UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DESMOND JUSTIN MURRAY, Petitioner, vs. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, and ATTORNEY GENERAL, STATE OF FLORIDA, Respondents.	Case No. 8:15-cv-1245-MSS-JSS ORAL ARGUMENT REQUESTED

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Desmond Justin Murray, through undersigned counsel, respectfully replies to respondents' amended response to petition for a writ of habeas corpus (Doc. 8).

TIMELINESS AND STANDARD OF REVIEW

Mr. Murray and respondents agree (1) that the petition is timely and all grounds raised are exhausted, (2) about the deferential standard of federal habeas review under 28 U.S.C. § 2255(d), and (3) that the clearly established law that controls Mr. Murray's claim of ineffective assistance of counsel is *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See* Doc. 8 at 3-5.

STATEMENT OF THE CASE AND FACTS

Mr. Murray incorporates by reference the statement of the case and facts set forth in his initial brief in *Murray* v. *State*, No. 2D13-3947 (Fla. 2d DCA). *See* Doc. 9-1.19.

ARGUMENT

I. GROUND 1: THE POST-CONVICTION COURT RENDERED A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW WHEN IT CONCLUDED, WITHOUT AN EVIDENTIARY HEARING, THAT TRIAL COUNSEL WAS EFFECTIVE DESPITE OMITTING "CULPABLE NEGLIGENCE" AS AN ELEMENT FROM AGGRAVATED MANSLAUGHTER

The post-conviction court rendered a decision that was contrary to, or involved an unreasonable application of, clearly established federal law when it concluded, without an evidentiary hearing, that the record refuted Mr. Murray's claim that his trial counsel omitted "culpable negligence" as an element from aggravated manslaughter.

One element of first degree aggravated manslaughter is "culpable negligence." Fla. Stat. § 782.07(3). Specifically, any "person who causes the death of any person under the age of 18 by *culpable negligence* under s. 827.03(2)(b) commits aggravated manslaughter of a child, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." *Id.* (emphasis added). Under Florida law, "culpable negligence is an essential element of manslaughter." *Reed* v. *State*, 531 So. 2d 358, 359 (Fla. 5th DCA 1988).

Mr. Murray's post-conviction motion pursuant to Florida Rule of Criminal Procedure 3.850 alleged that in Count 3, "the essential element of 'culpable negligence' was omitted." R. 49. The post-conviction court, however, denied this ground because it concluded the trial transcript refuted Murray's claim that Count 3 omitted culpable negligence as an element of the offense.[1] R. 67[2] (citing Doc. 9-1.4 (Trial Tr.) at 685-86). This was an elementary misreading of the trial transcript that no reasonable jurist could make.

To the contrary, the trial transcript did not refute the Rule 3.850 motion's factual allegation, but in fact confirmed it. *See* Doc. 9-1.4 (Trial Tr.) at 685-86. Specifically, the trial court instructed the jury that first-degree aggravated manslaughter had the following elements: (1) "Daidon Murray is dead"; (2) "the death of Daidon Murray was caused because Desmond Murray failed to make a reasonable effort to protect Daidon Murray from abuse, neglect or exploitation by another person"; (3) "Desmond Murray was a caregiver for Daidon Murray"; and (4) "Daidon Murray was under the age of 18 years." Doc. 9-1.4 (Trial Tr.) at 684-85.

---

[1] Presumably, the Second District Court of Appeal had previously per curiam affirmed on this issue on direct appeal in *Murray* v. *State*, 84 So. 3d 1038 (Fla. 2d DCA 2011) because Mr. Murray's trial counsel invited the error when she drafted the instruction herself. *See Downs* v. *State*, 977 So. 2d 572, 574 (Fla. 2007) (describing invited-error doctrine).

[2] Mr. Murray will separately file the record on appeal from his post-conviction appeal in *Murray* v. *State*, 84 So. 3d 1038 (Fla. 2d DCA 2011), in paper format. The reply's record citations (i.e., R. __) refer to that record.

This instruction, however, impermissibly omitted "culpable negligence" as an element to be proven beyond a reasonable doubt. The fact that the trial court subsequently provided a freestanding definition of culpable negligence (Doc. 9-1.4 (Trial Tr.) at 685) did not make up for its exclusion from the elements of the crime itself. Simply put, this disconnect meant the instruction did not require the State to prove beyond a reasonable doubt the essential element that Murray acted with culpable negligence. And Count 3's freestanding definition of culpable negligence (Doc. 9-1.4 (Trial Tr.) at 685) did not make up for its omission of culpable negligence as an element.

