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.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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Mr. Overton offers this Reply to the State's Response to the Petition for Writ of Habeas Corpus and fully relies on and incorporates all arguments, facts and law presented in his Initial Brief and Petition for Writ of Habeas Corpus. However, Mr. Overton offers this Reply to a portion of the State's arguments.

CLAIM I

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 State incorrectly argues that this claim is legally insufficient on its face and that the record does not support the contention that the issue would entitle relief on appeal. However, rather than dealing with the facts and arguments presented by Mr. Overton in his petition, the State chooses to ignore the evidence of extensive pre-trial publicity and instead focuses on the *voir dire* of only one juror who was not on the panel deciding life or death for Mr. Overton. This is a transparent attempt to mislead this Court by misstating the arguments and facts presented: "Overton's complaint is legally insufficient. He must allege more that (sic) the fact that a potential juror has heard about the case." (State's Reply, p. 17). Clearly, Mr. Overton has shown far more than simply the fact that one juror had pre-trial

knowledge of the case through the press reports. (See, Petition for Writ of Habeas Corpus, p. 17-22).

On April 28, 1997, more than 18 months prior to trial[1], the trial court entered an Order ("Gag Order") prohibiting further media access to records that were submitted by the police to the State as part of the case discovery – and setting up procedures for when discovery became public information. In that order, the court notes: "**The State and defendant stipulated that there has been substantial publicity surrounding the crime, investigation and arrest of the defendant**." (R. 71-72). (Emphasis added). Therefore, the Court is noting, and the attorneys agreed, that there had already been pervasive news coverage, and trial was still a long way off. Also, considering that the crime occurred in 1991, the investigation continued from 1991 until Overton's arrest in 1996, and the trial didn't begin until 1999, the trial court's finding that, and the State's stipulation that there was substantial publicity during this entire time, cannot be discarded by the State today.

After the judge entered the gag order, and before the defense received the information, the Miami Herald newspaper published a news article with highly detrimental assertions about Mr. Overton. The headline for this article

[1] Trial began on January 20, 1999 (T. 2991).

is "Suspect Aroused by Photos of Victims", and the article divulges extremely prejudicial allegations such as:

1. Overton had boxes of evidence in his jail cell, including graphic crime scene photos.
2. Monroe County jail workers took the photos away from Overton this week after another inmate **saw him masturbating while looking at the pictures in his jail cell**[2].
3. Overton is a career burglar known to wear masks and wigs.
4. Overton can only view the photos now with his lawyers present.
5. Overton's attorneys won't talk to the press because there is a gag order.
6. Missy MacIvor, 8 months pregnant when killed, was hogtied with belts from her chest of drawers – bound, unbound and bound. [3]
7. Overton's blood matched with DNA in semen found at the crime scene.
8. **Prosecutor's claim there is a one-in-six-billion chance that anyone but Overton committed the crime**.

(T. 257-258). (Emphasis added).

Based on this news article, on December 19, 1997, the defense was compelled to file a motion (with the news article attached) seeking sanctions for violations of the Gag Order, stating:

1. This court entered an order restricting public disclosure of discovery materials April 25, 1997. This order was entered due to the **parties recognition that substantial publicity surrounds this case and that such publicity is detrimental and impinges on the Defendant's due process rights to a fair trial**. Particularly given the fact

[2] This was entirely based upon the word of snitch Zientek.
[3] The only evidence of this at comes solely from snitch Zientek.

that **certain discovery materials are graphically incriminating, contain inadmissible evidence, and affect the ability of the Defendant to select a jury free from the taint of prejudice**…

3. Upon information and belief certain individual(s) connected with the Monroe County Sheriff's Office and/or the Florida Department of Law Enforcement **released highly prejudicial discovery materials involving jailhouse informants and the Defendant's alleged conduct. These discovery statements and reports or the information contained in them were released to the Miami Herald prior to being provided to the Defendant.**

4. The mechanism set up to control the disclosure of such prejudicial material was not followed, opening the Defendant up to **very severe prejudice and community ridicule**.

(T. 255-256).

The trial attorneys then attempted to discover who had violated the gag order by serving a subpoena on the Miami Herald reporter. The reporter and Knight-Ridder, Inc., the publisher of the Miami Herald newspaper, moved to quash the subpoena, which was granted after a hearing in February, 1998. (T. 363-365).

