

IN THE SUPREME COURT OF FLORIDA

NO. SC04-2018

THOMAS M. OVERTON,

Petitioner,

v.

THE HONORABLE MARK H. JONES,

Circuit Judge, Sixteenth Circuit

In and For Monroe County,

Respondent.

EMERGENCY PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF PROHIBITION, AND FOR A WRIT OF
MANDAMUS AND REQUEST FOR STAY OF
HEARING SCHEDULED FOR NOVEMBER 15-17, 2004

LUCRECIA R. DIAZ
Assistant CCRC
Fla. Bar No. 0988110
OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL-South Region
101 NE 3rd Avenue
Ft. Lauderdale, Florida 33301
(954) 713-1284

Petitioner, THOMAS M. OVERTON, through undersigned counsel, petitions this Court for a writ of prohibition prohibiting the Honorable Mark Jones, Judge of the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, from conducting an evidentiary hearing in the matter of State of Florida v. Thomas M. Overton, Case No. **CFP-96-30167** at this time and for a writ of mandamus directing Judge Jones to continue the evidentiary hearing until after the pending appeal on Mr. Overton's Motion for DNA Testing pursuant to Fla. R. Crim. P. 3.853 is concluded.

Judge Jones has scheduled an evidentiary hearing regarding Mr. Overton's Amended Motion to Vacate Judgement for November 15-17, 2004. The hearing requires Mr. Overton to present evidence of how his trial counsel were ineffective for failing to adequately to use the crime scene expert in preparation of Mr. Overton's trial. Mr. Overton sought post-conviction DNA testing pursuant to Fla. R. Crim P. 3.853 and was partly denied relief. Mr. Overton has timely appealed to this Court. Mr. Overton's appeal of his 3.853 motion is currently pending before this Court. This case presents the question of whether Mr. Overton can be compelled to go forward with an evidentiary hearing regarding issues of crime scene processing and DNA analysis when an appeal affecting those very matters is pending before this Court. As grounds for relief, Petitioner alleges:

I. INTRODUCTION

Petitioner requests the Court's attention to this Petition for extraordinary relief at the earliest opportunity as Petitioner has been ordered to conduct an evidentiary hearing in Mr. Overton's case which is scheduled for November 15-17, 2004. Pursuant to Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure, Petitioner respectfully urges that this Court stay any further post-conviction proceedings, including the currently scheduled hearing, in Mr. Overton's case pending this Court's consideration of the petition for writ of prohibition.

Petitioner, Thomas M. Overton, is an indigent individual incarcerated at Union

Correctional Institution under sentence of death. Petitioner Overton is entitled to a full, fair and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Art. V, sec. 3(b)(9), Fla. Const., Fla. R. App. P. 9.030(a), and Fla. R. Crim. P. 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida's constitution and laws, Holland; Fla. R. Crim. P. 3.850; art. V, sec. 3(b)(9), Fla. Const.; Fla. R. App. P. 9.030(a)(3), as well as the federal constitution, guarantee Petitioner Overton that opportunity. See Michael v. Louisiana, 350 U.S. 91, 93 (1955) (Due Process Clause guarantees defendant "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948); Case v. Nebraska, 381 U.S. 336, 337 (1965) (Clark, J., concurring) (federal constitution guarantees defendant "adequate corrective [state-court] process for the hearing and determination of [his] claims of violation of federal constitutional guarantees); see also id. at 340-47 and nn. 5-6 (Brennan, J., concurring) (same).

Petitioner respectfully urges that this Court stay any further post-conviction proceedings in Mr. Overton's case, specifically the evidentiary hearing currently set for November 15-17, 2004, until Mr. Overton's pending appeal of the denial of his Motion for Post-Conviction DNA Testing is concluded.

II. JURISDICTION

This is an original action under Rule 9.100(a) of the Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to 9.030(a)(3) thereof and art V, sec. 3(b)(8), Fla. Const. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) (writ granted where circuit court erroneously denied motion to recuse judge.)

III. STATUS OF PETITIONER

Mr. Overton was sentenced to death in the Circuit Court of Monroe County. Mr. Overton has filed a Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.851.

On April 3, 2003, Mr. Overton filed a Motion for DNA Testing, pursuant to Fla. R. Crim. P. 3.853, requesting testing of several items in evidence, including but not limited to: rope cuttings obtained from several locations at the crime scene, vacuuming from around the female victim's body, tape cuttings from both victim's bodies, hair from the mattress pad, hair found in the tape on shoulder of man's T-shirt, fingernail scrapings from the victims, a sexual assault kit and a swab potentially containing a DNA specimen from fluid found on the leg of the female victim. All evidence which Mr. Overton's crime scene expert informed him would lead to evidence likely to either exonerate Mr. Overton or implicate additional perpetrators and affect the proportionality of his sentence.

On May 17, 2004, an Order was entered denying in part and granting in part the Defendant's Motion for Post-Conviction DNA testing, allowing for testing only of the sexual assault kit and the fingernail scrapings.

Mr. Overton subsequently filed a Motion for Clarification of Postconviction DNA Order. On August 20, 2004, the lower court entered an Order clarifying that the swab potentially containing a DNA specimen from the leg of the female victim was included for DNA testing as part of the sexual assault kit. However, the hairs attached to the bindings were still not included. This Order specifically incorporated by reference the Order entered on May 17, 2004.

A Second Motion for DNA Testing was submitted, specifically requesting that the hairs found in the tape bindings of the female victim be tested for DNA. This too was denied by

Order entered on August 20, 2004.

