IN THE SUPREME COURT OF FLORIDA

LEONARD P. GONZALEZ, JR.,

Appellant,

v.

CASE NO. SC17-1146
Lower Tribunal No.
2009-CF-3249C
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

RESPONSE BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the July 9, 2009, murders of Byrd and Melanie Billings are recited in the Florida Supreme Court's opinion in the direct appeal:

> Leonard Patrick Gonzalez, Jr. (Gonzalez) was charged with two counts of first-degree premeditated murder in the shooting deaths of Byrd and Melanie Billings in their Escambia County home on the evening of July 9, 2009. Gonzalez was also charged with armed home invasion robbery for this incident. Gonzalez and four other men—Frederick Thornton, Rakeem Florence, Donnie Stallworth, and Wayne Coldiron—invaded the Billings' home at three different entry points with the intent to steal a safe that purportedly contained $13 million. The men wore black clothing, masks, and gloves and were carrying firearms. Florence carried an AK-47, Stallworth and Thornton had shotguns, Coldiron had a .357 revolver, and Gonzalez carried a nine-millimeter automatic pistol. Three others-Leonard Gonzalez, Sr., Gary Sumner, and Pamela Long-Wiggins—also had roles in the crimes. Gonzalez, Sr., remained in Gonzalez's large red van outside of the Billings' home. Sumner stayed out on the highway in a Ford Explorer, communicating with Gonzalez via walkie-talkie. Long-Wiggins participated after the fact by hiding the safe taken from the Billings' home and either hiding or disposing of the weapons used in the home invasion. The men did not know that the Billings had a surveillance system in their house in order to monitor their nine adopted children who have various disabilities. That surveillance system captured some of the events during the invasion, including the Billings being accosted in their living room, and provided a view of Gonzalez's red van parked outside of the home. However, there was no camera in the Billings' master bedroom where the fatal shots were fired.

Two of the participants in the crimes, Thornton and Florence, told their families that they knew about the murders because they had accompanied some men in a van to the house to buy "weed," but never entered the house and did not know that anything was going to happen until they heard the shots and saw the men run out of the house. At the urging of their families, Thornton and Florence turned themselves in to law enforcement. When the police confronted the men with evidence from the surveillance video, Thornton and Florence admitted that their initial stories were false and confessed to their involvement in the crimes. Both men testified that Gonzalez was the individual who planned the crimes. He solicited the others to participate in the home invasion robbery in order to get $13 million that he believed the Billings kept in the safe. The group met several times at Fifth Dimensions, a car body shop in Fort Walton Beach owned by Sumner. As the plans progressed, they also met at Gonzalez, Sr.'s trailer in Pensacola. Gonzalez would contact Sumner, who would then contact Thornton, Florence, and Stallworth, to gather for these meetings.

On the day of the murders, the group was contacted and drove in Stallworth's Explorer to a Wal-Mart in Gulf Breeze to meet Gonzalez. Gonzalez was driving a red minivan that belonged to Long-Wiggins. Sumner, Stallworth, and Gonzalez went into the Wal-Mart, and Thornton and Florence remained in the Explorer in the parking lot. A security video from the Wal-Mart places Sumner, Stallworth, and Gonzalez inside the store on July 9 at 3:30 p.m., where they purchased a pair of boots. The men then drove in the two vehicles to Gonzalez, Sr.'s house, where Coldiron was also present.

Gonzalez provided the weapons, black clothing, masks, and gloves that the participants used in the crimes. Gonzalez showed the others pictures and a layout of the Billings' home and gave them their assignments. He told Thornton and Florence to enter through a door on the far left of the home, Stallworth to enter through

the front door, and Coldiron to enter with Gonzalez through a sliding glass door in the master bedroom. Gonzalez showed the others how to use zip ties to secure the victims' hands and passed out the ties. He remained in charge after the participants entered the Billings' home.

