IN THE SUPREME COURT OF FLORIDA

JAMES FRANKLIN ROSE	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC 06-473**
STATE OF FLORIDA,	)	**L.T. No. 76-5036CF10A**
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

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PRELIMINARY STATEMENT

Appellant, James Franklin Rose ("Rose"), was the defendant and post-conviction movant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee, State of Florida ("State"), was plaintiff.

References to the Record on Appeal will be designated by the symbol "R" followed by appropriate page number(s) and encased in parentheses. The Transcript of the hearings relevant to Rose's rule 3.850 and 3.851 motion, the Order on which is presently before this Court for review, will be designated by the symbol "T" followed by the appropriate page number(s), together encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review a Circuit Court's ruling upon a motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.850 and 3.851, in a death penalty case. Art. V, § 3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(1).

STANDARD OF REVIEW

To uphold a trial court's summary denial of claims raised in a postconviction motion pursuant to Fla. R. Crim. P. 3.850 and 3.851, the claims must be either facially insufficient or conclusively refuted by the record. *See* Fla. R. Crim. P. 3.850(d). Where no evidentiary hearing is held below, the Supreme Court must accept the defendant's factual allegations as true to the extent they are not refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

STATEMENT OF THE CASE

On November 9, 1976, Defendant, James Franklin Rose ("Rose"), was indicted for the Kidnapping and First-Degree Murder of eight year old Lisa Berry. (R 361). Rose was convicted as charged on both counts. Though the jury had deadlocked 6-to-6 on their advisory verdict, an Allen charge (later found to be improper) prompted a 7-to-5 death recommendation and Rose was sentenced to death for the offense of First-Degree Murder and to life imprisonment for Kidnapping. Rose appealed, contending, *inter alia*, that the evidence was insufficient to support his convictions for first-degree murder and kidnapping. This Court, in Rose v. State, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909, 103 S.Ct. 1883 (1983), affirmed Rose's convictions, but vacated his sentence of death and remanded for resentencing. At resentencing, the death sentence was reimposed and was affirmed on direct appeal. Rose v. State, 461 So. 2d 84, 86 (Fla. 1984), *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689 (1985).

Rose then originally moved for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P., challenging the lawfulness of his conviction and sentence of death. The trial court summarily denied Rose's motion without an evidentiary hearing. On appeal, however, this Court reversed and remanded, directing the trial court to "reconsider Rose's motion and to hold an evidentiary hearing on the ineffective

assistance of counsel claims and any other appropriate factual issues presented in the motion." Rose v. State, 601 So. 2d 1181, 1184 (Fla. 1992).

The trial court then reconsidered Rose's original postconviction motion and conducted an evidentiary hearing on his claims that he had received ineffective assistance of counsel at both guilt and penalty phases of trial. The trial court again denied relief as to all claims, holding Rose's ineffective assistance claims did not meet the standard of Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984).

On appeal of the trial court's denial of Rose's original postconviction motion, this Court held:

> In light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented, we find that counsel's errors deprived Rose of a reliable penalty phase proceeding. We further conclude that Rose was prejudiced by the ineffective assistance of counsel at the penalty phase for failing to investigate and present available mitigating evidence.

Rose v. State, 675 So. 2d 567, 574 (Fla. 1996).

This Court affirmed the trial court's denial of relief as to all claims raised in the original postconviction motion, except for Rose's claim that counsel was ineffective during the resentencing proceeding. This Court reversed the trial court's denial of relief as to that claim, vacated Rose's sentence of death, and remanded for

a new penalty phase proceeding before a jury who would properly consider available evidence of aggravation and mitigation before rendering their advisory verdict. Id.

New penalty phase proceedings were presided over on remand by the Honorable Paul L. Backman. The jury recommended a sentence of death and, on February 13, 1998, the trial court issued its sentencing order (R 341-359). Finding five statutory aggravators and no mitigators, the trial court imposed a sentence of death. (R 359). The aggravators found by the trial court to justify the death sentence were as follows:

> 1) the crime for which the defendant is to be sentenced was committed while he had been previously convicted of a felony and was under the sentence of imprisonment or on parole (F.S. 921.141(5)(a));
>
> 2) the defendant was previously convicted of a felony involving the use and/or threat of violence to some person (F.S. 921.141(5)(b));
>
> 3) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or attempting to commit the crime of kidnapping (F.S. 921.141(5)(d));
>
> 4) the capital felony was especially heinous, atrocious, or cruel (F.S. 921.141(5)(h));
>
> 5) the victim of the capital felony was a person less than 12 years of age (F.S. 921.141.(5)(l)).

