IN THE SUPREME COURT OF FLORIDA

GARY RAY BOWLES,

Petitioner,

v. Case No.: SC06-1666

JAMES R. MCDONOUGH,

Secretary, Florida Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, JAMES R. MCDONOUGH, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and hereby submits the following.

STATEMENT OF THE FACTS AND OF THE CASE

Bowles' Petition for Writ of Habeas Corpus was filed in conjunction with his appeal from the denial of his motion for postconviction relief (Case No. SC06 1666). The State has submitted an Answer Brief in that case outlining a detailed Statement of the Facts and of the Case; therefore, recitation of the underlying facts and procedural history will not be repeated herein.

Bowles' habeas petition raises two claims of ineffective assistance of appellate counsel. It is well-understood that a

habeas petition is the appropriate vehicle to raise a challenge to appellate counsel's performance. The standard of review for claims of ineffective assistance of appellate counsel is as follows:

> 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.

Rivera v. State, 859 So. 2d 495, 509-10 (Fla. 2003) (quoting *Pope v. Wainright*, 496 So. 2d 798, 800 (1986)).

Bowles' initial argument is that the State made two improper arguments; first, by making reference to the number of applicable mitigators; and second, by making reference to §921.141(6)(H),[1] known as the "catchall mitigator." In its closing argument, the State propounded the following:

> **Mr. de la RIONDA:** The mitigators presented to you yesterday, and the instructions that the Court will read to you regarding what possible mitigators may exist in terms of your decision as to how much weight – first of all, if they do exist, how much weight they should be given are arguably accepted. 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.
>
> **MR. WHITE:** Objection your honor to numbering the mitigators.
>
> **THE COURT:** Sustained

[1] Section §921.141(6)(H) provides that a generic mitigator that may be considered by the fact-finder is "[t]he existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."

(PP. V. 963).

Shortly thereafter, the following exchange occurred:

> **Mr. de la RIONDA:** And I would submit the mitigators in this case have not been proven in terms of the statutory ones, and then there is one that's a catchall that –
>
> **MR. WHITE:** Objection to the characterization of the mitigators, Your Honor.
>
> **THE COURT:** Sustained
>
> **MR. WHITE:** Your Honor, I would ask for a curative instruction.
>
> **THE COURT:** The jury should disregard the comments of catchall. Proceed.

(PP. V. 971-72).

Bowles argues that his appellate counsel was constitutionally ineffective for not challenging these two exchanges on direct appeal. Bowles' contentions lack merit as he has not made a demonstration that the allegedly improper comments had a substantive effect on the proceedings. A somewhat similar argument was raised in *Schoenwetter v. State*, 931 So. 2d 857 (Fla. 2006). In *Schoewetter*, during its closing argument, the prosecution addressed the weight to be accorded the relevant aggravators and mitigators. The prosecutor told the jury that it could consider the fact that Schoenewetter "had been previously or contemporaneously convicted for other crimes charged in this case." *Id.* at 871-72. Schoenwetter's counsel objected and moved for a mistrial. The trial court denied the motion, and gave a curative instruction. Schoenwetter agreed to the curative instruction, but

reserved his right to appeal the denial of his motion for mistrial. This Court concluded that the trial court had not abused its discretion by denying Schoenwetter's motion for mistrial, and that any error that resulted from the jury's hearing the improper argument was harmless because a curative instruction had been given. *Id.* at 872.

Similarly, in *Gorby v. State,* 630 So. 2d 544 (Fla. 1993), a capital defendant moved for mistrial based on three improper statements made by the prosecution during its closing argument. The trial court sustained all three of Gorby's objections to the improper statements, denied Gorby's motion for mistrial, and further instructed the jury to disregard the prosecution's improper arguments. This Court again found that the curative instructions were sufficient to minimize any harm caused by the prosecution's closing arguments. *Gorby,* 630 So. 2d at 547; *see also Mason v. State,* 438 So. 2d 374 (Fla. 1983) ("[T]he court sustained the objection, and the jury was instructed to disregard the comment. While such an instruction alone does not eliminate fundamental error, it is further evidence that the relatively immaterial comment does not require reversal.").

Accordingly, because the trial court gave a curative instruction, and given the overwhelming aggravating circumstances found in this case, this ground of error should be rejected.

The second issue raised by Bowles' habeas petition is that the

State produced a series of photographs depicting the crime scene. Bowles contends that the photographs were needlessly gory and proved more prejudicial than probative. He opines that his appellate counsel was ineffective for failing to argue that the photographs were unduly prejudicial.

This Court has acknowledged that the admission of photographs depicting a crime scene "is within the discretion of the trial court, and its ruling will not be disturbed on appeal absent a clear abuse of that discretion." *Rodriguez v. State,* 919 So. 2d 1252 (Fla. 2005). The Court in *Rodriguez* further commented that although courts should be wary of admitting photographs that are needlessly gratuitous, "[t]he test for the admissibility of such photographs is relevancy rather than necessity." *Id.* at 1286.

In the instant case, Bowles' attorney objected to several photographs that depicted, among other matters, extensive blood spattering throughout the victim's home. Bowles' counsel argued that the photographs were inflammatory and cumulative in nature (PP. Vol. III 518-19). The State responded that the photographs were relevant for a variety of reasons, arguing:

> **Mr. de la RIONDA:** Judge, [the photographs] are all relevant to show what [Bowles] did, the steps he took to cover the body up. They also show that [Bowles] was aware of everything he did at the time that he killed Mr. Hinton. He took elaborate pains to cover up the body.
>
> [The defense] is going to show – they are going to argue that he snapped and didn't know what was going on, he was so intoxicated he just did it. These [photographs] refute that. They are also able to show the actual motive

of what he actually did.

(TT. Vol. III 519).

The admission of the photographs were relevant: 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. The foregoing rationales have been deemed a legitimate basis for the admission of crime scene photographs. *See, e.g., England v. State,* 2006 Fla. LEXIS 942, at *20-24 (Fla. May 25, 2006)(photos were relevant to show the manner of death and the location of victim's wounds); *Arbelaez v. State,* 898 So. 2d 25, 44 (Fla. 2005)(photos were necessary to give context to expert testimony regarding the location of the body, the autopsy's findings, and to refute the defense's claims as to how the victim died).

Moreover, even if it was erroneous to admit the photographs, this was merely harmless error. See *Dufour v. State,* 905 So. 2d 42, 74 (Fla. 2005) (recognizing that even if it was erroneous to admit photographs, this "would not have provided a basis for reversible error on appeal because the admission was harmless and the photos [did] not create the circumstance that the risk of prejudice outweighed the relevancy").

Accordingly, this claim of error should also be rejected by this Court.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that Bowles' petition for habeas relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Frank J. Tassone, Esq. and Rick A. Sichta, Esq., 1833 Atlantic Boulevard, Jacksonville, Fl 32207 this 20th day of November, 2006.

_____
Ronald A. Lathan, Jr.
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New font 12 point.

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