

No. SC19-1766

IN THE

Supreme Court of Florida

GARY MICHAEL HILTON

Petitioner,

v.

MARK S. INCH, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

**REPLY TO STATE'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS**

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I. The State Generally Relies on Flawed Standards and Principles

It is necessary to address some of the State's arguments more generally, as the State relies on flawed standards and principles throughout its response that undermine its analysis in most, if not all, of the claims.

A. The State is Incorrect that the Direct Appeal Standards are Irrelevant to this Court's Analysis of Ineffective Assistance of Appellate Counsel Claims

The State takes great issue with Mr. Hilton's references to the direct appeal standards for each claim. It argues that Mr. Hilton failed to establish ineffective assistance of appellate counsel ("IAAC") because, instead of arguing the *Strickland*¹ standard, Mr. Hilton argues these claims under the direct appeal standards. In support of this proposition, the State cites to the language in *Frances v. State*, 143 So. 3d 340 (Fla. 2014), explaining that the *Strickland* ineffectiveness standard applies to IAAC claims. Resp. at 14 (citing *Frances*, 143 So. 3d at 358).

Importantly, the State left out the parenthetical right after this language explaining how this operates in the context of an IAAC claim. As this Court stated, a defendant must

meet both the deficiency and prejudice prongs of *Strickland* . . . [by] establish[ing] first, that appellate counsel's performance was *deficient* because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professional acceptable performance and second, that the petitioner was *prejudiced* because appellate counsel's deficiency

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Frances, 143 So. 3d at 358 (internal citation omitted).

The State's response illustrates much confusion over what Mr. Hilton must establish to prove IAAC. As demonstrated by each of Mr. Hilton's claims, appellate counsel failed to raise claims that had a reasonable probability of success on direct appeal. To show this, Mr. Hilton must first address the standard by which this Court would have reviewed these claims on direct appeal. The failure to raise these claims are the "specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance." *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Then, because appellate counsel omitted these claims to instead raise ones with little to no chance of success, appellate counsel's performance "compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." *Id.* Using this standard, Mr. Hilton's habeas petition argues (1) appellate counsel forewent the opportunity to raise these claims that had a reasonable probability of success; and (2) Mr. Hilton was prejudiced by appellate counsel's omissions because his conviction or sentence otherwise may have been overturned. Mr. Hilton's petition established both of *Wainwright's* prongs, and the State's dissatisfaction and confusion in how Mr. Hilton chose to do so does not provide any reason for this Court to deny Mr. Hilton's claims.

B. The State is Incorrect that a Proper “Winnowing” of Claims Occurred Here, so Appellate Counsel was not Ineffective

The State argues the claims raised on direct appeal were “stronger” so that adding the habeas claims would have detracted from those claims which “garner[ed] attention.” Resp. at 26. The State suggests that appellate counsel raised six claims “attack[ing] the evidence of guilt and aggravation in the case” and that “[g]iven the strength of that evidence, it was not unreasonable to conclude that an attack on the admissibility or use of that evidence presented the best chance of success on appeal.” Resp. at 26-27. This argument defies all reason. Given how strong the evidence was, it was unreasonable for appellate counsel to expect success on these claims—even establishing the trial court should have excluded one type of evidence would have been harmless error when considering the remaining evidence.

Appellate counsel raised only six claims, including several that had little to no chance of success. For example, he argued there was insufficient evidence of the heinous, atrocious, and cruel (“HAC”) or the cold, calculated, and premeditated (“CCP”) aggravators. Regarding HAC, this Court found substantial evidence existed that Ms. Dunlap was “held anywhere from 2 days to a week” in captivity; that “she was injured enough during that time to leave traces of her blood on several of Hilton’s items;” and that she was “likely terrified, suffering from emotional strain, or suffering during the time leading up to her murder.” *Hilton v. State*, 117 So. 3d 742, 753 (Fla. 2013). Thus, the State’s evidence at the penalty phase fit squarely

under this Court’s definition of HAC. Similarly, this Court found substantial evidence to show Mr. Hilton had made statements to law enforcement “that he killed as a matter of course;” the method of disposing Mr. Dunlap’s body was “calculated” and “carried out after a period of reflection”; and Mr. Hilton made statements that he had “be[en] with the victim for a long enough time for careful reflection.” *Id.* at 754. Appellate counsel had no chance of success on either of these claims.

