IN THE SUPREME COURT OF FLORIDA
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No. SC07-1201

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ALVIN MORTON,
Petitioner

versus,

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

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REPLY PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Any claims not addressed in this Reply are not waived. Petitioner stands on the merits as raised in his Habeas Petition.

The following symbols will be used to designate references to the record in this instant cause: "1994R." - record on first direct appeal to this Court; "1999R." - record on second direct appeal to this Court; “1994TR.” - transcript on first direct appeal to this Court; “1999TR.” - transcript on second direct appeal to this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. MORTON’S CONVICTIONS AND SENTENCES.

1. Appellate counsel’s failure to raise a claim that an element of the offense of burglary was never established at the original guilt proceedings or the resentencing proceedings was ineffective assistance of counsel.

Respondent’s first argument on this issue is that appellate counsel could not be found to be ineffective for failing to raise an issue which was not preserved for appeal. In his Habeas Petition, the Petitioner specifically addresses two separate reasons why appellate counsel was not barred from raising this issue on appeal. Citing the case of F.B. v. State, 852 So.2d 226, 230 (Fla. 2003), Petitioner pointed out the longstanding appellate rule under which, in death penalty cases, this Court

is required to review the sufficiency of the evidence to support the conviction. Id. (citing Fla. R. App. P. 9.140(j)). The second exception to the requirement that claims of insufficiency of the evidence must be preserved occurs when the evidence is insufficient to show that a crime was committed at all. Id. It has long been established that due process forbids a state to convict a person of a crime unless all the elements of that crime have been proven beyond a reasonable doubt. Bunkley v. Florida, 538 U.S. 835, 840 (2003).

Both of these exceptions apply in this case. In a death penalty case, this Court must review the sufficiency of the evidence even if that issue has not been preserved by proper objection. Likewise, the failure to prove the material element of ownership meant that there was insufficient evidence that the crime of burglary had occurred. Under either exception, this Court was required to remedy the error of a missing element at trial. As such, appellate counsel was not barred from raising the issue, and therefore rendered ineffective assistance in failing to raise the claim that the crime of burglary, as a basis for felony murder, was not proven.

Respondent states that "Petitioner's argument is patently devoid of merit." The Respondent supports this spurious assertion by relying on this Court's opinion in Petitioner's

original appeal Morton v. State, 689 So.2d 259 (Fla. 1997), and two inaccurate descriptions of the testimony at the guilt phase of the original trial.

As to the reliance on this Court's opinion, the Petitioner would first point out that the opinion is not evidence which could be used to support a factual basis for a burglary charge at the trial level. Second, the passage cited by the Respondent explained that the case was only being returned to the trial court for a new penalty phase because "[i]t is undisputed that Morton and his companion committed burglary by breaking into the victim's house…" Morton, 689 So.2d at 264. This is the very basis of the issue that the Petitioner has raised in his habeas petition – that appellate counsel was ineffective for not disputing that the state had presented adequate evidence to establish a burglary.

In attempting to find record support for the burglary, the Respondent alleges that "[f]irefighters and police found the victims [Bowers and Weisser] at 6730 Sanderling Drive in Hudson on January 27, 1992." (Response to Habeas at p.6) The Respondent does not cite to any specific testimony or witness in the record to support this contention. As the Petitioner pointed out in his habeas petition, the testimony of various law enforcement and fire fighting personnel as presented by the state at the

1994 trial merely established that these witnesses responded to 6730 Sanderling Drive and saw two dead bodies at that location. There is absolutely no testimony from any of these witnesses that they could identify those bodies as John Bowers or Madeline Weiser, or that they had any knowledge as to who occupied or owned the house in question (see Petition for Writ of Habeas Corpus, hereinafter "Petition", 10-11). The only reference in the entire record to the house at 6730 Sanderling Lane belonging to Bowers and Weiser was by the assistant state attorney while he was asking a question. (1994TR.272, Petition 11).

The second point of testimony the Respondent relies upon to support the burglary is the testimony of Linda Custer. After identifying herself and stating that she knew Bowers from working with him at a real estate office, the Respondent contends that she testified that she visited Bowers at his home which he shared with his mother on Sanderling Lane, that they lived there alone with two dogs, and that she was able to identify both bodies at the medical examiner's office (Response at p.6). However, as previously pointed out by Petitioner, Custer only testified that she had met Bowers mother a few times at her home on Sanderling Lane (1994TR.860), that she had been inside the home and was not aware of anyone living there other than Bowers, Weisser and her two dogs (1994TR.860), and that she

was asked to look at two bodies at the Medical Examiner's Office and was able to identify both of them (1994TR.860)(Petition 14). Custer never testified when she made these visits, whether these visits were to 6730 Sanderling Drive or to some other residence where Weiser may have lived, and to what identification she made of the bodies she was shown. This lack of testimony as to identification is especially important since another state witness, medical examiner Dr. Edward Corcoran, testified that Custer could not identify Weiser (1994TR.858-59).

