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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1146

LEONARD PATRICK GONZALEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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I. THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GONZALEZ'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY FILE FOR CHANGE OF VENUE DUE TO A SATURATION OF ESCAMBIA COUNTY WITH PREJUDICIAL AND INFLAMMATORY PRETRIAL PUBLICITY CONCERNING THE CASE RENDERING A FAIR TRIAL BY AN IMPARTIAL JURY IMPOSSIBLE

In the Response the Appellee argues that counsel was not ineffective for failing to argue for a change of venue because counsel did file a motion for change of venue and during the jury selection process the venire was asked general questions about whether they could set aside anything they had heard in the media about the case and they stated they could. The Appellee also asserts that the lower court was correct in finding that there was no basis to conclude that had the additional evidence suggested by postconviction counsel been presented that it would have granted a motion for change of venue. (Appellee's Response, p. 21-22)

The Appellee's response is erroneous because (1) the jury was not adequately questioned about the publicity in the case; (2) the defense motion for change of venue did not include documentation about the extensive and prejudicial pre-trial publicity in the case; and (3) because the lower court denied an evidentiary hearing in the case the Appellant was not provided an opportunity to present documentary and expert witness testimony to establish that the pre-trial publicity in this case made it impossible to seat a fair and impartial jury in the First Judicial Circuit.

THE JURY WAS NOT ADEQUATELY QUESTIONED

Contrary to the assertions of the Appellee, the lower court erred in concluding that the jury selection questioning cured any ineffectiveness of counsel because jurors were asked if they had heard anything about the case and, if they did, whether they could be fair and impartial. The lower courts stated in its order denying this claim that "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. The jurors agreed 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. Those that indicated they could not do so were removed. Defense counsel further inquired of the panel if they could put aside what they heard on the news and the Sheriffs comments and judge the case fairly. The panel said they could do so. Under these circumstances, the Court finds no basis to conclude that, had the additional information suggested by postconviction counsel been presented, the trial court would have or should have granted a motion for change in venue, Defendant is not entitled to relief on this claim." (PCR. 796).

The lower court erred in finding the cursory questions by the state and defense counsel rebut the prejudice associated with the extensive and prejudicial media coverage of Mr. Gonzalez's case. In *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir. 1985) the court found prejudice where the petitioner presented the court with over

150 newspaper articles written about the case before his trial, one of which included a statement by the county's chief law enforcement officer that he would like to "precook" the petitioner before he was electrocuted, and media broadcast transcripts and witness statements indicating the case was a main topic of conversation for an extensive period of time. The Eleventh Circuit addressed the issue of whether general voir dire questions can rebut prejudice in cases of extensive and media coverage as follows:

> Another problem with the voir dire in petitioner Coleman's case is that the prospective jurors were not asked questions which were calculated to elicit the disclosure of the existence of actual prejudice, the degree to which the jurors had been exposed to prejudicial publicity, and how such exposure had affected the jurors' attitude towards the trial. *See Calley v. Callaway, 519 F.2d 184, 208-09 (5th Cir. 1975), cert. denied, 425 U.S. 911, 96 S. Ct. 1505, 47 L. Ed. 2d 760 (1976)*; *cf. Patton v. Yount*, 467 U.S. at n.10. Instead, leading questions and conclusory answers were typical of the manner in which Coleman's voir dire was conducted. For example, special prosecutor Geer began the individual questioning of prospective jurors and typically asked whether the juror understood "that this defendant, Wayne Carl Coleman, is presumed innocent until proven guilty to a moral certainty and beyond all reasonable doubt by the state of Georgia." Trial Record, Vol. 1 at 85. Geer also typically asked the juror whether he understood that the defendant "is innocent at this moment under the law." *Id.* Geer often asked, "Would the fact that you might have read something about this case from any source influence your mind one way or the other?" *Id.* Other typical questions included, "Would you go by the evidence in the case and the charge of court given you by the court?" "Do you understand that the defendant doesn't have to prove anything?" and "The burden is on the state to prove him guilty beyond a reasonable doubt?" *Id. at 86*
>
> Similarly, although the questions posed by defense attorneys were somewhat more effective, they too tended to be conclusory. For example, the defense attorney would typically elicit the fact that the

> potential juror had read or heard about the crimes, i.e., some exposure. However, that would too often be followed up by a merely conclusory question: "Now, from having read about the homicides and also having read of the persons accused and having also seen this on television, is your mind now perfectly impartial between the state and the accused?"
>
> Despite these problems with the voir dire in petitioner Coleman's case, almost one-half of the jurors who were questioned as to whether they had formed an opinion, were stricken for cause for having a fixed opinion.
>
> For the foregoing reasons, and in light of the overwhelming evidence that the community had prejudged both guilt and sentence, we are satisfied that the conclusory protestations of impartiality in the voir dire are not sufficient to rebut the presumption of prejudice. *Cf.* *Irvin v. Dowd, 366 U.S. at 728, 81 S. Ct. at 1645* ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father").