Contrary to the State’s argument, the strength of the guilt and aggravation evidence at trial is precisely why reasonable counsel would have instead presented claims that rely not on any sufficiency or admissibility of the evidence argument, but on claims attacking the fairness of the process in itself—claims like an unfair venue, tainted jurors, and a biased judge. The State’s suggestion that any careful winnowing process by reasonable appellate counsel could have led to the conclusion that the weak sufficiency claims should have been included over the potentially meritorious claims offered in the habeas petition is unpersuasive.

C. The State is Incorrect that the Only Remedy Available to this Court is to Grant a New Direct Appeal

The State suggests that the only remedy available is a new direct appeal. While this Court may order such a remedy, *see Wilson*, 474 So. 2d at 1165, the State is wrong that this Court may not also grant a new guilt or penalty phase. In *Marrero v. State*, 864 So. 2d 1131 (Fla. 2d DCA 2003), the case the State uses as an example, the Second DCA found it would have reversed Marrero’s habitual felony offender

sentence if raised on direct appeal, so it found IAAC and ordered a new sentencing hearing. 864 So. 2d at 1132. This Court may do the same here.

II. The State Applies the Wrong Standard to the Venue Claim

The State argues that Mr. Hilton did not establish prejudice because he “fails to identify a biased juror who actually served; additionally, he fails to specify which jurors, if any, could not be rehabilitated but were not challenged for cause.” Resp. at 27. This is the wrong test for a change of venue claim, where an appellant must show “(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury.” *Rolling v. State*, 695 So. 2d 278, 285 (Fla. 1997). The focus is not on specific jurors, but instead “the general state of mind of the inhabitants of a community” *Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979). Then, in the context of showing appellate counsel was ineffective for not raising a change of venue claim, the focus is on whether the outcome *of the direct appeal* would have been different, not whether a single juror at trial served and was rehabilitated.² The petition included a proper analysis of the content, timing, and volume of pretrial publicity; and the percentage of jurors—86%—who

² In Claim IV asserting that the trial court erred in denying trial counsel’s cause challenges to strike biased jurors with exposure to pretrial publicity, a claim where a showing of a biased jury making it onto the panel, Mr. Hilton did include record citations to such jurors. *See* Pet. 26-28, 31-32. Mr. Hilton specifically referred this Court to this analysis in his change of venue claim. Pet. at 16.

acknowledged pretrial knowledge of the case because of the media coverage. In doing so, Mr. Hilton sufficiently pled his change of venue claim.

The State also contends that Mr. Hilton did not distinguish his case from those where the trial court change of venue decision was upheld, relying on *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994). In *Pietri*, however, the venue claim depends solely on the fact that there was pretrial publicity, and “[p]retrial publicity alone does not warrant a change of venue.” *Pietri*, 644 So. 2d at 1352. There is no discussion of the factors this Court has found relevant to venue claims such as the volume, timing, and content of any pretrial publicity—factors that are particularly compelling in Mr. Hilton’s case. *Rolling*, 695 So. 2d at 285.

Finally, the State’s assertion that “[n]owhere . . . does Petitioner address the prejudice required for an ineffective assistance of counsel claim” is false. Resp. at 27. As Mr. Hilton made clear in his petition, because there was a reasonable probability that his venue claim would have succeeded on appeal, thereby mandating a new trial, appellate counsel’s failure to include this meritorious claim and thus not resulting in Mr. Hilton’s success on appeal prejudiced Mr. Hilton. *See* Pet. at 3-16.

III. The State Applies the Wrong Standard to the Judicial Bias Claim

The State suggests that Mr. Hilton’s claim of judicial bias is procedurally barred because trial counsel failed to seek Judge Hankinson’s disqualification. However, judicial bias is fundamental error, *see Chapman v. California*, 386 U.S.

