IN THE SUPREME COURT OF FLORIDA

THOMAS OVERTON,

Petitioner,

vs. Case No. SC06-237

James McDonough, Secretary,
Florida Department of Corrections

Respondent.
_____/

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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The facts adduced at trial which overwhelmingly supported Overton's conviction were as follows:

> On August 22, 1991, Susan Michelle MacIvor, age 29, and her husband, Michael MacIvor, age 30, were found murdered in their home in Tavernier Key. Susan was eight months pregnant at the time with the couple's first child.
>
> Susan and Michael were last seen alive at their childbirth class, which ended at approximately 9 p.m. on August 21, 1991. Concerned co-workers and a neighbor found their bodies the next morning inside the victims' two-story stilt- house located in a gated community adjacent to a private airstrip.
>
> Once law enforcement officers arrived, a thorough examination of the house was undertaken. In the living room, where Michael's body was found, investigators noted that his entire head had been taped with masking tape, with the exception of his nose which was partially exposed. He was found wearing only a T-shirt and underwear. There was a blood spot on the shoulder area of the tee-shirt. When police removed the masking tape, they discovered that a sock had been placed over his eyes, and that there was slight bleeding from the nostril area. Bruising on the neck area was also visible. The investigators surmised that a struggle had taken place because personal papers were scattered on the floor near a desk, and the couch and coffee table had been moved. A small plastic drinking cup was also found beside Michael's body.
>
> Continuing the search toward the master bedroom, a piece of clothesline rope was found just outside the bedroom doorway. Susan's completely naked body was found on top of a white comforter. Her ankles were

tied together with a belt, several layers of masking tape and clothesline rope. Her wrists were also bound together with a belt. Two belts secured her bound wrists to her ankles. Around her neck was a garrote formed by using a necktie and a black sash, which was wrapped around her neck several times. Her hair was tangled in the knot. Noticing that a dresser drawer containing belts and neckties had been pulled open, officers believed that the items used to bind and strangle Susan came from inside the home. Her eyes were covered with masking tape that appeared to have been placed over her eyes in a frantic hurry. Under the comforter upon which the body rested were several items which appeared to have been emptied from her purse. Also under the comforter was her night shirt; the buttons had been torn off with such force that the button shanks had been separated from the buttons themselves. Near the night shirt were her panties which had been cut along each side in the hip area with a sharp instrument.

Within the master bedroom, the investigators also found a .22 caliber shell casing, and somewhat later a hole in a bedroom curtain was noticed. Also in that bedroom, the officers found an address book with some pages partially torn out.

The sliding glass door in the bedroom was open and a box fan was operating. There had been a heavy rain storm the night before and the heat and humidity were quickly rising. As a result of these conditions, Susan's body was covered with moisture. The investigators used a luma light to uncover what presumptively appeared to be seminal stains on Susan's pubic area, her buttocks, and the inside of her thighs. The serologist later testified that he collected what appeared to be semen from Susan's body with swab applicators. Three presumptive seminal stains also appeared on the fitted sheet. Within close proximity to one of the seminal stains on the fitted sheet, a stain which

appeared to be dried feces was located. It was also noticed that Susan had fecal matter in her buttocks area. Ultimately, the officers took the comforter, fitted sheet, and mattress pad into evidence.

The investigation next proceeded to a spare bedroom, which was then being renovated for use as a nursery for the baby. The sliding glass door in that room was also open. A ladder was found propped up against the balcony outside the nursery. Cut clothesline rope was hanging from the balcony ceiling, and outside the home, the phone wires had been recently cut with a sharp instrument.

The medical examiner's testimony at trial established multiple factors. As to Michael, the autopsy revealed that he suffered a severe blow to the back of the head. The external examination of Michael's neck revealed several bruises particularly around the larynx, along with ligature marks which indicated that the device used to strangle Michael had been wrapped around his neck several times, n1 and that pressure was applied from behind. The internal examination of Michael's neck confirmed that his larynx, as well as the hyoid bone and epiglottis, had been fractured. There was also bruising and an internal contusion indicative of a heavy blow to the back of the neck. The internal examination of the neck area revealed that the neck was unstable and dislocated at the fifth cervical vertebrae. There was also internal bleeding in the left shoulder, indicative of a severe blow to the area. Additionally, Michael had significant bruising in his abdominal area causing a contusion fairly deep within the abdomen. The doctor testified that the injury could have been inflicted by a strong kick to the area. Based on his observations, the doctor opined that the cause of death was asphyxiation by ligature strangulation (rope). He added that Michael could have been rendered unconscious ten to fifteen seconds after the ligature

was applied, or that it could have taken longer depending on the pressure applied.

n1 The doctor testified that the ligature marks were indicative of "a rope wrapped around four times or wrapped around twice and reapplied once or wrapped around once and reapplied four times."

