APPENDIX A

Filing # 126092157 E-Filed 05/04/2021 09:12:44 AM

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. 18-CF-585-A

vs.

JOHN EVERETT MURRAY III,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE comes before the Court on Defendant's pro se "Motion for Post Conviction Relief," filed pursuant to Fla. R. Crim. P. 3.850 on April 19, 2021.[1] Having reviewed the motion, the case file, and the applicable law, and upon due consideration, the Court finds as follows:

The record reflects that Defendant was charged by indictment with first degree premeditated murder, reclassified. A copy of the indictment is attached hereto as Exhibit A. On February 6, 2019, Defendant pled guilty to the lesser included offense of second degree murder pursuant to a negotiated plea. A copy of the plea agreement is attached hereto as Exhibit B. Pursuant to the terms of the plea agreement, Defendant was sentenced to thirty-five years imprisonment with a minimum mandatory term of twenty-five years pursuant to Fla. Stat. § 775.087(2), followed by five years of probation. A copy of the judgment and sentence is attached to Defendant's motion as Exhibit B. Defendant did not appeal.

In his motion, Defendant raises several claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984);

[1] By order rendered December 30, 2020, this Court granted Defendant's request for an extension of time to file his Rule 3.850 motion and gave Defendant until May 5, 2021, to file his motion.

*** E-FILED: GRANT MALOY, CLERK OF CIRCUIT COURT SEMINOLE COUNTY, FL 05/04/2021 09:12:42 AM.****

Appendix A

Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994). As to a claim of ineffective assistance of counsel arising out of the plea process, in order to satisfy the second prong, or the "prejudice" requirement, a defendant must show that there is a reasonable probability that, but for counsel's errors, they would not have entered a plea and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). The Court notes that in reviewing claims of ineffective assistance of counsel, it must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. Coleman v. State, 718 So. 2d 827 (Fla. 4th DCA 1998); Schofield v. State, 681 So. 2d 736 (Fla. 2d DCA 1996).

In **Ground One**, Defendant asserts that trial counsel was ineffective for failing to request that a presentence investigation (PSI) be conducted. Defendant entered a negotiated plea, which called for a sentence of thirty-five years with a twenty-five year minimum mandatory followed by five years of probation. Therefore, the PSI could not have affected the sentence Defendant received as the trial court imposed the agreed upon sentence. As a result, Defendant has failed to demonstrate that he was prejudiced. Consequently, Defendant has failed to demonstrate an entitlement to relief as to **Ground One**.

In **Ground Two**, Defendant asserts that the trial court erred in not having a PSI prepared. Issues of ordinary trial error, reviewable on appeal, are not cognizable under rule 3.850. Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001); Straight v. State, 488 So. 2d 530 (Fla. 1986); Childers v. State, 782 So. 2d 946 (Fla. 4th DCA 2001); State v. Johnson, 651 So. 2d 145 (Fla. 2d DCA 1995). As this an issue that Defendant could and should have raised upon direct appeal, it is inappropriately raised in a 3.850 motion and procedurally barred. Consequently, Defendant has failed to demonstrate an entitlement to relief as to **Ground Two**.

In **Ground Three**, Defendant asserts that trial counsel was ineffective for failing to filed a motion to dismiss based upon heat of passion. Defendant asserts that the evidence was insufficient to establish the crime of first degree premeditated murder; therefore, he asserts that trial counsel could have gotten the charge reduced to second degree murder or a lesser included offense by filing a motion to dismiss based upon heat of passion. Defendant asserts that had trial counsel gotten the charge reduced to second degree murder, he could have then entered a plea to manslaughter or third degree felony murder.

The record reflects that Defendant entered a negotiated plea to the lesser included charge of second degree murder. Even if trial counsel had been able to get the charge reduced to second degree murder prior to Defendant's entry of his plea, Defendant cannot establish that he was prejudiced. If the charge was reduced to second degree murder, Defendant could not have entered a plea to a lesser included offense without an agreement from the State. "[A] defendant is not entitled to a plea offer from the State; that is a discretionary matter entirely within its executive domain." Bass v. State, 932 So. 2d 1170, 1172 (Fla. 2d DCA 2006) (citing Hitchcock v. State, 578 So. 2d 685, 690 (Fla.1990), vacated on other grounds, 505 U.S. 1215 (1992) and Downs v. State, 386 So. 2d 788 (Fla.1980)). Given that plea offers are within the discretion of the State, Defendant's assertion that he could have entered a plea to a lesser offense if the charge had been reduced to second degree murder is purely speculative. "Postconviction relief cannot be based on speculative assertions." Jones v. State, 845 So. 2d 55, 64 (Fla. 2003); see also, Valle v. State, 70 So. 3d 530, 550 (Fla. 2011). Consequently, the Defendant has failed to demonstrate an entitlement to relief as to **Ground Three**.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion is DENIED.

