IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2333

RODNEY TYRONE LOWE,

Petitioner,

v.

JAMES V. CROSBY Jr.,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

RACHEL DAY
Assistant CCRC
Florida Bar No. 0068535

CAROLINE KRAVATH
Assistant CCRC
Florida Bar No. 483850

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTIONS

TREATISES

INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, demonstrating that Mr. Lowe was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. ___). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const.

PROCEDURAL HISTORY

On July 25, 1990, an Indian River County grand jury indicted Mr. Lowe for first-degree murder in the death of Donna Burnell, attempted robbery, and possession of a firearm by a convicted felon (R. 1326-27). On April 12, 1991, a jury found Mr. Lowe guilty of first-degree murder and attempted robbery (R. 1135, 1807-08). On

April 22, 1991, the jury recommended a sentence of death by a vote of nine to three (R. 1309, 1833). On May 1, 1991, the Circuit Court sentenced Mr. Lowe to death for first-degree murder (R. 1318-24, 1845-56). On May 9, 1991, the Office of the State Attorney entered a nolle prosequi to the charge of possession of a firearm by a convicted felon (R. 1866).

On direct appeal, this Court affirmed Mr. Lowe's convictions and sentence. Lowe v. State, 650 So. 2d 969 (Fla. 1994), cert. denied, 516 U.S. 887 (1995)[1].

On March 18, 1997, Mr. Lowe filed his initial motion for post-conviction relief with request for leave to amend. With leave of the lower court subsequent amendments were filed following public records litigation.

On August 11, 2004 the lower court issued a written order denying all of Mr.

[1]Appellate counsel raised the following issues: error for trial court to deny Lowe's motion to suppress his confession; fundamental error to permit the jury to hear Invesigator Kerby's inflammatory and prejudicial statements on interrogation tape; trial court erred in admitting State's evidence Box 32, the entire contents of a box of Lowe's personal items; trial court's refusal to appoint co-counsel; failure to conduct an inquiry into trial counsel's effectiveness; error to deny motion for trial judge's disqualification; trial judge lacked jurisdiction; error to give state's requested special jury instruction on "inconsistent exculpatory statements"; error to overrule objection to State's improper closing argument in guilt phase; error to exclude child Danny Butt's spontaneous statement that "two peoples" shot his mother; error to deny defense request to instruct that presence of child could not be considered in penalty recommendation; error to instruct on HAC because unsupported by evidence; State's penalty argument was improper; court gave excessive weight to prior violent felony by considering a weapon where conviction was not for armed robbery; error to allow Officer Scully's testimony about flight from police and chase during prior robbery; failure to inquire about mitigation witnesses' failure to appear; failure to consider or

Lowe's remaining claims. On August 25, 2004, Mr. Lowe filed contemporaneously a motion for rehearing and an additional motion for post-conviction relief based on newly discovered evidence that Mr. Lowe was not the shooter. Mr. Lowe filed subsequent motions for post-conviction relief on January 11, 2005 and March 2, 2005, also based on newly discovered evidence. The Circuit Court granted Mr. Lowe a new penalty phase but denied him a new trial. Mr. Lowe is appealing the denial of a new trial to this Court contemporaneously with the filing of this petition for habeas corpus relief.

This is Mr. Lowe's first and only petition for habeas corpus relief.

CLAIM I

MR. LOWE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Lowe had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The two-prong Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See

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weigh mitigation.

Orazio v .Dugger, 876 F. 2d 1508 (11th Cir. 1989). Appellate counsel's performance was deficient and Mr. Lowe was prejudiced because these deficiencies compromised the appellate process to such a degree as to undermine confidence in the correctness of the result of the direct appeal. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000).

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Lowe's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was deficient and omitted meritorious issues, which had they been raised, would have entitled Mr. Lowe to relief.

In Wilson, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So. 2d at 1165. In Mr. Lowe's case appellate counsel failed to act as a "zealous advocate," and Mr. Lowe was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise a number of issues to this court.

