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OFFICE OF
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FIRST JUDICIAL CIRCUIT OF FLORIDA

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PRESS RELEASE

The Office of the State Attorney announced that on May 23, 2017, the Honorable Nickolas P. Geeker ordered that a new penalty phase be conducted in the case of Leonard Patrick Gonzalez, Jr. Gonzalez was convicted on October 28, 2010, for the murders of Byrd and Melanie Billings. An Escambia County Jury recommended that the death penalty be imposed by vote of 10-2 on both murders.

Gonzalez sought a new penalty phase based upon the Florida Supreme Court's decision in the Hurst case. A copy of the Order is attached. A hearing will be scheduled at a later date to conduct a new penalty phase.

For further information, please contact Assistant State Attorney John A. Molchan at 850-336-0754.

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

STATE OF FLORIDA

vs.

LEONARD PATRICK GONZALEZ, JR.,

Defendant.

Case No.: **2009 CF 003249C**
Division: **E (Geeker)**

ORDER DENYING IN PART AND GRANTING IN PART MOTIONS FOR POSTCONVICTION RELIEF and VACATING DEFENDANT'S SENTENCES OF DEATH and ORDERING A NEW PENALTY PHASE

THIS CAUSE is before the Court on Defendant's "Motion for Postconviction Relief," filed October 2, 2015, pursuant to Rule 3.851, Florida Rules of Criminal Procedure. The Court also has before it the State's response to the motion, filed November 25, 2015. In addition, Defendant submitted a "Motion for Leave to Amend 3.851 Motion," on February 10, 2016, in which he raises a claim of entitlement to relief under Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). The State responded on March 24, 2016. After a case management conference, the Court granted an evidentiary hearing on one claim only (Claim III of the original motion). However, prior to the evidentiary hearing, in light of case law developments, Defendant withdrew his request for an evidentiary hearing on his Claim III. At the request of counsel, the Court allowed written arguments to be submitted by the parties, and oral arguments were heard on April 26, 2017.

Procedural History

On October 28, 2010, Defendant was found guilty of two counts of first degree murder, and one count of home invasion robbery.[1] On October 29, 2010, by votes of 10-2, the jury recommended the death penalty for both counts of murder.[2] On February 17, 2011, the Court imposed the death sentence for each count of murder (consecutive), with a life term for the robbery (concurrent to the death sentences).[3] The Supreme Court of Florida affirmed the judgment and sentence by mandate and opinion filed with this Court on May 7, 2014.

The Supreme Court of Florida summarized the pertinent facts of the case as follows:

> 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.

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1 Attachment 1, verdict.
2 Attachment 2, advisory sentences.
3 Attachment 3, judgment and sentence.

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 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.

Dan Blocker, the owner of a tire and automotive business, testified that Gonzalez, Gonzalez, Sr., and Coldiron arrived at his business in Long-Wiggins' red minivan on the day after the murders. Blocker had known Gonzalez for years through servicing vehicles for Gonzalez. On this day, Gonzalez was transporting two wheels in the minivan and asked Blocker to replace the tires on those two rims with another set of tires Gonzalez was also transporting in the minivan. Blocker thought the request was strange because the tires on the rims were better than the replacement tires Gonzalez provided. Gonzalez placed twenty dollars on the counter and told Blocker, "If anyone asks, you haven't seen me." The crime scene technicians had taken photographs of the tire tracks left by the invaders' van in the grass at the Billings' residence. However, there were no discernible tire tread patterns.

Law enforcement obtained records for the phones used by Sumner and Gonzalez. An analysis showed forty-two contacts between them from July 2 through July 10, 2009. The records showed several phone calls being made from each phone on July 9, the day of the murders, but none during the time that the crimes took place or immediately thereafter. There was also a flurry of calls made from each phone between 6:30 p.m. and 7 p.m. on July 9. Testimony from Thornton and Florence established that the group, except for Coldiron, had attempted to take the safe from the Billings' home five days earlier. However, the plan was abandoned after lights

came on at the home when the men drove into the driveway.