(R 342-348).

On appeal after remand, this Court affirmed Rose's newly imposed sentence of death. Rose v. State, 787 So.2d 786 (Fla. 2001). Rose petitioned for a writ certiorari in the Supreme Court of the United States, which was denied March 18, 2002. Rose v. Florida, 535 U.S. 951, 122 S.Ct. 1349 (2002).

Rose subsequently moved for postconviction relief, pursuant to rules 3.850, and 3.851, Fla. R. Crim. P., raising the eight (8) presently urged grounds for relief. (R 107-153). The State filed a response to Rose's postconviction motion (R 116-841), which the trial court adopted, entering an Order summarily denying Rose's postconviction motion without an evidentiary hearing. (R 842-848).

Rose file a timely Notice of Appeal. (R 849-850).

This appeal follows.

STATEMENT OF FACTS

This Court, in Rose v. State, 425 So.2d 521,522 (Fla. 1982), set forth the facts established at the original trial as follows:

> Although circumstantial in nature, the evidence was sufficient for the jury to have found beyond a reasonable doubt that defendant, and no other person, kidnapped and murdered eight-year-old Lisa Berry. The evidence reveals that defendant was the last person to be seen with Lisa at the bowling alley on the night she disappeared. Barbara Berry, Lisa's mother, was at the bowling alley with family and friends when defendant arrived shortly after 9 p.m. on October 22, 1976. According to Barbara, defendant joined her and other team members at the bowling circle where they talked for several minutes. Shortly after 9:30 p.m., defendant said that he was going to the pool room area of the bowling alley. Lisa told her mother that she was going with him. Defendant and Lisa were last seen by Lisa's sister Tracy, who testified that Lisa was outside the front door of the bowling alley and defendant was standing just inside the front door. Defendant gave Tracy money for cokes, but when she returned from the snack bar with the cokes, both defendant and Lisa were gone. Upon being informed by Tracy that she could not find defendant and Lisa, Barbara attempted to find them. While looking for them, she was paged for a telephone call which turned out to be from defendant. He asked Barbara the time; she said 10:30. He responded that it was 10:23. He asked what time she would be finished bowling; she said 11:30. Defendant was next seen entering the bowling alley at approximately 11:30 p.m. The medical examiner's testimony established the time of Lisa's death to be within twenty-four hours either side of 1:12 a.m., October 23, 1976. The evidence reveals that defendant had a motive for killing Lisa. Although he and Lisa's mother had dated for about nine months, they were no longer dating regularly because he was extremely jealous about her working in the bowling alley bar and being around other men. Lisa's mother testified that defendant told her that he could hurt her and that she did not know what he was capable of doing. A male friend of Barbara's who was at the bowling circle when defendant was there was

asked by Lisa if he was going to have breakfast with her and her mother. According to testimony at trial, defendant, after having overheard this conversation had a look on his face as if to say, "What is going on?" Several people present at the bowling alley testified that when defendant returned at approximately 11:30, he had a large red spot on his lower right trousers leg. Expert testimony revealed the spot to be type B blood. Type B bloodstains also were found on the outside of the passenger's door of defendant's white van, on the passenger's seat, and on the engine cover. Fingernail scrapings taken from defendant revealed blood. It was stipulated in the record that Lisa had type B blood and that defendant had type A blood. At about 11:45 p.m. on the night Lisa disappeared, a white van was seen behind a Pantry Pride store located about a quarter of a mile from the bowling alley. Defendant was seen driving his white van that same night. According to testimony at trial, when the search for Lisa began shortly after defendant's return to the bowling alley at 11:30, he drove away and returned at least three times. Lisa's green sweater and pink pants were found the next afternoon behind the Pantry Pride. Her pink blouse was later found in defendant's van. Lisa's nude body was found four days after her disappearance in a canal approximately ten miles from the bowling alley. Her shoes were found about a mile apart alongside a road between the canal and the bowling alley. A paint-stained hammer was found in the canal about six feet from Lisa's body. Defendant was a painter, and expert testimony revealed that paint samples from the hammer were similar to paint samples taken from paint cans in his van. The medical examiner testified that Lisa's death resulted from severe head injuries caused by blunt force. Expert witnesses also testified that a green fiber taken from defendant's clothing after his arrest was consistent with fibers from Lisa's green sweater found behind the Pantry Pride and that a crushed hair taken from defendant's sock was consistent with hair from Lisa's hairbrush. Defendant made numerous inconsistent attempts to account for his whereabouts on the evening Lisa disappeared and to explain away certain evidence. Defendant told Lisa's mother that he was at the Highway Bar when he telephoned her regarding the time and stated to her that it was 10:23. He was uncharacteristically exact about the time, and he could be clearly heard without background noise which, according to testimony, would not have been possible had he been at the bar when he telephoned since the