Gonzalez accosted Mr. Billings and demanded that Mr. Billings tell him where the money was located. When Mr. Billings replied that he did not have any money, Gonzalez fired a shot into the floor. Gonzalez repeated the same question and received the same response from Mr. Billings. Gonzalez then shot Mr. Billings in the leg. Gonzalez repeated the question again, received the same response, and shot Mr. Billings in the other leg. Gonzalez then led the Billings into the master bedroom. Thornton and Florence's testimony about the events inside the house was consistent with the surveillance video. According to Thornton's account, the Billings, Gonzalez, and Stallworth were in the bedroom. While Thornton retrieved duffel bags from the van outside, he heard three more shots. When Thornton returned to the bedroom, he saw Mr. Billings lying face down on the floor in a pool of blood. Gonzalez then asked Mrs. Billings to open the safe in the closet of the bedroom. Thornton saw Gonzalez fire the gun again, but could not see Mrs. Billings. According to Florence's account, only Gonzalez was in the bedroom with the Billings when the shots were fired. Gonzalez then ordered the others to take the safe and leave. When Florence entered the bedroom to retrieve the safe, he saw Mr. Billings lying on the floor, but could not see Mrs. Billings.

The group left in Gonzalez's large red van, then met up with Sumner in the Explorer. The safe and guns were transferred to the Explorer.

Gonzalez told Gonzalez, Sr. and Coldiron to drive the large red van back to Gonzalez, Sr.'s house in Pensacola. The others got into the Explorer, removed their black clothing, and drove to a location where they

had left Long-Wiggins' red minivan before the crimes were carried out. Gonzalez, Sumner, and Stallworth drove the red minivan back to the Pensacola area. Thornton and Florence returned in the Explorer and met with the others in the red minivan at the Wal-Mart in Gulf Breeze. Both vehicles were driven to Long-Wiggins' antique store. The safe was left with Long-Wiggins in a storage area behind her store. The guns were left with Long-Wiggins and Gonzalez. Gonzalez told Thornton and Florence to take the clothing worn during the crimes and burn all of it, which they did.

Law enforcement was called to the Billings' home by April Spencer, a registered nurse who lived in a trailer on the Billings' property and helped them with the children. Spencer had been alerted when Adrianna, one of the Billings' children, came to her trailer. Adrianna had been instructed to go to Spencer's trailer in a phone conversation she had with Ashley Markham, the Billings' adult daughter who did not live in the home. Markham had received a missed call from her mother's home phone number and returned the call. Jake, another of the Billings' children, answered the call and was screaming incoherently. Markham asked him to speak to their mom or dad, but instead, Adrianna got on the phone and alerted Markham about what was happening in the house. Markham told Adrianna to run to April Spencer's house and get her. When Spencer arrived, she saw blood in the hallway and found the Billings on the floor of the master bedroom. She called emergency services, and the Escambia County Sheriff's Office responded to the scene.

The Billings both died of multiple gunshot wounds. Mr. Billings was shot five times: in both legs, the left cheek (exiting at the right side of the neck), and twice in the back of the head. The two leg wounds would have been survivable; the cheek wound [would] have been survivable for a few minutes until the victim drowned in his own blood; the two head wounds were inflicted close together, based on the similar angles and positions of the wounds, and were each fatal. Mrs. Billings was shot four times: once in the face, once in the head, and twice

in the chest. All of her wounds were fatal; the first shot to her face would have rendered her unconscious; the other shots were inflicted as she lay on her back on the floor. Mr. Billings was located face down in the bedroom with a zip tie on his left wrist; Mrs. Billings was on her back in front of the closet. All of the bullets and shell casings recovered from the crime scene were nine-millimeter. A firearms examiner was able to show that the two bullets recovered from Mrs. Billings' body were fired from a Springfield Armory nine-millimeter pistol that was found hidden in the springs under the cushion of the back seat of a vehicle owned by Long-Wiggins. Three other bullets and all ten bullet casings recovered at the residence were also fired from that nine-millimeter pistol.

The safe taken from the Billings' home was recovered unopened under a pile of bricks in the backyard of Long-Wiggins' residence. Long-Wiggins' fingerprints were found on a plastic bag covering the safe. Long-Wiggins and her husband, Hugh Wiggins, gave an AK-47 and two shotguns to Eddie Denson, a friend in Mississippi, who turned the weapons over to law enforcement. Denson also observed Hugh Wiggins toss a small handheld radio onto the side of the road, which was recovered by law enforcement the next day. Gonzalez's DNA was found on the AK-47. Gonzalez was also included as a possible contributor of the DNA found on one of the shotguns. Gonzalez's large red van was recovered behind Gonzalez, Sr.'s trailer. The van contained a package of trash bags, a canister of disinfectant wipes, some scouring pads, and two tires. Gonzalez's fingerprint was recovered from the interior of the back passenger side window of the van.