Gonzalez's mother, Terri Poff, testified that in June or July 2009 Gonzalez was having financial difficulties and that she was helping him pay his bills. Poff had also purchased the large red van and given it to Gonzalez. Gonzalez's wife, Tabatha Gonzalez, testified that she and Gonzalez ran a karate business that failed in 2009. She also testified that the couple was having financial difficulties. In July 2009, Tabatha and Gonzalez both worked at Long-Wiggins' antique business. Gonzalez often drove a red minivan that belonged to Long-Wiggins. In June or July 2009, Gonzalez's mother bought him a larger red van, but it was not in good working condition. Gonzalez left that van with his father Gonzalez, Sr., to perform mechanical work on it. Tabatha also testified that prior to July 2009, Gonzalez met with Mr. Billings to solicit funds for Gonzalez's karate business. Mr. Billings made a $5,000 donation to the couple's self-defense project, but refused to invest in the business because he thought it was a bad investment. She testified that on the night of July 4, 2009, Gonzalez was with her, their children, and neighbors, shooting off fireworks.

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* 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. 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.) cert. denied, 135 S. Ct. 193, 190 L. Ed. 2d 150 (2014).

Postconviction Claims

In the "Motion for Postconviction Relief," Defendant raises three grounds: 1) his trial counsel was ineffective for failing to properly argue for a change of venue; 2) his trial counsel was ineffective for failing to challenge the grand jury indictment on the grounds that the Escambia County Sheriff

engaged in governmental misconduct; and 3) trial counsel was ineffective for failing to conduct a complete investigation of available mitigating circumstances and failing to present the mitigation to the jury and judge. As noted previously, Defendant also raises a claim of entitlement to relief pursuant to Hurst v. Florida and Hurst v. State in his "Motion for Leave to Amend 3.851 Motion."

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 (1984). "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. The standard for evaluation is not whether an attorney could have done more. Id. "A fair assessment of attorney 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. "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)).

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 v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998)(citations omitted).

CLAIM I

COUNSEL FOR MR. GONZALEZ 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 FAIR TRIAL BY AN IMPARTIAL JURY IMPOSSIBLE.

In his first claim, Defendant alleges that his counsel was ineffective for failing to properly argue for a change of venue, asserting 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." Defendant cites to and includes numerous examples of national and local news coverage, which "contain significantly inflammatory information including negative statements about Leonard Patrick Gonzalez Jr. which were not admissible at his trial including that he was 'diabolical,' 'evil,' 'manipulative,' and the like." Defendant alleges that the news reporting also included "rampant speculation" about his prior criminal history and the possibility that he was involved in the international drug trade and was a contract killer. According to Defendant, videos of several witness statements and of Defendant's statements to the police were available on line. In addition to the negative publicity surrounding him, significant publicity and attention was also given to the Billings family, including "numerous front page stories with pictures of the Billings posing with their special needs adopted children."

Defendant acknowledges that his counsel made a motion for change of venue,[4] but notes that he "acquiesced" to the Court's decision to delay ruling on the motion until voir dire. He then "failed to renew the motion or seek a ruling on the motion after voir dire or to otherwise preserve the issue

4 Attachment 4, motion and supporting affidavits.

for appeal." Defendant argues that counsel was "ineffective for failing to produce the supporting documents, such as newspaper articles and video tapes of television broadcasts, in order to prove that pre-trial publicity was inflammatory and prejudicial to Mr. Gonzalez." Defendant observes that there "was no way that counsel could have known what news accounts the Judge had been exposed to or would be considered by the judge in deciding the motion on changing venue," and argues that his actions in failing to produce supporting documentation deprived Defendant of any meaningful appellate review of the issue.[5] In addition, he argues that counsel was ineffective for "failing to fully inquire of the jurors, or to request individual voir dire, so the prospective jurors could be questioned about the specifics of what they had learned about the case from various media sources." In short, Defendant alleges that the ineffective assistance of his counsel in this case "caused [Defendant] to be tried by a jury selected in the First Judicial Circuit where inflammatory and prejudicial pretrial publicity so pervaded and saturated the community as to render virtually impossible a fair trial," and therefore undermines confidence in the entire trial.