With respect to Susan, the external examination of her face revealed that she had received several slight abrasions. The ligature marks around her neck indicated that she was moving against the ligature, thereby causing friction. Also, the discoloration in her face indicated that blood was not exiting the head area as fast as it was entering. According to the medical examiner, this is indicative of an incomplete application of the ligature, which demonstrated that, more likely than not, a longer period of time passed before Susan lost consciousness once the ligature was applied. Her wrists also exhibited ligature marks and her hands were clenched. Moving down to her lower body, an abrasion to her vulva and several abrasions to her legs indicative of a struggle were found. The medical examiner concluded, based on the totality of the circumstances, that she had been sexually battered. When interrogated for an explanation of the presence of feces in the rectal area, the doctor determined that it could have happened either at the time of death or it could have been caused by her fear.

The medical examiner determined that Susan was approximately eight months pregnant at the time and proceeded to examine the fetus. The doctor determined that the baby would have been viable had he been born, and that he lived approximately thirty minutes after his mother died. The doctor testified that there was evidence that he tried to breath on his own.

Dr. Pope, the serologist, examined the bedding and made cuttings in accordance with the markings he had made at the scene. One of the stains from the fitted sheet and another stain from the mattress pad tested positive for sperm. The cuttings were later sent to FDLE for DNA testing. n2 Examination of the swabs from Susan's body failed to reveal the presence of sperm cells. n3

n2 Cuttings were not sent to the FDLE immediately after Dr. Pope detected the presence of sperm cells because at that time (i.e., 1991-92), the FDLE had recently begun the process of DNA testing and their protocol did not allow for testing in cases where there was not a suspect.

n3 The doctor provided the following explanation as to why the luma light indicated the presence of presumptive seminal fluid and why no sperm cells were found on the swabs: "The body is forever degrading and the most important thing that we're looking for in seminal fluid itself is the sperm cells, and remember, I told -- I mentioned that the body itself was moist and it already was exuding a liquid. You're in a hot, hot environment. You're in a very humid environment. It had been raining off and on all that day. With those factors, those things cause the seminal fluid to basically decompose or degrade rapidly and so it was really not a big surprise when I got to this stage that there was no sperm." A similar explanation was provided by the forensic serologist from the FDLE.

The discovery of this death scene produced a large-scale investigation, and comparable media coverage focused on the murders. Over the years following the murders, law enforcement agencies investigated several potential suspects. Through this investigatory process, Thomas Overton's name was brought up during a brain-storming session in May 1992. The reason he was

considered a suspect was because he was a known "cat burglar," whom police suspected in the murder of 20-year-old Rachelle Surrett. n4 At the time of the MacIvor murders, Overton worked at the Amoco gas station which was only a couple of minutes away from the MacIvor home. Janet Kerns, Susan's friend and fellow teacher, had been with Susan on several occasions when Susan pumped gas at that Amoco station. No further investigation was undertaken with respect to Overton at that time.

n4 Overton was never arrested in connection with the Surrett murder.

In June of 1993, the cuttings from the bedding were sent to the FDLE lab in Jacksonville where James Pollock, an expert in forensic serology and DNA identification, proceeded to examine the cuttings. Through a process known as restriction fragment length polymorphism ("RFLP"), Dr. Pollock was able to develop a DNA profile from two of the cuttings (i.e., one cutting from the fitted sheet and another from the mattress pad). Specifically, the profile was developed by examining the DNA at five different locations, known as loci, within the chromosomes. Dr. Pollock compared the profile to samples from several potential suspects. No match was made at that time.