Lonnie Smith and Tony Eisa both testified that Gonzalez had approached them in June or July 2009 about participating in a job or a robbery involving a safe and millions of dollars. Both men refused to participate. Carol Brant, the wife of Gonzalez, Sr., testified that she lived with Gonzalez, Sr., and that the defendant had met with Gonzalez, Sr., several times in the months before the crimes. Brant

overheard Gonzalez talking about a robbery and a person who was dealing drugs. She also testified that Gonzalez came over on July 9, but she left shortly after he arrived. The sister of Gonzalez, Sr., testified that she lived near her brother and could see the front of his house from her home. On or about July 9, she saw Gonzalez, Gonzalez, Sr., and three or four other men arrive in three different vehicles. Gonzalez arrived in a red minivan, and the others were in an SUV.

The defense elected not to present any evidence. During jury deliberations, the jury sent two questions to the judge, asking for a magnifying glass and for transcripts of all witness testimony. Over defense objection, the judge provided a magnifying glass to the jury. With the agreement of the parties, the judge instructed the jurors to rely on their recollections of the testimony. On October 28, 2010, the jury found Gonzalez guilty of first-degree murder in the deaths of the Billings and home invasion robbery with a firearm.

The penalty phase proceedings commenced the same day the verdict was returned. The State presented three witnesses related to Gonzalez's 1992 robbery conviction. Gonzalez limited his mitigation witnesses to his mother and his wife. Without objection, the trial court instructed the jury on the following statutory aggravators: prior violent felony, committed in the course of a robbery, committed for financial gain, and that the capital felony was especially heinous, atrocious, or cruel (HAC). Gonzalez requested that the court instruct the jury on the catch-all mitigator. The jury recommended death sentences for both murders by a vote of ten to two.

The trial court conducted a Spencer[1] hearing on December 9, 2010. The State submitted additional victim impact statements. Defense counsel announced that they were prepared to present a number of records (school, military, and psychological reports), but Gonzalez had instructed them not to do so. Gonzalez told the court that he did not want the records offered into evidence.

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

> Defense counsel asked the court to take judicial notice of the fact that none of Gonzalez's codefendants were facing the death penalty. Gonzalez testified by reading a prepared statement and a "closing statement" after being cross-examined by the State. In these statements, Gonzalez professed his innocence and his shock that he had been convicted. Gonzalez's aunt and wife also testified.
>
> On February 17, 2011, the trial court followed the jury's recommendation and sentenced Gonzalez to death for both murders. The court found the following aggravating factors: prior violent felony conviction (based on the contemporaneous murders of the Billings and the 1992 robbery conviction); committed during the course of a robbery/pecuniary gain (merged); and HAC. The court rejected all of the statutory mitigators. The court also rejected the nonstatutory mitigator of disparate sentencing of Gonzalez's codefendants, finding that the disparity in sentencing was due to Gonzalez being more culpable than his codefendants. The trial court found three nonstatutory mitigators: Gonzalez was a businessman who served the community and did volunteer service for which he had been commended (some weight); he is a devoted husband, a devoted father to his children, and a father to all children, as evidenced by his community service (little weight); and he came from a broken home, suffered from depression and attention disorder, and was addicted to prescription medicine (little weight). The court concluded that the "three sufficient aggravating circumstances" far outweighed the "insignificant and insufficient" mitigators and sentenced Gonzalez to death for both murders. Gonzalez received a life sentence for the armed home invasion robbery conviction, to run concurrently with the two death sentences.

Gonzalez v. State, 136 So. 3d 1125, 1135-40 (Fla. 2014) (internal page numbers and footnotes omitted).

On direct appeal, this Court addressed thirteen issues: (1) improper prosecutorial comments during the guilt phase; (2) magnifying glass during jury deliberations; (3) the trial court's denial of the jury's request for transcripts; (4) cumulative effect of guilt phase errors; (5) denial of Gonzalez's pretrial motions regarding aggravators; (6) penalty phase testimony regarding the 1992 robbery conviction; (7) improper penalty phase closing argument by the prosecutor; (8) errors in the penalty phase jury instructions; (9) errors in the trial court's sentencing order; (10) cumulative effect of penalty phase errors; (11) proportionality; (12) constitutionality of capital punishment in Florida; and (13) sufficiency of the evidence.