Id. At 1535.

Because no individual *voir dire* was conducted, there is no way of determining what information potential jurors had heard about the case and whether they had been exposed to the highly prejudicial publicity, which contained assertions concerning Mr. Gonzalez that were false and highly inflammatory. Consequently, the cursory questioning of the panel in general was not sufficient and ineffective.

THE DEFENSE MOTION FOR CHANGE OF VENUE WAS INADEQUATE

Contrary to the assertions of the Appellee, he motion for change of venue filed by Mr. Gonzalez's counsel was wholly inadequate. It contains only passing reference to a lot of media coverage without including any details which would have

informed the court of the inflammatory and prejudicial nature of the media coverage in Escambia County, as outlined in the 3.851 Motion. The motion filed by Mr. Gonzalez's trial counsel contained only a bare smidgen of the highly prejudicial media coverage that was actually present.

Worse yet, counsel for Mr. Gonzalez effectively abandoned any realistic hope of obtaining a change of venue, which was necessary for Mr. Gonzalez to have a fair trial, when he argued the motion before the trial court. After the court stated that it would have to attempt to impanel a jury before ruling on the motion, the following exchange too place between the court and counsel for Mr. Gonzalez:

> "COUNSEL FOR MR. GONZALEZ: We have filed the necessary affidavits from various citizens, 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 have not added any supporting documents 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 stated in my motions, so we don't have to go through the effort of trying to bring in a bunch of newspaper articles for the Court**.
> THE COURT: Okay, I have no problem with that, Mr. Molchan?
> MR. MOLCHAN: No, Your honor."

(PCR. 166).

Mr. Gonzalez asserts that his counsel was ineffective for failing to provide the court with the available media coverage of the Gonzalez case so that the court would have been made aware of its inflammatory and prejudicial nature as to Mr. Gonzalez. Instead, counsel relied upon the court's memory of the pretrial publicity without any

knowledge whatsoever of what the court actually knew or had been exposed to in terms of the highly prejudicial and inflammatory pre-trial publicity.

In the 3.851 motion, Mr. Gonzalez asserted that the pretrial publicity in this case so pervaded and saturated the community of Escambia County as to render virtually impossible a fair trial by an impartial jury drawn from that community. Mr. Gonzalez also alleged that the 75-page limit on 3.851 motions would not allow him to incorporate all of the relevant pretrial publicity which surrounded the case, but stood ready to present all of it at an evidentiary hearing. (PCR. 160). Mr. Gonzalez did reference some excerpts of the reporting to demonstrate a *prima facia* case for purposes of the 3.851 motion. To that end, he referenced articles that stated the following inflammatory information:

> The killings were "execution style"
> One of the men stated "you're gonna die"
> Gonzalez told police his involvement was "deep"
> Sheriff Morgan said it was a "contract killing"
> DEA Agent stated, "There has to be a drug connection somewhere."
> Mr. Gonzalez "always wanted to be a mafia guy"
> Sheriff Morgan referred to Mr. Gonzalez as "an inveterate liar" and a "psychopath"
> Sheriff Morgan referred to Mr. Gonzalez as a "lying con man"
> Sheriff Morgan stated new documents suggest the Billings murders were a "hit," and Gonzalez was hired to commit the murders by resentful business rivals"
> Sheriff Morgan stated the co-defendants were in fear of being "wacked" by the figures that contracted with Mr. Gonzalez to do the murders.
> Involvement of the "Mexican Mafia" in the case
> Sheriff Morgan responded to Mr. Gonzalez's request for a bond with, "And people in hell want ice water."