On Dec. 31, 1998, Overton's trial counsel filed a Motion for Change of Venue, reiterating that there was extraordinary, prejudicial and pervasive publicity. (R. 743-749). Attached, as an exhibit, was **80 pages** of newspaper articles "as **examples of part of the extensive pretrial publicity** which has

arisen regarding this cause." (R. 743; 754-834). (Emphasis added). Affidavits of local attorneys were also included, which sworn documents stated that the affiants had read, heard, or seen numerous mass media reports, have heard this same matter discussed by citizens of Monroe County, are generally acquainted with the public opinion of Monroe County and are of the opinion that due to the publicity, Mr. Overton could not receive a fair and impartial trial by jurors drawn from Monroe County. (R. 750-753).

The State has misstated the applicable law by arguing that Mr. Overton has not proven that pretrial publicity caused actual prejudice from the jury selection process in order to justify a change of venue. First, Mr. Overton submits that the record on appeal of the *voir dire* does show actual prejudice. However, that is not the only consideration under the law. In a case arising out of Florida, the United States Supreme Court has established two ways to analyze whether jury exposure to news accounts of the crime has deprived the accused of due process. In Murphy v. State of Florida, 421 U.S. 794 (1975), the U.S. Supreme Court held that the defendant must show "inherent prejudice" in the trial setting, or, must show "actual prejudice" from the jury selection process. With inherent prejudice, "the influence of the news media, either in the community at large or in the courtroom itself,

pervaded the proceedings." Id. at 799. In the case of actual prejudice, the influence of the media reports must have caused a predisposition in the minds of individual jurors that the defendant was guilty before the trial began. Id. at 798.

This Court has also defined the burden to merit a change of venue based on extensive publicity as a showing of inherent prejudice in the trial setting, or as a showing of facts that permit an inference of actual prejudice from the jury selection process. Rivera v. State, 895 So. 2d 495, 510 (Fla. 2003).

Furthermore, according to Heath v. Jones, 941 F. 2d 1126, 1134 (11th Cir, 1991), the inherent prejudice analysis is a mixed question of law and fact, and occurs when the pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. Actual prejudice occurs when the prejudice actually enters the jury box and affects the jurors. (Cites omitted). Therefore, there are both the inflammatory and the saturation requirements of the inherent prejudice analysis. Furthermore, the Court in Heath also held that actual prejudice cannot be established without proving that at least one juror should have been dismissed for cause, and that the court must look at

the totality of the circumstances to determine the extent of the prejudice. Id., citing to Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988).

The fact that there were pervasive, inflammatory news accounts that lasted for years and up to and through the trial is shown in many places in the record. The news articles that were presented to the court below as attachments to the defense motion for change of venue (R. 754-834), are an excellent example of the type of news being reported – and show that they are not purely factual accounts of the crime, but rather are reports of prejudicial evidence that negatively influences the reader against Mr. Overton. Furthermore, a review of the arguments presented in the defense motion for change of venue (R. 742-753), the language of the trial court in the gag order, and the newspaper article attached to the defense motion for sanctions for violation of the gag order (T. 257-258) are more examples of proof of the pervasiveness of the news accounts and their inflammatory nature.[4]

The record on appeal of the *voir dire* is where proof of actual prejudice is found. The trial court began the process by asking the jury panel, by a show of hands, if they had read or heard any information about the case (T. 1270-1271). From there on, the record is replete with juror after

[4] The record on appeal only contains written news accounts of the crime. The record does not include the extensive television and radio coverage.

juror discussing their knowledge of the case and their feelings towards Mr. Overton due to the news coverage of the case that lasted for many years. The following is a synopsis of how some of the jurors responded and is also a strong indication as to inherent prejudice:

- Mr. Morris said he had read the articles in the "Key West Citizen" but that he could put it aside and base his verdict solely on the evidence. (R. 1271)
- Ms. Clark said she had also read the Citizen, but could not disregard what she'd read. (R. 1273-1274).
- Mr. Brittain also said he could not put aside what he had read. (R. 1275)
- Mr. James Clayton Johnson said he would be able to disregard what he had read. (R. 1277)
- Mr. Wilson said he could disregard what he'd read. (R. 1278)
- Mr. Stevens also said he could disregard what he'd read. (R. 1279)
- Mr. Russell said he could disregard what he'd read. Id.
- Mr. Brumwell also said he could disregard what he'd read. (R. 1281)
- Mr. Buckheim said he would not be able to disregard what he knew. (R. 1282)
- Mr. Kroels said he did not know if he would be able to disregard what he'd read. (R. 1284).
- Mr. Welicho stated he would be able to disregard what he knew. (R. 1285-1286)
- Ms. Scanlon said she was not sure whether she would be able to be unbiased. (R. 1287-1288)
- Mr, Perez said that based on his newspaper reading he had already made a decision, and would not be of much use to the Court. (R. 1289)
- Ms. Harrell thought that she could be impartial. (R. 1290)
- Ms. Blacketor-Jones said that the information she'd read had influenced her decision, therefore, she would not be able to start out with a clean slate. (R. 1291).
- Ms. Cathey also said that her reading and conversations with law enforcement had caused her to make up her mind on this case. (R. 1292-1293)

- Mr. Simms also indicated that the news reports had made an impression on him, and he would not be able to disregard what he knew. (R. 1293-1294)
- Mr. Hemphill indicated that although he knew a lot about the crime, that he would be able to have an open mind throughout the trial. (R. 1296).
- Mr. Long indicated that he had lived in Tavernier, many people were talking about the case and he'd read media reports. Although he'd like to think he could put what he'd heard out of his mind, he seriously doubted whether he could. (R. 1298-1300).
- Mr. Menendez read accounts in the paper, that day as well as when the crime occurred and heard others talking about it. He had doubts as to whether he could base his verdict only on the evidence and the law. (R. 1301-1302).
- Mr. Wray said he'd read about it ever since it happened including that morning and spoken to friends about the case and could not disregard the information he'd heard. (R. 1302-1303).
- Mr. Mellies read "just a little bit" and also involved in "just a little bit of talking here or there", then indicated that he could be unbiased. Id. **Mr. Mellies sat on the jury. (**R. 2925).
- Mr Disdier indicated that he could put aside what he had read. (R. 1305)
- Ms. Hannibal indicated that she would be able to disregard what she'd read, but was holding up a newspaper which the Judge explained that she shouldn't share with other potential jurors. (R. 1306)
- Mr. Oettle indicated he could not disregard what he had read. (R. 1307).
- Mr. Tilghman indicated he'd had read about the case "from the time it happened" and that he'd read "All of the articles", but he could start off with a clean slate. (R. 1305-1308).
- Mr. Spottswood read about the case in the Key West Citizen and Miami Herald but said he would be able to base his verdict on the facts and the evidence. (R. 1309-1310)
- Mr. Passika indicated he was not sure if he could put all the news out of his mind – but probably not. (R. 1311).
- Mr. Roche indicated he could not be fair and impartial. (R. 1313).
- Ms. Presley, who also works at the Sheriff's Office, said she would not be able to be impartial. (R. 1314).
- Mr. Bacle indicated that although he already had some predisposition, he would be able to put it aside. (R. 1315).