On April 10, 2014, after briefing and oral argument, this Court concluded that issues 8 and 10 constituted harmless errors and that the remainder of Appellant's claims were without merit. This Court found the evidence was sufficient to support Appellant's convictions for two counts of first-degree murder. Gonzalez, 136 So. 3d at 1140. On July 1, 2014, Appellant filed a petition for writ of certiorari in the United States Supreme Court. On October 6, 2014, the United States Supreme Court denied review. Gonzalez v. Florida, 135 S.Ct. 193 (1994).

On October 2, 2015, Appellant filed a Motion for Postconviction Relief raising three claims. The State filed its response on November 25, 2015. On February 10, 2016, Appellant

submitted a Motion for Leave to Amend 3.851 Motion, raising a claim of relief under Hurst v. Florida, 136 S.Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). An evidentiary hearing was granted only for Claim 3; however, due to developments in the law, Appellant withdrew his request for an evidentiary hearing on Claim 3. After written arguments were submitted by the parties and oral arguments were heard on April 26, 2017, the postconviction court, on May 25, 2017, entered an order granting Appellant relief under Hurst and denying his other claims.

This appeal followed the postconviction court's order. Appellee is not appealing the postconviction court's order granting Appellant relief under Hurst.

REFERENCES

References to the Appellant will be to "Gonzalez" or "Appellant." References to the victims in this case will be to "Mr. Billings" or "Mrs. Billings" or "victims."

The record on appeal is in fourteen volumes that are numbered consecutively and conform with the requirements of Fla. R. App. P. 9.200. Volumes 9-14 are transcripts for voir dire, jury selection, guilt/innocence phase, and the penalty phase. The page numbers can be found on the upper right hand corner of each page. They will be referenced by the letter "T" followed by an appropriate volume and page number "(T#:##)."

Volumes 1-10 are transcripts from the Spencer hearing, sentencing hearing, exhibits and motions from the trial. They will be identified by the letter "R" followed by an appropriate volume and page number "(R#:##)." These pages are Bates stamped and located at the bottom center of each page.

The remaining volumes of the record are two volumes of supplemental record containing a pretrial hearing and the judgment and sentences of the co-defendants in this case. In this response they will be identified by the letters "SR" followed by the appropriate volume and page number "(SR#:##)." These pages are Bates stamped and located at the bottom center of each page.

Appellant's Motion for Postconviction Relief will be referenced by "DM" followed by the appropriate page number "(DM:##)" which can be found at the bottom of each page. The postconviction court's order will be referenced by "Order" followed by the appropriate page number "(Order at ##)" which can be found at the bottom of each page. Finally, Appellant's "Initial Brief of the Appellant" will be referenced by "Initial Brief" followed by the appropriate page number "(Initial Brief:##)" which can be found at the bottom of each page.

JURISDICTION

Initially, the State questions whether this Court has jurisdiction of this case given the postconviction court's order granting a new penalty phase pursuant to Hurst v. State, 202 So.

3d 40 (Fla. 2016). See State v. Preston, 376 So. 2d 3, 4 (Fla. 1979)(where this Court declined to hear an interlocutory appeal from a murder trial because the death penalty had not yet been entered); Trepal v. State, 754 So. 2d 702, 706-07 (Fla. 2000) (holding that this Court had jurisdiction to hear an interlocutory appeal arising during capital postconviction proceedings because a valid death sentence was imposed in the defendant's case). It remains the State's position that because there is no final judgment and sentence in Gonzalez's case at this time, his appeal is untimely and this Court lacks the necessary jurisdiction to hear the appeal. Holding Gonzalez's appeal in abeyance will moot any jurisdictional challenges to this appeal and prevent the possibility of relitigating his guilt-phase claims in the future.

Moreover, the judgment and sentence are not intended to be litigated separately. When a sentence is vacated, the judgment associated with that sentence is also vacated. Berman v. United States, 302 U.S. 211 (1937). If Gonzalez's guilt-phase claims are litigated while no valid judgment exists in his case, Gonzalez could potentially be provided the opportunity relitigate those claims after his sentence is re-imposed, which would waste valuable state and judicial resources.

For these reasons, the State respectfully submits that Gonzalez's appeal challenging the denial of his guilt-phase claims is untimely until his resentencing is completed and a new judgment

is entered. Accordingly, the State respectfully requests that this Court hold Gonzalez's appeal in abeyance pending completion of his resentencing proceedings.