As this Court stated in Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985):

> The criteria for proving ineffective assistance of appellate counsel

> parallels the Strickland standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163, citing Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases (ABA Guidelines). Guideline 11.9.2 of the 1989 ABA Guidelines is clear that "Appellate counsel should seek, when perfecting the appeal, to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules." ABA Guideline 11.9.2 Duties of Appellate Counsel (1989). The 2003 Guidelines further state, "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003).[2] Appellate counsel failed to raise a number of such grounds.

[2] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Lowe's case. However, notwithstanding the fact that Mr. Lowe's case was tried in 1991, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those

In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different. Confidence in the result of Mr. Lowe's direct appeal has been undermined. A new direct appeal should be ordered.

A. MR. LOWE'S DUE PROCESS RIGHTS WERE VIOLATED BY THE PROSECUTOR'S IMPROPER ARGUMENT AND IMPEACHMENT

The prosecutors' comments in both the guilt and penalty phase were improper and prejudiced the jury.

1. Reference to facts not in evidence

During guilt phase closing arguments, that state argued:

> The Defendant…by the video taping that you saw, ladies and gentleman, easily have driven to the store, walked into the store like the Detectives did, gone back to the back cooler, pulled out the hamburger pretending you were a customer. Walk up, place it in the microwave, walk up to

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cases tried before the Guidelines were promulgated. In Rompilla v. Beard, 1125 S. Ct 2456 (2005) in which case the trial took place in 1989 prior to the promulgation of either the 1989 or the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

Furthermore, as the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel. The 2003 ABA guidelines do not depart in principle or concept from Strickland [or] Wiggins." Hamblin 354 F. 3d at 487 (citing Wiggins v. Smith, 123 S. Ct. 2257 (2003). The 2003 guidelines are applicable to cases tried before the 2003 Guidelines were promulgated since they merely explain in more detail the concepts promulgated previously. Thus the 2003 guidelines are applicable, as the Sixth Circuit found, to cases tried before they were promulgated in 2003 since they merely explain in more detail the concepts promulgated previously.

> the cash register, commit the robbery. The robbery goes bad for whatever reason. Donna panics, she slams the cash drawer, "I'm not gonna give you cash." Defendant, bang, bang, bang, "Well, then you're dead." Runs around bangs on the cash register…. That doesn't work, it sets off the buzzer. He panics. He shoots the cash register. Still can't get it to open. He leaves the store without getting a red cent or as he said to Dwayne Blackmon, "An F-ing pack of Newport cigarettes."

(R. 1085).

This emotionally charged narrative of the crime by the prosecutor, based on a video tape made by detectives, was improper and inflammatory and referred to facts not in evidence. There was no evidence of Donna Burnell slamming the cash drawer and saying, "I'm not gonna give you cash"; of the statement, "Well then you're dead"; or of the entire sequence of events as portrayed in the prosecutor's emotional and inflammatory description.

Appellate counsel failed to raise this issue on appeal, rendering deficient performance.

2. Improper vouching for witness credibility

In guilt phase closing argument, the prosecutor improperly vouched for State witness Leudtke's credibility:

> He's doing the best he can to recollect and tell the truth….

(R. 1077).

Under Rule 4-3.4(e) of Rules Regulating the Florida Bar, it is improper for an

attorney to vouch for the credibility of a witness. Kelly v. State, 842 So. 2d 223 (Fla. 1st DCA 2003). Appellate counsel's failure to raise this issue on appeal rendered deficient performance.

3. Improper impeachment of defense penalty phase witness Brandes

In the penalty phase of the trial, defense witness Catherine Brandes testified that she worked with Mr. Lowe at Gator Lumber and that he was "a good person", "very friendly", (R. 1204 - 1205), that he was given more responsibilities over the time he worked at Gator Lumber and that he did a very good job (R. 1206).

On cross-examination, the State asked Miss Brandes:

> Q: [Prosecutor] I'm gonna ask you about what you really know about this good person. You familiar with his robbery charge in Titusville, December 1987?
>
> A: [Miss Brandes]: No.
>
> Q: You're not. You know that he climbed into the back of a man's van, burglarized the van, hid in the back of a van for eight miles until the man got to his home, put something up to the throat, the man believed a knife, demanded his wallet and (indiscernible).

(R. 1207).