In late 1996, Overton, then under surveillance, was arrested during a burglary in progress. Once in custody, officers asked him to provide a blood sample, which Overton refused. Days later, Overton asked correction officers for a razor, and one was provided. Overton removed the blade from the plastic razor using a wire from a ceiling vent, and made two cuts into his throat. n5 The towel that was pressed against his throat to stop the bleeding was turned over to investigators by corrections officers. Based on preliminary testing conducted on the blood from the towels, police obtained a court order to withdraw the defendant's

blood for testing.

n5 Police were not sure whether Overton was attempting to commit suicide, or whether this was a ploy to attempt an escape- something he had tried previously several years earlier while at another institution.

In November of 1996, over five years after the murders, Dr. Pollock was able to compare the profile extracted from the stains in the bedding to a profile developed after extracting DNA from Overton's blood. After comparing both profiles at six different loci, n6 there was an exact match at each locus. Dr. Pollock testified that the probability of finding an unrelated individual having the same profile was, conservatively, in excess of one in six billion Caucasians, African- Americans and Hispanics.

n6 Dr. Pollock testified that since he had initially conducted the DNA extraction process in 1993 (when lab only had capabilities to examine five loci), the FDLE lab had been able to examine one additional locus by 1996.

In 1998, the cuttings from the bedding were submitted to yet another lab, the Bode Technology Group ("Bode"). Dr. Robert Bever, the director at the Bode lab, testified as to the tests which were conducted on the bedding and the resulting conclusions. The Bode lab conducted a different DNA test, known as short tandem repeat testing ("STR"), from that performed by the FDLE. Overton's DNA and that extracted from a stain at the scene matched at all twelve loci. These results were confirmed by a second analyst and a computer comparison analysis. Asked to describe the significance of the Bode lab findings, Dr. Bever testified that the likelihood of finding another individual whose DNA profile would match at twelve loci was 1 in 4 trillion Caucasians, 1 in 26 quadrillion African

Americans and 1 in 15 trillion Hispanics.

In addition to the presentation of the DNA evidence, the State presented the testimony of two witnesses formerly incarcerated in the same facility with Overton. The first was William Guy Green, who testified that Overton had admitted to him that Overton had "done a burglary at a real exclusive, wealthy, wealthy area down in the Keys. The guy had his own airplane and a private airway and he could land his plane in his front yard." Overton further told Green that when he went into the house, he "started fighting with the lady," whom he later described as a "fat bitch," and that "she jumped on his back and he had to waste -- waste somebody in the Keys." Green also testified that Overton stated that he had struggled with another person inside the house. Green further testified that Overton spoke to him about specific action he would take when he committed burglaries. Among these precautions were the cutting of phone lines before going into the house to stop victims from calling out or to stop automatic alarm systems; he would always wear gloves, and he would bring with him a "kit," consisting in part of a gun, knife, gloves and disguises. Green also testified that Overton told him that the "best time" to commit a burglary would be during a power outage or severe storm.

The second informant to testify was James Zientek, who met Overton at the Monroe County Jail in May 1997. Overton, who believed that Zientek was a hardened criminal from New York, sought Zientek's assistance to carry out a plan that would relieve Overton from the pending charges. Specifically, Overton planned to give Zientek significant details of the MacIvor murders, and then have Zientek contact authorities and inform them that another inmate by the name of Ace had provided such details. Using Overton's logic, this would create reasonable doubt and he would be

found not guilty. Therefore, during the course of several months, according to Zientek, Overton gave Zientek precise details of what occurred in the MacIvor home on the night the couple was murdered. Overton also showed Zientek pictures related to the crimes, which Overton had obtained to assist his attorneys in preparing his defense. Specifically, Overton told Zientek that he had met Susan at the Amoco gas station where he worked. Overton believed that he had a "hot and cold type relationship" with Susan; some days she was polite to him and others she was "cold and bitchy." There came a point when Susan stopped coming to the gas station. However, according to Zientek, Overton retrieved Susan's address from either a check or a credit card receipt. Zientek testified that Overton informed him that he had surveilled the house on several occasions. On one occasion, Overton had observed Michael doing construction work at the lower level of the house. Another time, he said he had intended to enter the home, but did not because he realized that the MacIvors had company.