- Ms. Carter said she would not be able to put aside what she'd learned from the papers. (R. 1316).
- Ms. Goepfert said she probably could be fair, but would prefer not to do it because she'd had a daughter that was a schoolteacher that she had lost. (R. 1317).
- Ms. Sanders indicated that she had been exposed to pre-trial publicity and that she would not be able to disregard it. (R. 1954-1954).
- Mr. Bochenick had also been exposed to pretrial publicity from the beginning, however, said he could put it aside. (R. 1955).
- Ms. Petitte indicated that she had been closely following the media – TV, radio and newspapers - since 1991 and she could not form an unbiased opinion - could not disregard what she had read in the papers. (R. 1957)
- Ms. Zimmerman said she'd been exposed to the news, knew the trial was coming and had something to do with a young couple murdered in Tavernier and the woman was pregnant too, but she could be a fair juror. (R. 1958; 2298). **Ms. Zimmerman sat on the jury. (**R. 2925).
- Mr. Wilkins also had been exposed to the news, but said he'd be fair. (R. 1959)
- Mr. Huslein remembered the **billboards** and had read the articles, but felt he could put that aside. (R. 1962) (Emphasis added).
- Ms. Gonzales had been exposed to pretrial publicity but felt she could put that aside. (R. 1963)
- Mr. Stoddard had heard about the case for years, new there was DNA evidence and that "the trial is going to be very similar to O.J. Simpson's case, dealing with planted evidence," but had not made any opinions about it. (R. 1964; 2350-2351). **Mr. Stoddard sat on the jury. (**R. 2925).
- Mr. Avola indicated that due to his exposure to publicity he was biased. (R. 1966).
- Ms. Kreinan indicated that she had been exposed, but could be fair. (R. 1967).
- Mr. Archer indicated he could be fair despite his exposure. (R. 1968).
- Ms. Bluestone indicated that the case made her sick and that she would be biased. (R. 1969).
- Ms. Eskew said she did not know if she could be fair, but promised to think about it. (R. 1970).
- Ms. Victores said it would be very hard for her to forget all she's read. (R. 1970-1972).

- Ms. Schoneck indicated that although she had read about the case in the paper she could be fair. (R. 1973).
- Ms. Collins indicated she could be fair although she works at "The Key West Citizen" which had covered the story. (R. 1974)
- Mr. Wollwich states that although exposed to the papers since >94, he could be fair because he believed nothing in the papers and media anyway. (R. 1976).
- Mr. Pedersen stated that he could not be fair, he already had a strong opinion formed. (R. 1978).
- Ms. Yaccarino indicated that she could be fair despite her exposure. (R. 1979)
- Mr. Fasano indicated that he could be fair despite his exposure. (R. 1980).
- Mr. Pitts indicated that he had a very strong opinion on it, and could not be fair. (R. 1981)
- Ms. Victores indicated that she would still have trouble factoring out what she may have read in the newspaper. (R. 2057).
- Mr. Guillory indicated that he was not sure if he could put all the publicity out of his mind, because something may pop up while listening to the evidence, and he probably thought Mr. Overton guilty from what he'd read. (R. 2238-2239).
- Mr. Bochenick indicated that he probably though Mr. Overton guilty when he first read the articles. He indicated that he hoped that what he'd read would not affect his decision. (R. 2252-2261).
- Mr. Huslein believes the accuracy in DNA science to quite incredible. That made him wonder about Mr. Overton's innocence. He added, "**The newspaper said that the front of the table is going to be covered because of the leg restraints and stun belts and all of that."** When asked if he could completely put that out of his mind, he answered yes. However, when pressed he said, "I don't know, to tell you the truth." (R. 2321-2323). (Emphasis added).
- Mr. Henderson indicated that based on what he knew already - a triple homicide - he would lean toward the death penalty because this was one of the extreme cases. (R. 2349-2360). **Mr. Henderson sat on the jury. (**R. 2925).
- Ms. Ferguson indicated that her exposure to pre-trial publicity rendered her incapable of listening only to the evidence and being fair and impartial. (R. 2480)
- Mr. Scheuerman indicated that he had discussions with his wife about the case after she read a newspaper article. (R. 2484).

- Mr. Dunbar indicated that he'd followed the publicity the entire time, and that he felt he had some preconceived notions about the case which he could not disregard. (R. 2487).
- Ms. Arnold indicated that although she had followed the story closely since it happened and had already expressed some opinions on the subject, that she could come with a clean slate. (R. 2488-2489).
- Ms. Sciarrino indicated that she could not be impartial due to her exposure to pre-trial publicity. (R. 2491).
- Ms. Scott indicated that she could not be impartial due to her media exposure. (R. 2492).
- Mr. Noda said he could not be fair and impartial either. (R. 2493).
- Mr. Bradbury stated that he could not be impartial either. (R. 2494-2495).
- Mr. Perez indicated he would have a real tough time basing his decision on only the evidence and the law. (R. 2496).
- Ms. Hughes at first stated that she had preconceived notions, but later added that she probably could base her decision on just the evidence and the law. (R. 2497).
- Ms. Hardy indicated that she would have a hard time disregarding everything she knew already. (R. 2498)
- Ms. McCutcheon said she could be impartial. (R. 2500).
- Ms. Rosenberg indicated that she would have a rough time putting aside what she'd read or her own personal life. (R. 2502).
- Ms. Soule stated that she had followed the story since the beginning and could not sit and be impartial. (R. 2503).
- Ms. Arnold stated that she was exposed to pre-trial publicity; however, felt that she could be impartial. (R. 2562).