Defense counsel objected to the State's improper cross examination, asserting that he had not asked her on direct about whether she knew about Mr. Lowe's background, and that the inquiry about Mr. Lowe's prior conviction served only to prejudice the jury. The court overruled the defense objection and allowed the State to

ask the witness about the prior conviction. The State continued the cross-examination:

> Q: [Prosecutor] Miss Brandes, when you stated a good person then you weren't familiar with any of the facts about that prior robbery were you?
>
> A: [Miss Brandes]: No, I was not.
>
> Q: And about this murder and this robbery when you stated a good person you aren't familiar with the details of this murder and robbery are you?
>
> A: Not – just whatever the media says.
>
> Q: Well, you're not familiar that the lady was shot three times, once through the heart, twice in the head in this particular case.
>
> A: No.
>
> Q: And the gun was held very closely to her when she was shot?
>
> A: Through hearsay I heard that.
>
> Q: Through hearsay. Now when you're talking about a good person you're not talking about he's a good person because of that past robbery and a good person because of the events in this case, right?
>
> A: Right.

The State's improper questioning served only to inflame and prejudice the jury. Defense counsel properly objected to the State's improper cross-examination and preserved the issue for appeal. Appellate counsel failed to raise this issue on appeal, rendering ineffective assistance.

4. Inaccurate, misleading, and improper description of prior robbery in penalty phase

In his penalty phase closing argument the prosecutor improperly described Mr. Lowe's prior robbery conviction, stating facts contrary to the record.

> You heard the testimony from Deputy Scully…that the sharp object could have, in fact, been a five inch long piece of plastic. Maybe there was a knife that was thrown out of the window during the chase that night.

(R.1274).

This argument was contrary to the facts. There was no evidence presented that a knife might have been thrown out of the van. Deputy Scully had testified on cross-examination:

> Q: [Defense] [D]id you seize a knife from him?
>
> A: [Scully] At the time of the arrest I recovered a small piece of plastic which at that time I believed to be the weapon used on Mr. Crosby.

(R. 1165-1166).

The victim of the robbery, Thomas Crosby, had also testified on cross-examination that he did not see a knife:

> Q: [Defense] [Y]ou never actually were able to describe the knife itself were you?
>
> A: [Crosby] No, I never actually did see it.

(R. 1157).

As established in the record, Mr. Lowe was not charged with an armed robbery (R1153). The prosecutor's argument about a hypothetical knife thrown out a window

was contrary to the facts and was highly inflammatory and prejudicial. Appellate counsel failed to raise this issue on appeal, rendering ineffective assistance.

5. Prejudice

In light of the serious prosecutorial misconduct in this case, Mr. Lowe's conviction and sentence were the product of a fundamental due process error in violation of Mr. Lowe's rights under the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Had these issues been raised on direct appeal, Mr. Lowe would have been entitled to a new guilt phase and penalty phase.

This Court has held that when improper conduct by a prosecutor "permeates" a case, relief is proper. Garcia v. State, 622 So.2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

This court has granted a new trial on direct appeal where the prosecutor has made improper comments:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consistent with the oath they take to conduct a fair and impartial trial. The trial of one charged with crimes is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998) (citing Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951)).

This court has granted a new sentencing trial on direct appeal because of comments by the prosecutor during the penalty phase that the defendant would be paroled and would kill again if the death penalty were not imposed. Teffeteller v. State, 439 So. 2d 840 (Fla. 1983).

Egregious prosecutorial misconduct, like that which occurred here, constitutes fundamental error, Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988). Therefore appellate counsel was obligated to raise these issues on direct appeal even in the absence of an objection by trial counsel. See Owen v. Crosby, 854 So.2d 182, 188 (Fla. 2003).

As this court has stated,

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

Appellate counsel's performance was deficient under the ABA Guidelines for failing to raise these meritorious issues on direct appeal. If appellate counsel had raised the issues of prosecutorial misconduct described above, in addition to those briefed by appellate counsel as Points IX and XI in the direct appeal, Mr. Lowe would have been entitled to relief. Therefore, confidence in the correctness and fairness of

the result of the appellate proceeding has been undermined.