Respondent next asserts that the Petitioner "had no legitimate defense to the burglary charge" and "certainly had no ownership or possessory interest in the house on Sanderling Lane." (Response at p.6) As to the first assertion, Petitioner was not required to assert a specific defense to the charge of burglary, as that would be impermissible burden shifting. Further, the failure of the state to prove a material element of an offense is a "legitimate defense" to that charge. As to the second assertion, Respondent is making assumptions based upon evidence not contained in the record. There simply was no evidence in the record that Bowers or Weiser had "ownership, possession, or control" over the property in question, a material element of the burglary charge, as is required by D.S.S. v. State, 850 So.2d 459, 461 (Fla. 2003).

Respondent relies upon D.S.S. in asserting that Bowers and Weiser had ownership or control of the Sanderling home superior to that of Petitioner. However, in D.S.S., this Court held that proof of ownership of a school superior to that of the defendant could be inferred where there was testimony by multiple witnesses of the name of the school and its location, where an assistant principal testified that he worked at the school and responded there the day of the burglary, and where the defendant was a juvenile (and therefore could not possess ownership interest in the building.) Id. at 462. In this case, there was no evidence in the record about Bowers or Weiser having any ownership, possession or control of the building in question, and the Petitioner is not a juvenile, meaning an inability to own, possess or control the property cannot be inferred. Since there was no evidence presented that established that Bowers and Weiser had any type of ownership or control of the property, this element was not established and appellate counsel was ineffective for failing to challenge it.

Respondent argues that appellate counsel had even less reason to challenge the in the course of a felony aggravator based upon a burglary because of three things: the fact that the issue was not preserved, the fact that defense counsel said he did not have a problem with burglary, and because Petitioner had

been convicted of burglary and had his conviction affirmed on direct appeal by this Court. (Response at p.7)

As to the preservation issue, Petitioner would rely upon the fact that this Court has stated that it has an independent obligation to review each death penalty case and determine whether death is the appropriate punishment. Shere v. Moore, 830 So.2d 56, 60 (Fla. 2002). As for the Respondent's assertion that defense counsel responded "No" when asked if he had any problems with burglary, this reply is taken out of context. Petitioner would point out that defense counsel at the time in question was asked if he had an objection to the presentation of a burglary instruction, not whether the defense was admitting to a particular aggravating circumstance. Finally, the fact that this Court had previously upheld a conviction on appeal did not affect the state's burden of proof below, and that the burden of proving this particular aggravating circumstance was required to be done by the state, on the record. As outlined in Petitioner's Habeas brief, the state presented even less evidence of burglary at the resentencing trial, and therefore appellate counsel was ineffective for not challenging that aggravator on appeal.

2. Appellate counsel's failure to raise a claim that the lower court's finding of the CCP and avoiding arrest aggravators was improper and duplicative was deficient performance which prejudiced Mr. Morton.

a. Finding of CCP aggravator was improper

Respondent asserts that appellate counsel was not ineffective in failing to challenge the CCP aggravator because evidence in the case established a prearranged plan to kill, that the Petitioner was armed with a shotgun, and that the Petitioner made statements that he planned to kill people. (Reply at p.9-10) Respondent has failed to address the argument raised in the petition that, while this evidence supports the heightened premeditation and careful plan elements of CCP, it does not provide sufficient proof of the cool and calm reflection element. Respondent therefore concedes this point.

This Court has held that the cool and calm reflection element is a distinct element of CCP and must be proven separately from the calculated and premeditated elements. Jackson v. State, 704 So.2d 500, 504 (Fla. 1997). Evidence of a premeditated, planned intent to kill cannot, under the precedent of this Court, be used to prove the "cool" element of CCP. Logic also dictates that evidence of a predesigned plan to kill is not probative of the issue of whether the killings were the product of cool and calm reflection.