Mr. Overton timely filed his Notice of Appeal on September 14, 2004 with the trial court, (Appellant's Appendix, Exhibit A – Notice of Appeal, 9/14/04), the Clerk of the Court has not yet forwarded the Notice to this Court.¹ At the same time, Mr. Overton filed a Motion to Stay the Evidentiary Hearing essentially making the same arguments that are made in this petition. This motion was denied. These above-referenced Orders Denying DNA Testing are the subject of the referenced appeal.

The Florida Department of Law Enforcement ("FDLE") is currently conducting the Court ordered DNA testing of some evidence gathered in this case, which testing has not yet been completed. Based on the time FDLE needs to conduct the testing, it is questionable whether that the test results will be available prior to the Evidentiary Hearing scheduled to begin on November 15, 2004.

IV. REASONS FOR GRANTING PETITION

This Court should grant this petition because the trial court is without jurisdiction to continue to rule when the issues are inextricably intertwined with issues which are currently the subject of appeal with this Court.

"The orderly administration of justice requires. . . that the defendant pursue in one court at a time whatever legal remedies he desires to employ in attacking his criminal conviction." State v. Meneses, 392 So. 2d 905, 906 (Fla. 1981). This Court held, "while appeal proceedings or certiorari proceedings are pending in an appellate court, the trial court is without jurisdiction to entertain a motion to vacate." Meneses, 392 So. 2d at 907.

Mr. Overton filed a Motion to Vacate Judgment and Sentence pursuant to 3.851.

¹ However, counsel did receive the record on appeal from the Monroe County Clerk's Office. A copy is provided to this Court under separate cover. (Appellant's Appendix, Exhibit A – Notice of Appeal, 9/14/04).

The trial court granted a hearing on certain issues which include whether trial counsel were ineffective for failing to adequately use their crime scene expert. Mr. Overton filed a motion for Post-conviction DNA Testing pursuant to Fla. R. Crim P. 3.853. Rule 3.853 allows the defendant to appeal an adverse decision within 30 days of its rendition. Mr. Overton has appealed the adverse portions of that denial. As such, jurisdiction of this case properly lies with this Court until those issues currently under appeal have been decided. Issues which are inextricably intertwined with the issues to be presented at the evidentiary hearing on Mr. Overton's 3.851 motion.

The trial court granted Mr. Overton an evidentiary hearing on several issues, one of which is whether his trial counsel were ineffective for failing to adequately use crime scene expert testimony. The results derived from DNA testing would affect the opinion of the crime scene experts that Mr. Overton intends to call. The crime scene experts testimony is premised on the availability of all scientific testing data. As such, this testimony would be affected by the results of any DNA testing.

Mr. Overton has appealed the denial of DNA testing of certain items of evidence to this Court. This Court has not yet heard that appeal. Mr. Overton is confident that his appeal is meritorious.

The issues which Mr. Overton has been afforded a hearing on are inextricably intertwined with all issues regarding Mr. Overton's Post-conviction DNA motion pursuant to 3.853 which is currently under appeal to this Court.

Mr. Overton is entitled to a full, fair and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Art. V, sec. 3(b)(9), Fla. Const., and Fla. R. Crim. P. 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida's constitution and laws, Holland; Fla. R. Crim. P. 3.850; art. V, sec. 3(b)(9), Fla. Const.; Fla. R. App. P. 9.030(a)(3), as well as the federal constitution, guarantee Mr. Overton that opportunity. See Michael v. Louisiana, 350 U.S. 91, 93 (1955) (Due

Process Clause guarantees defendant "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948); Case v. Nebraska, 381 U.S. 336, 337 (1965) (Clark, J., concurring) (federal constitution guarantees defendant "adequate corrective [state-court] process for the hearing and determination of [his] claims of violation of federal constitutional guarantees); see also id. at 340-47 and nn. 5-6 (Brennan, J., concurring) (same). Due process, equal protection, the Sixth Amendment, and the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), countenance no less. Furthermore, forcing Mr. Overton to go forward when matters affecting the testimony he will present are currently under appeal deprives him of due process.

WHEREFORE, Mr. Overton requests that this Court issue a writ of prohibition prohibiting the Honorable Mark H. Jones, Judge of the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, from conducting an evidentiary hearing in the matter of State of Florida v. Thomas M. Overton, Case No. **CFP-96-30167** at this time and for a writ of mandamus directing Judge Jones to continue the evidentiary hearing until such a time as Mr. Overton's appeal of the denial of his Motion for Post-conviction DNA Testing pursuant to Fla. R. Crim P. 3.853 is concluded.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all parties of record on October 15, 2004.

LUCRECIA R. DIAZ
Florida Bar 0899110
Assistant CCRC
101 NE 3RD Avenue
Fourth Floor
Ft. Lauderdale, Florida 33301
(954)713-1284

Attorney for Petitioner

Copies furnished to:

Hon. Mark H. Jones, Circuit Judge
500 Whitehead Street, Suite 402
Key West, FL 33040

John E. Marke
Trial Courts Staff Attorney
Sixteenth Judicial Circuit
502 Whitehead St., 3rd Floor
Key West, FL 33040

Katherine Vogel
Office of the State Attorney
520 Whitehead St.
Key West, FL 33040

Celia Terenzio
Assistant Attorney General
Office of the Attorney General
1515 N. Flagler, Ninth Floor
West Palm Beach, FL 33401