B. THE JURY WAS IMPROPERLY INSTRUCTED AND THE SENTENCING COURT IMPROPERLY CONSIDERED INVALID AGGRAVATING CIRCUMSTANCES IN VIOLATION OF MR. LOWE'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

At penalty phase, the court instructed the jury on four aggravators: especially wicked, evil, atrocious or cruel; cold, calculated and premeditated; prior conviction of a violent felony; and the murder was committed while engaged in the course of an attempted robbery (R. 1304–1305). At sentencing, the court found that the prior violent felony and in the course of an attempted robbery aggravators applied, and rejected as mitigating all of the mitigation evidence presented (R. 1319-1320).

The four aggravators on which the jury was instructed are unconstitutionally vague and overbroad. The fact that the court did not find two of the four aggravators does not render the error of a vague instruction harmless since the court indirectly relied on the other two aggravators by giving great weight to the jury's sentencing recommendation. Espinosa v. Florida, 505 U.S. 1079, 1082 (1992).

Mr. Lowe was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Although preserved by pre-trial motions, appellate counsel did not raise this issue on appeal, rendering deficient performance. Mr. Lowe was prejudiced because had any of these improper aggravating factors been raised on

direct appeal, Mr. Lowe would have been entitled to a new penalty phase. Mr. Lowe was deprived of effective assistance of counsel.

1. The 'in the course of an attempted robbery' aggravator.

Section 921.141(5)(d), Florida Statutes, is unconstitutional on its face and as applied to Mr. Lowe's case. The trial court instructed the jury and the sentencing court later found this aggravator (R. 1305, 1320). This was an improper aggravating circumstance because the jury had been instructed in guilt phase that it could rely on the same circumstance as an element of first-degree murder under felony murder (R. 1117 – 1120). Thus, this aggravator automatically applied to Mr. Lowe's case.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-189 (1979); Furman v. Georgia, 408 U.S. 238 (1972). This aggravator on its face and as applied does not "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983). The felonies listed as aggravating circumstances under 5(d) are also felonies that can be used as substitutes for premeditation under the felony murder rule. Section 782.04, Florida Statutes. Thus, any felony murder begins with one aggravating circumstance, regardless of whether the homicide was intentional, whereas a premeditated first-degree murder does not. All felony murders are subject to the death penalty, even if

the State puts on no evidence in the penalty phase. This shifts the burden of proof to the defendant in the penalty phase and creates a presumption that death is the proper sentence, in violation of the due process clauses of the Fifth and Fourteenth Amendments.

The failure of this aggravator to perform its constitutionally required function of genuinely narrowing the class of persons who are eligible for the death penalty violates the Fifth, Eighth, and Fourteenth Amendments to the United States.

Pre-trial, defense counsel filed a motion to declare §921.141(5)(d) unconstitutional for the above reasons (R. 11, 1553). Therefore the issue was preserved and appellate counsel's failure to raise the issue on direct appeal was deficient performance.

2. The 'especially wicked, evil, atrocious or cruel' aggravator.

The heinous, atrocious, and cruel aggravator, §921.141(5)(h), Florida Statutes, is facially unconstitutionally vague and overbroad. As applied in Mr. Lowe's case, the jury was improperly instructed on this aggravator in violation of Mr. Lowe's due process rights.

Pre-trial, defense counsel filed a motion to declare §921.141(5)(h) unconstitutional because it does not supply an objective limiting principle and because juries are given no guidance in determining whether the circumstance applies (R. 13,

1537). At trial, defense counsel objected to the State's proposed instruction because it did not require evidence of intent to torture, and asked for a HAC instruction in compliance with State v. Dixon, 283 So. 2d 1 (Fla. 1973) (R. 1251-1252). At penalty phase, the court gave the following instruction on the HAC aggravator:

> The factor of wicked, evil, atrocious or cruel is proper only in torturous murders those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

(R. 1305).

The jury was not instructed that the State must prove the defendant's specific intent beyond a reasonable doubt. The jury should have been instructed that the State must prove beyond a reasonable doubt that the defendant knew or intended the murder to be especially wicked, evil, atrocious or cruel. Omelus v. State, 584 So.2d 563, 566 (Fla. 1991); Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994); Kearse v. State, 662 So.2d 677 (Fla. 1995).