"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,

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5 The prejudice in counsel's deficient performance is assessed based upon its effect on the results at trial, not on its effect on appeal. See, e.g., Carratelli v. State, 961 So. 2d 312, 323 (Fla. 2007).

and is reserved for an 'extreme situation.'" Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985)(internal citations omitted).[6]

The Court finds that Defendant has failed to demonstrate prejudice in counsel's failure to submit additional documentation regarding the pretrial publicity in the instant case. As the Florida Supreme Court has opined:

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6 As observed by the United States Supreme Court:

> Prejudice was presumed in the circumstances under which the trials in Rideau, Estes, and Sheppard were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In Rideau the defendant had 'confessed' under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice because it considered the trial under review "but a hollow formality"—the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras. The trial in Estes had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair. The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. Qualified jurors need not, however, be totally ignorant of the facts and issues involved. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Murphy v. Florida, 421 U.S. 794, 798–800, 95 S. Ct. 2031, 2035–36, 44 L. Ed. 2d 589 (1975)(internal citations and quotations omitted).

> 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. Franklin v. State, 137 So. 3d 969, 986 (Fla. 2014) (quoting McCaskill v. State, 344 So. 2d 1276, 1278 (Fla.1977) (quoting Kelley v. State, 212 So. 2d 27, 28 (Fla. 2d DCA 1968))). The extent and nature of the publicity and the difficulty actually encountered in selecting a jury are critical factors for consideration by the court. Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997). If the defendant shows no undue difficulties in selecting a fair and impartial jury, then no legal basis would have existed for a change of venue—and trial counsel would not have been deficient in failing to move for one.

Carter v. State, 175 So. 3d 761, 776 (Fla. 2015), reh'g denied (Sept. 18, 2015).

The Carter Court further observed:

> In the widely publicized and infamous case of Rolling, we recognized that "pretrial publicity is normal and expected in certain kinds of cases, like this one, and that fact standing alone will not require a change of venue." Rolling, 695 So. 2d at 285. We held that the first prong of the analysis requires that certain factors must be evaluated to determine if a change of venue should have been granted. The second prong of the analysis requires the trial court to examine the extent of difficulty in actually selecting an impartial jury at voir dire. Id. "If voir dire shows that it is impossible to select jurors who will decide the case on the basis of the evidence, rather than the jurors' extrinsic knowledge, then a change of venue is required." Id. "The ability to seat an impartial jury in a high-profile case may be demonstrated by either a lack of extrinsic knowledge among members of the venire or, assuming such knowledge, a lack of partiality." Id. at 777.
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> In a similarly widely publicized case, Foster v. State, 778 So. 2d 906 (Fla. 2000), Foster produced voluminous newspaper articles and television accounts of the crime, most of which were published two years before the trial. Id. at 914. In Foster, similar to the instant case, most of the veniremen stated that they had heard something about the case through the media. As in this case, the trial court eliminated all those who stated that their fixed opinions would prevent them from reviewing the evidence in a fair manner; and the jurors who were selected all stated they could be fair and set aside what they heard. Id. We held on appeal that a change of venue was not required in *Foster* because the record did "not indicate that the community was so infected by the media coverage of this case that an impartial jury could not be impaneled, and an impartial jury appears to have been actually seated." Id.
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> In a postconviction context such as this one, where postconviction counsel failed to

> demonstrate there was a legal basis for filing a motion for change of venue, and where the record reflects no undue difficulty in selecting an impartial jury, trial counsel is not ineffective in failing to move for a change of venue. See Dillbeck, 964 So. 2d at 104. We also emphasized in Griffin v. State, 866 So. 2d 1 (Fla. 2003), that postconviction counsel must bring forth evidence to demonstrate that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if one had been filed. Id. at 12.

Carter v. State, 175 So. 3d 761, 777-78 (Fla. 2015), reh'g denied (Sept. 18, 2015).

