

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-866

Lower Tribunal No.: 16-1999-CF-1156-AXXX

JAMES BELCHER,

Petitioner,

v.

JAMES R. McDONOUGH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

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Petitioner James Belcher, by and through his undersigned, Court-appointed counsel, hereby submits his reply to the Respondent's response to Petitioner's Petition for Writ of Habeas Corpus as follows:

CLAIM 1: THE FLORIDA SUPREME COURT'S DECISION IN STATE v. STEELE, 921 So.2d 538 (Fla. 2005) SUGGESTS THAT PETITIONER'S DEATH SENTENCE, WHICH WAS IMPOSED PURSUANT TO A NON-UNANIMOUS DEATH RECOMMENDATION, IS NO LONGER LEGAL

Petitioner will rely solely on the argument he submitted in his original Petition for Writ of Habeas Corpus on this Claim. Should any new case law or legislation arise which Petitioner deems beneficial on this Claim, he will so notify the Court and counsel.

CLAIM 2: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF IMPROPER, GRUESOME PHOTOGRAPHS ON APPEAL

Respondent relies heavily upon Looney v. State, 803 So.2d 656 (Fla. 2001) in support of its argument that no winning appeal issue existed with regard to the trial Court's admitting the photographs of the victim's body into evidence. The subject of the Looney case was a combined robbery and murder in which the defendants subsequently set fire to the gunshot-killed victims' house in order to destroy evidence.

With regard to the "admissibility of gruesome photographs" issue, the

Looney court actually discussed *two* types of charred-body photos: (1) photos of the victims' charred bodies as found at the scene, and, (2) photos of the victims' charred bodies after autopsies. The Looney found only the first set of photos to be admissible. The Looney court explained the simple rationale underlying decision: "This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance." *Id.*, p. 688.

The Court explained why the pre-autopsy photograph showing the victim's charred remains were admissible:

Although undeniably a gruesome photograph (it) . . . is probative of other material issues in this case. First, because the picture depicts the bodies lying side-by-side and face down on the victim's bed, it corroborates . . . testimony that the victims were shot execution-style in the backs of their heads while bound face down on their bed. Second, the position of the victims' bodies is also relevant . . . because it assisted (the) crime scene investigator . . . in describing how the victims' bodies "protected" some of the victims' clothing from fire debris and, thus how such evidence was recoverable for testing of accelerants. Third, the photo assisted the State Fire Marshal investigator during his testimony in describing areas of the bedroom where accelerant was likely poured, e.g. on the flooring immediately surrounding the bed where the photo depicts flooring as completely missing. Fourth, the photo depicted for the jury the massive damage done by the fire to the victims and the area immediately surrounding them such that . . .it

significantly interfered with the recovery of projectiles and other forensic evidence. Finally . . . (it) is also probative of the avoid arrest aggravating circumstance. . .

(Id. P. 669, footnote 9).

The Looney Court also explained why the post-autopsy photographs of the victim's charged remains were *inadmissible*:

“ . . . [t]o be relevant, a photo of a deceased victim must be probative of an issue *that is in dispute*. Almeida v. State, 748 So.2d 922, 929 (Fla. 1999)

In this instance, the jury viewed two gruesome autopsy photographs showing the effects of the fire, which, all parties agree occurred *after* the victims' deaths. Because the victims' bodies were so damaged by the fire, neither of the admitted autopsy photos . . . are probative of the medical examiner's determination as to the manner of the victim's deaths. The photographs at issue were only used by the medical examiner to describe the damage done to the victims' bodies by the ensuing fire. Said another way, the damage caused to the deceased victims' bodies by the fire after their deaths was not an issue in dispute. Moreover, the medical examiner's testimony about the cause of death did not rely at all on the photographs.

(emphasis Court's; footnotes omitted)

The present Petitioner respectfully disagrees with the Respondent's characterization of the photos of the victim as “relevant.” As Respondent concedes, the Petitioner's DNA was allegedly found on the victim's slippers

outside of the bathtub, not in the body of the victim which was found *inside* the bathtub. No one disputed that the victim was murdered by being drowned in the bathtub. The only “guilt” issues in this case were whether or not the victim was sexually battered, and the identity of the person(s) who killed and possibly raped her. Therefore, the victim photographs in the subject case –even if they are only minimally gruesome– should have been objected to and should have been excluded for the same reason as the post-autopsy photographs in the Looney case: They were not relevant to any disputed issue in the case.

CLAIM 3: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUES OF THE TRIAL COURT’S ERROR IN DENYING PETITIONER’S MOTIONS FOR A JUDGMENT OF ACQUITTAL AND FOR JURY INSTRUCTIONS BASED ON THE CIRCUMSTANTIAL EVIDENCE RULE

Respondent relies heavily upon the cases of Reynolds v. State, SC03-1919 (Fl. May 18, 2000) and Orme v. State, 677 So.2d 258 ,(Fla. 1996) in support of its argument that a case in which the State produces evidence of Defendant’s DNA is not “wholly circumstantial.” Those cases are factually distinguishable from the subject case. In Reynolds, the Defendant’s DNA was found inside a trailer home which was the scene of the crime as well as a place the Defendant claimed to have never entered. Hence, Defendant’s “theory of

innocence,” which depended upon him never having entered the trailer, was no longer a “reasonable hypothesis of innocence.”