Turning to the events on the night of August 21, 1991, Overton told Zientek that he went to the home carrying a bag, which contained, among other things, a police scanner. He described his attire as being a Ninja-type suit, consisting of a mask, black military-style fatigues and gloves. One of the first things Overton completed when he arrived was the cutting of phone wires. He then positioned a ladder against the balcony that surrounded the house, but in the process of moving the ladder, he made a noise. A light in the house came on which caused him to wait outside for approximately twenty minutes before ascending the ladder. Once he reached the balcony, Overton cut some clothesline, "popped" the sliding glass door to the spare bedroom and gained entry into the home. He walked around the house and saw the MacIvors sleeping in their bedroom. He proceeded to walk throughout the house, but

suddenly he heard a noise and observed Michael walking over to the kitchen and opening the refrigerator. Overton said he panicked and that his adrenaline started rushing. Michael started looking around as if he sensed that something was wrong. Michael walked out of the kitchen and through the area where Overton was then standing. Overton then approached Michael from behind and "slammed him in the back of the head" with a pipe he had found at the house. Zientek testified that "the blow to the head with the pipe didn't immediately knock him out. There was a struggle and Mr. Overton knocked him out with his fist." While Overton was attempting to restrain Michael, Susan ran out of the bedroom screaming. He chased her back into the bedroom and temporarily restrained her, using articles he found inside the bedroom to bind her. Overton tried to calm Susan by stating that as long as everyone cooperated no one would get hurt. However, Susan began to plead with him, inquiring "Why are you doing this to me?" She told him that she was married, and began to plead with Overton for her husband's and baby's life. Overton also admitted to Zientek that Susan had stated: "I know who you are."

At that point, Overton became "concerned about the male just being temporarily knocked out. He knew that he wasn't dead." He then proceeded to place a sock over Michael's eyes and covered his face with masking tape. According to Zientek's testimony, Overton did not strangle Michael at that point. Instead, he went back into the master bedroom and raped Susan. When he had completed his attack, Overton said he strangled her because he "doesn't leave any witnesses." He also stated that either in the process, or after completing the strangulation, Overton noticed motion in her stomach, placed his hand over it, and felt the fetus move.

> Overton then returned to the living room area "where the male was apparently just becoming conscious." Overton then kicked Michael in the abdominal area and proceeded to strangle him with "some kind of cord." Overton "made it very clear that he doesn't leave witnesses." Overton also explained to Zientek that the reason why he placed a sock over Michael's eyes and tape around his head was because he thought that as he strangled Michael, his eyes would bulge out and he would bleed through his nose.
>
> Appellant continued to show Zientek photographs from the scene. When Zientek saw a picture of a shell casing and a bullet hole in the curtain, he asked Overton, "Why would they take a picture of that?" Overton replied that the casing and the bullet hole had nothing to do with the crime. Overton further stated that he "confused the crime scene" and ripped pages from the address book in the bedroom because he believed it would lead the police to think that the attacker wanted to remove the assailant's name from the phone book. Overton also told Zientek that he took things "nobody would realize were gone." The only item which neither law enforcement officers nor the families were able to account for were several pictures that Susan had taken that weekend of her pregnant stomach. Overton essentially concluded by informing Zientek that he entered the house with the intent to rape Susan.
>
> Zientek also testified that while looking at autopsy photos of one of the victims, he began to vomit. Overton started to laugh and cautioned Zientek to not get the pictures wet. Overton also showed Zientek a picture of a small chalkboard in the kitchen where one of the victims had written "renew life insurance." Overton laughed and said something to the effect that, "You don't think they knew what time it was?"

Overton v. State, 801 So. 2d 877, 881-887 (Fla. 2001).

This Court upheld the trial court's imposition of the death sentence based on the following:

> The trial court found the following aggravators as to both victims: (1) the crimes were heinous, atrocious and cruel ("HAC"); (2) the murders were committed in a cold, calculated and premeditated manner ("CCP"); (3) the defendant has been previously convicted of another offense involving the use of violence (contemporaneous murder); (4) the murders occurred during the commission of a sexual battery and burglary; and (5) the murders were committed in an attempt to avoid arrest.
>
> With regard to mitigation, the court considered, pursuant to section 921.141(6)(h), Florida Statutes (1999), the defendant's family background, military record, employment record, possible history of substance abuse and possible mental health problems. The judge concluded that nothing in the defendant's background could be classified as a statutory mitigating circumstance. As to nonstatutory mitigators, the court found that the defendant would be incarcerated for the rest of his life with no danger of committing any other violent acts, but gave this factor little weight. The court also recognized the defendant's courtroom demeanor and behavior as a nonstatutory mitigating factor, and accorded it some weight.
>
> The trial court ultimately determined that "in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestionably to the side of death." Accordingly, the judge imposed the death penalty upon Overton for the murders of Susan and Michael MacIvor. As to the other offenses, Overton was sentenced to 15 years for the killing of an unborn child and to two terms of life imprisonment for the burglary and sexual

battery.

