IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

GARY RAY BOWLES

Appellant/Petitioner,

v.

STATE OF FLORIDA,

Appellee/Respondent.
_____/

Appeal No.: **SC06-1666**
L.T. Court No.: 94-CF-12188

PETITION FOR HABEAS CORPUS, PURSUANT TO FLA. R. APP. PRO., R. 9.142 (A)(5)

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Jack Schemer
Judge of the Circuit Court, Division A

_____
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JURISDICTIONAL STATEMENT

The Florida Supreme Court (hereinafter "FSC") has jurisdiction over this "Petition for Habeas Corpus," as this Honorable Court has original jurisdiction, as the instant case is a death penalty case, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.850/3.851 Motion for Postconviction Relief. Fla. R. App. Pro. R. 9.142(a)(5).

THE FACTS UPON WHICH PETITIONER RELIES

Gary Ray Bowles was arrested by Jacksonville Sheriff's Office officials on November 22, 1994 in relation to the murder of Walter Hinton. During the subsequent police interrogation, appellant gave both oral and written confessions to the murder. The grand jury indicted Appellant in December of 1994 on charges of first-degree murder and robbery. Bowles pled guilty to premeditated first-degree murder, and the jury in the subsequent penalty phase recommended death by a 10-2 vote. The trial court sentenced appellant to Death.

On appeal, the Florida Supreme Court (hereinafter FSC) vacated the death sentence and remanded the case for re-sentencing on August 27, 1998. The FSC found that the trial court erred in allowing the state to introduce evidence of Appellant's alleged hatred for homosexual men in the penalty

phase as it was not harmless and was a prevalent feature of the penalty phase.[1]

On remand, the re-sentencing jury recommended death, voting 12-0. The trial court again imposed the death penalty on or about September 7, 1999.[2] Appellant appealed this sentence to the FSC, raising twelve issues.[3]

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[1] See *Bowles*, 716 So. 2d at 769.

[2] The trial court found the following five aggravating circumstances: (1) Bowles was convicted of two other capital felonies and two other violent felonies; (2) Bowles was on felony probation in 1994 when he committed the murder as a result of a July, 18, 1991 conviction and sentence to four years in prison followed by six years probation for a robbery in Volusia county; (3) the murder was committed during a robbery or an attempted robbery, and the murder was committed for pecuniary gain (merged into one factor); (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was cold, calculated, and premeditated (CCP). The trial court assigned tremendous weight to the prior violent capital felony convictions, great weight to the HAC and CCP aggravators, significant weight to the robbery-pecuniary gain aggravator, and some weight to the fact that appellant was on probation for a robbery conviction. The trial court rejected the two statutory mitigators advanced by Bowles: (1) Extreme emotional disturbance at the time of the murder and (2) substantially diminished capacity to appreciate the criminality of his acts at the time of the murder. The trial court found and assigned weight to the following non-statutory mitigating factors: significant weight to evidence that Bowles had an abusive childhood; some weight to Bowles' lack of education; little weight to Bowles' use of intoxicants at the time of the murder; and no weight to the circumstances which caused Bowles to leave home or his circumstances after he left home. The trial court concluded that the aggravating circumstances overwhelmingly outweighed the mitigating circumstances. See *Bowles*, 804 So. 2d 1173

[3] (1) the trial court erred in allowing the use of peremptory challenges to remove prospective jurors who were in favor of the death penalty but would only impose it under appropriate circumstances; (2) the trial court erred in allowing the State to introduce in aggravation for the first time at this re-

The FSC denied this appeal, affirming Appellant's sentence on October 11, 2001.

The undersigned was appointed to represent Appellant on February 28, 2002. Following the denial of a Writ of Certiorari by the United States Supreme Court on June 17, 2002, Appellant filed an amended motion pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851 with the trial court on August 29, 2003.[4] The state's response was filed November

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sentencing hearing evidence of two prior similar murders for which the defendant was convicted after the first sentencing hearing; (3) the trial court erred in finding HAC; (4) the trial court erred in rejecting the proposed HAC jury instruction; (5) the trial court's CCP instruction to the jury was unconstitutionally vague; (6) the trial court erred in finding the robbery-pecuniary gain aggravator; (7) the trial court erred by giving little weight or no weight to the non-statutory mitigators; (8) the trial court erred in rejecting the proposed victim impact evidence jury instruction; (9) the trial court erred by rejecting the two statutory mental mitigators of extreme emotional disturbance at the time of the murder and substantially diminished capacity to appreciate the criminality of acts at the time of the murder; (10) the trial court erred in giving the standard jury instruction on mitigation instead of the requested specific non-statutory mitigation instructions; (11) the trial court erred in rejecting the requested jury instructions defining mitigation; and (12) the trial court committed reversible error in allowing impermissible hearsay.

