The 2003 Guidelines further state, "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise **every potential ground of error that might result in a reversal** of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003).[2] (Emphasis added). Appellate counsel failed to raise a number of such grounds.

In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the

[2] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that counsel should have utilized in Mr. Overton's case. Although Mr. Overton's case was tried in 1999, the 2003 Guidelines still apply to his case. In Rompilla v. Beard, 1125 S. Ct 2456 (2005) the trial took place in 1989, which was prior to the promulgation of either the 1989 or the 2003 Guidelines. However, the U.S. Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

Furthermore, as the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel".

appeal would have been different. Confidence in the result of Mr. Overton's direct appeal has been undermined. A new direct appeal should be ordered.

B. DENIAL OF DUE PROCESS AND A FAIR TRIAL BEFORE AN IMPARTIAL JURY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO EXTENSIVE AND INFLAMMATORY PRETRIAL PUBLICITY

The murders of Michael and Michelle MacIvor resulted in a large-scale investigation involving the Monroe County Sheriff's Office, the Florida Department of Law Enforcement (FDLE), the Federal Drug Enforcement Administration, U.S. Customs, the FBI, and other law enforcement agencies (T. 4400-4401, 4413; R. 768). The crime was characterized as one of the most highly publicized in the history of the Florida Keys (R. 742-834). There were numerous newspaper articles published, television crime re-enactments were aired, and billboards were erected showing a picture of the couple and offering rewards for any information concerning the killings (T. 4426; R. 768, 777, 831). The publicity concerning the crime was so extensive that Tourist leaders feared it would affect the islands' business interests (R. 777). One editorial discussing the crime lamented that the Keys had lost the "innocence that once seduced many . . . to make these islands [their] home" (R. 767).

Due to the pervasive media coverage, trial counsel filed a written Motion for Change of Venue (R. 742), and repeatedly requested a change of

venue (T. 988; 1233; 2918; 2966). This was denied by the trial court (T. 2966), and properly preserved for appeal. Due to the ineffective assistance of appellate counsel, this issue was not presented on direct appeal.

Attached to the motion for change of venue were affidavits of trial counsel and other local attorneys stating under oath that each had heard citizens of Monroe County talking about the case and believed that due to the great amount of pretrial publicity they believe Mr. Overton could not receive a fair and impartial jury from Monroe County (R. 750-753). Counsel also presented the court with copies of the voluminous inflammatory media articles (T. 754-831). The press had become a party in this case early on (T. 255–6).

During voir dire, it became apparent that citizens of Monroe County had read the extensive media coverage and had already been influenced by the reporting about the crime. Out of twelve jurors chosen for the jury, some were already familiar with the massive and influential media reporting surrounding Mr. Overton's trial. In fact, in the first panel, all of the potential jurors had heard about the case through newspaper coverage of the events. (T. 1271-1317). A prime example was Juror Russell. During his individual *voir dire*, Mr. Russell indicated that given the security measures used and all the articles he'd read, he'd already decided Mr. Overton was guilty. (T.

1676). This Court found it was error not to have recused Mr. Russell for cause. See, Overton v. State, 801 So. 2d 877 (Fla. 2001).

Mr. Overton's trial was infected from the very beginning, as is evidenced by the large number of jurors excused for cause by agreement (T. 1347-1362, 1634, 1669, 1694, 1773, 1905, 1913, 1916, 2003-2005, 2107, 2108, 2109, 2246, 2268-2270, 2430, 2453,[3] 2527, 2596-97, 2612, 2656, 2855, 2905, 2914). Some were familiar with intricate facts of this case.[4]

The trial judge also recognized the impact of the substantial pretrial publicity stating, "I suspect we're going to have plenty of challenges for cause. I mean, between the scientific evidence and the nature of the offenses **and the publicity**, we're going to have, I would expect, lots of challenges for cause R. 293)(Emphasis added).

