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.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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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 State's suggestion that the trial court properly entered summary denial based solely on the State's Response--which attached no part of the record of the penalty trial--and appellate briefs (Answer Brief at 15-17) is simply wrong. In reviewing a summary denial without an evidentiary hearing, this Court accepts all allegations in the motion as true that are not conclusively refuted by the record. Rutherford v. State, 926 So.2d 1100 (Fla. 2006). "Files and records" exclude matters outside an official court record. Cintron v. State, 504 So.2d 795 (Fla. 2nd DCA 1987).

The State's claim that Rose's motion is facially insufficient is conclusory and the State's contention that Rose's *ineffective assistance of counsel* claims were addressed on direct appeal (Answer Brief at 20) is spurious.

I. The State's contention that this Court correctly stated--*based solely on the re-sentencing transcript and without an evidentiary hearing*–that counsel made a *tactical* decision not to obtain a ruling on the Richardson hearing (Answer Brief at 23-31) is contradicted by intermediate appellate authorities. *E.g.*, Comfort v. State,

597 So.2d 944 (Fla. 2nd DCA 1992) (fact that trial counsel may have had legitimate tactical reasons for not calling witness did not render summary denial proper); McCann v. State, 854 So.2d 788 (Fla. 2nd DCA 2003) ("Although there may have been strategic reasons why . . . counsel proceeded as he did, the evaluation of such strategic decisions generally requires resolution through an evidentiary hearing.").

Each of the cases the State cites to suggest that counsel's failure to obtain a ruling on the Richardson hearing did not result in prejudice (Answer Brief at 29) was decided after an evidentiary hearing. 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."). *See also* Finney v. State, 831 So.2d 651 (Fla. 2002) (Circuit courts are encouraged to conduct evidentiary hearings on postconviction motions in capital cases when appropriate).

II. The State's suggestion that juror DeMatteis' uncorrected comment that Rose had previously been sentenced to death for the same offense was harmless (Answer Brief at 31-38) is likewise without merit. Rose's motion asserts defense counsel was ineffective for failing to correct juror DeMatteis' belief--expressed in

the presence of other jurors ultimately seated on the panel--that Rose had previously been sentenced to death for the same offense at a prior proceeding. (R 127-129). During *voir dire*, Juror DeMatteis--who was later seated (R 413-414)--asked in the presence of other seated jurors: "Well, is the case going to be explained to us? I mean, ***why he was sentenced?***" (R 139). Neither court nor counsel corrected the notion that Rose had already received the sentence jurors were being asked to decide.

A constitutionally fair trial requires "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. *See also* Weber v. State, 501 So.2d 1379, 1382 (Fla. 3rd DCA 1987) ("Courts . . . 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.").

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

Rose should be afforded an opportunity to show at an evidentiary hearing that he was prejudiced by defense counsel's failure to object and correct Juror DeMatteis' stated belief that Rose had already been sentenced to death at least once. Counsel's failure to do so--if shown at an evidentiary hearing to have been an unreasonable defense strategy--fell below minimally acceptable standards of reasonably effective representation by attorneys handling capital cases, resulting in a breakdown in the adversarial testing process, undermining the reliability of the trial's outcome and rendering Rose's penalty trial fundamentally unfair. Strickland v. Washington, 466 U.S. at 687. But for counsel's failure to act, jurors reasonably would not have proceeded on the assumption that the death penalty had already been imposed.

The summary denial simply adopted the State's Response, attaching no part *of the penalty trial* to refute Rose's allegations. As the attachments adopted by the trial

court contain no part *of the penalty trial,* the record fails to show conclusively that Rose is entitled to no relief–and the summary denial should be reversed.

III. The State's contention that Rose did not exercise his right to remain silent (Answer Brief at 44) is factually inaccurate. In reality, 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 had happened with the child at the bowling alley (forceful vs. voluntary transportation) directly impacted whether, as the State suggested, the victim experienced the sort of distress comprising the "HAC" Aggravator and whether the "Murder Committed While Engaged in the Commission or Attempt to Commit Kidnapping" Aggravator would apply.

Prejudice was potentiated by the fact that, during the penalty trial, Rose invoked his right not to testify. In combination with the State's mention in its opening statement 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 to Rose's unfair prejudice.

Reasonably effective capital counsel would have objected, seeking a mistrial or curative instruction to preserve the issue for appeal. The State's references to Rose's silence when accused of fabricating his earlier account prejudiced the trial's outcome by placing in jurors' minds the notion that, since he remained silent rather than 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 references to Rose's silence, there remains a reasonable probability that jurors would not have accepted the State's theory that the victim was abducted, rather than having entered the van of her own accord.

Where 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." State v. Hoggins, 718 So.2d 761, 769 (Fla. 1998). *Accord* 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 silence is not harmless if evidence is not "clearly conclusive,"

Fundora v. State, 634 So. 2d 255 (Fla. 3d DCA 1994). As this Court has noted, the case against Rose is circumstantial. Rose v. State, 425 So.2d 521, 522 (1982).

"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, counsel posed no objection.

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.

Counsel's failure to object to the State's comment may then be said to have prejudiced the defense, undermining the reliability of the trial's outcome, as it planted in jurors' minds the notion that Rose remained silent to conceal the most damning evidence underlying two aggravating factors, resulting in a breakdown in the adversarial testing process and rendering the trial fundamentally unfair.

IV. Claim IV alleges defense counsel was ineffective for failing to object to the State's comment in closing that Rose's time-line defense was a "smoke screen." (R 132-134). *Cf.* McGee v. State, 435 So.2d 854, 859 Fla. 1st DCA 1983) ("[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."); Brown v. State, 733 So. 2d 1128 (Fla. 4th DCA 1999) ("[T]he state should not have denigrated appellant's defense in closing argument by suggesting that it was a smoke screen."). *See also*, 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); Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982); Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986).

As there remains a reasonable probability that 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 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.

The trial court's summary denial of this ground as procedurally barred since 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 "smoke

screen," barring the unpreserved error from direct review. *See* 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").

Moreover, the ineffectiveness of defense counsel may not normally be raised 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."). *See also* Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992) (condemning summary denial on basis that matter should have been raised on direct appeal while overlooking fact that the claim was counsel's failure to object, barring direct review).

V, VI and VII. As to Grounds V, VI and VII, Rose rests on the argument and citations of authorities contained in the Initial Brief on Appeal.

CONCLUSION

To uphold a summary denial of postconviction relief, the claims must be shown to be either facially insufficient or conclusively refuted by the record. The State's Response in this case, adopted by the trial court, attaches no part of the record *of the penalty phase jury trial.* Rose has, however, raised eight grounds for relief, Grounds I, II, III, and IV of which allege facts which, if shown to be true, would constitute denial of his Sixth Amendment right to the effective assistance of counsel *at the penalty phase jury trial.* The validity of such grounds cannot be conclusively refuted by reference to the State's own filings, trial counsel's, or the court's. As Rose's claims are not conclusively refuted by the record, reversal is required.

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 2nd day of May, 2007.

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

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