The United States Supreme Court explained in Espinosa v. Florida:

> [A]n aggravating circumstance is invalid…if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.

Id. at 505 U.S. 1079, 1081 (1992). The Court clarified that under Florida's bifurcated sentencing procedure, the sentence is invalid if the jury received a vague instruction because the sentencing court indirectly weighs the invalid aggravator when it gives

great weight to the jury's recommendation. Id. at 1082. See also Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (finding the heinous, atrocious, or cruel aggravator unconstitutional for failing to impose any restraint on the arbitrary and capricious imposition of the death sentence).

In Maynard v. Cartwright, 486 U.S. 356 (1988) the United States Supreme Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id. at 362. The Court in Maynard found Oklahoma's HAC aggravator unconstitutionally vague and reversed the death sentence despite the fact that the jury found two other aggravating circumstances that were unchallenged. Here, the court's instruction did not cure the vagueness of the aggravating circumstance because it did not properly instruct on the burden of proof for specific intent. The jury's discretion was not limited as required by the Eighth Amendment. This failure also relieved the State of its burden to establish this specific intent beyond a reasonable doubt, in violation of the due process clauses of the Fifth and Fourteenth Amendments.

In Omelus, the Court vacated defendant's death sentence on direct appeal where the jury instruction on HAC was improper because there was no evidence that the defendant intended the death to be torturous. Relief was granted even though the

sentencing court did not find HAC:

> We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence.

Id. at 566.

The issue was preserved and appellate counsel's failure to raise the issue on direct appeal was deficient performance under the ABA Guidelines. Mr. Lowe was prejudiced by appellate counsel's failure to raise the issue because this Court has granted relief on direct appeal in similar cases. Omelus v. State, 584 So.2d 563 (Fla. 1991).

3. The 'Cold, calculated, and premeditated' aggravator.

The cold, calculated, and premeditated aggravator, §921.141(5)(i), Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious. Pre-trial, defense counsel had requested the court to define both the HAC and CCP aggravators in its jury instructions (R. 12) pursuant to Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994). Defense counsel also filed a pre-trial motion to declare §921.141(5)(i) unconstitutional for vagueness and overbreadth (R. 1488).

However, the court gave only this instruction on the CCP aggravator:

> [T]he crime for which the Defendant is to be sentenced in Count One was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1305). The court's failure to give the CCP aggravator any limiting construction whatsoever was contrary to this Court's holding in Jackson. In that case, this Court found that the standard CCP jury instruction, which was identical to the instruction given to Mr. Lowe's penalty phase jury, was unconstitutionally vague:

> For all of these reasons, Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey -- the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

Jackson at 90 (Fla. 1994), (citing Espinosa, 505 U.S. 1081.) This Court vacated the defendant's death sentence, even though, as in Mr. Lowe's case, the sentencing court did not find CCP. "We cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested instruction had been given." Id. at 90.

This Court then authorized the following limiting instruction for CCP:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In order for you to consider this aggravating factor, you must find the murder was cold, and calculated, and premeditated, and that there was no pretense of moral or legal justification. "Cold" means the murder was the product of calm and cool reflection. "Calculated" means the defendant had a careful plan or prearranged design to commit the murder. "Premeditated" means the defendant exhibited a higher degree of premeditation than that which is normally required in a premeditated murder. A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the

otherwise cold and calculating nature of the homicide.

Id. n.8.

The jury instruction on CCP in Mr. Lowe's case was therefore invalid and in violation of Jackson; the United States Supreme Court decisions in Espinosa v. Florida, 505 U.S. 1079 (1992); Stringer v. Black, 503 U.S. 222 (1992); Socher v. Florida, 504 U.S. 527 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988); and the Eighth and Fourteenth Amendments to the United States Constitution.

The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As this Court has held, this does not suffice to define the "cold, calculated and premeditated" aggravating factor. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). It must be presumed that the erroneous instruction tainted the jury's recommendation and in turn the judge's sentence of death, in violation of the Eighth Amendment.