Mr. Overton was convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage as to deny him the fair trial and sentencing proceeding guaranteed

[3] It's difficult to tell from the records provided how many total potential jurors were interviewed. There are no clerk's notes indicating such. The only clue that we have to how many people were in each panel is that the trial transcript mentions a new venire of 34 people was sworn in during jury selection. (T. 2468). In its initial questioning the Court excused 20 people for cause from the first panel, alone; 20 people – over half. (T. 1362). Upon further questioning, an additional four jurors (T. 1669), later another two (T. 1694, 1893), and, even later, another four were excused for cause by agreement. (T. 1905, 1910, 1913,1916). Thirty-one jurors or a substantial part of the venire were excused for cause.

[4] Mr. Huslein stated that he believed in the accuracy of DNA science, and believed Mr. Overton was guilty. (T. 2321).

by the Sixth, Eighth, and Fourteenth Amendments. The United States and Florida Constitutions guarantee an accused the right to due process of law, and a speedy and public trial by an impartial jury under the Fifth and Sixth Amendments of the United States Constitution. Mr. Overton was denied his constitutional rights. The court should have ordered a change of venue in Mr. Overton's case "...because pretrial publicity precluded selection of a fair and impartial jury." Gaskin v. State, 591 So. 2d 917, 919 (Fla. 1991).

The constitutional standards governing change of venue issues were summarized in Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985):

> Ultimately, those standards derive from the Fourteenth Amendment's due process clause, which safeguards a defendant's Sixth Amendment right to be tried by "a panel of impartial, `indifferent jurors.'" Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). The trial court may be unable to seat an impartial jury because of **prejudicial pretrial publicity or an inflamed community atmosphere.** In such a case, due process requires the trial court to grant defendant's motion for a change of venue, Rideau v. Louisiana, 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L.Ed.2d 663 (1963), or a continuance, Sheppard v. Maxwell, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966). At issue is the fundamental fairness of the defendant's trial, Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 2035, 44 L.Ed.2d 589 (1975). There are two standards, which guide analysis of this question, the "actual prejudice" standard, and the "presumed prejudice" standard.

Coleman, 778 F.2d at 1489 (emphasis added).

In Mr. Overton's case, the pretrial publicity deprived Mr. Overton of a fair trial under an inherent and actual prejudice analysis. See Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991).

Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." Coleman, 778 F.2d at 1490. Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single fact is dispositive." Id.

An inherent prejudice analysis requires examining whether pretrial publicity was inflammatory and whether that publicity saturated the community. Heath, 941 F.2d at 1134. Mr. Overton has met both of those requirements. The inflammatory nature of the pretrial publicity that saturated the community up to and including the time of Mr. Overton's trial required a change of venue. Trial counsel's partial presentation of reports[5]

[5] Counsel submitted an extensive packet of newspaper articles from Key West area when he filed the Motion for Change of Venue (R. 754-834). There were many more articles published before and during the trial that were not submitted.

in news media, the intervention of the media at the trial itself, and the affidavits of counsel have established prejudice.

The prejudice pervading the community "enter[ed] the jury box," Heath, 941 F.2d at 1134, and created actual prejudice. A juror's statement that they would set aside pretrial knowledge of the case and their feelings about the victims is not dispositive. As the Supreme Court explained in Irvin v. Dowd:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion....

Irvin, 366 U.S. at 728. See also, Sheppard v. Maxwell, 384 U.S. 333, 351 (1966) (finding that jurors' statements that they would decide the case only on evidence and that they felt no prejudice toward Mr. Maxwell not dispositive of claim that pretrial publicity deprived Mr. Maxwell of fair trial).

In a related context, the Supreme Court has observed:

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined.

> But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Estes v. Texas, 385 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965); In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.

Estelle v. Williams, 425 U.S. 501, 504 (1976). See also, Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

The publicity surrounding the crime began years before the trial and continued throughout Mr. Overton's capital trial. Due to the extensive and prejudicial media attention concerning Mr. Overton's trial in Monroe County, he was denied a right to a fair and impartial jury and to a jury selected according to the requirements of due process and equal protection.