18, 23 n.8 (1967), and thus could have been raised on direct appeal, *see* Fla. Stat. § 90.104(3). For the reasons stated in the petition, fundamental error occurred here. *See* Pet. at 17-23.

The State further posits that Mr. Hilton’s claim “chronicles” only “adverse rulings by the trial court . . . [and] fails to establish actual, judicial bias.” Resp. at 29. However, Mr. Hilton need only show *the probability of actual bias* was sufficient to violate his constitutional right to due process. *United States v. Rodriguez*, 627 F.3d 1372, 1382 (11th Cir. 2010) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)). And the trial court’s denigration of Ms. Suber constituted more than adverse rulings, and many of the court’s remarks could be construed as personal animus towards Suber. Telling her to be quiet and sit down as she was interposing an objection—an objection he later sustained; telling her she was making a witness feel uncomfortable when the witness expressed no such discomfort; and denigrating the defense function and/or judicial process by telling the jury that a case being thrown out due to juror misconduct is “unfortunate” were more than adverse rulings. *See Coley v. State*, 185 So.2d 472, 475 (Fla. 1966) (“We have many times observed that jurors are prone to be attentive to every indication by the trial judge of his appraisal of the accused and the view which he takes of any aspect of the case being tried in his court. The judge’s attitude, as it is gleaned by the jurors, is especially poignant in a criminal case”). Similarly, Judge Hankinson’s favoritism towards the State was

so prejudicial as to warrant reversal. *See, e.g., McNeil v. Durham County ABC Bd.*, 368 S.E.2d 619, 622 (N.C. 1988) (noting that the “same disaffection seemed not to be visited upon plaintiff’s witnesses”).

Lastly, the State argues Mr. Hilton failed to show *Strickland* prejudice. However, as stated above, the State misconstrues the prejudice analysis in IAAC claims. *See supra*. Mr. Hilton has established there is a reasonable likelihood that his judicial bias claim would have succeeded on direct appeal. Judicial bias is a “structural defect” not subject to harmless error analysis and would have been treated as such on direct appeal. *See Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). Because there exists a reasonable probability that the outcome of Mr. Hilton’s direct appeal would have been different, appellate counsel’s failure to raise it prejudiced Mr. Hilton.

IV. The State is Incorrect that Cause Challenges were not Preserved

The State suggests that the cause challenge claim was not preserved for appeal, relying on an argument in Mr. Hilton’s 3.851 appeal that trial counsel failed to preserve cause challenges for the record. The State confuses Mr. Hilton’s claim that appellate counsel was ineffective for not raising the trial court’s error in denying Mr. Hilton’s cause challenges—those preserved on the record and thus ripe for review on direct appeal—with Mr. Hilton’s 3.851 claim that there were other jurors trial counsel should have objected to but did not—those properly raised as

ineffective assistance of trial counsel claims in the 3.851. As a result of the State's failure to understand the distinction between these claims, the State exerts much effort explaining to this Court that the IAAC claim is procedurally barred because there were no objections on the record. In actuality, Mr. Hilton properly provided record citations to those preserved objections. *See* Pet. at 26-37.

The State complains that this issue is not preserved because trial counsel did not make the proper objections under *Caratelli v. State*, 961 So. 2d 312, 318 (Fla. 2007). This is false. As explained in the petition, trial counsel moved for cause challenges for jurors with knowledge of Mr. Hilton's crimes in other states, Pet. at 32; jurors who would automatically vote for death, Pet. at 29; and jurors predisposed to find Mr. Hilton guilty, Pet. at 34. Upon running out of peremptory challenges, trial counsel sought more and stated that she wished to use a peremptory strike on Sally Rice, who testified that she would automatically vote to impose death where there was evidence of premeditated murder and a confession. 23 R. 1077. This both put on the record that the defense "exhaust[ed] all remaining peremptories" and that "an objectionable juror . . . served on the jury." *See Caratelli*, 961 So. 2d at 319; Resp. at 37. Trial counsel then further preserved the issue by objecting again right before the final panel was sworn in. 23 R. 1078. Thus, the State's extensive argument that appellate counsel could not have been ineffective because these cause challenges were not preserved is indisputably belied by the record.