(PCR. 161-163)

Attached to Mr. Gonzalez's 3.851 motion were 180 pages of newspaper, television, and media reports on the case published and/or broadcast in the geographic area encompassing Escambia County. These reports cover the time from July of 2009 until and including the trial of Mr. Gonzalez. They contain significantly inflammatory information including negative statements about Mr. Gonzalez, including that he was "diabolical," "evil," "manipulative," and the like. (PCR. 163). There are also reports attached to the motion with rampant speculation about Mr. Gonzalez's prior criminal history and participation in previous "wacks" and "hits," and that he pulled a gun on a neighbor over a dispute about debris in his yard, stabbed an inmate with a pencil in the Escambia County Jail, and "cyberstalked" his ex-wife. (PCR. 163). Videos of Leonard Patrick Gonzalez's statements to the police were broadcast and made available online in Escambia County. Videos of several witnesses who were not called at the trial were also broadcast, including Leonard Patrick Gonzalez Sr., Hugh Wiggins, Cab Tice, and Pamela Long. (PCR. 163).

In addition to the highly inflammatory information, which saturated Escambia County concerning Mr. Gonzalez, there were numerous reports about the Billings which would understandably cause the community of Escambia County to be outraged toward the person or persons who did this crime. There were numerous front page stories with pictures of the Billings posing with their special needs adopted children. Local activities were conducted to raise money for a trust fund for

the children. Surviving family members appeared numerous times on local and national television to outline the tragic impact the killings had on the family, especially the special needs children. (PCR. 164)

The first instance of ineffective assistance of counsel concerning this claim is when counsel for Mr. Gonzalez failed to present to the trial court a true measure of the massive, inflammatory, and prejudicial media coverage of this case, and properly move for a change of venue.

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING

Mr. Gonzalez asserts that his counsel was ineffective for failing to provide the court with the available media coverage of the Gonzalez case, so that the court would have been made aware of its inflammatory and prejudicial nature as to Mr. Gonzalez. Furthermore, the lower postconviction court erred in not conducting an evidentiary hearing on this claim.

Under Florida Rule of Criminal Procedure 3.851, an evidentiary hearing must be held on an initial motion for post-conviction relief whenever the movant makes a facially sufficient claim that requires a factual determination. *Hurst v. State*, 18 So.3d 975 (Fla. 2009), *citing Gonzalez v. State*, 990 So.2d 1017 (Fla. 2008). On such a motion, to the extent the movant has made a facially sufficient claim requiring a factual determination, the court must presume that an evidentiary hearing is required. *Id.*, *citing Booker v. State*, 969 So.2d 186 (Fla. 2007) (*See also Seibert v. State*, 64

So.3d 67 (Fla. 2003). The reason for granting an evidentiary hearing is detailed in *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000). "In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of circuit courts to grant evidentiary hearings when they are required. The failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs filed with this Court. In order to alleviate the problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of delay that is the current system." *Id.*

Here the movant did make a facially sufficient claim requiring a factual determination. An evidentiary hearing should have been conducted, which is the only way to determine whether the prejudicial pretrial publicity so inflamed the community of Escambia County that Mr. Gonzalez's counsel was ineffective for failing to file a complete motion for change of venue. It cannot be determined from the record what investigation that counsel conducted concerning the nature and extent of the pre-trial publicity. Such information can only be established by calling

the counsels who represented Mr. Gonzalez as to the investigation they conducted. Additionally, there is no way for this Court to determine whether the lower court's finding that the evidence proffered, along with the 3.851 motion, would not have caused a change in venue, was supported by substantial and competent evidence without the benefit of an evidentiary hearing. Accordingly, the lower court erred in not setting an evidentiary hearing on this claim.

II. THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GONZALEZ'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE GRAND JURY INDICTMENT ON THE GROUNDS THAT ESCAMBIA COUNTY SHERIFF DAVID MORGAN ENGAGED IN OUTRAGEOUS GOVERNMENTAL MISCONDUCT BY IMPROPERLY INFLUENCING MEMBERS OF THE GRAND JURY WHO ISSUED THE INDICTMENT AGAINST MR. GONZALEZ

The Appellee asserts that the Grand Jury indictment is merely a formality, and governmental misconduct in corrupting the Grand Jury process is harmless error when the state determines that the evidence against a particular capital defendant is "overwhelming." (Appellee Brief p. 23-26). According to the Appellee, dismissing a Grand Jury indictment for governmental corruption of the Grand Jury process is a waste of time. However, Amendment V to the United States Constitution states "No person shall be held to answer to a capital or otherwise infamous crime unless on presentation or indictment of a Grand Jury."