CLAIM II

APPELLATE COUNSEL FAILED TO APPEAL THE DENIAL OF MOTIONS IN LIMINE TO EXCLUDE DNA EVIDENCE BASED ON A COMPLETE BREAK IN THE CHAIN OF CUSTODY

The only identifying evidence used against Mr. Overton at trial was the DNA evidence. The trial court did not find that Mr. Overton had not proved prejudice as a result of any break in the chain of custody. Instead, the trial court found that the chain of custody was intact.

Several times prior to trial, Mr. Overton requested that the DNA evidence be excluded (R. 669, 671; T. 795-9; 796, T. 1019-1020), which was denied by the trial court. Therefore, this issue was properly preserved for appeal, and appellate counsel provided ineffective assistance by failing to include this important issue in Mr. Overton's direct appeal.

In its order denying postconviction relief, the lower court analyzed the chain of custody of the evidence in great detail, giving a good indication as to the rationale behind the consistent denials of trial counsels' motions to exclude the DNA evidence (PCR. 2823-2824, 2931-2948).[6]

> Since many of the Defendant's claims are predicated on the assertion that the DNA evidence was unreliable because of a troubling chain of custody, that issue will be examined first. If the DNA was the Defendant's **and the chain of custody was intact**, any other **identifiable miscues committed in the course of the investigation and subsequent trial lose much of their significance**" (PCR. 2844) (Emphasis added).

If this is true, then the converse is equally true. If the chain of custody is not intact, then "any other identifiable miscues committed in the course of the investigation and subsequent trial" gain **much more** significance.

Mr. Overton recognizes that according to Florida law, a party attempting to exclude relevant physical evidence based on a gap in the chain

[6] The Clerk of the Court inexplicably inserted Mr. Overton's Designation to Court Reporter (PCR. 2825-2830) into the beginning of the final order, which pages should be excluded.

of custody must show probability of tampering. A bare allegation by a defendant that the chain of custody has been broken is not sufficient to render relevant physical evidence inadmissible. Floyd v. State, 850 So. 2d 383 (Fla. 2002), Terry v. State, 668 So. 2d 954, 959 (Fla. 1996).

The chain of custody will be considered "in tact" and that evidence will be admissible unless there is an indication of probable tampering. Defense expert witness, Dr. Libby, testified that tampering is defined as any sample that is somehow altered by introducing more biological material or is a consequence of the manner in which the sample is stored (PCT. 383). He said such tampering can be inadvertent and as easy as storing the samples improperly.

In seeking to exclude certain evidence, Mr. Overton bears the initial burden of demonstrating the **probability** of tampering. Once this burden has been met, the burden shifts to the State to show that tampering did not occur. Murray v. State, 838 So. 2d 1073 (Fla. 2002). Mr. Overton carried that burden, and the State failed to submit evidence that the tampering did not occur. The prejudice to Mr. Overton was that the altered DNA and its enormous statistical probabilities were used against Mr. Overton.

Dr. Pope, the veterinarian-turned serologist (T. 3322-3329), processed the crime scene and collected the bedding that included a mattress pad,

bottom sheet and comforter. It was on the sheets and mattress pad that DNA samples allegedly matching Mr. Overton were found.

Dr. Pope took samples, referred to as clippings, from each piece of bedding for later DNA testing (T. 3379, 3381). Two of these clippings were tested years later and the DNA profiles matched Mr. Overton's profile when compared to his known blood sample. Therefore, the clippings are the **only** evidence to follow to see whether the chain of custody remained intact.

On August 23, 1991, Detective Petrick took into evidence the mattress pad, sheet and comforter from the victim's bedroom (T. 3194). He put all of the evidence in his van (T. 3281). The next day, August 24, he gave the pad, comforter and sheet to Dr. Pope (T. 3197-98, 3223). The property receipt, number 15523, indicates that the mattress pad, sheet and comforter were taken into evidence (T. 3238). This property receipt also shows additional items, 1B and 2B, which are two envelopes of clippings, and item 3B which is five envelopes with clippings (T. 3239). Therefore, the chain of custody issue solely surrounds what happened to items 1B, 2B, and 3B on property receipt 15523 which are all clippings taken from the bedding.

