IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

DONN DUNCAN,

Appellee.

CASE NO. SC02-636

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, the State of Florida, the prosecuting authority in the trial court, will be referenced in this brief as Appellant, the prosecution, or the State. Appellee, Donn Duncan, the defendant in the trial court, will be referenced in this brief as Appellee or his proper name.

The record on appeal consists of eleven volumes, which will be referenced by the letter "R," followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The trial court set out the facts and procedural history of the instant case as follows:

> The facts of this case, as set forth by the Supreme Court of Florida in Duncan v. State, 619 So.2d 279, 280 (Fla. 1993), as follows:
>
> On the morning of December 29, 1990, Donn A. Duncan murdered his fiancee, Deborah Bauer. At the time of the murder, Duncan was living with Deborah Bauer, Deborah's daughter, Carrieanne Bauer, and her mother, Antoinette Blakeley. During the evening hours of December 28, 1990, Deborah left the house apparently to go drinking. Duncan left a short time later. When Duncan returned home around 8:30 p.m., he told Antoinette that Deborah would not be home until later because she had gone off with a guy who was going to buy her beer because Duncan had refused to do so. Duncan also told Antoinette to ask Deborah to sleep on the couch because he did not want to argue with her and that he would be leaving in the morning. Duncan then went into the bedroom, where he remained until the next morning.

When Deborah returned around 10:30 p.m., her mother told her not to go into the bedroom because Duncan did not want to be bothered. A short time later Deborah went into the bedroom to get some cigarettes but left the room after a couple of minutes. Neither Antoinette nor Carrieanne heard any arguing or fighting while Deborah was in the room. Deborah slept in the living room with her mother and daughter, neither of whom was aware of any further contact between Duncan and Deborah during the night.

The next morning, Deborah went outside to smoke a cigarette. While Deborah was on the front porch, Duncan got up. Antoinette told him "there is the door," indicating that he should leave. After he and Antoinette exchanged words, Duncan put on a jacket and walked out on the porch where Deborah was sitting, smoking a cigarette. Duncan stood behind Deborah for a few seconds and then stabbed her multiple times with a kitchen knife he had hidden in his jacket. When Carrieanne responded to her mother's screams, Duncan approached Carrieanne with the knife and asked, "You want it too?" Believing Duncan would stab her too, Carrieanne ran and hid in the closet.

When Antoinette asked a neighbor who had witnessed the attack to call 911 because her daughter had been stabbed, Duncan said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." Duncan, who had thrown the knife on the ground, then waited until police arrived. Upon their arrival, Duncan told police, "I stabbed her." After being advised of his rights, Duncan told police that he and the victim had been arguing and that he remembered going outside and stabbing her twice. In a signed statement, Duncan wrote:

I walked out the door with the knife and stabbed Debbie as she was sitting on the stoop. I think I stabbed her twice. I saw her go off with two guys last night she came home about 1:00 a.m. and I guess I went nuts.

Deborah Bauer died two hours after the attack. The cause of death was a stab wound to the right chest. According to the medical examiner, the victim also had suffered two life threatening wounds to the back and three defensive wounds, one to each arm and one to her leg.

Duncan was charged with and convicted of the first-degree murder of Deborah Bauer and aggravated

assault on Carrieanne Bauer. He was sentenced to three and one-half years' imprisonment on the aggravated assault. In accordance with the jury's twelve-to-zero recommendation of death, the trial judge sentenced Duncan to death for the first-degree murder.

In aggravation, the trial court found that Duncan had previously been convicted of a felony involving the use or threat of violence--the aggravated assault on Carrieanne and the second-degree murder of a fellow inmate in 1969. In mitigation, the trial court considered the following fifteen mitigating factors urged by the defendant: 1) Duncan's childhood and upbringing saddled him with an emotional handicap; 2) Duncan's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime; 3) Duncan was under the influence of extreme mental or emotional disturbance at the time of the killing; 4) the defendant was under the influence of alcohol at the time of the killing; 5) the killing was not for financial gain; 6) the killing did not create a great risk of death to many persons; 7) the killing did not occur while Duncan was committing another crime; 8) the victim was not a stranger; 9) the victim was not a child; 10) Duncan was a good, dependable, and capable employee; 11) Duncan was a good listener and supportive friend; 12) Duncan had satisfactorily completed his parole and was discharged from parole; 13) Duncan confessed to the killing; 14) the killing came as a result of and subsequent to a domestic dispute; 15) Deborah Bauer chose Donn Duncan to be her husband.

All issues on appeal concerned the sentencing phase of the trial. Mr. Duncan raised the following claims: 1) his death sentence is disproportionate and is cruel or unusual punishment; 2) it was reversible error to admit a gruesome photograph of the victim of the 1969 murder; and 3) the trial court erred in refusing to give numerous special jury instructions. Duncan, 619 So.2d at 281. The Supreme Court of Florida affirmed Mr. Duncan’s conviction and sentence.

