IN THE SUPREME COURT OF FLORIDA
==========

No. SC08-644

==========

FRED ANDERSON, JR.,
Petitioner

versus,

WALTER A. MCNEIL,
Secretary, Florida Department of Corrections,
*Respondent***.**

==========

REPLY PETITION FOR WRIT OF HABEAS CORPUS

==========

NATHANIEL E. PLUCKER
FLORIDA BAR NO. 0862061

MARIA D. CHAMBERLIN
FLORIDA BAR NO. 0664251

MARIE-LOUISE SAMUELS PARMER
FLORIDA BAR NO. 0005584
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

PRELIMINARY STATEMENT

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

Citations shall be as follows: The record on appeal from Mr. Anderson's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

CLAIM I

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

A. Introduction

Respondent argues that Petitioner has asserted that appellate counsel is required to raise every colorable or non-frivolous argument, and then includes three pages of block quotes on this issue. (Response, p.2-5). Petitioner never asserted such a requirement in his Petition, and again states that ineffective assistance of appellate counsel claims should be evaluated under the requirements of Strickland v. Washington, 466 U.S. 668 (1984), with its dual requirements of deficient performance and prejudice.

In that same section, Respondent includes a block quote from Farina v. State, 937 So.2d 612 (Fla. 2006) and asserts that appellate counsel cannot be deemed ineffective for failing to raise an issue on direct appeal that was not properly preserved below. (Response, p.6). However, as outlined in the Petition, the actual rule from Farina states that appellate counsel cannot be deemed ineffective for failing to challenge an unpreserved issue unless it resulted in fundamental error. Farina, 937 So. 2d at 629.

B. Appellate Counsel Failed to Raise on Appeal the Trial Court's Improper Denial of the Motion to Change Venue

i. Failure to Appeal Denial of Motion

In response to Petitioner's claim relating to his motion for change of venue, the Respondent first argues that the Petition did not inform this Court that the motion for change of venue was not denied until immediately before the jury panel was empanelled and sworn. (Response, p. 13). However, as cited in the Petition, at a pre-trial hearing on September 18, 2000, the trial court heard arguments on the Petitioner's motion for change of venue and stated that "I think we will be able to pick a fair jury" and that "your motion will be denied." TR Vol. VI, p.178. The trial court then reaffirmed this ruling before the jury was sworn because "We did get a jury for this case." TR Vol. XII, p.1312.

Respondent then again includes three pages of block quotes which are supposed to support its opposition to the claim. In the first part of this block quote, Respondent cites Henyard v. State, 689 So.2d 239, 245-6 (Fla. 1996) for the proposition that, since a jury was seated in this case, the motion for change of venue was moot. However, this only addresses one half of the actual prejudice/presumed prejudice standard as laid out in Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), as discussed in the Petition. Petitioner has argued, and continues to argue, that regardless of whether an actually prejudiced juror can be shown to have been seated in this case, the pretrial publicity was sufficiently prejudicial, inflammatory, and saturating that prejudice should be presumed. As detailed in the Petition, the pretrial publicity in this case was substantial and very prejudicial, and reached not only the local community, but surrounding metropolitan areas as well. This evidence shows that the community was pervasively exposed to the circumstances of the incident and that prejudice, bias, and preconceived opinions are the natural result. Manning v. State, 378 So.2d 274, 276 (Fla. 1979).

In the second half of the extended block quote, the Respondent cites Provenzano v. Dugger, 561 So.2d 541, 544-5 (Fla. 1990) to argue that trial counsel for Petitioner should have renewed the motion for change of venue prior to the jury being sworn and that this "raises a question" about the preservation of the issue. (Response,

p. 16). However, the cited quotation points out that the motion for change of venue in Provenzano was an oral motion prior to jury selection, trial counsel agreed to hold the motion in abeyance until an attempt at selecting a jury was made, the trial court never actually ruled on the motion, and trial counsel made a tactical decision not to renew the motion. Id. None of these circumstances are present in Petitioner's case, where the trial court denied the motion at a pretrial hearing and then renewed that denial prior to the jury being sworn. The trial court was certainly aware of the basis of Petitioner's motion and ruled on it twice on the record. There should be no doubts that this issue was preserved for appellate review.

The remainder of the Respondent's argument is that this issue is "weak" and that there "was no basis for reversal" of the trial court on the motion. (Response, p. 17). Petitioner therefore will rely upon the extensive presentation of evidence on the prejudicial and saturating nature of the pretrial publicity in this case as outlined in his Petition, and emphasize that the presumed prejudice standard for granting a pretrial motion for change of venue has been met in this case.

ii. *Failure to Ensure Complete Record on Appeal*

While Respondent does not directly address this claim, Respondent does argue that the Court should not consider any evidence related to jury questionnaires and that since the Court denied Petitioner's Motion to Correct/Supplement Record and Toll

Time for Filing of State Habeas and All Acts Related To It, this issue has already been decided. Petitioner refutes these contentions.

Petitioner specifically claimed that appellate counsel was ineffective for failing to ensure that the record on appeal was complete, referring to the failure to include the jury questionnaires in the record on direct appeal. As noted in the Petition, trial counsel for the Petitioner moved for the trial court to take judicial notice of the questionnaires without objection (TR Vol. VI, p.171), and specifically requested that all questionnaires be made a part of the record in the written motion for change of venue (TR Vol. IV, p.541). In addition, these questionnaires are certainly "original documents" that are to be considered part of the record under Fla. R. App. P. 9.200(a)(1). Since Respondent does not address this issue other than to characterize the Petitioner's argument as "stand[ing] reason on its head", the claim should be deemed admitted and this Court should take appropriate action to ensure that this vital part of the record is considered in deciding the motion for change of venue.