If the Appellee's assertions are correct, why have a Grand Jury process at all in capital cases? The Appellant asserts that the Grand Jury process in capital cases

is an important constitutional protection to put the state's case to the test by requiring that Grand Jury, and not the state, make the decision on charging a defendant where the ultimate punishment is death. The Appellee's position would eviscerate an important constitutional requirement and should not be adopted by this Court.

Furthermore, it is not the case that the evidence against the appellant in this case is overwhelming. Far from overwhelming, this case was based almost entirely on the testimony of two co-defendants, Frederick Thornton and Rakeem Florence, both of whom admitted they initially lied to the police and their families about going over to the Billings house to buy some weed. No physical evidence ever placed Mr. Gonzalez at the scene, in possession of the murder weapon, in possession of the safe or anything else from the Billings residence. The safe was found at Pamela Long's house, not Mr. Gonzalez's house. The gun was found in Pamela Long's car, not Mr. Gonzalez's. The other weapons allegedly used in the invasion were located in possession of Hugh Wiggins and Pamela Long, not Mr. Gonzalez.

Additionally, it is not the case that the 3.851 motion did not adequately allege that Sheriff Morgan greeted the Grand Jurors in this case. The basis for the factual allegation was a letter dated on March 17, 2011 from United States District Judges M. Casey Rodgers, Roger Vinson, and Lacey Collier to Sheriff Morgan outlining that he had a practice of regularly greeting jurors near the courthouse where the jurors are summoned to appear. The letter noted that jurors would show up for duty

with a business card from Sheriff Morgan. The Judges further stated in their letter that "your interaction with these prospective jurors raise legitimate concerns about the court's ability to seat fair and impartial jurors, especially when considering that the majority of those selected will serve on criminal juries." They stated that the potential for bias created by a senior elected public law enforcement official greeting prospective jurors and handing out business cards to them just prior to jury selection is undeniable. They requested that Sheriff Morgan refrain from his jury greeting activities. (PCR. 171).

Sheriff Morgan did not acquiesce. Instead he fired back a letter to the Federal District Court Judges stating he would continue his practice of greeting jurors with the intent of putting a complimentary face on law enforcement. (PCR. 171). Sheriff Morgan thereafter signed an affidavit stating that it was his normal practice on Monday or Tuesday to go to the juror parking area where the potential jurors are directed to park and greet them by giving them his business card and thanking them for appearing. (PCR. 15). In a letter to State Attorney Bill Eddings, Sheriff Morgan stated he had suspended his jury greeting for any "Billings" case, as he was the "public face" of those cases. (PCR. 173)

The 3.851 motion alleged that the Grand Jury in Mr. Gonzalez's case issued its indictment on August 11, 2009. The motion states that it was the undersigned counsel's understanding and belief that the potential Grand Jurors arrive in the same

general assembly parking lot where Sheriff Morgan engaged in his jury greeting and influence activities. (PCR. 174). Based upon the time frame Sheriff Morgan says he greeted potential jurors and when the Grand Jury was convened to issue the indictment, counsel had a good faith belief that Sheriff Morgan greeted some or all of the members of the Grand Jury who indicted Mr. Gonzalez. (PCR. 174).

It is error for the lower court to have found that the 3.851 motion did not establish that Sheriff Morgan met with the Grand Jury members in this case when the Sheriff's own words in his letters stated that he did. However, that is the purpose of setting an evidentiary hearing, so counsel representing the Appellant could have an opportunity to prove the allegations set forth in the motion.

CONCLUSION

Based upon the foregoing arguments and citations of authority set forth in his Reply Brief, Appellant Leonard Gonzalez requests that this Honorable Court vacate his judgment and convictions in this case and/or remand the case back to the lower court and order than an evidentiary hearing be conducted on Issues One and Two of his Initial Brief.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy in PDF format of the foregoing REPLY BRIEF OF THE APPELLANT has been transmitted to the Clerk of the Supreme Court of Florida, through the Florida Courts E-Filing Portal, which will serve a Notice of Electronic Filing to: Lisa Hopkins, Assistant Attorney General, Office of the Attorney General at Lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com. A hard copy will be sent by first class U.S. Mail to Leonard Gonzalez, DOC # 768915, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083 on this 13th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF THE APPELLANT was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a)(2).

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