Detective Petrick, who was primarily responsible for processing the scene, testified at trial that he was unable to identify the evidence bag. He

said that it was not the bag he placed the bedding into, and that the signature of "Detective R. Petrick" was not his (T. 3221-3222).

Detective Petrick then reviewed property receipt 15523 showing that the clippings were added. He testified that he did not place the clippings into evidence and that although the property receipt states, "Above list represents all property impounded by me in my official performance of duty," he had not added the bedsheet clippings. He said the markings were added after he had affixed his signature (T. 3240).

Moreover, Detective Petrick noted that the property receipt **did not indicate when the clippings were impounded**. He suggested that Dr. Pope be asked that question (T. 3242) (Emphasis added).

Although Detective Petrick gave the bedding to Dr. Pope on August 24, 1991, the property receipts read "8/26" (T. 3223).

Dr. Pope testified that he was an "assistant" to Detective Petrick at the crime scene, which included making up evidence bags and labeling them (T. 3356). He testified that **he** had taken the bedding from Detective Petrick on August 24 (T. 3391), and immediately took the bedding to the property room in Key West, put them into evidence and immediately checked them out that same day to work on them (T. 3395). The bedding was not returned to the property room until November 21 (T. 3396).

Dr. Pope was asked to identify many pieces of evidence. He identified the evidence bag containing the bottom sheet (T. 3357-3358),[7] and agreed that he had made clippings from the sheet (T. 3359). Although he had been given the bedding on August 24, Dr. Pope testified that he took the sheet clippings on September 9 (T. 3365). He never signed off on any property receipts because he was only "assisting" at the crime scene (T. 3366). He said, " I should have put Detective Petrick/Doc Pope, but to me, I know my handwriting, I know the scene, and it just doesn't make any difference to me" (T. 3366-3369).

Dr. Pope then identified the bag containing the mattress pad that was taken from the crime scene (T. 3376-3378),[8] and from which he also took a cutting (T. 3378). He testified that the mattress pad cutting was also done on September 9 (T. 3407). Again, his indifference to proper documentation and processing led him to sign "Detective Petrick" on the evidence bag (T. 3377).

There is a discrepancy as to when the clippings were made, since Dr. Pope later testified that his notes indicate that he made the clippings on September 11 rather than September 9 (T. 3519, 3544).

[7] State's Exhibit 50 in evidence.

[8] State's Exhibit 51 in evidence.

When the State showed Dr. Pope an envelope and asked if he placed the mattress pad cutting into that envelope, he replied, "I put half of it in this envelope" (T. 3415). There are no further discussions about the whereabouts of the other half of the mattress pad cutting. But later, Dr. Pope said he took clippings, cut them in half and put one half in his "working envelopes" (the ones they've been looking at in evidence) and the other half went into his DNA storage envelopes (T. 3521). There was never any further explanation by Dr. Pope as to what he did with the "DNA storage envelopes." He was not asked to explain during cross-examination by the defense. Not even the State could figure out how many envelopes Pope had created and what they contained:

> THE STATE: Are there more envelopes than these 10 envelopes, is that what you're telling me?
>
> DR. POPE: I don't know how they're labeled, but there's - - there's other envelopes besides the ones you showed me yesterday.

(T. 3521).

Dr. Pope testified that he kept half of the mattress pad cutting "…in my working refrigerator in my lab in Key West" and that it was an unlocked refrigerator in his locked lab (T. 3416). However, he did not testify about who else, or how many others, had access to this lab.

Dr. Pope also testified that he kept the bottom sheet clippings in the "same place, in the refrigerator" in his lab (T. 3420). However, he then testified that immediately prior to his leaving the Sheriff's office, the **clippings were in his locked refrigerator-freezer at Marathon**. He added that he had taken the clippings from Marathon and brought them to Key West in 1993 (T. 3421, 3549).

According to his testimony, Dr. Pope either had the clippings in his unlocked refrigerator in Key West from September 1991 (when the clippings were made) until 1993 when he left his job at the Sheriff's Office, or, he had the clippings in Marathon until they were brought to the Key West lab in 1993.