SUMMARY OF THE ARGUMENT

ISSUE I: The postconviction court did not err in denying Appellant's Claim 1 and finding that trial counsel did not provide ineffective assistance of counsel for failing to argue for a change of venue due to pretrial publicity. Each juror of the venire was questioned about their knowledge of the case by both the State and trial counsel. The potential jurors who indicated that they would not be able to set aside their previous knowledge of the case and make a decision based on the evidence that was presented at trial were dismissed for cause. Additionally, trial counsel filed a motion for change of venue, but it was deferred by the trial court until it could be determined if a fair and impartial jury could be seated. Under the law, to find that trial counsel was ineffective, the defense must bring forth evidence demonstrating that the trial court would have or should have granted a motion for change of venue. The postconviction court found that there was no basis to conclude that, had the additional information suggested by postconviction counsel been presented, the trial court would have granted a motion for change of venue. As such, trial counsel was not ineffective and the postconviction court was correct in denying relief under Appellant's Claim 1.

ISSUE II: The postconviction court did not err in summarily denying Appellant's Claim 2 and in finding that trial counsel was not ineffective for failing to challenge the grand jury indictment. Appellant's Claim 2 was based on speculation that Sheriff Morgan actually greeted the members of the grand jury. Even if Appellant could prove that Sheriff Morgan greeted the members of the grand jury, Appellant could not show prejudice in trial counsel's failure to challenge the indictment on this basis. The indictment is nothing more than the accusation and the merits of the crimes charged will be determined at trial, in front of a different jury.

Additionally, under Florida law, a challenge to the grand jury may only be brought if it is believed that the grand jury was not seated in accordance with the law. Where the evidence against a defendant is more than sufficient to support a conviction by a jury, it cannot be successfully argued that the failure to seek dismissal of the indictment was an error which would ultimately affect the outcome of the proceedings and the defendant would have been reindicted. In this case, even if Appellant were to successfully challenge the indictment, no prejudice could have been proven. Because the evidence against Appellant was overwhelming, he would have been reindicted and the challenge would only serve to delay the trial. As such, the postconviction court was correct in finding that trial counsel was not ineffective and in summarily denying Appellant's Claim 2.

Appellee is requesting that this Court affirm the postconviction court's order in denying Claims 1 and 2 and granting Appellant a new penalty phase under Hurst.

ARGUMENT

The two claims raised by Appellant in his Motion for Postconviction Relief raise ineffective assistance of counsel claims. Appellant argued in Claim 1 that trial counsel was ineffective for failing to properly argue for a change of venue due to saturation of Escambia County with prejudicial and inflammatory pretrial publicity concerning the case rendering a trial by a fair and impartial jury impossible. Appellant argued in Claim 2 that trial counsel was ineffective failing to challenge the grand jury indictment on the grounds that Escambia County Sheriff David Morgan's conduct of often greeting jurors as they waited for transportation was governmental misconduct.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1994). "Judicial scrutiny of counsel's performance must be highly deferential." Pagan v. State, 29 So. 3d 938, 949 (Fla. 2009) (citing Strickland, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. Pagan, 29 So. 3d at 949 (citing Strickland, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. Id. "A fair assessment

of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Pagan, 29 So. 3d at 949 (citing Strickland, 466 U.S. at 689). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Pagan, 29 So. 3d at 949 (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)).

The strong presumption that counsel's performance was sound is even stronger when trial counsel is experienced. See Cummings v. Sec'y, Fla. Dept. of Corr., 588 F.3d 1331, 1356 (11th Cir. 2009) (citing Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)(en banc)). In Florida, minimum standards have been established for appointment of defense attorneys in capital cases. Fla. R. Crim. P. 3.112. Those rigorous standards govern not just the qualifications of lead counsel on a capital case, but also co-counsel on a capital case in order to ensure the quality of representation afforded to a defendant facing capital punishment. As such, defendants facing capital punishment are often benefited with the legal expertise and experience of some of the most seasoned and knowledgeable lawyers available.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. 668. The Florida Supreme Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence — both adduced at trial, and the evidence adduced in the . . . [post-conviction] proceedings' — and 'reweig[h] it against the evidence in aggravation.'" Porter v. McCollum, 558 U.S. 30, 41 (2009). Therefore, Appellant must show that but for counsel's alleged errors, he probably would have received an acquittal at trial or a life sentence during the penalty phase. Gaskin v. State, 822 So. 2d 1243, 1247 (Fla. 2002).