band at the bar would have been playing loudly at that particular time. When defendant returned to the bowling alley at 11:30, he pretended that Lisa was still alive. Acting as though Lisa was present at the bowling alley in his visible sight, he commented to Lisa's mother that Lisa was getting chubby and asked who was the person with the goatee to whom Lisa was talking. When she turned around to see who defendant was referring to, she saw neither Lisa nor a person with a goatee. After initially denying that the spot on his trousers leg was blood, defendant later explained that he had cut himself changing a tire. Testimony indicated the spare tire was fully inflated. He told a police officer that he had cut his leg while crawling underneath the van to check out a noise he had heard. When the officer took defendant to the area where he claimed to have crawled under the van, the officer could not find any impressions in the sand that could have been made by a human body. In an attempt to cover the blood spot on his trousers which was first noticed and called to his attention upon his return to the bowling alley at 11:30, defendant first covered it with a whitewash or paint. Later, after he went into a restroom, the spot was covered with grease or some black substance. Defendant explained to a police detective that the blood on the seat of his van was from an injured friend whom he had taken home about two months earlier. The friend had type A blood. The blood on the seat was type B, the same as Lisa's. Defendant, at one point, told police detectives that Lisa had last been near the van about two weeks prior to the night of her disappearance. He later stated that Lisa had attempted to get into the van earlier that evening and he told her to get out. Lisa's mother testified that Lisa had not been in defendant's van for about a year. Defendant was convicted for the kidnapping and first-degree murder of Lisa Berry. The jury recommended death, and the trial court sentenced him to death for the murder and to life imprisonment for the kidnapping.

Rose v. State, 425 So.2d at 522-23.

Upon reversal and remand, penalty phase proceedings were conducted before the Honorable Paul L. Backman, Circuit Court Judge. As alleged in Rose's Sworn Motion for Postconviction Relief, the following then transpired:[1]

During *voir dire*, prospective juror, Doris DeMatteis, asked: "Well, is the case going to be explained to us? I mean, ***why he was sentenced?***" (R 117). The State then began its efforts for imposition of the death penalty by commenting, during opening statement:

> Mr. Rose had been advised of his rights, constitutional rights, to remain silent by Detective McLellan and Walker, and he was further advised of his constitutional rights by Detective John Bukata on a written form. . . . Now, the police were suspicious, as I stated, of Mr. Rose. So they started surveilling Mr. Rose, following him, watching him. . . . And [Detective] Van Sant said words to the effect, "Look, are you making up this story regarding Lisa with a man at the bowling alley that you saw?" And at that time, Jim Rose terminated the conversation, wouldn't speak to him anymore.

(R 117-118).

The jury was again shown close up pictures of the body of Lisa Berry floating in the canal covered with maggots. The State elicited testimony from numerous witnesses for sentencing purposes, including Lisa's family members. Several fact

[1] Citations are to Rose's present Sworn Motion for Postconviction Relief, whose allegations must be taken as true to the extent they are not refuted by the record. Peede v. State, 748 So.2d 253, 257 (Fla. 1999).

witnesses testified concerning the events leading up to Lisa Berry's disappearance. Two of Rose's prior parole and probation officers also testified for the State. Several current and former law enforcement officials testified. Medical examiner Abdullah Fatteh testified that his autopsy findings led him to the opinion that Lisa Berry had died as the result of severe head injuries caused by blunt force. (R 118).

Also, as alleged in Rose's postconviction motion, the State had withheld autopsy photographs which should have been disclosed earlier as they would have been relevant to establishing a more favorable time of death as it relates to the State's assertion of the HAC aggravator. (R 119). In order to illustrate the nature of Lisa's injuries, including a fracture to the base of her skull, the State presented two (2) photographs of the victim's skull which could have been used by the defense to show the fracture resulted not from a head injury, but from the erosion of that part of the skull by the work of maggots which had invaded the decaying body for days after death. (R 119). Though the Court held a Richardson hearing on the State's failure to earlier disclose this evidence, defense counsel failed to obtain any ruling from the trial court on the Richardson inquiry. Defense counsel omitted to obtain a ruling, not as a matter of strategy, but due purely to oversight. (R 119).