C. Appellate Counsel Failed to Raise on Appeal the Violation of Mr. Anderson's Due Process Right to be Present as Required During the Examination of Prospective Jurors and for the Trial Court Judge to be Present for a Fundamental Aspect of the Trial

Respondent asserts that the Petitioner's claim is that he was not present for the "general qualification" of the jury panel and that this issue is foreclosed by settled law,

citing Robinson v. State, 520 So.2d 1, 4 (Fla. 1988). However, the Respondent has incorrectly interpreted Petitioner's claim. In addition, the Robinson case, as outlined in the Petition, actually supports Petitioner's claim.

In Robinson, the defendant objected to the fact that potential jurors in his case were asked general qualification questions as part of a larger group of jurors prior to being brought to the courtroom for voir dire examination. Id. This Court held that this was not a critical stage of the proceedings requiring the defendant's presence. Id. However, and most importantly for this case, the Court noted that Mr. Robinson was present at the time the jury panel for his particular case was sworn, and that this moment marked the beginning of his trial. Id.

Neither the Petitioner nor trial judge, as outlined in the Petition, were present at the time Petitioner's trial commenced, which under Robinson and other cases (see Petition p.22-3), is when the jury panel for voir dire examination is sworn. It is also important to note that the Respondent, in addition to failing to correctly identify the claim, also fails to acknowledge or address that this exact right has already been recognized in the federal courts of this circuit. See U.S. v. Pinero, 948 F.2d 698, 700 n.4 (11th Cir. 1991)(citing U.S. v. Martin, 740 F.2d 1352, 1358-59 (6th Cir. 1984)).

Respondent's only other identifiable argument against this claim is that the claim was not "remotely preserved" for appellate review. However, this Court has

recognized the right at issue, to be present at a critical stage in the proceedings, as one of a criminal defendant's most basic rights. Jackson v. State, 767 So.2d 1156, 1159 (Fla. 2000)(citing Illinois v. Allen, 397 U.S. 337, 338 (1970)). This Court has repeatedly remanded for new trials where this right has been violated. See Orta v. State, 919 So.2d 602 (Fla. 3d DCA 2006)(remand for new sentencing where defendant was not present at sentencing – 3.180(a)(9)); Williams v. State, 785 So.2d 652 (Fla. 2d DCA 2001)(remand for new proceedings where defendant was not present at pretrial conference – 3.180(a)(3)); T.D.T v. State, 561 So.2d 1333 (Fla. 5th DCA 1990)(remanded for new trial where defendant not present for jury view – 3.180(a)(7)); Savino v. State, 555 So.2d 1237 (Fla. 4th DCA 1989), quashed on other grounds, 567 So.2d 892 (Fla. 1990)(remand for new trial where defendant not present for jury question and court's answer – 3.180(a)(5)); Taylor v. State, 385 So.2d 149 (Fla. 3d DCA 1980)(finding per se error and remanding for new trial where defendant not present for jury instructions – 3.180(a)(5)). The raising of such a fundamental error could, and should, have been raised by appellate counsel on appeal, and the failure to do so was deficient performance which prejudiced Petitioner.

D. Appellate Counsel Failed to Raise on Appeal the Failure of the Trial Court to Give the Legally Required Merging Instruction for the Penalty Phase

Respondent asserts that Petitioner's claim is expressly rejected by Florida law and cites three cases in support of this proposition: Larzelere v. State, 676 So.2d 394 (Fla. 1996); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992); Echols v. State, 484 So. 2d 568 (Fla. 1985). Respondent is presumably arguing that the CCP and pecuniary gain aggravators, as a matter of law, can never be doubled. However, this is not the current law on doubling of aggravators in Florida.

"[F]acts in a given case may support multiple aggravating factors provided the factors are not based on the same essential feature of the crime." Larzalere, 676 So.2d at 406. In all three of the cases cited by the Respondent, the Court held that the two aggravating factors at issue were properly found in the case because they were not based on the same essential feature of the crime or of the offender's character. However, as outlined in the Petition, the CCP and pecuniary gain aggravators in this case were based on the same essential feature of the crime, namely the plan to rob the bank. (Petition, p.28). As such, the aggravators were improperly doubled, and the jury should have been given a merging instruction.

CLAIM II

MR. ANDERSON'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. ANDERSON 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. Anderson 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 August, 2008.

_____
Nathaniel E. Plucker
Florida Bar No. 0862061

_____
Maria D. Chamberlin
Florida Bar No. 0664251

_____
Marie-Louise Samuels Parmer
Florida Bar No. 0005584
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544

Copies furnished to:

Judge G. Richard Singeltary
Circuit Court Judge
550 W. Main Street
Tavares, FL 32778

William M. Gross
Assistant State Attorney
550 West Main Street
Tavares, FL 32778

Kenneth Nunnelley
Assistant Attorney General
444 Seabreeze Blvd, 5th Floor
Daytona Beach, FL 32118

Fred Anderson, Jr.
DOC #218693
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

_____

Nathaniel E. Plucker
Florida Bar No. 0862061
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Counsel for Petitioner