As previously noted, counsel filed a motion for change of venue on October 7, 2010.[7] A hearing was held on the motion on October 8, 2010. At the hearing, the Court indicated that it would attempt to seat a jury prior to ruling on the motion, a decision supported by existing case law. The trial court may withhold making a determination regarding the necessity for a change of venue until an attempt is made to obtain impartial jurors to try the cause. Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). In this case, counsel, in his written motion for change of venue, addressed the tremendous publicity surrounding the trial and events and the Court took judicial notice of same.[8] Indeed, the motion for venue summarizes the extent of the pretrial publicity, the volume and tenor of which the Court was well aware at the time of trial. 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)(citation omitted). A prospective juror may sit on the jury if that juror can lay aside his or her 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.

The jurors selected for trial were Judy Jenkins, Kim Brock, Beatriz Liss, Suzanne Mize, Renee Wilson, Robin Johnston, Jeffrey Hoover, Eugenia Hernandez, Nicola Hernandez, Donna

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7 Additional affidavits regarding the extensive media coverage were also filed on October 25, 2010.

Bowden-Johnson, Amanda Stephenson, and Ester Nesbit. The alternate selected was Christopher Kyte. The record demonstrates that no difficulty was had in seating these individuals as a fair and impartial jury.[9] 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.[10] The jurors agreed under oath 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. Those who indicated that they could not do so were removed.[11] Defense counsel further inquired of the panel if they could put aside all the news and the Sheriff's comments and judge the case fairly. The panel agreed that they could do so.[12] 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 of venue. Defendant is not entitled to relief on the basis of his first claim.

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8 Attachment 5, October 8, 2010, transcript.
9 Attachment 6, October 25, 2010, transcript excerpts.
10 Attachment 6, October 25, 2010 transcript excerpts, pages 27, 41-42, 50-53, 134-135, 155-157, 185-186, 205-207, 217-219.
11 Attachment 6, October 25, 2010 transcript excerpts.
12 Attachment 6, October 25, 2010 transcript excerpts, pages 163-164.

CLAIM II

COUNSEL FOR MR. GONZALEZ 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.

As outlined in detail in Defendant's motion, Sheriff David Morgan, at the time of Defendant's indictment and trial, often greeted jurors as they waited for transportation to the courthouse from a common parking area. Defendant asserts that Sheriff Morgan has acknowledged that it would have been improper to greet members of the trial jury for this case, in which he was the "face of the investigation." Defendant asserts that it is "equally improper for [the Sheriff] to meet with prospective members of the Grand Jury charged with the decision of whether there was sufficient evidence to charge [Defendant] with first degree murder." Defendant asserts that "counsel has a good faith belief that Sheriff Morgan greeted some or all of the members of the Grand Jury who indicted Mr. Gonzalez at the jury assembly parking lot, and he did so to put a complimentary face on law enforcement." Based on this, Defendant argues that his trial counsel was ineffective for not challenging the indictment "due to Sheriff Morgan's greeting of the [jury members] at the jury assembly parking lot for the express purpose of putting a complimentary face on law enforcement." He concludes that "[p]rejudice under Strickland is established for this claim because the legal debacle of the elected Sheriff of Escambia County improperly influencing members of the Grand Jury undermines confidence in the entire trial proceedings and the proper administration of justice due to [an] indictment procedure compromised by a governmental official."

First, Defendant's claim is based on speculation that Sheriff Morgan actually greeted the

members of the grand jury. Secondly, even assuming that the Sheriff did so, Defendant cannot show prejudice in his counsel's failure to challenge the indictment on this basis. 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. "[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). Indeed, the evidence against Defendant was sufficient to support a jury finding that Defendant was guilty beyond a reasonable doubt.[13] See Francois v. Wainwright, 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 served only to delay the date of trial.") See also 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

13 "We ... find that Gonzalez's convictions are supported by competent, substantial evidence." Gonzalez v. State, 136 So. 3d 1125, 1140 (Fla. 2014).

prejudice.") Consequently, the Court concludes that Defendant is not entitled to relief on the basis of his second claim.

CLAIM III

COUNSEL FOR MR. GONZALEZ WAS INEFFECTIVE IN THE PENALTY PHASE BY FAILING TO CONDUCT A COMPLETE INVESTIGATION OF AVAILABLE MITIGATING CIRCUMSTANCES AND FAILING TO PRESENT THE MITIGATION TO THE JURY AND SENTENCING JUDGE.