The State cross-appealed the trial court's findings that 1) Mr. Duncan was under the influence of alcohol at the time of the murder; 2) Duncan was under the influence of extreme mental or emotional disturbance at the time of the murder; and 3) Mr. Duncan's ability to conform his conduct to the requirements of the law was substantially impaired. The Supreme Court agreed

> with the State, and found that there was sufficient evidentiary basis for the challenged findings. Duncan, 619 So.2d at 282.

(R, 1757-59).

On May 2, 1995, Duncan filed a Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. (R, 784-820). On July 10, 1998, the circuit court held a Huff hearing to determine whether an evidentiary hearing would be required on the claims raised in Mr. Duncan's motion. The circuit court found that an evidentiary hearing would be required on the following claims:

1. Claim VIII - only as to sub-claims of ineffective assistance of counsel at guilt phase as the relate to mental health issues and to concession of guilt
2. Claim IX - ineffective assistance of counsel at the penalty phase
3. Claim X - only as Claims VIII and IX impact Claim X regarding counsel's alleged ineffectiveness as it relates to mental health experts.

On December 14, 1999, the circuit court held an evidentiary hearing which was continued on June 12 and June 13, 2000. At that hearing, Duncan presented the following witnesses: Edwin Cluster, Janet Felty, trial defense attorney Robert Larr, trial defense attorney Louis Lorincz, Francis Eugene Mulcahy, Jonathan Lipman, and Robert Berland. The State presented the following witnesses: James Upson, Jeff Jackson, Renee Boudreaux, Don

Nazarchuk, Keith Hubbard, Michael Stenkamp, Antoinette Blakely, Carrieann Bauer, and trial defense attorney Lou Lorincz. (R, 1759-60).

The trial court made the following findings of fact regarding "SUBCLAIM IX-A:"

> Mr. Duncan claims that counsel was ineffective for failing to introduce available mental health mitigation that could have led the jury to recommend a life sentence. At the evidentiary hearing, the Court heard testimony from Dr. Berland about the information he had available to him before Mr. Duncan's trial and the opinion he had formed based on that information:
>
> I had testing data which indicated to me the existence of mental illness, significant biologically-determined mental illness, psychosis, but in very hidden ambulatory form, meaning he could walk and talk and wouldn't look the part. I also had testing which suggested brain injury, cortical brain injury, but no definitive history of head injury from him.
>
> So as has been my custom since 1980 or 81, I sought contact with some lay witne,5aes who would have had intimate knowledge of him, my favorite formal witnesses being ex-wives and ex-girlfriends and finally tracked down one of his ex-wives with whom I spoke in I believe it was June of'91, early in June, June 4th, I think, and she was memorable to me because, one, she corroborated symptoms of a psychotic disturbance in him that I detected in his very hidden MMPL She also corroborated some other things such as significant drug abuse.
>
> But for reasons that I have absolutely no recollection of, I did not continue down the road suggested by that lay witness and the case basically was terminated at that point.
>
> Q: You said that you don't recollect why you didn't continue down the road suggested by the witness?
>
> A: I have no recollection of what my interactions were with Mr. Lorincz at all, I don't -- I don't recall having been given an explanation. I just know that the file went that far, that was what I would call a break-through witness and then it just ended and I have no recollection as to why.

Q: Would that be something on your own that you would not pursue?

A: Well, again, from my point of view, that was a break-through witness which confirmed what I knew. The MMPI never lies in my experience. And sometimes it's hard to find the corroboration that you know will exist out there but once you open the door, then you know there's more out there. So my normal reaction to that kind of a situation would have been to pursue more lay witnesses, I've been ready to go to trial in cases where all I had were lay witness evidence and nothing usable from the defendant.

In one case I'm thinking of, we were going to go on attempted first degree murder case where the defendant faked, different case, he faked all of his responses to me so I had nothing from him but I had excellent data from all the lay witnesses, people who hated him corroborating what I thought was wrong with him and we were ready to go to trial until the case pled. ,

So my normal approach would be having now found one witness, to go ahead and get more because it's not sufficient in my opinion, it was enough to tell me what was there but I would want more than that to go to trial on.

Q: So if you had been told to continue on and to go get more witnesses, you would have done that?

A: Yes. I kind of basically take a bulldog approach to those things.

Q: In 1991, what kind of an evaluation did you do on Mr. Duncan?

A: Well, at that time, I did clinical eval -- a clinical evaluation or diagnostic evaluation and then at least made some preliminary efforts, I would have made some preliminary efforts to do a clinical legal evaluation to look at various issues where mental, health issues are raised in the legal context.

Q: What is a diagnostic evaluation?

A: Well, I'm just trying to find out initially if there's evidence of mental illness. In my case, I look primarily at psychosis just because I believe that's the main kind of mental illness that has enough impact on someone to make a difference in the criminal justice system.

Q: And what is a clinical legal evaluation?

A: That is where you're assessing, if you find they're mentally ill and/or and of extreme low intellect, then you look at issues like whether they're competent to proceed to trial, sane at the time of the offense, capable of forming specific intent, whether there's evidence of mitigation for capital sentencing, those kind of clinical legal issues.

(See transcript pages J25-J27).

Dr. Berland also testified as to specific information that he found about Mr. Duncan's mental health:

Q: So the MMPI that you administered in 1991, what does that show about Mr. Duncan?