[4] Appellant presented nine claims in said pleading, namely: (1) Counsel for Mr. Bowles failed to sufficiently present both statutory and/or non-statutory mental mitigating factors, in clear violation of 8th and 14th Amendment rights; (2) The Court erred in denying defense counsel's requested Jury Instruction defining both Statutory and non-statutory mitigation, in direct violation of Mr. Bowles Eighth and Fourteenth amendment rights; (3) The trial court erred in instructing the jury that they could consider victim impact evidence, in violation of defendant's Eighth and Fourteenth amendment rights; (4) Mr. Bowles was denied the right to a jury trial in violation of the

18, 2003, and Appellant's reply was filed on January 21, 2004. A ***Huff***

Fifth, Sixth, and Fourteenth amendments to the United States Constitution; (4)(a) Florida's Death Penalty scheme is effectually similar to the Arizona scheme found unconstitutional by the United State Supreme Court in ***Ring v. Arizona***; (4)(b) Under Articles three and six, and clause three of the Constitution of the United States, Florida's Judicial Officers must apply the holding of ***Ring*** to the Florida's Death Penalty Scheme; (4)(c) Even should this Court determine that the decision in ***Ring*** constitutes a "new rule", the Court must retroactively grant constitutional relief to Mr. Bowles; (4)(d) The right to a Jury trial is a fundamental bedrock procedural element of a trial as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the constitution of the United States; (4)(e) The unconstitutional procedures authorized by Florida's Death penalty statute infect the entire framework of the trial by jury so that the death sentence imposed under the statute must be vacated; (5) Florida's Death Penalty scheme as applied violated Bowles' Constitutionally guaranteed right to a fair and impartial trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States constitution because the statute under which he was sentenced, Fl. Stat. 921.141, did not meet the heightened reliability requirements of a capital sentencing scheme and failed to adequately safeguard his right to a fair trial by permitting unreliable evidence to be used against him. (6) Bowles was unconstitutionally deprived of his Fifth, Sixth, and Fourteenth Amendment rights because under Florida Statute 921.141 he was not given notice of the nature of the charges against him and he was not indicted on every element of the offense for which he was charged. (7) Bowles conviction under Fl. Stat. 921.141 is constitutionally invalid because the Jury's findings of Death eligibility was not unanimous, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, Sections 2, 9, 16, and 17 of the State of Florida Constitution. (9) Defendant was unconstitutionally sentenced to death because defendant was denied a fair jury trial in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the Constitution of the United States and Article I sections 2, 9, 16, and 17 of the Florida Constitution; (10) Florida's Death Penalty scheme as applied violated Bowles' constitutionally guaranteed right to a fair and impartial trial under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because the Statute under which he was sentenced, Fl. Stat. 921.141, did not meet the heightened reliability requirements of a Capital sentencing scheme and failed to adequately safeguard his right to a fair trial by permitting unreliable evidence to be used against him.

hearing was conducted on February 17, 2004, and a subsequent evidentiary hearing was conducted on February 8, 2005. Appellant filed closing argument for said hearing on April 12, 2005; the state filed its closing argument on May 12, 2005. The trial court denied Appellant's motion on August 12, 2005.[5] The Notice of Appeal of the trial court's ruling was filed on December 9, 2005. This timely Petition for Writ of Habeas Corpus, filed in conjunction with Petitioner's Initial Brief Pursuant to Fla. R. App. Pro. Rule 9.210 follows.

NATURE OF RELIEF SOUGHT

Petitioner seeks to have this Honorable Court reverse and remand Petitioner's sentence of death and direct the trial court to conduct a penalty phase sentencing hearing.

[5] Specifically, the trial court dismissed claims one through eight as, "procedurally barred either having been raised on direct appeal or because they should have been raised on direct appeal." (See ROA, pg. 156) The trial court, while addressing each claim in the order, only effectively considered claims nine and ten in its decision to deny the motion.