Overton, 801 So. 2d at 889.

There were nine issues raised on direct appeal. They were as follows:

1. The trial court erred in denying defense cause challenges

2. The trial court erred in admitting the STR DNA results because the defense was not provided with all the necessary information to prepare for the Frye hearing.

3. The trial court abused its discretion in failing to grant a continuance of the Frye hearing.

4.The trial court erred in denying appellant's request for an additional defense expert to assist in preparation of trial.

5. The trial court erred in denying a motion for mistrial based on the prosecutor's closing argument.

6. The trial court erred in allowing the state to bolster the testimony of a state witness with prior consistent statements.

7. The trial court erred in ruling that the state would be allowed to present evidence that Overton was suspected in other crimes should he attempt to impeach law enforcement officer concerning the officer's alleged bias.

8. The trial court erred in finding the aggravating factors of "HAC", "CCP", and "avoid arrest".

9. The trial court erred in failing to consider all the mitigating evidence.

REASONS FOR DENYING THE WRIT

ISSUE I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL A CHALLENGE TO THE TRIAL COURT'S DENIAL OF HIS MOTION TO CHANGE VENUE

The state asserts that the following legal principles are germane to the resolution of this entire petition.

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986). See also Haliburton, 691 So.2d at 470; Hardwick, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317

> (Fla.1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla.1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So. 2d 1055, 1070 (Fla. 2000); See also Rutherford v. Moore 774 So.2d 637, 643 (Fla. 2000). Additionally appellate counsel is not required to raise every preserved or nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 751-753 (1983); see also Provenzano v. Dugger, 561 So. 2d 541, 549 (Fla. 1990). Based on these stringent legal principles, it will become clear that Overton will not be able to meet his burden of establishing that appellate counsel was ineffective. All relief must be denied. Petitioner alleges that appellate counsel should have raised on direct appeal, a claim that the trial court erred in denying his motion for change of venue. Respondent disagrees as this claim is legally insufficient on its face and the record does not support his contention that the issue would have entitled him to relief on appeal.

Overton alleges, “[o]ut of the twelve jurors chosen for the jury, some were already familiar with the massive and influential media reporting surrounding Mr. Overton’s trial.” Petition at 18. Overton makes a conclusory argument that because many cause challenges were granted and there was extensive media coverage that began years before the trial and continued

throughout the process, a change of venue should have bene granted. In support of his claim, Petitioner sites to the responses of one potential juror, Juror Russell, who had preconceived notion of Overton's guilt.[1] Overton is not entitled to relief for several reasons.

Overton's complaint is legally insufficient. He must allege more that the fact that a potential juror has heard about the case. This Court has stated:

> The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. In Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), . . . the United States Supreme Court recognized that qualified jurors need not be totally ignorant of the facts and issues involved in a case. The mere existence of a preconceived notion as to guilt or innocence is insufficient to rebut the presumption of a prospective jurors' [sic] impartiality. It is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court.

Bundy v. State, 471 So. 2d 9, 19-20 (Fla. 1985). More recently this Court stated:

> The change of venue claim is likewise insufficiently pled. Henry devotes only three sentences to this argument in his initial brief, and barely expands upon it in his reply. There are no specific references made to any prejudice

[1] Overton fails to mention that although Russell should have been stricken for cause, defense counsel used a peremptory challenge to remove his from the panel. Overton, 801 So. 2d at 890-893.

> Henry suffered as a result of appellate counsel's ineffectiveness in pursuing the change of venue argument. In fact, there is no specific record reference to the alleged "pervasive prejudicial pretrial publicity that permeated this case in Broward county," other than the unsubstantiated statement that such prejudicial publicity existed.