ISSUE I: THE POSTCONVICTION COURT DID NOT ERR IN SUMMARILY DENYING APPELLANT'S CLAIM 1 AND FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE FOR A CHANGE OF VENUE DUE TO PRETRIAL PUBLICITY.

Appellant argues that the postconviction court erred in finding that trial counsel was not ineffective for failing to argue for a change of venue due to pretrial publicity. (Initial Brief:28).

Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence

resulted from a breakdown in the adversary process that renders the result unreliable. Strickland, 466 U.S. 668. In determining if defense counsel was ineffective, the defendant must show that the trial court would have or should have granted the motion for change of venue, if it had been presented to the trial court. See Carter v. State, 175 So. 3d 761, 776 (Fla. 2015).

> When applying the prejudice prong to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, 'bring forth evidence demonstrating that the trial court would have, or at least should have, granted a motion for change of venue if [defense] counsel had presented such a motion to the court.

Dillbeck v. State, 964 So. 2d 95, 104 (Fla. 2007) (citations omitted). "Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held. The presumed prejudice principle is 'rare[ly]' applicable and is reserved for an 'extreme situation.'" Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985).

In Carter, this Court explained the standard for a change of venue as:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that the jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Carter, 175 So. 3d at 776 (citing Franklin v. State, 137 So. 3d 969, 986 (Fla. 2014) (quoting McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977))). The defendant also has to show that there were difficulties in selecting a fair and impartial jury to support a change of venue to show that counsel was deficient. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979) (approving the procedure where ruling on defendant's motion for change of venue is delayed until attempt has been made to select jury).

In this case, defense counsel filed a motion to change venue on October 7, 2010. (R2:280-86, 289-91). At the hearing held the next day, the trial court stated that it was the practice to first try to empanel a jury before making a decision on whether a change of venue was warranted.

> THE COURT: Now, I think it has been the practice of this Court and I assume the experience of both you and Mr. Etheridge who are also well versed and experienced in these kind of cases that there first be an attempt to impanel prospective jurors, conduct voir dire and attempt to seat a jury before there's a decision made whether or not a change of venue is warranted. So I don't mean to preempt your ability to argue the motion that's filed but I think that is the way that this motion has customarily been treated.
> …
> MR. GONTAREK: Judge, that is my understanding of the correct understanding of how venue matters are handled by — it has happened on many other cases I've had. But one thing I would like to, we have filed the necessary affidavits from various citizens, Judge, and we would try, of course, to pick a jury but we would ask that the Court take judicial notice that there has been — we had not added any supporting documentation like pictures, newspaper articles or Internet, you know. I would ask

> the Court to take judicial notice, I don't think the State has any objection, that there has been a tremendous amount of publicity as I stated in my motion, so that we don't have to go through that effort of trying to bring in a bunch of newspaper articles for the Court.
>
> THE COURT: Okay. I have no problem with that request. Mr. Molchan?
>
> MR. MOLCHAN: No, Your Honor. I think the Court has correctly stated the process set forth in McCaskill, the Supreme Court decision that dealt with this. Also I have copies of Overton as well as the Rawlings case which talks about the standards that we'll have to utilize and, in fact, the Armstrong decision cited at 862 So. 2d 705 talks about this process being the process that is recommended.
>
> THE COURT: All right. Well, the Court will take judicial notice of these matters and also note that you've met the threshold requirements insofar as properly filing this motion in a timely fashion, Mr. Gontarek and Mr. Etheridge.

(SR1:1474-76). The court noted that the motion was properly filed and that it was being held under advisement. (SR1:1474). The trial court stated it had no problem with taking judicial notice of the pretrial publicity and the State Attorney agreed. (SR1:1475). Consequently, as defense counsel did file an adequate notice for change of venue and the trial court took notice of the motion, counsel was not ineffective for not having asked for change of venue.

Moreover, there was no reason for defense counsel to have reasserted the motion for change of venue. The "mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness." Armstrong v. State, 862 So. 2d

705, 719 (Fla. 2003). A juror is sufficient to sit on the jury if they can lay aside their opinion or impression and render a verdict based on the evidence presented in court. Id. Therefore, unless there are difficulties in selecting a fair and impartial jury, then there would be no basis for a change of venue. Carter, 175 So. 3d at 776.