Defendant may file a notice of appeal within thirty days of the date this order is rendered.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida, Tuesday, May 4, 2021.

59-2018-CF-000585-A 05/04/2021 09:12:17 AM

Marlene Alva, Circuit Judge
59-2018-CF-000585-A 05/04/2021 09:12:17 AM

I hereby certify that copies of the foregoing have been furnished by mail this 4 day of May 2021 to:

John Everett Murray III, #N60292
Walton Correctional Institution
691 Institutional Rd.
DeFuniak Springs, FL 32433

Office of the State Attorney
101 Eslinger Way
Sanford, FL 32772

GRANT MALOY, Clerk of Courts

By: _____
DEPUTY CLERK

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,
vs.
JOHN E. MURRAY III
Defendant,
_____/

Case No. 18-CF-585-A

MOTION FOR REHEARING

The Defendant, John Murray, pro se[1] and pursuant to Fla. R. Crim. P. 3.850(j), hereby respectfully moves this Honorable Court for rehearing and on opportunity to amend his 3.850 motion asserting that the Court's previous decision inadvertently overlooks or misapprehends relevant points of both law and fact. In support the Defendant submits:

Procedural History:

1. The Defendant filed his rule 3.850 motion for post conviction relief on April 19th 2021, presenting three grounds for relief.
2. The Court summarily denied the 3.850 motion on May 4th 2021.
3. For good cause, the Defendant timely filed a motion for extension of time to file for rehearing on May 18th 2021, pursuant to the mail box rule, requesting an additional 15 days extension.
4. Thus, the instant motion for rehearing is being timely filed in good faith prior to the requested deadline of June 3rd 2021.

Request For Rehearing

In denying **Ground one** of the 3.850 motion, the court inadvertently overlooked a relevant point of law and fact relevant to the prejudice test inquiry or the second prong of Strickland. Specifically, the court erroneously found that the Defendant failed to demonstrate prejudice where the PSI could not have affected the sentence. See (order Denying defendant's Motion for Post conviction Relief at 2)

However, the proper prejudice test inquiry, in the context of a guilty plea, is whether or not there is a reasonable probability that the Defendant would not have pled and would have gone to trial but for counsel's deficient performance. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Grosvenor v. State*, 874 So. 2D 1176 (Fla. 2004)(in the context of a guilty plea, the prejudice prong of Strickland is

1. Mr. Murray is a layman to the law and is asking not to be held to the same standard of a Florida Bar Certified lawyer.

Appendix A

satisfied if there is a reasonable probability that but for counsel's error the defendant would not have pled and would have gone to trial).

Here, the Defendant failed to make the requisite allegation in ground one of his 3.850 motion in order to satisfy the prejudice prong of Strickland as he did not specifically allege that he would not have pled and instead would have gone to trial. See (Motion For Post Conviction Relief, Ground one at 2-4)

As such, because Ground One of his 3.850 motion is facially insufficient containing a pleading deficiency relevant to the prejudice test inquiry or second prong of Strickland, the Court should grant rehearing and provide Defendant with one good faith opportunity to amen the claim in order to cure the pleading deficiency within a reasonable amount of time pursuant to the Florida Supreme Court's holding in *Spera v. State*, 971 So. 2D 548, 561 (Fla. 2007).

As to **Ground Two** of the 3.850 motion, the Defendant admits that the Court properly denied this claim as trial court error is properly raised on direct appeal and not in a post conviction motion pursuant to Bruno v. State, 807 so 2d 55, 63 (Fla. 2001). However this opinion is in conflict with holdings dealing with this particular point of law in Martell v. State, 676 so 2d 1030 (Fla. 1996) where the court ruled that this issue could be raised on a timely 3.850 motion for post conviction relief.