In their response, respondents argue it was "reasonable for the state court to conclude that this [freestanding] instruction was sufficient to inform the jury that a finding of culpable negligence was required in order to convict petitioner on count three." Doc. 8 at 7. Respondents are incorrect.

As instructed, the second element of aggravated manslaughter required mere negligence, not culpable negligence. To wit, the second element asked the jury to determine whether "the death of Daidon Murray was caused because Desmond Murray failed to *make a reasonable effort* to protect Daidon Murray from abuse, neglect or exploitation by another person." Doc. 9-1.4 (Trial Tr.) at 685 (emphasis added). In other words, the instruction asked the jury to find mere negligence. But under Florida law, culpable negligence requires much more:

> Each of us has a duty to act reasonably toward others. If there's a violation of that duty without any consci[ous] intention to harm then that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be culpable negligence it must be gross and flagrant. The negligence must be committed with a[n] utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily harm.

Doc. 9-1.4 (Trial Tr.) at 685-86. Accordingly, the jury was presented with a crime, the elements of which required mere negligence, along with a free-standing definition of culpable negligence, which was not attached to the crime's elements. Presented with this state of affairs, a reasonable jury would have focused exclusively on the crime's elements (which required mere negligence) while disregarding the freestanding definition of culpable negligence as irrelevant. That is why the instruction was wrong, and that is why trial counsel's failure to include culpable negligence in the instruction was ineffective assistance of counsel.

Because the post-conviction court summarily denied this ground without an evidentiary hearing, the appropriate remedy here is for this Court to conduct an evidentiary hearing to determine whether this failure to include culpable negligence as an element prejudiced Mr. Murray or whether it was a matter of trial strategy. 28 U.S.C. § 2254(d)(2), (e)(2); *accord Gary* v. *State,* 775 So. 2d 335, 336 (Fla. 2d DCA 2000). "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could

enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro* v. *Landrigan*, 550 U.S. 465, 474 (2007). "[A] petitioner cannot be said to have 'failed to develop' relevant facts [under 28 U.S.C. § 2254(e)(2)] if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings." *Breedlove* v. *Moore*, 279 F.3d 952, 960 (11th Cir. 2002). Because Mr. Murray sought, but did not receive, an evidentiary hearing from the post-conviction court regarding this ground, this Court should grant him that evidentiary hearing.

II. GROUND 2: THE POST-CONVICTION COURT RENDERED A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW WHEN IT RELIED ON RULE 3.505 INSTEAD OF RULE 3.152 IN CONCLUDING, WITHOUT AN EVIDENTIARY HEARING, THAT TRIAL COUNSEL WAS EFFECTIVE DESPITE FAILING TO SEVER COUNTS ONE AND TWO FROM COUNT THREE

The post-conviction court rendered a decision that was contrary to, or involved an unreasonable application of, clearly established federal law when it mistakenly relied on Florida Rule of Criminal Procedure 3.505 instead of Florida Rule of Criminal Procedure 3.152 in concluding, without an evidentiary hearing, that Mr. Murray's trial counsel was effective despite failing to move to sever Counts 1 and 2 from Count 3.

Counts 1 and 2 were legally inconsistent with Count 3. Indeed, they put Mr. Murray in an untenable position in which "he was damned if he did

and damned if he didn't." R. 161. For that reason, Mr. Murray's defense could not focus on Counts 1 and 2 on one hand or Count 3 on the other hand. Instead, Mr. Murray's defense had to keep the evidence regarding all counts in equipoise. R. 118.

To address this difficulty, Mr. Murray's trial counsel filed a motion to elect, which would have forced the State to choose between pursuing Counts 1 and 2 on one hand or Count 3 on the other. *See* Addendum. Had that motion been granted, Murray could have focused only on defending Counts 1 and 2 or Count 3. But a motion to elect sought the wrong remedy. Indeed, Florida law is clear that the State "need not elect between inconsistent counts." Fla. R. Crim. P. 3.505.

Instead, trial counsel should have sought a different remedy by filing a motion to sever. In contrast to Rule 3.505, trial courts "*shall* grant severance" whenever "appropriate to promote a fair determination of the defendant's guilt or innocence of each offense." Fla. R. Crim. P. 3.152(a)(2)(A) (emphasis added); *cf.* Fed. R. Crim. P. 14(a) ("If the joinder of offenses . . . in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts . . . or provide any other relief that justice requires."). It is true that, under Florida law, the "decision to grant or deny a motion for severance rests within the sound discretion of the trial court." *Williams* v. *State*, 40 So. 3d 89, 91 (Fla. 4th DCA 2010). But that discretion can

readily be abused. For instance, in *Ellis* v. *State*, a trial court abused its discretion in denying a severance where admission of one offense was "highly prejudicial" for others. 534 So. 2d 1234, 1235 (Fla. 2d DCA 1988). That same rule applies with full force here. Simultaneous prosecution of Mr. Murray on the legally inconsistent theories alleged in Counts 1 and 2 was "highly prejudicial" to his defense on Count 3. Had the trial court denied a motion to sever, it would have abused its discretion. It follows, then, that Murray's trial counsel's performance was deficient when she mistakenly filed a motion to elect instead of a motion to sever.