ARGUMENT ONE:

PETITIONER'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE OF THE STATE'S IMPROPER CHARACTERIZATION OF MITIGATING CIRCUMSTANCES IN CLOSING ARGUMENT THAT DENIGRATED SAID MITIGATING FACTORS INTRODUCED BY THE DEFENSE. APPELLANT WAS PREJUDICED BY SAID COMMENTS, AS THERE WAS A REASONABLE PROBABILITY THAT SAID COMMENTS BY THE PROSECUTION AFFECTED THE JURY'S RECOMMENDATION OF DEATH

Appellant's direct appellate counsel was ineffective in failing to allege as an issue on direct appeal that the State's characterization of mitigation was denigrating to the defense's introduction of mitigating circumstances. As a result, Petitioner was prejudiced because the penalty phase jury was allowed to believe that only three mitigators were allowed to be considered in Appellant's case, and one of the three was a "catchall" mitigator.

In Appellant's November 2, 1999 penalty phase, the prosecution, in its closing argument to the jury stated the following:

> "And I would submit to you the question is how much weight do you put to the three mitigators that are going to be submitted to you…and the court is going to instruct you as to two statutory mitigators, and one that covers everything" (T. pg. 963).

Additionally, the prosecution stated:

> "I would submit the mitigators in this case have not been proven in terms of the statutory ones, and there is one that is a catchall" – (T. p. 971).

Defense counsel objected to said comments by the prosecution, thus preserving the issue for appellate review.[6] (T. pgs. 963, 971) Upon conclusion of the prosecution's closing argument, defense counsel moved for a mistrial, stating the following:

> "Your Honor, I would move for a mistrial based on the statements relating to the catchall mitigator and also the numbering of mitigators. I know the Court just sustained the objection and told the jury to disregard, however, I feel I have to file a motion for a mistrial. And I believe that the State's use of catchall and the numbering of the mitigators in the argument set up a theme of denigrating the mitigating circumstances in this case." (T. p. 1011)

After defense counsel's argument, the trial court denied the motion for mistrial based on the prosecution's characterization of the mitigating factors. (T. p. 1011)

The aforementioned facts and arguments made by defense counsel show that the prosecution in the instant case improperly denigrated the defenses' mitigating factors, by numbering how many mitigators the jury should consider, and calling the non-statutory mitigating factor a "catchall." Said argument by the prosecution was in violation of Appellant's rights pursuant to 8th and 14th Amendment rights of the U.S. Constitution, as the Eighth and Fourteenth Amendments "require that the sentencer…not be

[6] In regards to the last comment by the state and subsequent defense objection thereto, the trial court gave a curative instruction, telling the jury to "disregard the comments of catchall." (T. p. 972)

precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *See Lockett v. Ohio*, 438 U.S. 586 ((1978); *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000).

The proper analysis to follow when appellate counsel fails to raise an issue that was properly preserved by objection at trial is the following:

> "With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this Court (FSC) evaluates the prejudice or second prong of the *Strickland* test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the Petition. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that the habeas petition was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced." *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002) (quoting *Jones*, 794 So. 2d 583-4)

In Appellant's case, the jury was told by the prosecution that the defense's mitigation was limited to three mitigators. Moreover, the prosecution also told the jury that one of the mitigating factors was a "catchall." (T. 963, 971) These comments are clearly prohibited. *See*

Lockett v. Ohio, 438 U.S. 586 ((1978); *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000).

By denigrating the defense's mitigation in the case, the prosecution effectively argued to the jury that it was a numbers game, and because the prosecution had greater numbers than the defense (in the way of statutory aggravators as opposed to petitioner's mitigation), that the death penalty was an appropriate recommendation. These comments are not harmless error, as allowing the jury to believe that "numbers" are the deciding factor in recommending life or death, the jury's determination was tainted, as they were misled as to the requirements of weighing the aggravators against the mitigators.

Appellant poses the question: How this can be considered harmless error when the jury is told by the State that simply adding up the aggravators and mitigators decides life or death? The 12-0 vote for death in this case supports petitioner's claim, as it was clear that by numbers, the aggravators in the instant case outnumbered the mitigators. In cases where there the aggravating factors outnumber the mitigating factors, comments like the prosecution made in Appellant's case become extremely critical and damaging to the defense, as the jury is led to believe that the death penalty is essentially automatic, as the aggravators outnumber the mitigators.