Looking to the evidence itself, while there is ample evidence of planning, there is no evidence in the record that there was any discussion or planning as to how any killings would be accomplished. All of the statements by the Petitioner

introduced at trial that the Respondent points to in support of CCP are general statements about killing, but not a specific plan or discussion as to how this would be accomplished. As this Court has noted, the focus in a CCP analysis is on "the manner in which the crime was executed." Sireci v.Moore, 825 So.2d 882, 886 (Fla. 2002). So in the "cold" analysis, the question must be whether, in addition to any heightened premeditation and planning, is there ample evidence that the crime was committed in a manner evidencing cool and calm reflection? As pointed out in Petitioner's brief, that is not the case. Rather, the evidence shows that Bowers was killed either as a result of him turning to look at the Petitioner when told not to, or as a result of Bowers informing the Petitioner that he wouldn't inform the authorities and the Petitioner yelling "That's what they all say!" and shooting Bowers, as found by the trial court. (1999R.154). The killing of Bowers was not cold and calculated, but rather the result of a split-second decision when Bowers did not follow instructions or an emotional rebuke of Bowers assertion that he would not contact police. The trial court's factual finding supports this argument, in that the trial court found that Petitioner was yelling at the time he fired at Bowers, signifying emotion, rather than a cool calmness. This

aggravator was not established and appellate counsel was ineffective for failing to challenge it.

b. Finding of Avoiding Lawful Arrest aggravator was improper

Respondent points to evidence that Petitioner did not want to be arrested in support of a finding of the avoid arrest aggravator. (Reply at p.11-12) However, as this Court has stated, the avoid arrest aggravator focuses on the motive for the murder of the victim. Sireci v. Moore, 825 So.2d 882, 886 (Fla. 2002). The evidence in this case relied upon by the Respondent shows, at best, a desire not to get caught, not that the sole or dominant motive for the crime was to avoid arrest, as is required under the law.

Since a finding of the avoid arrest aggravator must be based upon evidence that the sole or dominant purpose of the murders was to avoid arrest, evidence that Alvin Morton and the other boys with him wore gloves, later returned to the scene of the crime to set a fire, and expressed a desire not to get caught are all irrelevant to whether the motive for the killings was to avoid arrest. They simply show that Petitioner and the others did not want to get caught, a state of mind presumably present in almost anyone who has committed a crime.

There is very little left then to base a finding of the avoid arrest aggravator upon. Indeed, the only other evidence relied upon by the trial court and the Respondent are the conversation between Bowers and Petitioner immediately prior to Bowers death and the testimony of a jail guard about a conversation he testified he overheard between Petitioner and another inmate. As Petitioner noted in his brief, in addition to being inconsistent with one another, these two statements do not establish, beyond a reasonable doubt, that the killing was done to avoid arrest. Rather they show that Petitioner shot Bowers despite Bowers assertion that he would not call the police or that Bowers was shot when he disobeyed a command to stay down on the floor. Neither of these scenarios is proof that the killing was done for the sole or dominant motive of avoiding arrest.

A closer look at the case law relied upon by the Respondent further supports Petitioner's position that the avoid arrest aggravator was improperly found. In two of the cases, this Court found that the avoid arrest aggravator was not supported by the evidence in the case. Zack v. State, 753 So.2d 9 (Fla. 2000)(aggravator improperly applied where record suggested that murder was part of premeditated plan to kill victim, fact that victim could identify defendant not significant); Mahn v. State, 714 So.2d 391 (Fla. 1998)(aggravator not found where defendant

admitted he stabbed second victim when she entered room and tried to get him). In the two cases where this Court upheld the aggravator, the finding was based upon facts showing that the motive for the killing was to prevent being arrested. Sliney v. State, 699 So.2d 662 (Fla. 1997)(victim killed during robbery after co-defendant told Sliney he had to kill victim to keep someone "from finding out or something); Peterka v. State, 640 So.2d 59 (Fla. 1994)(murder committed as part of plan to avoid arrest and detection for crimes Peterka was a fugitive from justice on).