This case is similar to Kearse v. State, 662 So. 2d 677 (Fla. 1995). In Kearse, this Court vacated defendant's death sentence on direct appeal because of a unconstitutionally vague CCP instruction identical to that given in Mr. Lowe's case. This Court stated:

The denial of Kearse's requested instruction on the CCP aggravating

> circumstance…constituted error in this case….. [D]efense counsel objected to the form of the CCP instruction at trial, requested an expanded instruction that essentially mirrored this Court's case law explanations of the terms, and raised the constitutionality of the instruction in this appeal as well. Thus, the issue has been properly preserved.
>
> Subsequent to Kearse's trial, this Court determined that the standard CCP instruction, which was given in this case, is unconstitutionally vague. Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994). The State contends that any error in failing to give the requested instruction to the jury would necessarily be harmless because the trial court did not find CCP after its independent examination of the evidence. We do not agree. The fact that the court correctly determined that the murder was not CCP does not change the fact that the jury instruction was unconstitutionally vague. As the United States Supreme Court noted in Espinosa v. Florida, 505 U.S. 1079 (1992), "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."

Id. at 686 (citation omitted).

This aggravating factor and instruction was applied in an overbroad manner, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), failed to genuinely narrow the class of persons eligible for the death penalty, see Zant v. Stephens, 462 U.S. 862, 876 (1983), and did not apply as a matter of law.

The issue was preserved at trial and appellate counsel's failure to raise the issue on direct appeal was deficient performance under the ABA Guidelines. Mr. Lowe was prejudiced by appellate counsel's failure to raise the issue because this Court has granted relief on direct appeal in similar cases. Jackson v. State, 648 So. 2d 85, 90

(Fla. 1994); Kearse v. State, 662 So. 2d 677 (Fla. 1995).

4. The 'prior violent felony' aggravator.

Section 921.141(5)(b), Florida Statutes, the aggravator relating to the previous conviction of another capital felony or a felony involving the use or threat of violence is unconstitutional facially and as applied to Mr. Lowe's case. This factor is overbroad in that the jury and judge are not required to consider the circumstances surrounding the prior conviction on an individual basis.

Pre-trial, defense counsel filed a motion to declare §§ 921.141(5)a,b,c,e,f,g,j and k, Florida Statutes, unconstitutional. (R. 10, 1562). Instructing the jury on this aggravator, the trial court directed the jury to conclude that a robbery necessarily involves the "use of violence." This is an incorrect statement of the law, as the crime of robbery may be proven without proof that there was the use of violence or the threat of violence. The court's instruction amounted to a command that the jury must find the aggravating circumstance and thus invaded the statutory province of the jury to recommend the sentence to the court. The instruction amounted, therefore, to a partial directed verdict as to this aggravating factor. The State was relieved of its burden to prove this aggravating factor beyond a reasonable doubt, violating Mr. Lowe's right under the due process clauses of the Fifth and Fourteenth Amendments.

This issue was preserved and appellate counsel's failure to raise the issue on

direct appeal was deficient performance constituting ineffective assistance.

C. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION

Defense counsel moved for a judgment of acquittal at the close of the State's case (R. 1000). After conviction and sentence, defense counsel filed a motion for new trial based on a number of grounds, including that the verdict of guilty was contrary to law or weight of the evidence and that the advisory verdict of death was contrary to law or weight of the evidence (R. 1842-1844). Had this issue been raised Mr. Lowe would have been entitled to a new trial. Appellate counsel did not raise these issues on direct appeal, rendering ineffective assistance of appellate counsel.

D. DUE TO APPELLATE COUNSEL'S DEFICIENT PERFORMANCE, MR. LOWE WAS PREJUDICED IN HIS DIRECT APPEAL

The Constitutional violations that occurred during Mr. Lowe's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Therefore it cannot be said that the "adversarial testing process worked" in Mr. Lowe's direct appeal. Id. The lack of appellate advocacy on Mr. Lowe's behalf is similar to the lack of advocacy present in other cases in which this Court has granted habeas relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in his petition demonstrates that the representation of Mr. Lowe involved serious and substantial deficiencies. Fitzpatrick v. Wainwright, 490

So.2d 938, 940 (Fla. 1986). Individually and cumulatively, Barclay v. Wainwright, 444 So. 2d 957, 959 (Fla. 1984), the claims omitted by appellate counsel establish that confidence in the correctness and fairness of the result of Mr. Lowe's appellate proceeding has been undermined. Wilson. In light of the serious reversible error that appellate counsel never raised, a new direct appeal should be ordered.