The trial court adopted the State's Response to Rose's Sworn Motion for Postconviction Relief, entering an Order summarily denying Rose's postconviction motion without an evidentiary hearing. (R 842-848).

This appeal follows.

SUMMARY OF ARGUMENT

The trial court erred in summarily denying each of Rose's Claims I, II, III, IV, V, VI, and VII, as they are facially sufficient and not conclusively refuted by the record. These claims should be remanded for evidentiary hearings.

ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S CLAIMS I, II, III, IV, V, VI & VII, AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

The trial court entered an Order on Rose' Sworn Motion for Postconviction Relief, stating that no evidentiary hearing would be had on any of its eight (8) grounds and that each of the claims would be summarily denied. (R 842-848).

In order to uphold a trial court's summary denial of claims raised in a motion under rules 3.850 and 3.851, the claims must be shown to be either facially insufficient or conclusively refuted by the record. McLin v. State, 827 So.2d 948 (Fla. 2002). Rule 3.850(d) requires in this regard: "In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order."

Yet the State's Response in this case, adopted by the trial court, attaches absolutely no part of the record or transcript *in the trial court* other than (a) the original Indictment, and (b) the trial court's sentencing order. (R 341-362). The remainder of the State's attachments, adopted by the trial court, contain solely the State's own filings, copies of *appellate* briefs and written opinions of the *appellate*

courts. (R 294-841). Rose has, however, raised eight (8) grounds for relief, Grounds I, II, III, and IV, of which allege a denial of his Sixth Amendment right to the effective assistance of counsel *in the trial court*. The validity of such grounds cannot be even vaguely discerned–much less "conclusively refuted"--by reference to the State's own appellate filings, those of Rose's appellate counsel, and/or the orders of this and other appellate courts. As the files and records attached to the order summarily denying Rose's postconviction claims fail to show conclusively that the Defendant is entitled to no relief, reversal is required. McLin v. State, *supra*.[2]

As each of the summarily denied claims and the stated grounds for their denial differ in this case, an individual review of each claim follows.

Claim I alleges defense counsel's failure to obtain a ruling on a Richardson inquiry into a State discovery violation precluded the defense's use of photographs

[2] Thus, the Second District, in Flores v. State, 662 So.2d 1350 (Fla. 2nd DCA 1995), held a trial court's order denying postconviction relief from a first-degree murder conviction did not contain the required record attachment showing a proper jury instruction was given on premeditation and its summary denial of the defendant's ineffectiveness claim for failure to request the instruction was consequently improper, though the order incorporating the State's response identified a page of the transcript in which the instruction was given and recited the instruction verbatim, where the court did not attach a copy of the relevant page of the transcript to its order. The court noted the State's response is not a record attachment contemplated by the rule requiring record attachments to support summary denials and that the growing practice of incorporating State responses into orders denying postconviction motions is no substitute for record attachments to support summary denials of relief.

demonstrating that an alleged skull fracture may actually have resulted from maggots rather than the impact of a hammer, precluding an HAC aggravator. (R 123-127).

On appeal from his resentencing, Rose asserted that the State had improperly withheld autopsy photos which would have been relevant in establishing a more favorable time of death as it relates to the State's assertion of the HAC aggravator. In order to illustrate the nature of Lisa's injuries, including a "fracture" to the base of the skull, the State presented two photos of the victim's skull which could have been used to show that the "fracture" resulted not from a head injury, but from the erosion of that part of the skull by the work of maggots that invaded the decaying body in the days after death. This Court then observed that "[t]hese two sets of photographs curiously surfaced in the most recent penalty phase," noting, "[t]o the extent that these two photographs might have shown that the victim died very quickly, they might have negated the State's theory on HAC." Rose v. State, 787 So. 2d at 796.

This Court, however, then engaged in some speculation (without benefit of any evidentiary proceedings) about defense counsel's state of mind, knowledge and intent: "Counsel appeared concerned that, because of their gruesome nature, the use of the photographs before the jury would have actually hurt his client," concluding

"the fact that counsel tactically chose not to use this material undermines any claim of prejudice." Rose v. State, 787 So.2d at 796. This Court then restated its rationale:

> Rose argues that the trial court erred in failing to rule on the Richardson issue. We disagree. ***As a general rule, the failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes.*** *See* Richardson v. State, 437 So.2d 1091, 1094 (Fla.1983). As just mentioned above, the trial court held a hearing regarding the late discovery of the two sets of photographs. Although it could not be determined whether the State wilfully committed improprieties regarding the late discovery of the photographs, Rose's counsel realized that the use of these photographs would have at best had the effect of a double-edged sword because of their gruesome nature. ***In a tactical move,*** Rose's counsel decided not to use the photographs and not to call his own expert despite the trial court's urging. Trial counsel's decision effectively resolved the matter and any failure of the court to formally rule was rendered harmless.