It is also important to note that the Respondent's assertion that the State presented "strong, indeed. overwhelming evidence to establish that the murder was for the dominant purpose of avoiding arrest" (Respondent's Brief at 12-13) is disingenuous in that the State's theory of the case throughout the trial, and indeed in other places in this brief, is that the killings in this case where a predesigned plan where the entire purpose of the events of that night were for Petitioner and the others with him to kill the victims. To allow the State and trial court to extend the avoid arrest aggravator to a case where the State argued, and the trial court found, that the killings were a preplanned event unrelated to any type of witness elimination, would undermine this Court's previous holdings that "proof of

the requisite intent to avoid arrest and detection must be very strong," in such cases to sustain the avoid arrest aggravator as it extends to witness elimination. Urbin v. State, 714 So.2d 411, 415 (Fla. 1998)(citing Riley v. State, 366 So.2d 19 (Fla. 1978)). The avoid arrest aggravator is specifically targeted at witness elimination as a motive for murder. To extend it to a situation such as Petitioner's would violate the Eighth Amendment's requirement that a capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty. Loving v. U.S., 517 U.S. 748, 757 (1996). There is no evidence of any kind in this case that the killing was designed to eliminate witnesses, and as such appellate counsel was ineffective for failing to raise this meritorious issue.

c. Finding both CCP and Avoiding Lawful Arrest improper doubling

While Respondent has correctly pointed out that CCP and the avoid arrest aggravators are not per se doubling, he fails to note that this court has found in some cases that the two aggravators cannot both be supported by the evidence. As noted in Petitioner's brief, in Troedel v. State, 462 So.2d 392, 397 (Fla. 1984), this Court held that, in a scenario on point with the current case, it was improper for the avoid arrest aggravator to be applied where CCP was found based upon the theory that there was premeditated intent to kill the victims

according to a pre-arranged plan. Since the evidence showed that the primary purpose of the entry to the home was to commit murder, the avoid arrest aggravator was not proved beyond a reasonable doubt and it was disapproved by this Court. Id. As in Troedel, "going to the victims' home for the specific purpose of killing them would seem to indicate that the primary purpose of the defendants' action was not burglary and robbery but murder." Applying Troedel to this case then, with very similar facts, it would be improper to find avoiding arrest was a dominant or primary purpose where a finding of CCP was already based on the fact that the home was entered with premeditated intent to kill.

Reasonably competent appellate counsel would have raised the issue of the improper doubling of the CCP and avoid arrest aggravators. This court would have struck one of both of those aggravators. Confidence in the outcome is undermined. When combined with the other sentencing errors, the consideration of these aggravators could not be said to be harmless beyond a reasonable doubt. Therefore, appellate counsel was ineffective in failing to raise this claim and counsel's failure violated Mr. Morton's Fifth, Sixth, Eighth, and Fourteenth Amendment rights because he was sentenced to death on an unproven

aggravator. Espinosa v. Florida, 505 U.S. 1079 (1992); Zant v. Stephens, 462 U.S. 862 (1983).

4. Appellate counsel failed to raise a claim that Mr. Morton's right to a public trial was violated at his 1994 and 1999 trials.

Respondent makes three errors in addressing the violation of Petitioner's right to an open and public trial. First, Respondent argues that the issue was not preserved for appeal, disregarding the fact that the error presented is fundamental error. Second, Respondent presumes and supposes facts and rational for the improper closing of the courtroom not supported by the record. And third, Respondent attempts to impose a prejudice requirement on the Petitioner, when it is clear that Petitioner is not required to show prejudice when his right to a public trial has been violated.

Respondent's assertion that this issue was not preserved for appeal because of the lack of a contemporaneous objection is erroneous. The right to a public trial is fundamental and may be relinquished only upon a showing that the defendant knowingly and voluntarily waived such a right. Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (holding that right to a public trial was not waived by failing to object at trial). As the Supreme Court has held, "every reasonable presumption should be indulged against" waiver of a

fundamental trial right. Hodges v. Easton, 106 U.S. 408, 412 (1882). As such, no objection was required to preserve this issue of a fundamental trial right for review.

Respondent's next goes outside of the record to infer and presume justifications for the closing of the courtroom. This is improper. An appellate court is bound by the record. Respondent claims it is "apparent" that the trial court did not exclude anyone from the courtroom. (Reply, p.17) However, it is not "apparent" that no one was excluded from the courtroom. Rather, the only thing "apparent" from the record is that both trial judges, without any prior announcement or warning, secured the courtroom and prevented access to the courtroom for members of the public. (1994TR.951, 1999TR.771).

Respondent states that the trial court "did not want anyone leaving or entering the courtroom when he read the jury instructions" and argues that the court "presumably" did not want distractions during the reading of the instructions. (Reply p.17) None of these assertions is supported by the record in this case and are simply efforts by Respondent to impose a justification for the closing of the courtroom into the record when none exist. In addition, preventing people from entering the courtroom is a violation of the right to a public and open trial. It should be noted that the one case cited by the

Respondent in support of their contentions, U.S. v. Juarez, 573 F.2d 267 (5th Cir. 1978), dealt not with the closure of the courtroom to the public, but rather with the exclusion of witnesses from certain parts of the trial so as not to jeopardize their ability to testify in the future, similar to Florida's rule of sequestration as laid out in Wright v. State, 473 So.2d 1277, 1280 (Fla. 1985).