CLAIM II

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Florida capital sentencing scheme violates due process of law and is cruel and unusual punishment on its face and as applied. Trial counsel filed and argued a number of pre-trial motions that were denied, including motions to declare unconstitutional Florida's death penalty statute, FS §921.141, as well as to declare unconstitutional various enumerated aggravating factors therein: (5)i, (5)d, (5)(h), and (5)a,b,c,e,f,g,j, and k. (R. 4, 9-13, 1471–1512, 1537- 1565).

Section 921.141(1), Florida Statutes, allows the use of hearsay during the penalty phase to establish aggravating factors, violating Mr. Lowe's right to confront and cross-examine his accusers as guaranteed by Article I, Section 16 of the Florida Constitution and the Sixth Amendment to the United States Constitution and Mr. Lowe's right to remain silent as guaranteed by Article I, Section 9 of the Florida

Constitution and the Fifth Amendment to the United States Constitution.

The Florida capital sentencing statute allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prone towards conviction and imposition of the death penalty and denies the right to a jury representing a fair cross-section of the community.

Section 921.141 is unconstitutional under the Eighth Amendment to the United States Constitution in that the death penalty may be imposed under the theory of felony murder without a finding that the Defendant intentionally caused the death of the victim.

CLAIM III

MR. LOWE'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE STATE USED PRIOR CONVICTIONS BASED ON ACTS COMMITTED BY MR. LOWE WHEN HE WAS A JUVENILE TO ESTABLISH AN AGGRAVATING FACTOR, IN VIOLATION OF THE EIGHTH AMENDMENT AND ROPER V. SIMMONS

The State used prior convictions based on acts committed by Mr. Lowe when he was a juvenile to establish an aggravating circumstance, in violation of the Eighth Amendment and the principles underlying Roper v. Simmons, 125 S. Ct. 1183 (2005). At the penalty phase of the proceeding in Mr. Lowe's case, the State introduced a prior conviction of one count of burglary, a third degree felony, and one count of robbery without a weapon, a second degree felony, arising from acts committed when Mr. Lowe was seventeen years old (R. 1153).

At penalty phase, the court instructed the jury that it may consider the robbery conviction as an aggravating factor:

> [T]he Defendant has previously -- has been previously convicted of another felony involving the use or threat of violence to some other person. The crime of robbery is a felony involving the use of violence to another person.

(R. 1304).

The jury returned a recommendation of death by a vote of nine to three (R. 1309, 1833). At sentencing, the trial court found this aggravator, as well as the aggravator for "in the course of an attempted robbery" (R. 1319-1320). This use of a

prior offense for which Mr. Lowe was convicted at the age of seventeen as an aggravating factor making Mr. Lowe eligible for the death penalty is contrary to the principle of Roper v. Simmons, 125 S. Ct. 1183 (2005), which prohibits the imposition of the death penalty for crimes committed by juveniles.

On March 1, 2005, in Roper v. Simmons, the United States Supreme Court declared:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.

Id. at 1197. Accordingly the Supreme Court concluded that the Eighth Amendment precluded reliance upon criminal acts committed before the age eighteen from serving as a basis for the imposition of a sentence of death.

The Court noted that:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." * * * In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from

> voting, serving on juries, or marrying without parental consent.
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained at least in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment. * * *
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * *
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 1186 (citations omitted).

As feared by the Roper court, the state turned Mr. Lowe's young age into an improper, non-statutory aggravator:

> The Defense will argue, ladies and gentleman, his tender age of twenty is something that should be considered by you in mitigation. Something that you should consider as appropriate for a life sentence. I submit just the opposite. A person that robs and puts an object to a man's throat and threatens to kill at seventeen and then who robs at twenty with a gun and kills in the manner that he killed in is not deserving in a civilized society to live. That is a man that has become more dangerous, more evil, more wicked by his daily acts.

