IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2333

RODNEY TYRONE LOWE,
Petitioner,

v.

JAMES MCDONOUGH,
Secretary, Florida Department of Corrections,
Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

NEAL A. DUPREE
Capital Collateral Regional Counsel – South
Florida Bar No. 311545

RACHEL DAY, Assistant CCRC
Florida Bar No. 0068535

CAROLINE KRAVATH, Staff Attorney
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

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

ARGUMENT IN REPLY

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

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

1. This claim is not procedurally barred.

The State contends that Mr. Lowe's claim of ineffective assistance of appellate counsel for failure to raise the prosecutor's improper argument and impeachment is procedurally barred because several of the complained of arguments were not objected to by trial counsel. However, this Court has held that improper comments may constitute fundamental error, which may be raised on direct appeal even where not preserved. Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996), cert. denied, 522 U.S. 834 (1997). Fundamental error is defined as that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. In Mr. Lowe' case, the remarks injected "elements of emotion and fear into the jury's deliberations." King v. State, 623 So. 2d 486, 488 (Fla. 1993) (citing Garron v. State, 528 So.2d 353, 359 (Fla. 1988).

The state also asserts that Mr. Lowe's claim is procedurally barred because Mr. Lowe had challenged the prosecutor's improper closing arguments in his direct appeal as points XI (guilt phase argument) and XIII (penalty phase argument). However, the state itself acknowledges that the instances of improper argument and improper impeachment at issue here are not the same as those raised on direct appeal (Response at 9). Since these claims were not raised on direct appeal, they are not procedurally barred.

2. Reference to facts not in evidence

The state's guilt phase closing argument was a misleading and inflammatory narrative that included facts not in evidence, including the victim's purported actual words and an imitation of Mr. Lowe shooting the victim and saying, "Well, then you're dead." The state asserts that the prosecutor's comments were logical inferences from the record. However, the state concedes that there was no testimony as to the victim's actual words and that there was no testimony that Mr. Lowe said, "Well, then you're dead," and no testimony that Mr. Lowe was seen shooting the victim. Indeed, in his closing argument, the prosecutor stated that he based his narrative on the videotape made by the detective. (R. 1085).

The state asserts that the court's instructions to the jury removed any prejudice caused by the prosecutor's comments. However, the comments were of such an

emotionally inflammatory nature that it is not possible to say that the court's instructions to the jury rendered the improper argument harmless beyond a reasonable doubt.

3. Improper vouching for witness credibility

In guilt phase closing argument, the prosecutor improperly vouched for State witness Leudtke's credibility when he said about Leudtke, "He's doing the best he can to recollect and tell the truth….." (R. 1077).

The state asserts that the prosecutor's comment was not improper because "the prosecutor was merely commenting on the witness's nervousness and demeanor, which would have been visible to the jurors, and summarizing Leudktke's account and obvious explanation why he did not memorize the clothing and other attributes of the man he saw…Such is proper argument well within the prosecutor's forensic acumen." (Response at 16).

Contrary to the state's assertion, the prosecutor did vouch for the witness' credibility when he told the jury that the witness was doing his best to recollect the truth. The state's witness' nervousness did not provide the prosecutor with an excuse to bolster the witness' credibility. The United States Supreme Court has ruled that due process and the right to a fair trial may be violated when the prosecutor vouches for the credibility of a witness. In United States v. Young, 470 U.S. 1 (U.S. 1985) the

Court noted:

> Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction…". The Court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones."
>
> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that
>
> > "[it] is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)."

Id.at 7-8 (citations and footnotes omitted).

The Court set forth the reasons that a prosecutor's vouching for a witness' credibility is improper:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than

its own view of the evidence.

470 U.S. at 18-19 (U.S. 1985) (citations omitted).

Despite the state's attempts to minimize it, the prosecutor's comment that witness Leudtke was "doing the best he can to recollect and tell the truth" is an egregious example of the two dangers warned of by the U.S. Supreme Court in Young.