Henry v. State 31 Fla. L. Weekly S342 (Fla. May 25, 2006); See also Rivera v. State, 859 So. 2d 4895, 511 (Fla. 2003)(finding, "[b]ecause Rivera fails to plead in the petition how the denial of his change of venue motion established 'actual prejudice' and how appellate counsel could have successfully argued that the trial court abused its discretion, we find that Rivera has not shown how appellate counsel's failure to appeal the denial of the change of venue motion was of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and that it compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.")

A review of the record on appeal clearly establishes that the trial court did not abuse its discretion in denying defense counsel's motion for change of venue. The initial motion for change of venue was filed prior to the start of voir dire. (ROA 742-750). In response the state noted that the media coverage was factual and was not negative. (ROA 989-990). The trial court took the issue under advisement noting that the crimes had

occurred in the upper keys and the trial was moved down to the lower keys due to the publicity. The court also made it clear that he would revisit the issue should jury selection become a problem. (Id.).

Defense counsel also requested additional peremptory challenges, and individual voir dire. The trial court denied without prejudice the request for additional peremptory challenges and granted individual voir dire when the inquiry was related to publicity and capital punishment (ROA 998-1000).

Counsel renewed the motion the following day, the trial court responded:

> Well, we're going to, again, consider the Motion To Change Venue once we initiate and attempt to seat a jury, so we'er not going to make a ruling on that.

(ROA 1234). Jury selection was completed in just four days. (ROA 1261-2930). At its conclusion, defense counsel renewed the motion for change of venue. The trial court noted that there had been exhaustive voir dire, he had granted cause challenges liberally and saw no basis for a change of venue. (ROA 2919, 2966).

Based on this record Overton cannot demonstrate that any actual prejudice occurred. Overton's focus on Mr. Russell, who did not sit on this jury, does not establish the requisite prejudice. Overton would not have been successful on appeal because he could not demonstrate that the trial court had abused

its discretion. Appellate counsel was not ineffective for failing to raise this issue on appeal. Relief must be denied. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991)(explaining that pretrial publicity which is purely factual and does not contain accounts of inadmissible evidence does not rise ot the level of inherent prejudice to warrant a change of venue); Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997)(finding that review of the denial of motion to change venue includes whether there was difficulty in selecting impartial analysis);Wike v. State, 813 So. 2d 12 (Fla. 24, 2002)(rejecting claim of ineffective assistance of counsel based on lack of prejudice as record demonstrates that no undue difficulty in selecting impartial jury); Rivera, supra.

ISSUE II

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT CHALLENGE THE CHAIN OF CUSTODY OF THE DNA EVIDENCE

Petitioner argues that appellate counsel was ineffective for failing to challenge the admissibility of DNA evidence based on an alleged break in the chain of custody. He further alleges that the issue had been preserved for appeal. Respondent asserts that this issue is procedurally barred and without merit.

A version of this issues was raised on direct appeal. A main theory of defense at trial was that the Overton's semen was planted some time after the murders. Detective, Charles Visco, from the Monroe County Sheriff's Office received the semen in a condom from Overton's former girlfriend. Overton v. State, 801 So.2d at 878. Two of the nine issues raised on appeal were related to that central theory. The first was a challenge to the trial court's refusal to appoint an additional defense expert. The expertise involved spermicide found in condoms. Overton, 801 So. 2d at 896. The argument was that if there was spermicide found on the bed sheet, that would corroborate Overton's theory that the semen was planted through a condom.

The second issue involved the admissibility of information as it related to impeachment of Detective Vicso. Id, at 899-900. The state asserts that both issues were directly related to Overton's theory that the chain of custody had been compromised, which lead to the tampering and planting of evidence. Consequently, petitioner is simply seeking an additional review of those issues under the guise of ineffective assistance of counsel. Given that the issue was already raised and rejected by this Court, relitigation is not proper. Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000) (refusing to consider additional argument regarding issue that was already raised on direct appeal).

Moreover, appellant's statement that the issues had been preserved for appeal is incorrect. The record cites referenced by petitioner establish that trial counsel made repeated challenges to the admissibility of DNA based on a Frye[2] analysis, and not because there had been a break in the chain of custody:

> We would adopt our motion to exclude evidence/and or continue the matter. Basically we're not prepared to meet the State's DNA discovery in either a Frye hearing and/or a deposition, which would lie to have had with the BODE Tech people prior to any type of Frye Hearing or testimony

(ROA 1019). Consequently the issue was not preserved for appeal. Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995).