The jury in this case was told by the prosecution that it only could consider three mitigating factors, and one mitigator was a "catchall." *Messer v. Florida*, 834 F. 2d 890 (11th Cir. 1987) As such, these comments by the prosecution regarding mitigation had the reasonable probability of affecting the jury's verdict. *See King v. State*, 623 So. 2d 486 (Fla. 1993)

Appellant's direct appeal counsel was ineffective in failing to raise this claim, as the claim was clearly evident in Appellant's sentencing transcripts. Trial counsel made objections to this line of argument by the state, and the defense moved for a mistrial. (T. pg. 1011) Moreover, Federal Case law had been around pertaining to this issue for nearly thirty years prior to this sentencing. *See Lockett v. Ohio*, 438 U.S. 586 (1978) Instead, direct appeal counsel alleged twelve claims, nine of which this court ruled were without merit. *Bolwes v. State*, 804 So. 2d 1173 (Fla. 2001)

ARGUMENT TWO:

APPELLANT'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE IN FAILING TO ALLEGE THE ISSUE OF WHETHER THE STATE'S INTRODUCTION OF GRUESOME PHOTOGRAPHS TO THE JURY HAD ANY RELEVENCE TO THE STATE'S CASE, AND WHETHER APPELLANT WAS PREJUDICED THEREBY

In the instant case, in Appellant's second penalty phase (after remand by the FSC), the prosecution introduced seven pictures of the victim that were taken several days after the murder of the victim. (T. pg. 517-533)

Over defense objection, said pictures were allowed into evidence for the jury to see. However, the introduction of said photographs served no relevant purpose to the prosecution's case, and the prejudice to Appellant of said introduction of photographs outweighed their probative value.

The Florida Supreme has ruled that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. Where photographs are relevant, then the trial judge in the first instance and the Supreme Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and distract them from a fair and unimpassioned consideration of the evidence. The Florida Supreme Court has consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence. The Florida Supreme Court has stated that autopsy photographs may be admissible when used to illustrate the medical examiner's testimony and the victim's injuries, or when relevant to the medical examiner's determination as to the manner of the victim's death. Moreover, to be relevant, a photo of a deceased victim must be probative of an issue that is in dispute. *Looney v. State*, 803 So. 2d 656 (Fla. 2001)

In Appellant's case, the state entered seven pictures, these were taken days after the body was discovered, showing the body, blood spattering on the walls and surrounding area, and the bed.[7] Moreover, said pictures did not depict a fresh crime scene, and body had entered decomposition at the time of discovery.[8]

These pictures served no purpose regarding an evidentiary nature or relevance to the prosecution's case. The state introduced seven pictures depicting the body, the surrounding area, and blood and bodily fluids on other objects in the vicinity. (T., pgs. 517-533) There was no probative value in entering these pictures. The state argued that it was necessary to show that defendant was aware and took measured steps after the murder to attempt to conceal the body. (*Id* at 519) However, appellant had previously given police both a written and oral confession, describing in detail the way he murdered the victim, the victim's identity, and the sequence of events both leading up to and after the murder in graphic detail. *See* *Beagles v. State*, 273 So. 2d 796 (Fla. 1st DCA)

[7] In particular, State's exhibits 9-15 at sentencing hearing.

[8] See the testimony of medical examiner Margarita Azzura. (T. pg. 541) Dr. Aruzza states that the body, upon discovery, "Had signs that he had been dead for a few days…there was a great degree of discoloration of the skin. I mean in ranges of black, red, green. Bloating. Body purging. He was decomposing."

Moreover, the photographs taken of the scene were taken days after the murder by the investigators and forensic evidence team. The pictures did not show an accurate depiction of the state of the body at the time of death as decomposition had quite noticeably began. The pictures did not serve to depict anything in an evidentiary manner that had not been known to both the state and jury, and served only to inflame the minds of the jury, clearly prejudicing the outcome of the sentencing proceedings. See also Looney v. State, 803 So. 2d 656 (Fla. 2001) *[Holding that in order to be relevant, a photo of a deceased victim must be probative of an issue that is in dispute.]*