The State further alleges that “prejudice can only be shown through a demonstration of actual bias—something Petitioner fails to do.” Resp. at 37. However, the State fails to engage at all with Mr. Hilton’s in-depth analysis of Jurors Crowell, Harris, and Rice, including the relevant case law establishing how they were ineligible for service. Pet. 26-33. The State also argues that Mr. Hilton did not offer any actually biased jurors who made jury. This is also false, as the habeas petition provided names and record citations for biased jurors on the panel. *See id.* The petition establishes IAAC, and the State’s suggestions otherwise are flawed.

V. The State Applies the Wrong Standard to the Tainted Jury Pool Claim

The State argues that “for all intents and purposes,” the tainted jury pool claim is really a cause challenge for multiple jurors. Resp. at 40. And as a collective cause challenge, the State wishes this Court to find the claim procedurally barred because trial counsel did not preserve these cause challenges on appeal. This is not so. The State cannot find a similar but ultimately distinct claim that was presented both at trial and in a habeas petition just to fabricate a nonexistent procedural bar.

Instead of refuting a tainted jury pool claim, the State relies on *Ortiz v. State*, 543 So. 2d 377 (Fla. 3d DCA 1989), to argue Mr. Hilton is not entitled to relief. In *Ortiz*, the Third DCA found reversible error where the trial court denied a cause challenge for a woman who felt the defendant was guilty when she saw the story in the paper, notwithstanding her statements to the court that she could put these

feelings aside. 378-79. While *Ortiz* actually bolsters Mr. Hilton’s position in Claim IV(B) about biased jurors, *Ortiz* is not applicable to a tainted jury pool claim.

The State also emphasizes that the motion to strike the panel, at trial and as argued here, failed to rely on Rule 3.290. However, Rule 3.290’s procedure applies only where there was a defect in the jury summoning process. Here, Mr. Hilton’s claim pertains to a juror violating the court’s orders not to discuss the case and to avoid media about the case when he read a news article containing inadmissible evidence to a room of potential jurors. There was no issue with the summons.

The State bemoans the lack of a “procedural basis” for the motion to strike and, in doing so, ignores entirely Mr. Hilton’s federal and state constitutional right to a fair and impartial jury. Resp. at 39.³ Because of this misunderstanding, the State irrelevantly argues against cause challenges for these jurors, including asserting that because no cause challenge was made, this claim is now defaulted. The State provides no substantive argument undermining Mr. Hilton’s claim, and for the reasons stated in the petition, *see* Pet. at 37-40, this Court should grant relief.

VI. The State Fails to Rebut the Prejudice that Occurred by the Trial Court’s Failure to Grant a Continuance

The State appears to concede deficient performance here, as its argument focuses on prejudice. In arguing a lack of prejudice, the State relies on *Guillen v.*

³ *But see id.* (The State acknowledges that Mr. Hilton relies on cases extending the right to an impartial jury to the context of jury panel contamination).

State, 189 So. 3d 1004 (Fla. 3d DCA 2016). In *Guillen*, the State disclosed an expert witness ten days before trial, waiting an additional two days to express its intent to call the expert. 189 So. 3d at 1006. The defense moved to exclude the expert due to the late disclosure, which the trial court denied but delayed opening arguments back one day so the defense would have time to prepare. *Id.* Before the start of trial, defense counsel assured the court he was ready to proceed. *Id.*⁴

It is inconceivable how the State believes these circumstances compare to this case. Mr. Hilton’s team faced almost 200 Category A witnesses it had not yet deposed and multiple last minute witness and document disclosures. The State failed to provide the statutorily required contact information for each witness and was uncooperative in making witnesses available for deposition. The court did not have time to hear pretrial motions under its own arbitrarily compressed timeline, all of which the State here fails to address in its response. Instead, the State reduces any prejudice resulting from trial counsel’s inability to depose 159 witnesses to trial prep counsel “would [have] like[d]” to do. However, this was not a mere preference by trial counsel but their duty to preserve Mr. Hilton’s rights to effective representation, due process, present a defense, and a fair trial.