In his third claim, Defendant asserts that his counsel was ineffective for failing to call a mental health expert to present to the jury significant available statutory and non-statutory mitigating circumstances. He writes that forensic psychologist Dr. Mark Cunningham could "establish that there were many mitigating circumstances available for presentation to the jury and sentencing judge had counsel conducted a proper investigation."

As it relates to the consideration of prejudice, Dr. Cunningham wrote in his report, "The above . . . developmental factors could have been provided to [Defendant's] capital sentencing jury in an organized and coherent categorization – each described in anecdotal detail so that the jury could have a subjective appreciation of his experience as a child, and each accompanied by a description of the implications so that the jury would have an informed mechanism for determining their weight and nexus. Instead, the jury received a fragmented and disorganized picture of a portion of these. Those that the jury did hear evidence of, the anecdotal detail were inadequate or lacking. Even fewer were accompanied by testimony regarding their implications." Defendant concludes, "These deficiencies of counsel were prejudicial and there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different."

The Court need not resolve this claim on the merits, as the Court concludes Defendant is

entitled to a new penalty phase, regardless of whether counsel was ineffective in his failure to investigate and present mitigation. The Supreme Court of Florida has interpreted Hurst v. Florida and its progeny in such a way that it has fashioned a rigid bright-line standard that forecloses consideration of any harmless error in cases in which the jury's verdict is less than unanimous. This Court is duty bound to follow those pronouncements. While the undersigned finds the argument of the State of Florida relative to the application of the harmless error standard has considerable persuasiveness, the Court is constrained to grant a new penalty phase in light of Hurst v. State, 202 So. 3d 40 (Fla. 2016). This conclusion renders Defendant's Claim III moot.

Hurst v. Florida and Hurst v. State

In his "Motion for Leave to Amend 3.851 Motion," Defendant raises a claim of entitlement to relief under Hurst v. Florida, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016). In its written closing argument, the State concedes that, under current Supreme Court of Florida precedent, Defendant is entitled to a new penalty phase. Although understanding and acknowledging the State's position that the Supreme Court of Florida has misapplied the United States Supreme Court decision in Hurst v. Florida, the Court finds that the concession is well-taken. See e.g. Dubose v. State, 210 So. 3d 641, 657 (Fla. 2017)(We have . . . determined that in cases where the jury makes a non-unanimous recommendation of death, the Hurst error is not harmless."); Kopsho v. State, 209 So. 3d 568, 570 (Fla. 2017)("The jury in this case recommended death by a vote of ten to two. While three of the aggravators in this case are such that no reasonable juror would not have found their existence, we cannot determine that the jury unanimously found that the aggravators outweighed the mitigation. We can only determine that the jury did not unanimously recommend a sentence of death. Because we cannot make these determinations, we cannot say that

there is no possibility that the error did not contribute to the sentence. We therefore determine that the error in Kopsho's sentencing was not harmless beyond a reasonable doubt.") Consequently, the Court concludes that Defendant is entitled to relief and orders a new penalty phase.

ACCORDINGLY, it is **HEREBY ORDERED and ADJUDGED** that the "Motion for Postconviction Relief" and the "Motion for Leave to Amend Rule 3.851 Motion" are **GRANTED in PART** and **DENIED in PART**. Defendant's original Claims I and II are **DENIED**. Defendant's Claim III is **DENIED as MOOT.** Defendant's claim of entitlement to relief under Hurst v. State, 202 So. 3d 40 (Fla. 2016), is **GRANTED.** The Court **VACATES and SETS ASIDE** the death sentences imposed on Counts 1 and 2 on February 17, 2011, and orders a new penalty phase with regard to those counts. Defendant's sentence of life in prison for the robbery conviction is undisturbed by this order. Defendant has the right to appeal within thirty (30) days of the rendition of this order.

DONE and ORDERED this 23rd day of May, 2017.

Nicholas P. Geeker

NICKOLAS P. GEEKER
CIRCUIT JUDGE

NPG/krw

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing order has been furnished by E-Service (*unless otherwise indicated*) to:

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this 25th day of May, 2017.

PAM CHILDERS
Clerk of Court

BY: _____
Deputy Clerk