There was no issue in dispute in the instant case that would warrant the entry of photographs of this nature. The testimony of the medical expert at sentencing centered on when the victim in this case lost consciousness prior to death, but the cause and method of the murder was never in question or debated by the defense at that time. The state points out at the sentencing hearing that these pictures were entered to show the pains taken by petitioner to hide the body. Again, as stated previously, appellant had provided in graphic detail the method and events of the murder in the previous confessions to police officers.[9] As the aforementioned argument indicates,

[9] The state makes it known to the jury that petitioner had previously confessed to the crime and in confession gave a graphic description of the attack and subsequent murder of the victim in opening statement. The state

the photographs were not relevant in an evidentiary manner. *See* *Beagles v. State*, 273 So. 2d 796 (Fla. 1st DCA) [*Holding that, the trial court erred in allowing the introduction of an unnecessarily large number of inflammatory photographs into evidence because appellant had admitted the victim's death, how it occurred, her identity, and that a bullet went into her brain and did not come out; thus, there was no fact or circumstance that necessitated or justified the admission of the photographs."].*

The photographs were objected to by defense counsel numerous times during the introduction of said photographs into evidence. (T. pgs. 517-533) However, the trial court overruled all of defense counsel's objections, allowing said photos into evidence. (T. pg. 519) As explained above, the photographs did not have any relevance in an evidentiary manner to the prosecution's case. The confession of petitioner, along with the testimony of the Medical examiner clearly evidenced the state's arguments as to method and cause of death, which would nullify the introduction of the photographs for the reasons given by the state. Moreover, the gruesomeness of the portrayal of the body in the stages of decomposition was so inflammatory as to create undue prejudice in the minds of the jury to restrict them from a fair and unimpassioned consideration of the evidence. The jury vote was twelve

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essentially recreated the content of petitioner's confession in opening statement. (T. pg. 471)

to zero, and said vote is not determinative of whether prejudiced ensued as a result of said introduction of photos. Moreover, the vote of twelve to zero could have been a result of the introduction of the photos themselves.[10] *See Beagles v. State*, 273 So. 2d 796 (Fla. 1st DCA) [*Holding that, "A very large number of photographs of the victim in evidence, especially those taken away from the scene of the crime, can only have an inflammatory influence on the normal fact-finding process of the jury. The number of inflammatory photographs and resulting effect is totally unnecessary to a full and complete presentation of the state's case when the same information can be presented to the jury by use of less offensive photographs whenever possible and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the jury."]*

In the instant case, defense counsel objected numerous times to the introduction of said photographs, as noted herein. Therefore, the proper analysis to follow when an appellate counsel fails to raise an issue that was properly preserved by objection is the following:

> "With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this Court (FSC) evaluates the prejudice or second prong of the *Strickland* test first. In doing so, we begin our review of the prejudice prong by examining the specific

[10] Without a jury finding of what aggravating factors they found to conclude a recommendation of death, the weight given to said photos is unknown.

> objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the Petition. If we conclude that the trial court's ruling was not erroneous, then it naturally follows that the habeas petition was not prejudiced on account of appellate counsel's failure to raise that issue. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced." *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002) (quoting *Jones*, 794 So. 2d 583-4)

As explained above, Appellant was prejudiced by the introduction of the gruesome photographs as they portrayed a decomposed body with unnecessary blood and gore. Said photographs were not relevant to the evidence or arguments in the prosecution's penalty phase. Moreover, this claim is not harmless, as gruesome photographs introduced to a jury without any relevance *See Beagles v. State*, 273 So. 2d 796 (Fla. 1st DCA) [*Holding that, "Evidence of another crime, in no way connected by circumstances with the one for which a defendant is being tried, is inadmissible. Evidence of facts solely relevant as to the character or propensity of a defendant is inadmissible."]; See also Looney v. State*, 803 So. 2d 656 (Fla. 2001)

Lastly, as stated in Appellant's "Argument One," nine of the twelve issues presented by direct appeal counsel were ruled without merit by the Florida Supreme Court, and the remaining issues where also denied. Though Appellant understands that not every conceivable issue has to be raised by direct appellate counsel in direct appeal, given the severity of the penalty

and the fact that the issue was clear in the record, counsel should have raised said issue, and was deficient in not doing so.

Wherefore, Appellant respectfully requests this court to reverse and remand Appellant's sentence for a new penalty phase.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this ___ day of August, 2006.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

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