⁴ The other cases the State relied on similarly involved one late-disclosed witness whom the trial lawyers had the opportunity to depose, one being a codefendant the defense would have known about anyway. *See Bouie v. State*, 559 So. 2d 1113, 1114 (Fla. 1990); *Fennie v. State*, 648 So. 2d 95, 97 (Fla. 1994).

Finally, the State relies on what it describes as “overwhelming evidence” of guilt to argue that any error in denying the continuance was harmless. This speciously overlooks the fact that the State’s case at trial was presented without the benefit of trial counsel’s adversarial testing, a result of the continuance denial. As this Court has explained: “What upon a limited record may appear to be first-degree murder may, upon full investigation and presentment of further evidence,” be entirely different. *Valle v. State*, 394 So. 2d 1004, 1008 (Fla. 1981).

For the reasons stated in the habeas petition, the trial court abused its discretion in denying a continuance. Pet. at 45-46. This Court should grant relief.

VII. The State is Incorrect that there was No Abuse of Discretion in Allowing the Bone Evidence at Trial

According to the State, Mr. Hilton failed to address “four critical facts” in assessing appellate counsel’s deficient performance. Resp. at 49. Mr. Hilton will let the record speak for two of those purported “critical facts,” but will address the State’s arguments that deal with DNA. Seemingly, the State is attempting to connect the charred bone fragments not only to the decedent, but to Mr. Hilton, through reference to DNA evidence unrelated to the bone fragments. The petition contains an argument against the relevancy of the charred bones and the trial court’s error in admitting same, but not an argument regarding circumstantial evidence versus direct evidence. As such, the State’s argument falls flat.

First, the State's expert could testify only that the charred bones derived from a human but could not determine gender. 27 R. 383. Second, while Mr. Hilton's DNA was found on a cigarette butt at a campsite near where the charred bones were found, *the State's expert was unable to extract DNA from those bone fragments* to compare them to a known sample of DNA taken from the decedent. Resp. at 49; 27 R. 386; 31 R. 837-38. Third, while the decedent's DNA may have been found in Mr. Hilton's van, again, *the State's expert was unable to extract DNA from the bone fragments* to compare them to a known sample taken from the decedent. 27 R. 382, 386; 31 R. 837-38. Contrary to the State's argument then, demonstrating an abuse of discretion by the trial court would not have been difficult at all. Resp. at 49.

The State's "four critical facts" argument is antithetic to this Court's precedent holding that "the chain of inference from the evidence necessary to establish the material fact . . ." to balance a piece of evidence's unfair prejudice and probativeness must be logical. *McDuffie v. State*, 970 So.2d 312, 327 (Fla. 2007). The State's argument broke the chain as it delves into DNA evidence, because of *the State expert's inability to extract DNA from the bone fragments*. This argument is also illogical because it 1) suggests there were bones other than those presented; and 2) acknowledges that the location where the charred bones were found was only near the campsite where Mr. Hilton was seen. Resp. at 49.

The State also argues Mr. Hilton failed to establish the prejudice prong for IAAC under *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006). As with the other claims, however, the State misconstrues the prejudice analysis regarding IAAC claims. *See supra*. Furthermore, the State’s conclusion that “any error regarding the admissibility of the evidence [in light of the overwhelming evidence of Mr. Hilton’s guilt] most likely would have been held harmless” is a misstatement of this Court’s precedent. In *Ventura v. State*, 29 So.3d 1086, 1089 (Fla. 2010), this Court “explicitly expressed that the harmless error analysis is *not* an ‘overwhelming-evidence test.’” (Emphasis added) (citing *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986)). Mr. Hilton has thus established IAAC, warranting relief.

CONCLUSION

For the foregoing reasons and for those previously stated in Mr. Hilton’s petition for writ of habeas corpus, Petitioner respectfully requests that this Court grant habeas relief and vacate Mr. Hilton’s conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020 the foregoing was served via the e-portal to Assistant Attorney General Michael T. Kennett.

/s/ Robert A. Morris

Robert A. Morris, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this computer-generated petition for a writ of habeas corpus is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.100(I).

/s/ Robert A. Morris

Robert A. Morris