Dr. Pope identified a bag containing the comforter taken from the scene (T. 3384-3385).[9] There was no discussion of any clippings being made from the comforter and no envelopes were identified as containing any comforter clippings. There was no discussion on why the comforter was eliminated as a possible source for biological material.

There was also a discrepancy in Dr. Pope's testimony as to where the clippings were made. Dr. Pope stated that the clippings were made at the lab

[9] State's Exhibit 52 in evidence.

(T. 3379). He then said that some were made at the scene and some at the lab. (T. 3381).

When the clippings were made, they were added to a supplemental sheet, which was attached to the original property receipt (T. 3492-3493). When asked to review the supplemental sheet that accounted for the clippings, Dr. Pope testified that the first time the clippings were documented was when they were placed in evidence on 6/10/94 (T. 3494, 3514).

According to Dr. Pope, the paperwork accompanying the clippings that were tested for DNA shows that Dr. Pope took the bedding on 8/24/91, made clippings on either 9/9/91 or 9/11/91, and that the clippings were not received by the Sheriff's office property room until 6/10/94.

Dr. Pope explained that he first took the bedding from Detective Petrick on 8/24/91 and placed it in the property room and then checked it out so he could work on the bedding. This was done so that there would be documentation that the bedding existed and was in someone's custody and control. There is no such questioning of Dr. Pope concerning the clippings – which ultimately became individual pieces of evidence and which were found to contain evidence of Mr. Overton's DNA. There is no explanation given as to why Dr. Pope didn't take the clippings he had made on 9/9/91 or

9/11/91 and immediately take the envelopes in which they were placed to the property room then check them out so that they could be documented as being in existence and in the custody and control of Dr. Pope.

The lower court relied on the testimony of Diane O'Dell, property director for the Monroe County Sheriff's Office. The judge attached portions of her trial testimony to the final order to show an intact chain of custody. But a review of her testimony makes the chain of custody even more troubling because the clippings were not accounted for by the Monroe County Sheriff's Office until **after** Dr. Pope left their employment in 1993.

Ms. O'Dell reviewed the property receipt for the bedding, which included additions for the trace sweepings (envelopes) and additions for the clippings. She verified that the receipt showed Detective Petrick impounded the bedding and then gave it to Dr. Pope (T. 3813). Dr. Pope took the bedding to the property room where it was turned over to James Adams, property assistant, who documented the fact that the property was turned in. Dr. Pope then immediately checked out the bedding from the property room, which is documented (T. 3813).

Ms. O'Dell explained:

> He [Dr. Pope] brought it in and took it out at the same time. That was a common procedure to generate paperwork to keep track of the evidence (T. 3813). She later explained that "[the

> bedding] came to storage but went right out. We just logged it into the computer, just to put it in our system"

(T. 3833).

Ms. O'Dell verified that the property receipt showed that Alice Cervantes, property assistant, documented that she received trace evidence on 9-9-91 (T. 3814), which is the same date that Dr. Pope said he had done a sweep for trace evidence of the bedding (T. 3361, 3519). Ms. O'Dell testified that the first time there is any indication that bed clippings existed was "[o]n 4-26 of '93 when I, the first time that the envelopes showed up, third line." (T. 3831). When she was asked why the documentation as to the trace sweepings was placed towards the bottom of the property receipt, she explained "we probably were not expecting any more entries." (T. 3833).

What is missing from Ms. O'Dell's and Dr. Pope's testimony is an explanation for why no such documentation existed for the clippings that ultimately tested positive for Mr. Overton's DNA. It is curious that the most damaging evidence presented at trial came from items that, according to Monroe County Sheriff's records, did not exist for more than 18 months. These are the same clippings that Detective Petrick did not recognize even though his signature supposedly appears on a bag. It is not clear when or where the clippings were made, nor do we know where they were kept or who had access to them. There is no explanation as to why the Monroe

County Sheriff's office policy of placing evidence into the property room to document its existence was not followed with the only pieces of evidence that place Mr. Overton at the scene of the crime.