Rose v. State, 787 So. 2d at 797 (emphasis added).

At no point did this Court suggest that it was receding from the time-honored principle that conclusions arrived at by appellate courts which lack any evidentiary basis below are *dicta*, or that this Court was disapproving the line of cases holding an evidentiary hearing is required to conclude whether action or inaction was the result of a strategic decision. This Court's speculation about defense counsel's trial strategy was not essential to its decision concerning the lacking Richardson hearing on direct review. It was *dicta*, which does not provide controlling judicial precedent.

State v. Fla. State Improvement Comm'n, 60 So.2d 747 (Fla.1952); Pell v. State, 97 Fla. 650, 122 So. 110 (Fla. 1929).

An evidentiary hearing is required in order to conclude that a particular action or inaction was a strategic decision. Walker v. State, 792 So.2d 604, 605 (Fla. 4th DCA 2001); Sampson v. State, 751 So.2d 602 (Fla. 2nd DCA 1998); Guisasola v. State, 667 So.2d 248, 249 (Fla. 1st DCA 1995); Collins v. State, 671 So.2d 827, 828 (Fla. 2nd DCA 1996) ("Matters of trial strategy should not be determined without an evidentiary hearing."). Yet no evidentiary hearing was ever held in which to take evidence capable of supporting a conclusion that Rose's counsel's failure to obtain a ruling after the Richardson hearing was the product of a strategic decision to avoid gruesome photos, rather than a simple failure by ineffective defense counsel to assert Rose's right to show that the purported fracture was not a pre-mortum fracture at all, but the result of natural processes occurring well after Rose's purported conduct.

Defense counsel's failure to obtain a ruling on the Richardson inquiry into the State's discovery violation precluded the defense from using photographs which demonstrated that what had been originally represented to jurors as being a skull fracture from the impact of a hammer may actually have resulted from maggots, precluding the HAC aggravator. Were counsel to testify at evidentiary hearing that his omission to obtain a ruling on the Richardson inquiry and introduce these photos

and derivative evidence was not a matter of strategy at all, but a mere oversight that cost Rose a significant defense, then counsel's omission may be said to have denied Rose the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Florida Constitution.

The standard for determining claims of ineffective assistance of counsel was set by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, counsel is deemed to have been ineffective upon a showing that: (1) counsel's performance was deficient, and (2) counsel's deficiency prejudiced the defense by undermining reliability of the outcome. 466 U.S. at 687.[3]

If, at an evidentiary hearing on this claim ordered by this court, it is determined that counsel's failure to obtain a ruling following the Richardson inquiry was not a matter of trial strategy and fell below acceptable standards of reasonably effective representation by attorneys handling death penalty cases, it may be said to have constituted a breakdown in the adversarial testing process, rendering Rose's penalty proceeding fundamentally unfair and prejudicing the defense by

[3] The Strickland Court held "the ultimate focus of inquiry must be on the fundamental fairness of the proceedings whose result is being challenged" and whether "the result of the particular proceedings is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id at 697.

undermining the reliability of the proceeding's outcome. Strickland v. Washington, 466 U.S. at 687.

Should defense counsel so testify at an evidentiary hearing ordered by this Court, it may then be said that, but for counsel's failure to obtain a ruling on the Richardson inquiry, there remains a reasonable probability the photos of the victim's skull could have been used to show the fracture resulted not from a head injury, but from the erosion of that part of the skull by the work of maggots that had invaded the decaying body in the days after death. There would therefore remain a reasonable probability this powerful photographic evidence would have convinced jurors the victim's death was not heinous, atrocious or cruel (HAC), and that their advisory verdict should be a recommendation of life imprisonment, rather than death.

Rose should therefore be granted a new, full and fair penalty proceeding with the effective assistance of counsel and photographs of the victim's skull to show jurors that the fracture resulted not from a head injury, as the State had maintained in support of an HAC aggravator, but from the erosion of that part of the skull by the work of maggots invading the body in the days after death. Remand is required for an evidentiary hearing to determine whether counsel's failure to obtain a ruling on the Richardson hearing was a matter of reasonable trial strategy or of simple neglect.