Irrespective of the procedural default, the issue is without merit because the record did not support a claim that there was a break in the chain of custody. As conceded by petitioner, the trial court determined based on the appellate record that the chain of custody was intact. Petition at 23. Furthermore, this Court on appeal noted the following:

> However, even if we were to assume that defense counsel did establish a particularized need for the expert to conduct a test to differentiate between these two forms of Nonoxynol-9, and further assumed that such test did exist, and that when conducted the test would indicate that

[2] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

> the Nonoxynol-9 found on the bed sheet was spermicidal, Overton cannot establish the requisite prejudice. That is, even if the Nonoxynol-9 came from a spermicidal condom, the State argued below that Overton, in his plan to not leave behind any evidence or witnesses, could have easily used a condom, the contents of which either spilled during the forcible sexual assault or when he attempted to remove the condom. Thus, as the State contends on appeal, and as was argued at the trial, it would not have mattered whether the Nonoxynol-9 was spermicidal or commercial grade. That factor, coupled with the correct characterization that the defense failed to produce a scintilla of evidence that Detective Visco planted the seminal fluids, precludes any showing of prejudice by Overton.

Overton, 801 So. 2d at 897 (emphasis added). Consequently, even if counsel raised the "chain of custody issue" on appeal, he would not have been granted relief. Relief must be denied.

ISSUE III

OVERTON'S CHALLENGE TO FLORIDA'S CAPITAL SENTENCING SCHEME IS PROCEDURALLY BARRED

Petitioner challenges the constitutionality of Florida's capital sentencing scheme in light of Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). Overton's arguments can be summarized as follows; the jury's role in Florida's sentencing scheme is merely advisory and therefore doesn't satisfy the requirements of Ring; given that the jury does not make written factual findings, it is unclear

[2] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

whether the jury found each "element" in support of their recommendation of death; and these elements were never charged in the indictment. Petitioner is not entitled to relief.

First Ring is not retroactive in Florida, consequently Overton is not entitled to its application. See Johnson v. State, 904 So. 2d 400 (Fla. 2005)(determining that Ring is not cognizable on collateral review).

Second, Overton's claim is not properly preserved for collateral review. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); See also Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). In the instant case, Overton never challenged the constitutionality of the death penalty statute based on the arguments presented here. At no time did Overton argue that the aggravating factors must be pled in the indictment or that the jury's findings must be in writing. Since the claim was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See Parker v. State, 550 So. 2d 449 (Fla. 1989)(finding collateral challenge to Florida's capital sentencing scheme based on Booth v. Maryland, is procedurally

barred for failure to preserve the issue at trial or on direct appeal).

Third, Ring is inapplicable to Florida's capital sentencing scheme, as this Court has previously recognized, the statutory maximum for first degree murder in Florida is death. Cox v. State, 819 So. 2d 705 (Fla. 2002); Bottoson v. State, 813 So. 2d 31, 36 (Fla. 2002), cert. denied, Case No. 01-8099 (U.S. June 28, 2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, Case No. 01-9154 (U.S. June 28, 2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001); Mills v. State, 786 So. 2d 532, 537 (Fla. 2001); Brown v. State, 803 So.2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Card v. State, 803 So. 2d 613 n. 13 (Fla. 2001.

And finally, to the extent Ring would be applicable to petitioner the requirements of same have been met. The trial court found the existence of the aggravating factor that the murder was committed during the course of a felony[3] and the aggravating factor of prior violent felony.[4] Overton, 801 So.2d at 889. See, e.g., Sochor v. State, 883 So. 2d 766 (Fla. 2004)(rejecting Ring claim based on fact that jury previously convicted appellant of felonies that subsequently formed the basis of an aggravating factor); Kimbrough v. State, 886 So. 2d

[3] Fla. Stat.. 921. 141 (5)(d)

965 (Fla. 2004); Pietri v. State, 885 So. 2d 245 (Fla. 2004); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(same); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003)(same). Relief must be denied.

[4] Fla. Stat. 921. 141 (5)(b)

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for writ of habeas corpus.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Christina Spudeas, 101 N.E.. 3rd Ave, Suite 400, Ft. Lauderdale, Fl. 33301, this 7th day of August, 2006.

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