4. Improper impeachment of defense penalty phase witness Brandes

In the penalty phase of the trial, the state improperly impeached defense witness Catherine Brandes. 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). Over defense counsel objection, the state questioned Ms. Brandes about her knowledge of Mr. Lowe's prior conviction for robbery. (R. 1207).

Fla. Stat. 90.608 [1] does not permit impeachment of a defense witness with prior

[1] Fla. Stat. 90.608 provides:
Any party, including the party calling the witness, may attack the credibility of a witness by:

(1) Introducing statements of the witness which are inconsistent with the witness's present testimony.
(2) Showing that the witness is biased.
(3) Attacking the character of the witness in accordance with the provisions of s.

convictions of the defendant. Contrary to the state's assertion, defense counsel did not "open the door" to this line of questioning. The direct examination was limited to witness Brandes' personal knowledge of Mr. Lowe based on their working relationship. Brandes was not asked on direct about her knowledge of Mr. Lowe's background. The cases cited by the state are easily distinguishable. In Butler v. State, 842 So.2d 817, on cross-examination of a defense witness, the state elicited instances of prior domestic violence in order to test his credibility concerning the relationship between the defendant and the victims. In Butler, the witness had actually testified about the relationship and therefore the questioning on prior instances of domestic violence was proper, pursuant to Fla. Stat. 90.608(4), to show "a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified." In the instant case, witness Brandes did not testify about Mr. Lowe's background or prior convictions, and it was therefore improper to impeach her using Mr. Lowe's prior conviction. In Hildwin v. State, 531 So. 2d 124 (Fla. 1988), the state introduced at penalty phase evidence of an uncharged crime to

---

90.609 or s. 90.610.
(4) Showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified.
(5) Proof by other witnesses that material facts are not as testified to by the witness being impeached.

rebut the defense evidence of the defendant's nonviolent nature. However, the Court added that the rebuttal evidence of the uncharged crime would not have been allowed if the defense had not presented evidence of nonviolence:

> We hasten to add that evidence that the defendant had been a devoted family man or a good provider would not place in issue his reputation for nonviolence.
>
> Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (n. 1).

Since Brandes did not testify about Mr. Lowe's background, it was not placed in issue and it was improper to impeach her using Mr. Lowe's prior convictions.

5. 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 testimony by suggesting that Mr. Lowe could have thrown a knife out of the van.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION

The State asserts that trial counsel failed to raise this issue. However, the issue was raised and preserved by trial counsel. 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 on direct appeal 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.

The State asserts that Mr. Lowe was not prejudiced by appellate counsel's failure to raise this claim because the Florida Supreme Court independently reviews each conviction and death sentence. However, leaving that issue to be reviewed pursuant to this Court's mandatory capital review is not a substitute for advocacy on behalf of Mr. Lowe.

C. 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

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

The state asserts that the challenge to the "especially wicked, evil atrocious or cruel" ('HAC') jury instruction challenge was not preserved by trial counsel because trial counsel did not ask for an instruction regarding specific intent. However, 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). Also, 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). The request for a HAC instruction in compliance with Dixon preserved the specific intent issue. In Dixon, this Court gave the following interpretation of the HAC aggravating circumstance:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

2. The 'cold, calculated, and premeditated' aggravator.

The "cold, calculated, and premeditated" aggravator, §921.141(5)(i), Florida Statutes, ('CCP') is unconstitutionally vague, overbroad, arbitrary, and capricious. The state asserts that Mr. Lowe made this claim on direct appeal and that Mr. Lowe is not entitled to further review of that claim (Response at 31-32). However, the present claim was not made on direct appeal, despite being preserved by trial counsel.

On direct appeal, Mr. Lowe's appellate counsel claimed as Point XII that it was error to instruct on the HAC and CCP aggravating circumstances when the evidence

did not support them. In contrast, the claim here is that the HAC aggravator is facially unconstitutionally vague and overbroad and that the CCP aggravator is unconstitutionally vague, overbroad, arbitrary, and capricious. This was not raised on direct appeal.