Claim II alleges defense counsel was ineffective for failing to correct a seated juror's belief, expressed in the presence of other jurors ending up on the panel, that Rose had already been sentenced to death at a prior penalty proceeding. (R 127-129). During *voir dire,* prospective juror Doris DeMatteis asked in the presence of other jurors: "Well, is the case going to be explained to us? I mean, ***why he was sentenced?***" (R 139). Neither court nor counsel corrected DeMatteis' suggestion that Rose had already received the sentence jurors were being asked to decide.[4]

Yet juror DeMatteis was ultimately seated on the jury panel deciding Rose's fate (R 413-414), as were the other jurors present for her uncorrected comment.

It is well established that an essential ingredient of the fair jury trial to which an accused is constitutionally entitled is "a panel of impartial, 'indifferent' jurors." Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036 (1975). While a juror may be deemed fair and thus qualified to sit even though not "totally ignorant of the facts and issues" in the case, a juror's assurance that he or she is up to the task of laying aside impressions or preconceived notions is not dispositive of the juror's ability to be impartial, indifferent and fair. Murphy v. Florida, 421 U.S. at 800, 95 S.Ct. at 2036. As noted in Weber v. State, 501 So.2d 1379 (Fla. 3rd DCA 1987):

[4] The Trial court's earlier explanation of the case's posture on remand made no mention of whether Rose had received a sentence on his conviction for first-degree murder. (R 99-101).

> Courts which have confronted the discrete issue posed by the present case have uniformly concluded that the prejudice arising from the exposure of jurors to information that the defendant was previously convicted of the very offense for which he is on trial is so great that neither an ordinary admonition of the jurors nor the jurors' ritualistic assurances that they have not been affected by the information can overcome it.

Weber v. State, 501 So.2d at 1382.

Juror DeMatteis' knowledge and belief that Rose had already been sentenced (*i.e.*, found guilty of the death penalty) presumptively colored her view of the evidence and her vote for the ultimate advisory verdict. The fact that her comment--made in the presence of other jurors--went uncorrected by court or counsel reasonably infected the rest of the panel with the belief that their forebears had already found more than enough evidence to recommend a sentence of death.

Rose asserts he was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Florida Constitution. He was prejudiced by deficient defense counsel's failure to object and correct Juror DeMatteis' stated belief that Rose had already been sentenced at least once to death. Counsel's failure to do so (provided it is not shown at an evidentiary hearing to have been a reasonable defense strategy) fell below minimally acceptable standards of reasonably effective representation by attorneys

handling death penalty cases and resulted in a breakdown in the adversarial testing process, rendering Rose's penalty phase trial fundamentally unfair.

Defense counsel's failure to object and seek to correct this damning comment by a juror eventually seated on a jury panel which included others who had heard her uncorrected comment, prejudiced the defense by undermining the reliability of the trial's outcome. Strickland v. Washington, 466 U.S. at 687. But for counsel's omission in this regard, jurors would not have proceeded on the prejudicial assumption that death had already been recommended the first time around.

As there remains a reasonable probability that, had defense counsel not so failed the Defendant, the trial court would have given the jury a curative instruction capable of overcoming the prejudice inhering in a belief that the Defendant had already been death-sentenced, Rose was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution–and should be granted a new penalty phase proceeding with an un-biased jury and the effective assistance of defense counsel.

The trial court's summary denial of Claim II, finding the claim procedurally barred, simply adopted the State's Response and failed to attach portions of the record or transcript from the trial refuting the Defendant's allegations. As a review of the State's attachments adopted by the trial court (which include absolutely no

part of the record or transcript *in the trial court* other than the original Indictment and the trial court's sentencing order), fails to show conclusively that Rose is entitled to no relief, the summary denial herein should be reversed. McLin v. State, *supra*.

Claim III of Rose's postconviction motion alleges defense counsel was ineffective for failing to object to the State's comment in opening that Rose invoked his right to remain silent once police questioning became accusatory. (R 129-132).

At trial, the State adduced the testimony of a police witness that when police became more suspicious of Rose, following him and watching him (R 469), Detective "Van Sant said words to the effect, 'Look, are you making up this story regarding Lisa with a man at the bowling alley that you saw?' And at that time, Jim Rose terminated the conversation, wouldn't speak to him anymore." (R 129-130).