During voir dire, the venire panel was adequately questioned regarding what they knew about the publicity of this case. The State Attorney questioned each panel member on whether they heard anything about the case and whether they could put aside what they heard and judge the case fairly. (T9:41-42, 129-30, 155-57, 178, 179-80, 182-83, 186; T10:207, 218-19). Most of the jurors agreed that they could put aside what they heard on the news and they would be able to judge the case from the evidence presented at trial alone. The jurors who indicated that they could not judge the case from the facts alone were removed. (Order at 14).

Further, defense counsel did ask the whole panel if they could put aside all the news and the Sheriff's comments and judge the case fairly.

> MR. ETHERIDGE: Just one, Your Honor. This goes towards the whole panel.
>
> Can you all agree and promise me and the Judge and the prosecutor, all of us, that you're not going to try this case based upon what WEAR TV says or what Sheriff Morgan says in his next pronouncement or what the newspaper says or what, you know, Channel 5 or Channel ten, WALA or WKRG says? And that you're only going to consider the

> evidence that you hear from the stand and you hear from us and that you actually see because we don't want — I can assured [sic] you, neither side wants to try this case in the media. You see all the trappings; we have them all over the place and what you've heard already. Can you all promise my client, Patrick, that you can give him his day in court? You can be fair and impartial and judge him only on what you hear in this courtroom?
>
> PROSPECTIVE JUROR: Yes.

(T9:163-64). Accordingly, a fair panel of jurors was able to be seated, who said they could judge the case fairly.

Nevertheless, although a majority of the panel members agreed to put aside what they heard, there were three members of the venire panel who asserted differently. In answer to questions regarding pretrial publicity, they stated that that they heard the news report and they could not disregard what they heard. (T9:51, 129-30, 155-57). They maintained that they could not judge the case fairly. (T9:51, 129-30, 155-57). The trial court, the State Attorney, and defense counsel were aware of these three jurors and agreed to have them dismissed for cause.

Consequently, because the majority of jurors were able to put aside what they heard defense counsel had a sufficient number of jurors to select a jury. Clearly there would have been no basis for the postconviction court to grant the motion to change venue. Defense counsel was not deficient and Gonzalez was not prejudiced by counsel's failure to reassert the motion for change of venue.

In his order, the postconviction court judge found "no basis to conclude that, had the additional information suggested by postconviction counsel had been presented, the trial court would have or should have granted a motion for a change of venue." (Order at 14). Consequently, the postconviction court was correct in denying Appellant relief under Claim 1.

ISSUE II: THE POSTCONVICTION COURT DID NOT ERR IN SUMMARILY DENYING APPELLANT'S CLAIM 2 AND FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE GRAND JURY INDICTMENT.

Appellant alleges that the postconviction court erred in finding that trial counsel was not ineffective for failing to challenge the grand jury indictment. (Initial Brief:37). Appellant argues that the grand jury issued an indictment against him on August 11, 2009, while Sheriff Morgan was engaged in the practice of jury greeting. (DM:17). Appellant's claims are speculative. Appellant must show that defense counsel's performance was deficient, that counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687. Additionally, Appellant must show how the deficient performance prejudiced the defendant depriving him of a fair trial. Id. at 689. A defendant must do more than speculate that an error affected the outcome, there has to be a reasonable probability that but for counsel's errors the result of the proceedings would have been different. Id. at 693-94. In this case, Appellant cannot show that

trial counsel's performance was deficient or that it affected the outcome of the proceedings.

Appellant was indicted by a grand jury on August 11, 2009, on two counts of first-degree murder. (R1:1-3). Although he asserts that Sheriff Morgan greeted the grand jury members, because they parked in the same lot as other jurists, he has not actually shown that Sheriff Morgan in fact greeted the members of the grand jury that approved his indictment. There is no allegation as to the date this grand jury was called or the date that Sheriff Morgan allegedly greeted them.

Accordingly, the postconviction court was correct in finding that it cannot be determined that the Sheriff greeted the grand jury in this case before it indicted Gonzalez.