After the jury was sworn, trial counsel renewed their Motion for Change of Venue, which was denied. (R. 2918-2920). Not long after, trial counsel again requested a change of venue, submitting the articles from "The Key West Citizen" regarding the case. Again the motion was denied. (R. 2966).

A review of the news articles present in the record on appeal (which represent only a portion of the written news on the case, and do not include the billboards, television and radio broadcasts about the case) show that the information being disseminated to the public was not purely factual, but rather was prejudicial and inflammatory. Heath v. Jones, 941 F. 2d 1126 (11th Cir, 1991). Furthermore, Mr. Overton has presented ample evidence that the media coverage had saturated the market – a substantial number of people in the relevant community could have been exposed to some of the prejudicial media coverage, and the effects of the media saturation continued until the trial. Id.

Therefore, the issue was ripe for appeal, requests for a change of venue were made repeatedly prior to trial, and Mr. Overton has shown that the media coverage was both actual and inherent prejudice. The claim would have been successful if brought on appeal, hence, appellate counsel provided ineffective assistance for failing to appeal the denial of Mr. Overton's motion for change of venue. For these reasons, Mr. Overton was deprived of a fair trial and is entitled to a new trial with an untainted jury.

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 State asserts that this issue is procedurally barred and without merit. The thrust of the State's argument is that a "version" of this issue was raised on direct appeal, and that two out of nine issues raised on appeal related to the central theory that Mr. Overton's semen was planted some time after the murders. (State's Response to Petition for Writ of Habeas Corpus, p. 21). The State then argues by a leap of logic that since the two previously determined issues factually relate to the DNA evidence, or to problems with Detective Visco and Mr. Overton, that Mr. Overton's motion in limine to suppress the DNA evidence due to a lack of chain of custody, has somehow been previously determined. This is incorrect.

The first issue was a challenge to the trial court's refusal to appoint an additional defense expert to test the bedding where Mr. Overton's DNA had been found for the presence of a spermicidal chemical, Nonoxonyl 9. The second issue was Mr. Overton's challenge to the trial court's decision to allow the State to question Detective Visco as to the circumstances giving rise to an internal affairs complaint made by Overton (i.e., Detective Visco's involvement in investigating the Rachel Surrette murder), if the defense

questioned the detective about the complaint. Overton v. State, 801 So. 2d 877 At 900 (Fla. 2000).

The issue presented in the Habeas petition is whether appellate counsel was ineffective for failing to appeal a meritorious, preserved issue, which deficiency resulted in undermining the confidence in the correctness of the result of the appeal. The sub-issue is that the trial court improperly denied the defense motion in limine to exclude the DNA evidence due to a lack of a chain of custody. This was never appealed below.

This Court has held that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal. Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000). However, the fatal problem with the State's argument is that this issue had not been presented on appeal. The fact that there was a broken chain of custody concerning the most important, individuating evidence against Mr. Overton at trial, is not an additional argument in support of a claim that was made on appeal. Even if this Court had found that the trial court improperly had refused to appoint the additional defense expert, there would not have been a concurrent finding that the chain of custody concerning the bedding with the DNA material was not intact and should have been suppressed. That

question was not before the court and was not germane to this Court's findings.

Likewise, the decision of the lower court concerning the testimony of Detective Visco was in no way related to a request to suppress the DNA evidence. Although habeas petitions are not to be used for additional appeals on questions that could have been, should have been, or were raised on appeal or in a post-conviction motion, or on matters that were not objected to at trial, Parker v. Dugger, 550 So. 2d 459, (Fla. 1989), such is not the case here.

The State's argument is irrelevant and should not be considered in determining this issue. Mr. Overton stands by the arguments presented in his Habeas petition and in this Reply, which conclusively show he is entitled to the relief requested.

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 REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States 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 this 6th day of November, 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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