Whether Rose had made up what he said happened to the child at the bowling alley (forceful vs. voluntary transportation) directly impacted whether, as the State suggested, the victim experienced the distress comprising the HAC aggravator.

Aggravating factor #3 (murder was committed while engaged in commission or attempt to commit kidnaping), and factor #4 (murder heinous, atrocious, or cruel), were directly implicated by the mention of Rose's invocation of his right to remain silent, which should never have been mentioned to jurors determining those facts.

Its inherent prejudice was potentiated by the fact that, during the penalty phase jury trial, much as when he had declined further police questioning, Rose invoked his right to remain silent and not to testify. In combination with the State's mention in its opening that "Mr. Rose had been advised of his rights, constitutional rights, to remain silent . . . and he was further advised of his constitutional rights . . . on a written form" (R 130), Rose's decision to invoke his right to remain silent at trial was highlighted and emphasized by the prosecution, all to Rose's unfair prejudice.

Reasonably effective capital trial counsel would have immediately objected to this comment on Rose's invocation of his right to remain silent, seeking a mistrial or curative instruction, preserving the issue for appeal. Rose's counsel did none of these. The State's opening comment on Rose's having invoked his right to remain silent when accused of fabricating his earlier account prejudiced the trial's outcome from its inception by placing in jurors' minds the notion that, since he had refused to discuss or defend his earlier story, he "must" have been lying to cover-up the gravity of his conduct, and was continuing to do so by invoking his right to remain silent at trial. But for counsel's failure to object to the State's comment on Rose's silence, there remains a reasonable probability jurors would not have accepted the State's theory that the victim was abducted, rather than entering the van of her own accord.

The law is clear that if a "comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence" under Article I, Section 9 of the Florida Constitution. State v. Hoggins, 718 So. 2d 761, 769 (Fla. 1998). *See also* Cook v. State, 714 So. 2d 1132 (Fla. 1st DCA 1998); Dickey v. State, 785 So. 2d 617 (Fla. 1st DCA 2001); Coney v. State, 756 So. 2d 173 (Fla. 4th DCA 2000). A comment on a defendant's silence is not harmless where, as here, evidence against the defendant is not "clearly conclusive." Fundora v. State, 634 So. 2d 255, 256 (Fla. 3d DCA 1994).

The case against Rose was circumstantial. Rose v. State, 425 So.2d at 522.

"The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest v. State, 462 So.2d 446, 448 (Fla. 1985). At bar, however, Rose's trial counsel failed to interpose any objection to the State's improper reference in its opening statement to Rose's invocation of his constitutional right to remain silent.

If, at an evidentiary hearing ordered by this Court, it is found that trial counsel's failure to object and seek a mistrial or curative instruction in the face of the State's impermissible comment on Rose's invocation of his right to remain silent was not a reasonable defense strategy, but a negligent though serious deficiency

which fell below acceptable standards of reasonably effective representation by attorneys handling death cases, Rose will have satisfied the first prong of Strickland.

In such an event, counsel's failure to object to the State's comment may be said to have prejudiced the defense by undermining the reliability of the outcome, Id., 466 U.S. at 687, as the comment planted the seed in jurors' minds that Rose remained silent to conceal the most damning evidence, resulting in a breakdown in the adversarial testing process and rendering the trial fundamentally unfair. As there remains a reasonable probability that, had counsel objected, the trial court would have granted a mistrial or given a curative instruction to counter the comment's inherently unfair prejudice, Rose was denied the effective assistance of counsel guaranteed by the Sixth Amendment and Article I, Section 16, Florida Constitution, and should be granted a new penalty phase proceeding with the effective assistance of counsel, without reference to Rose's invocation of his right to remain silent.

Claim IV alleges Defense counsel was ineffective for failing to object to the State's comment in closing argument that Rose's time-line defense was a "smoke screen." (R 132-134). This "smoke screen" argument has been universally condemned. Numerous cases have held such argument improper and no majority opinion in Florida has ever approved of it. The First District Court of Appeal, in

McGee v. State, 435 So.2d 854 Fla. 1st DCA 1983), for example, chronicled the long line of cases holding that such "smoke screen" arguments are impermissible:

> [W]ith respect to the state's "smoke screen" argument, we have condemned such language in the past, and have no intention of departing from our prior decisions on this point. *See*, Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977); Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981); Cooper v. State, 413 So.2d 1244 (Fla. 1st DCA 1982); and Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982).

McGee v. State, 435 So.2d at 859 (finding harmless error under the facts of that case as there was no factual dispute concerning the matter labeled a "smokescreen").