Moreover, defense counsel would have had no basis to object to an already empaneled grand jury. Florida Statute § 905.03 states "[a] challenge to the panel may be made ***only*** on the ground that the grand jurors were not selected according to law." See Seay v. State, 286 So. 2d 532, 535 (Fla. 1973) (emphasis added). As such, there would have been no basis for trial counsel to move to strike the grand jury. Appellant has not and cannot assert that any member on the grand jury was actually improperly influenced. Therefore, trial counsel was not ineffective.

Furthermore, Appellant cannot show any prejudice by the grand jury's indictment. There was overwhelming evidence of Gonzalez's

guilt to support the grand jury's indictment. See Gonzalez, 136 So. 3d at 1169. Two of the participants came forward and told the police what occurred and the meetings that happened to plan the robbery. Id. at 1135-36. Appellant and four other men invaded the Billings' home intent on stealing a safe containing $13 million. Id. Appellant provided the weapons, black clothing, masks, and gloves that were used by the participants in the crime. Id. He also provided the participants with a picture and layout of the home and directed each participant of their positions for the invasion. Id.

Appellant was carrying the nine-millimeter automatic pistol from which the fatal shots killing both Mr. and Mrs. Billings' were fired. Gonzalez, 136 So. 3d at 1137. Upon entering the home Appellant demanded that Mr. Billings tell him where the money was located and when Mr. Billings would not tell him, he fired a shot in each leg. Id. at 1136. Appellant then led both Mr. and Mrs. Billings into their bedroom, where he then fired three shots into Mr. Billings head. Id. Appellant then asked Mrs. Billings to open the safe and when she was unable to do so, he shot her four times. Id. at 1137. The testimony of the two witnesses also matched the evidence from the surveillance video of the home invasion. Id. at 1136.

A defendant is entitled to a fair trial, not a perfect trial. Michigan v. Tucker, 417 U.S. 433 (1974). "Even had counsel

successfully challenged the indictment, nothing suggests that the State could not have simply sought and obtained a new indictment." (Order at 16). "[A] charging document is 'no more than an accusation, the merits of which will be determined at trial,' and the threshold of proof to levy a criminal charge is 'probable cause,' not proof beyond a reasonable doubt." State v. Gonzalez, 212 So. 3d 1094, 1096 (Fla. 5th DCA 2017)(internal citations and quotations omitted). The evidence against Appellant was sufficient to support the conviction by the jury. Gonzalez, 136 So. 3d 1125, 1140 ("[w]e ... find that Gonzalez's convictions are supported by competent, substantial evidence"). See also Francois v. Wainright, 741 F.2d 1275, 1283 (11th Cir. 1984)("We need not examine the cause requirement here, because we are satisfied that Francois suffered no actual prejudice arising from the waiver of the claim.... [T]he evidence against the defendant was so overwhelming that there is no question but that he would have been reindicted. Therefore, a successful grand jury challenge would have only served to delay the date of trial."); Zamora v. State, 422 So. 2d 325, 327-28 (Fla. 3d DCA 1982)("[W]e think it rather evident that even had dismissal of the indictment been obtained, any subsequent, properly-constituted grand jury would surely have re-indicted Zamora. Therefore, it cannot be successfully argued that the failure to seek dismissal of the indictment was an error which would ultimately affect the outcome of the proceedings."); Pickney v.

Cain, 337 F.3d 542, 545 (5th Cir. 2003)("Given the strength of the State's case, a successful grand jury challenge would have served no purpose other than to delay the trial. Accordingly, Pickney has failed to prove actual prejudice.").

Accordingly, Appellant was not prejudiced by counsel's failure to challenge the indictment as there was more than sufficient evidence of his guilt to support the grand jury's indictment and the postconviction court did not err in denying Appellant relief under Claim 2.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the postconviction court's order denying Appellant relief under Claims 1 and 2. Appellant committed the brutal murders of Byrd Billings and Melanie Billings. The evidence of guilt was overwhelming. Two co-defendants were able to put the Defendant at the scene, shooting both of the victims with the nine-millimeter gun. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 at 695. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696. The record affirmatively demonstrates beyond a doubt that even if defense counsel had committed each of the errors complained of in the Motion for Postconviction Relief, there is no chance that the outcome would have been different.

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's Order granting Appellant a new penalty phase and denying his guilty phase claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 1st day of February, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Erick Pinkard, Esq., at Epinkard@creedlawgroup.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa A. Hopkins
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