It is insufficient to merely allege that a chain of custody has been broken in order to render relevant evidence inadmissible. Floyd v. State, supra; Terry v. State, supra. The evidence will be admissible unless there is an indication of probable tampering.

Mr. Overton maintained that the DNA found on the clippings was planted there long after the murders. The defense theorized that Detective Visco obtained the defendant's sperm in a condom from Mr. Overton's girlfriend, Lorna Swaby, who was suffering from AIDS, and that he had the opportunity and access to place the semen on the bed sheet clippings. Overton v. State, 801 So. 2d at 887 (Fla. 2001).

There was testimony at trial that showed that this was a high profile case where the police had exhausted all other leads and suspects before focusing on Mr. Overton. Those facts, coupled with the substantial problems with the making, storing and handling of the clippings, meet the threshold requirement of probable tampering.

Dr. James Pollock, FDLE crime lab analyst in serology, analyzed one of the samples for DNA evidence and testified for the State at the Frye hearing and at trial. (He also testified at the evidentiary hearing).

Dr. Pollock said he was familiar with the National Research Council's reports published in 1992 and 1996, and agreed that they are recognized in the scientific community as setting the proper scientific guidelines for handling of evidence, analysis, storage and collection. He agreed that the guidelines are generally accepted within the scientific community (PCT. 735).

Furthermore, in Hayes v. State, 660 So. 2d 257 (Fla. 1995), this Court recognized that the National Research Council of the National Academy of Sciences was called upon to establish recommended standards and methodology concerning DNA. The report of the National Research Council (NRC) stresses the critical need for a well-documented and secure chain of custody in DNA cases:

> Even the strongest evidence will be worthless – or worse, might possibly lead to a false conviction – if the evidence sample did not originate in connection with the crime. Given the great individuating potential of DNA evidence and the relative ease with which it can be mishandled or manipulated by the careless or the unscrupulous, the integrity of the chain of custody is of paramount importance. This means meticulous care, attention to detail, and thorough documentation of every step of the process, from collecting the evidence material to the final laboratory report.

National Research Council, Committee on DNA Forensic Science: An Update; Commission on Forensic Science: An Update, *The Evaluation of Forensic DNA Evidence*, National Academy Press, Washington, D.C. 1996, p. 25, 82.

In Dodd v. State, 537 So. 2d 626 (Fla. 3d DCA 1988) cocaine was seized and admitted into evidence. However, there was discrepancy in the weight of the cocaine from the evidence locker to the crime lab, and different markings on the container were not adequately explained. This was all that was necessary to prove that a "probability of tampering" existed. The court ruled that the evidence should not have been admitted.

If such evidence is not admissible in a simple felony drug case, then certainly evidence that shows a more significant likelihood of tampering is sufficient in a death penalty case.

In the instant case, no property receipts document that the bed clippings existed until 18 months later. Dr. Pope, the person claiming to have made them, never signed them in as evidence on the property receipt. He never took them to Marathon or Key West to have the evidence logged in and then checked out like he did with the bedding when Detective Petrick gave it to him.

The jury was forced to take Dr. Pope's word for the fact that he made the bed clippings from the sheets collected at the MacIvor household on

September 9, 1991 or September 11, 1991. With the absence of any proof as to what Dr. Pope did, he could have made cuttings from any bed sheet in the Keys and no one would know the difference. It is these huge discrepancies that ruin the chain of custody in this case because no one knows when the cuttings were made, how they were made and where they were kept. We just have to take Dr. Pope's word for it.

Nowhere in the National Research Council guidelines does it make a provision in the chain of custody for DNA testing for taking the analysts' word for what they've done to the evidence.

Here, there was no evidence presented as to who had access to them either in the lab or in Dr. Pope's guest room/office/catch-all. The policies of the Sheriff's office for submission of evidence to the property room for proper documentation were not followed. The most suspicious aspect of this scenario is that the only time the Sheriff's office procedures were not followed was with the swabs and bed clippings–the most damaging evidence against Mr. Overton.

Mr. Overton was denied the most basic chain of custody integrity on the only evidence that placed him at the scene of the crime.

