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,

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

Appellee/Respondent.
_____/

REPLY TO STATE'S RESPONSE FOR 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 CR-A

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JURISDICTIONAL STATEMENT

The Florida Supreme Court (hereinafter "FSC") has jurisdiction over this "Petition for Habeas Corpus," as this Court has original jurisdiction, as the because this 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

A procedural history was provided in the Appeal from the denial of Appellant's Motion for Post conviction relief filed in conjunction with the Initial petition for Writ of Habeas Corpus. A repetition of the factual and procedural histories will therefore not be provided herein.

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.

ARGUMENT ONE:

Appellee contends that in the instant case Appellant's claims of Ineffective Assistance of Counsel are without merit as the curative instruction given by the trial judge (PP. V. 971-972) and reference to objections of trial counsel were sufficient to cure the prejudice posed by the prosecutor's comments. (Response, pg 4) As shown in the record (PP V. 972), the trial court's curative instruction was limited to asking the jury to disregard the comments regarding the catchall mitigator, while failing to address the previous objection to the numbering of the mitigators except for a simple sustaining of counsel's objection.

As noted in Florida case law dating back decades, a curative instruction must meet requirements in order to have any effect towards curing the improper comment(s). *(See Deas v. State, 119 Fla. 839, 161 So. 729, 731 (1935) [Holding that: "…the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting office as to impress upon the jury the gross impropriety of being influenced by improper arguments."]; See also: Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)[Stating that: "We commend to trial judges the vigilant exercise of their responsibility to insure a fair trial."]; and Barnes v. State, 743 So. 2d*

1105 (1999 Fla. App LEXIS 1478)[Holding that: "The seriousness of the impropriety committed by the prosecutor demanded a rebuke in the presence of the jury, coupled with a more forceful admonition that this kind of argument is highly improper and should not be considered in any way by the Jury. Instead the court diluted it's "cure" to the weakest possible, thereby implying that the violation was insubstantial and tenuous and the objection merely ritualistic. For a curative instruction conceivably to erase the palpable prejudice to the defendant in this situation, the court should have condemned the comment in the clearest and most unmistakable terms.]

In the instant case the trial court's objection fell short of the standard held by this court in previous rulings. Additionally, as noted in Appellee's citation of *Mason v. State*, 438 So. 2d 374 (Fla. 1983); a curative instruction does not eliminate fundamental error.

The argument for the impropriety, error, and harm caused by the denigrating effect of the prosecution's comments made in the instant case has been previously raised in the initial Petition for Writ of Habeas Corpus and addressed in Florida and Federal case law for decades. Appellant reiterates the argument presented in Appellant's Initial Writ for Habeas Corpus in relation to this issue:

> "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)"

Given the impropriety of these types of arguments made by the prosecution and that a timely objection was made by trial counsel thereby preserving the issue for appellate review, the failure to raise this issue on appeal by appellate counsel additionally serves to undermine confidence in the result. *See Rivera v. State*, 859 So. 2d 495 (1986) *[Holding that: When evaluating an ineffectiveness claim, an appellate court must determine the following: First, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based]; See also Lockett v. Ohio*, 438 U.S. 586 (1978); and *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002)

In conclusion, Appellant requests that this Court to reverse and remand the trial court's ruling on this issue.

ARGUMENT TWO:

The State contends that the introduction of the pictures was relevant in order to demonstrate how the murder was accomplished, to support the State's argument that the murder was a contemplative act, and to undergird the applicability of the HAC aggravator.

As noted in the initial brief, the probative value of the introduction of these pictures far outweighed the relevancy given that Appellant had previously given law enforcement both a written and oral confession to the crime, 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. The question of how and in what manner the victim was killed was never in dispute. No pictoral representation was needed to bolster any argument presented by the state, nor was the issue of guilt contested by trial counsel. *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."].* Additionally, in order for pictures of a deceased victim to

have any form of relevancy, the picture must be probative of an issue that is in dispute. *See* Looney v. State**,** 803 So. 2d 656 (Fla. 2001)

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 of 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 *Looney*

Given Appellant's written and oral confession to the crime, coupled with the testimony of the medical examiner at trial (T. pg. 541) there clearly was no pertinent factual dispute necessitating the introduction of the pictures in question.

As noted, the jury vote in this proceeding was twelve to zero. Said vote is not determinative of whether prejudice ensued as a result of the introduction of photos. Moreover, the result of the vote could have been a result of the introduction of the photos themselves.[1] *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*

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

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."]

Given that the introduction of these photographs into evidence was objected to by defense counsel numerous times (T. pgs. 517-533) with the trial court overruling all of defense counsel's objections (T. pg. 519), this issue should have been raised by appellate counsel. Given the severity of the penalty and the fact that no pictoral evidence was necessary given the previously given confessions and testimony of the medical examiner, Appellate 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 12th day of March 2007.

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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