Orme was a rape/murder case. The Defendant’s “theory of innocence” was that an some additional, unknown person besides himself had been in the victim’s hotel room and had murdered the victim. There was DNA evidence that sexual contact had occurred between the bodies of the victim and defendant. Also, the Defendant had admitted that he was present in the victim’s hotel room and had argued with her and robbed her on the day of the murder. The Orme Court explained that such evidence of guilt effectively contradicted the Defendant’s theory of innocence to the point that the case was properly submitted to the jury.

In the present case, as indicated in pages 12-15 of the subject habeas corpus petition, there was much evidence suggesting that the victim was a sexually active individual and had engaged in recent, consensual sexual intercourse with the Defendant as well as with others. As mentioned by this Florida Supreme Court in its direct appeal opinion on this case, there was also evidence presented at trial which suggested that the Defendant and victim had a number of prior, peaceful encounters with each other. There was no evidence of any forceful entry into the victim’s apartment. *See* Belcher v. State, 851 So.2d 678 (Fla. 2003).

It is important to note that in the present case, the semen found in the victim's dead body was never DNA-tested. Consequently, the defense hypothesis in the present case –that the defendant never had any non-consensual intercourse with the victim– *was* indeed a “reasonable” hypothesis of innocence. The State did not present proof to the contrary. Defendant's Court-appointed appellate counsel was ineffective in failing to raise “circumstantial evidence rule” issues on direct appeal.

CLAIM 4: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF THE TRIAL COURT'S WRONGFUL DENIAL OF A MOTION FOR MISTRIAL BASED ON THE STATE'S COMMENT ON THE PETITIONER'S EXERCISE OF HIS RIGHT TO REMAIN SILENT

The State relies on Caballero v. State, 851 So.2d 655 (Fla. 2003) in support of its argument that “. . .it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument . . .” (Response, p. 25). The facts of Caballero are critical to an understanding of its ruling. In Caballero, the defendant made some pre-trial confessions to the police about how he tied up the victim and assisted in her murder, and then ejaculated into her dead body. The State produced presented these statements, along fingerprint and DNA evidence implicating the defendant, at trial. In closing

argument, defense counsel argued that the defendant did not intend to kill the victim. The State, in turn, argued that the defendant's true intent could be discerned by his *uncontradicted* statements to the police. The defense argued on appeal that the State's use of the expression "uncontradicted statements" in closing argument was a *de facto*, improper comment on the Defendant's silence. This Court ruled that such State emphasis on *uncontradicted* evidence was acceptable in that situation.

In the present case, by contrast, the prosecutor went much further. The State referred much more clearly to the Defendant's silence by telling the jurors, "What consent are we talking about? What evidence did you *hear* come out of that witness stand *saying* that she consented to this?" (TR 18, p. 1320-1321). Here, unlike Caballero, the prosecutor clearly referred to the lack of defense *testimonial* evidence.

Equally inapplicable is the Ramirez v. State, 847 So.2d 1147(Fla. 3d DCA 2003) case cited in the State's Response. In Ramirez, the Defendant showed his tattoos to the jury to support of his "misidentification" defense. The State objected that here had been no foundational showing that tattoos existed at the time of the crime. When the defense failed to subsequently prove the preexistence of the tattoos, as directed by the Court, the Court allowed the State to call attention

the lack of such foundational evidence during its closing argument. The Court did so as a corrective measure.

In Ramirez, the prosecutor simply pointed to a lack of evidence showing the defendant's tattoos were in place at the time of the crime. Ramirez does not deal with a prosecutor's indication that the defense failed to produce *testimonial* evidence, as occurred in the subject case.

Petitioner disagrees strongly with respondent's characterization of the prosecutor's comments as "harmless error." In fact, the comments were very harmful because the Defendant's semen was identified only on the victim's slipper, not her dead body. As noted in the discussion for Claim 3 above, there was evidence that the victim had been sexually active, and had been seeing the defendant as well as at least one other man shortly before her murder. The semen swabbed from the her dead body was never linked to this defendant. Other semen was found in the victim's apartment was never DNA- tested or linked to the present Defendant either.

In the present case, the trial Court's failure to grant Defendant's objection and motion for mistrial cannot be considered harmless error. In the cases cited by the State, the evidence of guilt was strong. In the present case, the evidence of Defendant's guilt was comparatively weak.

CLAIM 5: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN FAILING TO RAISE THE ISSUE OF VICTIM IMPACT EVIDENCE

Petitioner will rely solely on the argument he submitted in his original Petition for Writ of Habeas Corpus on this Claim. Should any new case law or legislation arise which Petitioner deems beneficial on this Claim, he will so notify the Court and counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of this document has been served by

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

The undersigned hereby certifies, that this Petition for Writ of Habeas Corpus is prepared in Times New Roman 14 Font and complies with Rule 9.210(a)(2), Fla. R. Crim. P.

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