(R. 1280).

In the penalty phase of Mr. Lowe's case, the State emphasised the prior conviction as an aggravating circumstance (R. 1274) and called as witnesses the victim

of the robbery (R. 1154-1160) and the arresting deputy sheriff (R. 1161-1167). The State even argued that Mr. Lowe's young age at the time of the prior robbery was evidence of a propensity to commit violent crimes:

> Now you also heard that the Defendant was seventeen years old when he committed that act. That's pretty young. But what you heard, ladies and gentleman, from other testimony today, from the lady from Indian River Correctional Institute was that she deals with young Defendants, ages fourteen through twenty. Almost all the Defendants she deals with violent criminals start at a young age.

(R. 1275).

As the United States Supreme Court found in Roper, one of the three differences between adults and juveniles is that "the character of a juvenile is not as well formed as that of an adult." Roper at 1186. Therefore, "a greater possibility exists that a minor's character deficiencies will be reformed." Id.

However, the prosecutions argument was completely contrary to this concept. The prosecution argued that Mr. Lowe's prior conviction actually showed the opposite: that he was inherently evil and could not be changed, even by strict punishment and incarceration.

The prosecutor also used Mr. Lowe's prior robbery to attempt to persuade the jury that his "track record" made him deserving of death:

> You have to look at his track record…. Past robbery and this robbery. The punishment [for the prior conviction] did not change the leopard. Did not change the spots on the leopard and that, ladies and gentlemen, is the only way for our punishment in our society, the death penalty can

> do—can stop that. Can teach him appropriately. If you commit a robbery you're punished. If you don't learn, you'll kill, commit a robbery then you should also die for your evil acts.

(R. 1281).

These are precisely the types of argument that the United States Supreme Court sought to prevent by its holding in Roper:

> In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating.

Roper at 1197.

As the Roper court recognized, it is too easy for a jury to be swayed by prosecutor arguments and to be unaware of the developing adolescent mind and behavior. The prosecutor used a robbery conviction based on acts when Mr. Lowe was seventeen years old to frighten the jury and to convince them that Mr. Lowe was inherently and incorrigibly violent, that no amount of punishment would ever change him, and that the only way to stop him was to execute him.

The prosecutor also argued that the jury should consider the current charges combined with the robbery conviction from when Mr. Lowe was seventeen:

> [Y]ou have to look at what is more important, the robbery that he committed in the past and the robbery that he committed in this case….

(R. 1282).

If the principle of Roper is that juveniles are less culpable for their criminal acts

than adults, this principle should be recognized when deciding which aggravating circumstances make a person eligible for the death penalty. At age seventeen, Mr. Lowe's culpability for his prior conviction was lower than if the offense had been committed when he was an adult. Therefore, to use this prior conviction as an aggravator violates the Eighth Amendment and the principles underlying Roper. This is especially so under Florida's sentencing scheme, where the penalty phase jury and the sentencing court are not required to consider the individual circumstances of the prior conviction. §921.141(5)(b), Florida Statutes.

Using criminal acts committed by a juvenile to render a defendant death eligible and to urge that it constitutes an aggravating circumstance that warrants a sentence of death must violate the Eighth Amendment principle announced in Roper. Since the prior conviction was one of only two aggravating circumstances found by Mr. Lowe's sentencing court, in the absence of this aggravator it is very likely that three of the nine jurors who voted for death would have voted for life and changed the outcome of the penalty phase. This Court should find this aggravator and Mr. Lowe's death sentence unconstitutional and grant a new penalty phase.

CONCLUSION

For all of the arguments discussed above, Mr. Lowe respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Leslie Campbell, Office of the Attorney General, 1515 N. Flagler Drive, Fl. 9, West Palm Beach, Florida 33401, on December 29, 2005.

_____

RACHEL DAY
Assistant CCRC
Florida Bar No. 0068535

CAROLINE KRAVATH
Assistant CCRC
Florida Bar No. 483850

OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL-SOUTH
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Times New Roman 14 point font in compliance with the font requirements of Rule 9.210 (a) (2) of the Florida Rules of Appellate Procedure.

_____

RACHEL DAY