As to **Ground Three**, the Defendant submits that the Court inadvertently overlooked relevant points of both law and fact. Specifically, the Defendant contends that the claim as presented in ground three was not only in artfully drafted but contained significant pleading deficiencies rendering the claim facially insufficient and warranting an amendment pursuant to the Florida supreme Court's holding in Spera v. State, 971 so 2d 548, 561 (Fla. 2007) (when the motion fails to sufficiently allege both prongs of Strickland in an ineffective assistance of counsel claim, the proper procedure is for the court to strike the motion, or all insufficiently pled claims within the motion and provide leave to amend the pleading

deficiencies within a reasonable period of time).

Here, the Defendant once again failed to satisfy the prejudiced prong of Strickland by failing to specifically assert that he would not have pled and would have gone to trial but for counsel's ineffectiveness pursuant to the holdings in *Hill* supra and *Grosvenor* supra.

Thus, Defendant submits that the Court inadvertently overlooked relevant points of law as contained in *Spera* supra, when the court denied these claims that contained pleading deficiencies relevant to the prejudice test inquiry of *Strickland*, without first providing Defendant with one good faith opportunity to amend the claims in order to cure the deficiencies within a reasonable amount of time.

Additionally, the claim presented in ground three of the motion was in-artfully drafted and exposes the Defendants ignorance of both his situation as well as the law. Instead of arguing that this "heat of passion" defense could have resulted in a motion to dismiss or a motion to reduce charges or a reduced sentence the defendant should have properly argued that his prospective heat of passion defense would have been a complete defense to either charge of premeditated murder or second degree murder and that had defense counsel properly investigated and advised Defendant on the applicability and viability of such a defense under the circumstances, the defendant would not have pled and instead would have gone to trial wherein the jury would have acquitted defendant finding that the killing was excusable homicide under the heat of passion defense to murder and therefore lawful.

Furthermore, the defendant contends that the facts and circumstances surrounding the killing establish excusable homicide and the viability of the prospective heat of passion defense based on adequate provocation where : 1) there was a sudden event that would have and did suspend the exercise of judgment in an ordinary reasonable person; 2) a reasonable person did and would have lost control and would have lost control and would have been driven by a blind and unreasonable fury; 3) there was not a reasonable amount of time to cool off; 4) a reasonable person would not have cooled off before

committing the act that caused death; and 5) the defendant was so provoked by the victim and did not cool off before ultimately shooting and killing the victim.

Notably, when discussing heat of passion and requesting that defense counsel file a motion to dismiss or reduce charges, counsel failed to advise Defendant that a heat of passion defense based on adequate provocation was a complete defense to murder that would have to be presented to a jury rather than in a motion to dismiss. Had defendant known such, he would not have pled and instead would have insisted on going to a jury trial.

Significantly, should the Defendant be provided with one good faith opportunity to amend his claim as presented in ground three of his motion (as expanded upon herein) the Defendant would present a legally valid and facially sufficient claim asserting that his plea involuntary and unknowingly entered based on defense counsel's ineffectiveness in failing to investigate and properly advise Defendant on the applicability and viability of this prospective heat of passion defense consistent with *Robinson v. State*, 909 so 2d 479 (Fla 5th DCA 2005).

Wherefore, Defendant request that the court grant rehearing and provide Defendant with one good faith opportunity to amend his 3.850 motion in order to cure the pleading deficiencies as contained in grounds one and three, pertaining to the prejudice prong of *Strickland*, within a reasonable amount of time pursuant to *Spera* supra.

Respectful Submitted,

_____,

John E Murray III #N60292
Walton correctional Institution
691 Institution Road
DeFuniak Springs, FL 32433

OATH

Under penalties of perjury and administrative sanction from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and

correct, and that I have a reasonable belief that the motion is timely filed. I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing motion or had the motion read to me, or the foregoing motion was translated completely into a language which I understand and read to me by John Murray, whose address is 691 Institution road Defuniak Springs Florida 32433, and whose certification of an accurate and complete translation is attached to this motion.