Unlike McGee, *supra*, a substantial factual controversy existed at bar that may well have been skewed by the State's "smoke screen" argument. The time-line in the present case was reasonably susceptible of the conclusion that it was physically impossible for Rose to have traveled the distances and engaged in ***all*** of the conduct that the State accused him. Rose was entitled to proceed on this viable defense–a defense the State ridiculed without any objection from Rose's defense counsel.

As Florida's Fourth District Court of Appeal more recently proclaimed in Brown v. State, 733 So. 2d 1128 (Fla. 4th DCA 1999):

> We also agree with the appellant that under the facts of this case the state should not have denigrated appellant's defense in closing argument by suggesting that it was a smoke screen. Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986). In the present case there was a legitimate issue of police officer credibility, because of a change in testimony. Under these circumstances appellant's position should not have been so ridiculed by the state. Miller v. State, 712 So.2d 451 (Fla. 2d DCA 1998).

Brown v. State, 733 So. 2d at 1131.

As there remains a reasonable probability jurors would have been more inclined to take Rose's partially exculpatory time-line more seriously had the State not been allowed to denigrate it with impunity as a "smoke screen," trial counsel's failure to object to the State's comment prejudiced the defense by undermining the reliability of the proceeding's outcome. Strickland, 466 U.S. at 687. Individually and in concert with the State's opening mention of Rose's invocation of his right to silence, the fairness of the penalty proceeding stands in grave doubt.

The trial court summarily denied Claim IV as procedurally barred based on the notion that Rose's "allegations that the State made improper comments during closing argument of the penalty phase could have or should have been raised on direct appeal" (R 845) ignores the fact that Rose's motion alleges his defense counsel was ineffective for failing to object to the State's denigration of his time-line

defense as a "smokescreen," barring the consequently unpreserved error from direct review.

The trial court's position fails as a matter of law as counsel may be said to have been ineffective for failing to object to prejudicial matters despite the unpreserved error's consideration on direct appeal, Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998) (where movant raises "counsel's failure to object . . . which the state argued was procedurally barred because those comments were raised as error in appellant's direct appeal . . . it is clear that any error involved in those comments was not preserved for appeal by counsel's failure to object; such failure may be sufficient to constitute the ineffective assistance of counsel"), and because the ineffectiveness of counsel may not generally be raised as an issue on direct appeal, Corzo v. State, 806 So.2d 642 (Fla. 2nd DCA 2002) ("Because of the strict rules limiting claims for ineffective assistance of counsel on direct appeal, the appellate courts typically reject the issue as both premature and requiring evidence beyond the appellate record. Accordingly, unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a postconviction motion.").

The trial court's "Catch-22" denies Rose access to the courts. If Rose were precluded from raising this issue on direct appeal as having been unpreserved by defense counsel, yet also precluded from showing Rose was denied the effective assistance of counsel though defense counsel's failure to preserve the issue for direct appeal, he would, in effect, be denied any remedy whatsoever to redress the State's improper and unfairly prejudicial argument that went to the heart of his defense. *See* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning denial of 3.850 claim on basis that matter should have been raised on direct appeal while overlooking that 3.850 claim was counsel's failure to object, barring direct review).

The trial court's contention that the State's denigration of Rose's time-line defense could not impact the advisory verdict is not supported by the record, no portion of which was attached. The summary denial of Claim IV should be reversed.

Claims V, VI and VII challenge the constitutionality of Rose's death penalty based on a lack of any requirement that a jury determine aggravating circumstances and a lack of any requirement that the facts constituting aggravating circumstances be charged in the indictment, resulting in a necessity that Rose be sentenced to life imprisonment. (R 134-147). Rose incorporates his arguments below in this regard based on his federal rights under the Sixth, Eighth and Fourteenth Amendments.

CONCLUSION

The trial court erred in summarily denying each of Rose's Claims I, II, III, IV, V, VI, and VII, as they are facially sufficient and are not conclusively refuted by the trial record. The Order of the trial court summarily denying these claims should therefore be reversed and remanded for evidentiary hearings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) Assistant State Attorney Susan Bailey, 201 S.E. 6th Street, Suite 675, Fort Lauderdale, FL 33301, (2) Assistant Attorney General Leslie Campbell, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401, and (3) Mr. James Franklin Rose, #011225, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this 24th day of November, 2006.

CERTIFICATE OF FONT AND TYPE SIZE

This brief is word-processed utilizing 14-point Times New Roman type.

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