In these circumstances, the appropriate remedy is for this Court to convene an evidentiary hearing to determine whether this failure to file a motion to sever prejudiced Mr. Murray or whether it was a matter of trial strategy. *See* 28 U.S.C. § 2254(d)(2), (e)(2); *accord Gary*, 775 So. 2d at 336; *see also Schriro*, 550 U.S. at 474; *Breedlove*, 279 F.3d at 960.

Disregarding the stipulation into which the State forced Mr. Murray to enter, respondents contend severance "would not necessarily have benefitted" Mr. Murray. Doc. 8 at 8. But on this record, it appears every reasonable jurist would have concluded this deficient performance did prejudice Mr. Murray. Had the trial court severed the counts, Mr. Murray would have pursued a defense to Counts 1 and 2 that it was Ms. Barkley who stuffed the rag into Daidon's mouth (or it was an accident), and a defense to Count 3 that he was ei-

ther not aware that Ms. Barkley had done so (or that it was an accident). This would have substantially changed Mr. Murray's and trial counsel's decision-making calculus whether to enter into the stipulation that Daidon's death was caused by the intentional act of another in lieu of pursuing an accidental-death defense. Instead, the jury was confronted with an information that charged legally inconsistent counts in which Mr. Murray was "damned if he did and damned if he didn't." R. 161. Accordingly, the jury compromised and essentially found that Ms. Barkley was the one who killed Daidon, but that Mr. Murray was responsible for failing to prevent her. This kind of compromise in the face of inconsistent counts would not have been necessary had the counts been severed.

Additionally, respondents contend the post-conviction court could have reasonably concluded that the trial court would not have abused its discretion in denying a motion for severance. Doc. 8 at 9. But this argument disregards the holding of *Ellis*: i.e., trial courts abuse their discretion in denying a severance whenever admission of one offense is "highly prejudicial" for defending against others. 534 So. 2d at 1235. Accordingly, because the trial court would have abused its discretion in denying a severance, Mr. Murray's trial counsel was ineffective when she filed a motion to elect instead of a motion to sever.

Rather than joining this debate by attempting to distinguish *Ellis*, respondents instead contend this argument was "pure speculation." Doc. 8 at 9.

Respondents' argument is difficult to understand, because post-conviction courts and appellate courts *always* have to speculate about what would have happened if trial counsel had pursued another course of action. In any event, the upshot is that this Court will have to decide this abuse-of-discretion question by reading *Ellis* without any guidance from respondents.

Finally, respondents contend Mr. Murray alleged no facts in his federal habeas petition or Rule 3.850 motion that "demonstrate a reasonable probability that he would not have been convicted on count three had the counts been severed." Doc. 8 at 9. This too is incorrect. Mr. Murray alleged he would not have entered into the stipulation had the counts been severed. Doc. 1 at 7; Doc. 9-1.13 at 16-22. And Mr. Murray alleged it was the stipulation that forced the jury to find him guilty of Count 3.[3] Again, because Mr. Murray sought, but did not receive, an evidentiary hearing from the post-conviction

[3] With respect to the prejudice prong, Mr. Murray specifically alleged:

> Moreover, the failure to file a motion to sever caused prejudice to Murray. Had the counts been severed, Murray could have defended Counts 1 and 2 by showing Barkley stuffed the rag into Daidon's mouth (or it was an accident), and Count 3 by showing he was either not aware that Barkley had done so (or that it was an accident). This would have substantially changed Murray's decision-making calculus whether to enter into the stipulation that Daidon's death was caused by the intentional act of another in lieu of pursuing an accidental-death defense. Instead, the jury was confronted with an information that charged legally inconsistent counts in which Murray was "damned if he did and damned if he didn't." R. 161. Accordingly, the jury compromised and found Barkley killed Daidon, but Murray was responsible for failing to prevent her. With a motion to sever, such a compromise would have been unnecessary.

Doc. 1 at 7.

court regarding this ground, this Court should grant him that evidentiary hearing. *See supra* Argument I.