Petitioner again points out that there are four prerequisites that must be satisfied before the presumption of openness can be overcome: (1) the party seeking to close the hearing must advance an overriding interest that it is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceedings; and (4) the court must make findings adequate to support the closure. Pritchett v. State, 566 So.2d 6, 7 (Fla. 2d DCA 1990)(citing Waller v. Georgia, 467 U.S. 39, 46 (1984)).

There is no evidence that either trial court: put any reasons for, or justification of, such a closure on the record; that the closure was done at the request of either party; that either party had advanced notice of the closure; or, that a hearing was held prior to the closure of the courtroom. Nothing in the record reflects that, prior to closing the courtroom, any

announcements were made to ensure that members of the press and public who wanted to be present were made aware of this closure. Rather, it appears that each trial court simply announced that the courtroom was about to be closed and it was immediately done. There is likewise no evidence that, as the Respondent now tries to "presume" into the record, these closures were part of a practice on the part of either court to avoid disruptions or distractions by allowing entry into and exit from the courtroom only at specific times.

Based on this complete lack of justification for the closure in the record, the State has not met the weighty burden required for violating the right to a public trial. No overriding interest for the closure was put forth by any party and the court did not make adequate findings of such as required under Waller. Likewise, there is nothing in the record to show that the closure was limited in its scope or that reasonable alternatives were considered, as is required. Any finding that the closure was justified by some substantial need to control access to the courtroom during the trial is not supported by the record and in fact contradicted by the fact that at only one part of each trial was such a restriction, without any warning, put into place.

Finally, Respondent attempts to impose a prejudice requirement by arguing that there is no evidence in the record that anyone from the public or press was excluded from Petitioner's trial. However, a defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee. Waller, 467 U.S. at 49. "[O]nce a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way. The mere demonstration that his right to a public trial was violated entitles a petitioner to relief." Judd v. Haley, 250 F.3d 1308, 1315 (11th Cir.2001). Thus, Respondent's argument that the Petitioner has not made a required showing that a specific person was excluded from the courtroom is an improper imposition of a prejudice requirement. In this case, Petitioner has clearly shown that the right to a public and open trial was violated, and therefore he is automatically entitled to relief.

5. Appellate counsel's failure to raise a claim that the 1994 trial court improperly denied Mr. Morton's motions to dismiss was ineffective assistance of counsel.

Respondent asserts that counsel for petitioner admits that the issues he raises in this section have no merit. Petitioner specifically refutes this allegation. While acknowledging that this Court has held that some of the issues are not meritorious,

Petitioner raises them specifically because of the belief that these issues do have merit.

Petitioner also refutes the Respondent's claim that Petitioner's brief simply refers to motions below and fails to provide supporting argument. As to the Motion to Dismiss No. 1, Petitioner specifically argued that the aggravating circumstances that the state relied upon constitute an element of the offense and were not included in the charging document as required, and that this omission prejudiced Petitioner in the preparation of a defense. As to Motion to Dismiss No. 4, Petitioner properly alleged that Section 921.141, Fla. Stat. (1989) was unconstitutionally vague and overbroad, specifically in that did not require the jury to make written factual findings and allows the trial court to arbitrarily impose the penalty of death since the statute does not require the judge to examine and consider how the jury rendered the verdict.

Finally, Respondent does not address Motion to Dismiss No. 6 because electrocution is no longer the primary method of execution in Florida. As this Court is well aware, the means of execution at time of the offense was solely electrocution, and there is no guarantee that the state will not turn, or return, to a form of execution other than lethal injection when issues relating to that method of execution are resolved.

CLAIM II

MR. MORTON'S DEATH SENTENCE VIOLATES HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE DID NOT HAVE A CONSTITUTIONAL JURY VERDICT ON EACH ELEMENT OF THE CAPITAL OFFENSE.

Petitioner will rely upon his argument as to this point as laid out in his initial brief.

CLAIM III

MR. MORTON'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. MORTON MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

Petitioner will rely upon his argument as to this point as laid out in his initial brief, and again emphasize that based upon In Re: Provenzano, 215 F.3d 1233 (11th Cir. June 21, 2000), the Petitioner is required to raise this issue at this time to preserve it for future review.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to all counsel of record on this ____ day of December, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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