Mr. Overton was not required to prove by direct evidence who had tampered with the evidence and broken the chain of custody. Circumstantial

evidence of tampering was sufficient. Mr. Overton proved that the only damaging forensic evidence against him was not in a locked property room in police custody for 18 months.

Detective Petrick, the lead investigator, could not identify the bag the clippings were in at the time of trial nor did he sign the bag that bore a forgery of his signature. Had Dr. Pope not resigned from the Monroe County Sheriff's Office in 1993, the evidence would still be in his refrigerator next to the leftover meatloaf.

Dr. Pope himself could not remember when he made the cuttings from the bed sheets on September 9th or 11th, 1991 (T. 3366-3369; 3519, 3544). He said he never signed off on the property receipts because he knew his own handwriting and the crime scene and it didn't make any difference to him (T. 3366-69). He admitted hanging the sheets to dry in his guest room at home. He never said who visited his home while the evidence dried.

The prejudice here is that Mr. Overton could not refute the State's case before the jury. The jury was left with the impression that the botched chain of custody was simply business as usual.

Mr. Overton was deprived of effective assistance of appellate counsel by the failure of counsel to appeal the denial of trial counsel's repeated

requests to suppress the DNA evidence due to the complete lack of establishment of a chain of custody.

CLAIM III

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. OVERTON OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO NOTICE, A JURY TRIAL, AND HIS RIGHT TO DUE PROCESS

Florida's capital sentencing scheme utilized to sentence Mr. Overton to death was unconstitutional and deprived Mr. Overton of his rights to notice, to a jury trial, and of his right to due process under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The role of the jury provided for in Florida's capital sentencing scheme, and in Mr. Overton's capital trial, fails to provide the necessary Sixth Amendment protections as mandated by Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002). Ring extended the holding of Apprendi to capital sentencing schemes by overruling Walton v. Arizona, 497 U.S. 639 (1990). The Ring Court held Arizona's capital sentencing scheme unconstitutional "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 497 U.S. at 2443.

The jury in Mr. Overton's case was clearly instructed that they were not the ultimate sentencer and their role was limited to issuing a recommendation and advisory opinion to the judge, who was solely responsible for sentencing Mr. Overton (T. 4999, 5002-5008, 5011-5013). Mr. Overton was not found guilty beyond a reasonable doubt by a unanimous jury on each element of capital murder; therefore, his death sentence should be vacated.

Mr. Overton's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendment to the U.S. Constitution, and due process (R. 8-15).

In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002), this Court revisited the holding in Mills v. Moore, 786 So. 2d 532 (2001) and addressed the concerns raised by Ring and its impact upon Florida's capital sentencing structure. The Bottoson and Moore decisions resulted in each Florida Supreme Court justice rendering a separate opinion. In both cases, a plurality *per curiam* opinion announced the result denying relief in those cases. In each of the cases, four separate justices wrote separate opinions specifically declining to join the *per curiam* opinion, but "concur[ring] in result only," Bottoson, 833 So.2d at 694-5;

King, 831 So.2d at 145, based upon key facts present in those cases. However, those key facts utilized by the Court to deny relief in Bottoson and King are not present in Mr. Overton's case. A careful reading of those four separate opinions and the facts in Mr. Overton's case reveal that he is entitled to relief.

The jury in Mr. Overton's case was clearly instructed that they were not the ultimate sentencer and their role was limited to issuing a recommendation and advisory opinion to the judge, who was solely responsible for sentencing Mr. Overton to death (T. 4999, 5002-5008, 5011-5013). During Mr. Overton's trial, the jury heard repeatedly that their decision was "advisory", a "recommendation", and/or the trial judge was the "ultimate sentencer." Id. These repeated references made it clear to the jury they were not sentencing Mr. Overton, but rather that the judge was sentencing him. Particularly important is that the jury was never told their advisory recommendation would be binding in any way. Id.