The state's citation to Pace v. State , 854 So. 2d 167 (Fla. 2003) is inapt. In that case, Pace claimed in his habeas petition that "appellate counsel was ineffective for failing to raise the fundamental error of allowing the avoid-arrest aggravator to be presented to the jury." Id. at 181. Pace did not complain that the avoid-arrest aggravator was unconstitutionally vague, only that there was not enough evidence to allow the jury to consider it. Therefore, Pace does not apply here. The same applies for the state's citation to Stewart v. State, 558 So.2d 416 (Fla. 1990). Stewart did not challenge the CCP instruction as unconstitutionally vague, but only that it was error to instruct the jury on it because the judge did not find the CCP aggravator at sentencing.

The state also cites to Davis v. State 915 So. 2d 95 (Fla. 2005) (corrected opinion at Davis v. State 928 So. 2d 1089 (Fla.2005) where this Court denied relief on a challenge to an invalid CCP instruction. However, this case is easily distinguishable. In Davis, the wording of the CCP jury instruction was not objected to by trial counsel and therefore not preserved for appeal, so that appellate counsel could not be ineffective for failing to raise it as it was not fundamental error under Jackson v. State,

648 So. 2d 85 (Fla. 1994). 928 So. 2d at 1133. That is not the case here, since Mr. Lowe's trial counsel preserved the issue for appeal by requesting the court pre-trial to define both the HAC and CCP aggravators in its jury instructions (R. 12). Defense counsel also filed a pre-trial motion to declare §921.141(5)(i) unconstitutional for vagueness and overbreadth (R. 1488).

In addition, as noted by the state, this Court on direct appeal had found in Davis that a finding of CCP was supported by the evidence. Davis v. State, 915 So. 2d at 98, citing Davis v. State, 586 So. 2d 1038 at 1040 (Fla 1991). In Mr. Lowe's case, this Court on direct appeal declined to address whether it was error for the trial court to instruct on the CCP and HAC aggravating circumstances. Lowe v. State, 650 So. 2d 969, 977, n.9 (Fla. 1994). Therefore, the state's suggestion that Mr. Lowe's citation to Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995) for support is inapt because "as this Court implicitly held, the CCP aggravator was valid as it had been sufficiently proven for jury consideration" (Response at 33), is incorrect.

In addition, the sentencing court in Mr. Lowe's case did not find CCP and HAC; the only aggravators found were the prior violent felony and in the course of an attempted robbery aggravators (R. 1319-1320). In such a case, even where the sentencing court does not find CCP and HAC, an invalid instruction is not harmless error. Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995).

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 seventeen years old to establish an aggravating circumstance (R. 1153), in violation of the Eighth Amendment and the principles underlying Roper v. Simmons, 543 U.S. 551 (2005).

In its response, the state cites two cases where petitioners were denied relief under Roper: Moreno v. Dretke, 362 F. Supp. 2d 773(D. Tex. 2005); and Hill v. State, 921 So. 2d 579 (Fla. 2006), stay denied, Hill v. Florida, 126 S.Ct. 1189 (U.S. 2006), cert. denied, 126 S.Ct. 1441 (U.S. 2006).

However, the issues in those two cases were distinct from the issue raised here. In Moreno, the issue was whether Roper applied where the petitioner committed the murder after he was eighteen but formed the *mens rea* to commit the crime when he was seventeen. 362 F. Supp. 2d at 812. In Hill, the issue was whether Roper applied to an inmate who was twenty-three when he committed the crimes at issue but whose mental and emotional age was under eighteen. 921 So. 2d at 584. Neither of these cases deal with aggravators based on convictions occurring when the defendant was a minor.

In contrast, Mr. Lowe was seventeen at the time of the convictions that the state later used as aggravators in his capital sentencing. The U.S. Supreme Court in Roper recognized that:

> The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.

543 U.S. at 570 (citations omitted). Roper recognizes that the culpability of a juvenile is not the same as an adult and therefore a juvenile should not be punished as an adult. Therefore, the use of a prior conviction as an aggravator when that prior conviction arose from incident occurring when Mr. Lowe was seventeen violates the Eighth Amendment and the principles underlying Roper.

CONCLUSION

For all of the arguments discussed in his Petition and his above Reply, 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 March 30, 2007.

_____
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 Reply 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