/s/_____

John E Murray #N60292, pro se

Certificate of Mailing

I certify that I placed this document in the hands of Walton Correctional institution officials for mailing to: **Seminole County Clerk of Court: P.O BOX 301 N. PARK AVE SANFORD, FL 32771**

State Attorney Office: P.O. BOX 8006 SANFORD FL 32771 County,**SEMINOLE**

By First Class U.S. Mail on (date) _____.

/s/_____

John Everette Murray III

Walton Correctional Institution

691 Institutional Road

DeFuniak Springs, FL 32433

DC#N60292

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 18-CF-0585-A

STATE OF FLORIDA,

Plaintiff(s),

vs.

JOHN EVERETT MURRAY, III,

Defendant(s).

APPENDIX A

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE came before this Court upon the Defendant's "Motion for Rehearing," filed on June 7, 2021. Having considered the motion and being fully advised in its premises, it is

ORDERED AND ADJUDGED:

The Defendant's Motion for Rehearing is **denied.**

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida on Tuesday, June 8, 2021.

59-2018-CF-000585-A 06/08/2021 09:03:59 AM

Marlene Alva, Circuit Judge
59-2018-CF-000585-A 06/08/2021 09:03:59 AM

I hereby certify that copies of the foregoing have been furnished by mail this ___ day of _____, 2021, to:

Office of the State Attorney
SemFelony@sa18.org

John Everett Murray, III #N60292
Walton Correctional institution
691 Institution Road
DeFuniak Springs, FL 32433

GRANT MALOY, Clerk of Courts

Mailed to DEF 6/8/21-DW

By: _____
DEPUTY CLERK

*** E-FILED: GRANT MALOY, CLERK OF CIRCUIT COURT SEMINOLE COUNTY, FL 06/08/2021 09:04:04 AM.****

Appendix A

/s/ Allison L. Morris
ALLISON L. MORRIS
ASSISTANT ATTORNEY GENERAL
Florida Bar #0931160
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, FL 32118
(386)238-4990/fax (386)238-4997
crimappdab@myfloridalegal.com
allison.morris@myfloridalegal.com

COUNSEL FOR APPELLEE

DESIGNATION OF E-MAIL ADDRESS

The State designates crimappdab@myfloridalegal.com as its primary email address and allison.morris@myfloridalegal.com as its secondary address.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response has been furnished by U.S. Mail to Pro Se Appellant, John Everette Murray, III, DC#N60292, Walton Correctional Institution, 691 Institution Road, DeFuniak Springs, FL 32433, on this 23rd day of August 2021.

/s/ Allison L. Morris
ALLISON L. MORRIS
Counsel for Appellee

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JOHN EVERETTE MURRAY, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

AFFIRMED 11/2/21

CASE NO. 5D21-1633
LT CASE NO. 2018-CF-0585-A

DATE: December 08, 2021

BY ORDER OF THE COURT:

ORDERED that Appellant's "Motion for Rehearing/Petition for Written Opinion," filed November 16, 2021 (mailbox date), is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Lambert, Edwards and Eisnaugle

cc:

Allison L. Morris — Office of the Attorney General — John Everette Murray, III

Appendix B

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE Brian D. Lambert, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: January 03, 2022
FIFTH DCA CASE NO.: 5D 21-1633
CASE STYLE: JOHN EVERETTE MURRAY, III v. STATE OF FLORIDA
COUNTY OF ORIGIN: Seminole
TRIAL COURT CASE NO.: 2018-CF-0585-A

I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Mandate and Opinion to: Clerk Seminole
cc: (without attached opinion)

Allison L. Morris	Office of the Attorney General	John Everette Murray, III

td
Served:

REBECCA ROCK MCGUIGAN
JOHN EVERETTE MURRAY III
HON. SANDRA B. WILLIAMS, CLERK
HON. GRANT MALOY, CLERK
HON. MARLENE M. ALVA, JUDGE

Supreme Court of Florida

TUESDAY, JANUARY 4, 2022

CASE NO.: SC22-7
Lower Tribunal No(s).:
5D21-1633; 592018CF000585A000XX

JOHN EVERETTE MURRAY III vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. *See Wheeler v. State*, 296 So. 3d 895 (Fla. 2020); *Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Gandy v. State*, 846 So. 2d 1141 (Fla. 2003); *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002); *Harrison v. Hyster Co.*, 515 So. 2d 1279 (Fla. 1987); *Dodi Publ'g Co. v. Editorial Am. S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court