Mr. Overton was not found guilty beyond a reasonable doubt by a unanimous jury on each element of capital murder; therefore, his death sentence should be vacated.[10] Florida juries are not required to render a

[10] There is no way to know how the individual jurors voted or decided on each aggravator. However, we do know that the jury recommended a death sentence by a vote of eight to four (8-4) for Michael MacIvor's death and nine to three (9-3) for Susan

verdict on elements of capital murder. Even though "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, Ring, at 2443 (quoting Apprendi, 530 U.S. at 494, n.19), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. § 921.141(2), Fla. Stat. (1999) does not call for a jury verdict, but rather an "advisory sentence." The Florida Supreme Court has made it clear that the jury's sentencing recommendation in a capital case is only advisory.

In addition, Mr. Overton's death sentence must be vacated because the elements of the offense necessary to establish capital murder were not charged in the indictment in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, the Florida Constitution, and due process. The indictment filed in Mr. Overton's case failed to allege the necessary elements of capital murder. Jones v. United States, 526 U.S. 227, 243 n.6 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven

---

MacIvor's death (T. 5017). The judge sentenced Mr. Overton to death on both counts (R. 1190-1199).

beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under State law.[11] Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element of a greater offense.'" Ring, 122 S. Ct. at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19). The aggravators in Mr. Overton's case were not alleged in the indictment.

Although Mr. Overton recognizes that this issue has been decided by this Court, recently there have been indications that this is not a stagnant issue but rather an evolving one in a climate of potential change. One indication that this issue remains fluid is this Court's recent analyses in State v. Steele, 30 Fla. L. Weekly S 677 (Fla., October 12, 2005), where it was stated that since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. There, the court was asked to answer two questions relating to capital cases: 1) Does a trial court depart from the essential requirements of law, by requiring the state to provide pre-guilt or

[11] The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477, n. 3.

pre-penalty phase notice of aggravating factors, and 2) Does a trial court depart from the essential requirements of law, by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury? The Court answered "no" to the first and "yes" to the second question.

Recently there have been indications that this is not a stagnant issue but rather an evolving one in a climate of potential change. One indication that this issue remains fluid is this Court's recent analyses in State v. Steele, 30 Fla. L. Weekly S 677 (Fla., October 12, 2005), where it was stated that since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. There, the court was asked to answer two questions relating to capital cases: 1) Does a trial court depart from the essential requirements of law, by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors, and 2) Does a trial court depart from the essential requirements of law, by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury? The Court answered "no" to the first and "yes" to the second question.

The Court reasoned that although there is no statute, rule of procedure, or decision of this Court or the United States Supreme Court which compels a trial court to require advance notice of aggravating factors, it is equally clear that none prohibits it, either. Moreover, the Court found that there is more justification for it now since the aggravators have increased more than 100%.[12]

However, this Court also decided that a requirement of a penalty phase special verdict form detailing the jurors' is a departure from the essential requirements of the law. The Court's rationale was that this is an extra statutory requirement imposed on the capital sentencing process, stating:

> Unless and until a majority of this Court concludes that Ring applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute . . . the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

Even more telling is this Court's language encouraging legislative changes to Florida's capital sentencing statute when it said:

> Finally, we express our considered view, as the court of last resort charged with implementing

[12] Previously there were 6 aggravating circumstances, now; there are 14 possible aggravators.

> Florida's capital sentencing scheme, that in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist and to recommend a sentence of death by a mere majority vote.

State v. Steele, Id. slip op. at 27, 28.

In response, there is proposed legislation pending in the Florida legislature that would require an advisory sentence of death be made by a unanimous recommendation of the jury, yet allowing the trial court to depart from that recommendation under certain circumstances.[13] Although by its language this proposed legislation would not be retroactive, it is yet another indication that the issue is in flux.

Therefore, Mr. Overton presents this claim to preserve challenges to his sentence, and submits that he is entitled to relief.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Overton respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States

[13] HB 663; SB 1130 (2006)

Mail, first-class postage prepaid to Ms. Celia Terenzio, Asst. Attorney General, 1414 W. Flagler Ave., Ste. 900, West Palm Beach, FL 33401; Florida Supreme Court, 500 S. Duval Street, Tallahassee, FL 32399-1925 on February 7, 2006.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 point Times New Roman type.

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