III. GROUND 3: THE POST-CONVICTION COURT RENDERED A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW WHEN IT FAILED TO RECOGNIZE CUMULATIVE ERROR EXISTS

The post-conviction court rendered a decision that was contrary to, or involved an unreasonable application of, clearly established federal law when it failed to recognize cumulative error exists.

The Supreme Court and Eleventh Circuit have not yet spoken whether the cumulative-error doctrine applies in habeas appeals under AEDPA. *See Morris* v. *Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 & n.3 (11th Cir. 2012); *accord Hill* v. *Sec'y, Fla. Dep't of Corr.*, 578 Fed. App'x 805, 810 (11th Cir. 2014). Accordingly, the only circumstance in which cumulative-error habeas claims have been held to fail is in "the absence of any individual errors to accumulate." *Morris*, 677 F.3d at 1132 n.3. Here, however, two errors have accumulated. *See supra* Arguments I-II. Therefore, the Court should rule that Mr. Murray is entitled to habeas relief under the cumulative-error doctrine as well.

LOCAL RULE 3.01(J) REQUEST FOR ORAL ARGUMENT

Mr. Murray respectfully requests 30 minutes of oral argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns (FBN 12535)
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

Respondents
AAG Sonya Horbelt

/s/ Thomas Burns
Thomas A. Burns

Addendum

IN THE CIRCUIT COURT, POLK COUNTY, FLORIDA

STATE OF FLORIDA

Plaintiff,

vs. CASE NO. CF07-002700-XX

DESMOND MURRAY,

Defendant.

_____/

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO ELECT

DEFENDANT, DESMOND MURRAY, through the undersigned and pursuant to Florida Rule of Criminal Procedure 3.140(o), hereby moves this Court to dismiss the Information filed April 27, 2010, or, in the alternative, to require the State to elect on which Count it will proceed to trial. As grounds for the motion, Defendant states:

1. Defendant was charged by Indictment dated April 26, 2007, with First Degree Murder and Aggravated Child Abuse. The allegations which formed the basis of both counts were that Defendant placed a washcloth in the victim's mouth and secured it with tape, which caused the victim to suffocate and die.
2. On April 27, 2010, The State filed a nolle prosequi of the Indictment.
3. When the State nolle prossed the Indictment on April 27, 2010, it also filed an Information charging three counts: (1) Manslaughter, (2) Aggravated Child Abuse, and (3) Aggravated Manslaughter of a Child (a copy of the Information is attached and incorporated by reference in this motion).
4. Count One essentially alleges that Defendant was the person who killed the victim by placing a piece of cloth in the victim's mouth (or by procuring someone else to do it).
5. Count Two alleges that Defendant knowingly or willfully abused the victim by placing a piece of cloth in the victim's mouth.
6. Count Three alleges Defendant failed to protect the victim from the actions (placing a piece of cloth in the victim's mouth) of another (i.e., Khristyne Barkley), which failure to protect caused the victim's death.
7. To break it down, Count 1 says "Defendant killed the baby by putting a washcloth in his mouth." Count 2, if proved, would provide the basis for a first-degree felony murder charge, not the manslaughter charge contained in Count 1. And Count 3 claims it wasn't Defendant at all who placed the cloth in the baby's mouth, it was the mother, Khristyne Barkley, who did.

Read — 8. The three counts are repugnant and inconsistent with respect to each other to the extent that they prevent the preparation of a defense in this case.

Read — 9. The Information is so vague, indistinct and indefinite so as to mislead Defendant and embarrass him in the preparation of his defense.

Read — 10. If the Court permits the State to proceed to trial on all three of these inconsistent counts, Defendant will be deprived of his due process and a fair trial rights under both the United States Constitution and the Florida Constitution.

Filed Polk County Clerk of Court 2010-04-29 15:49

Read — 11. Finally, Defendant notes that by alleging these mutually inconsistent theories, the State appears to be conceding that a reasonable doubt exists as to whether Defendant or Barkley placed the cloth in the baby's mouth and thus exists as to all of the Counts charged in the Information.

WHEREFORE, Defendant respectfully requests this Court dismiss the Information or, in the alternative, direct the State to elect which Count on which it will proceed to trial.

JAMES MARION MOORMAN
Public Defender

AMY PORINCHAK THORNHILL
FLORIDA BAR #0045616
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Castillo, Assistant State Attorney at the State Attorney's Office mailbox, Polk County Courthouse, Bartow, Florida, this 29th day of April, 2010.

JAMES MARION MOORMAN
Public Defender

AMY PORINCHAK THORNHILL
FLORIDA BAR #0045616
Assistant Public Defender