A: Just that the issue that I was trying to discern with it was is there evidence of psychosis. And in my opinion, there was evidence of a chronic psychotic disturbance in his MMPI responses.

Q: And you had that information back in 1991 when you were working on the -on this before Mr. Duncan went to trial?

A: Yes. I_administered the MMPI on March 26th, '91, and I normally score it the same day or the next day. The MMPI's are a favorite of mine and I can't wait to see the results so I score them very quickly.

Q: And would you have relayed that information to the trial attorney, to Mr. Duncan's trial attorney?

A: It's always been my custom to call and keep people up with my findings as I develop them. I don't recall when I began actually faxing profiles to people, I can't say that I did that back then. My custom pretty much since I've had access to a fax has been to fax them a copy of the profile for their file so that -- explain it to them on the phone, so I have no direct recollection of interacting with him and I, of course, didn't bring my time logs from my vehicle with me but it was my uniform custom since I began doing this to relate the findings to the attorney as I found them, especially this initial one. I always give the MMPI first and that's sort of the key to the door.

Do we even think we're going to have anything to work with or not? So typically I'm involved in discussing with them, yes, there is something to work on or no, the MMPI doesn't appear to show anything and, you know, I will look at some other things but the chances of there being anything go down dramatically.

Q: But in this case, the MMPI did show something to you?

A: That was my opinion then and now, yes.

Q: You mentioned that those results could be subject to dispute. Is there something else that you would do to try to substantiate your view on that?

A: Well, as I said, I don't believe in relying on one data source anyway but knowing the arena which is operated, I wouldn't go in relying just on these data because they're subtle, he is trying very hard to hide and it would be subject to some dispute by people as to whether this represented mental illness, though to me it did. What this was to me was a prompting to go looking in other avenues for evidence of mental illness.

Q:. The MMPI that you administered in 1991, did you find any evidence of malingering?

A: No. The opposite. That he was trying to suppress or hide mental illness.

(See transcript pages J40-J42).

Dr. Berland went on to discuss his the significance of his test results, his interviews of Mr. Duncan, and his interviews of lay witnesses. (See transcript pages J79-J81). When asked whether he had been prepared to testify about his opinion at Mr. Duncan's trial, Dr. Berland said that he had been:

Q: All right. I'm saying the basis of what you could testify to that it was extreme, what you knew about Mr. Duncan?

A: The basis for being able to testify that he was mentally ill?

Q: Right.

A: Yes. I had that then, I felt the combined impact of -- or import, I'm sorry, of his MMPI, his WAIS, and especially the responses I got from Dianne Goodman told me he had psychotic disturbance that may, in fact, have been at least in part secondary to a brain injury.

Q: So, if Mr. Lorincz had called you in 1991 to testify, you could have testified to all those things that would be the basis for the statutory minimal mitigator of under extreme mental or emotional disturbance and then left it to the jury to decide whether or not it was extreme?

A: I think I see what you're saying. I could have testified as to what I just said. I would think it would be a better presentation to go forward with more lay witnesses but if this was all I had, it was enough to convince me that I had something substantial.

Q: Okay. And you also, as far as the other minimum mitigator that -- the person's ability to conform his conduct to the law or appreciate the criminality of his conduct was substantially impaired, you had the basis to present that to a jury that that finding could have been made?

A: One part of that dichotomy, that his capacity to conform his conduct to the requirements of law was impaired and again the question is at that time, what does substantial mean.

Q: Okay. And that would have been -- but you would have been able to present things to the jury from which they would have been able to find that?

A: I would have been able to present the impact of his mental illness compounded by his recent history of drug and alcohol use on his mental state, yes.

(See transcript page J82-J83).

Dr. Berland was unable to remember the content of his communications with Mr. Lorincz, and his notes indicated only minimal consultation. (See transcript pages J72-J77). He indicated that he certainly would have informed Mr. Lorincz of his opinion that Mr. Duncan had a hidden psychosis. (See transcript pages J122-J123). Dr. Berland went on to explain that had he been given the opportunity to do so, he would have continued to investigate Mr. Duncan's mental health through additional investigation into his personal history. (See transcript pages J90-J92). Dr. Berland also testified that through his investigation into Mr. Duncan's history for the postconviction proceeding, "he found enough evidence to present and . . . show the existence of not only one and a half of the statutory mitigator [sic] but a series of seven additional nonstatutory mitigators." (See transcript pages J108, J115-J117). Regardless, although he indicated that he would have preferred to conduct additional investigation, jar. Berland testified definitively that he was prepared to testify at the penalty phase proceeding about Mr. Duncan's mental health problems. (See transcript pages J153-J156).

Based on Dr. Berland's testimony, the Court finds that counsel knew or should have known of the existence of

various mitigating factors that could have been presented during the penalty phase. The onus is therefore on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors.

Mr. Lorincz testified as to his decision not to call Dr. Berland. (See transcript pages J372-J377). The State asked him about his decision:

Q: Can you tell me some more about the other mental health or substance abuse issues and your thinking on whether or not to call Dr. Berland and what that was?

A: I had oral communications with Dr. Berland concerning Mr. Duncan. I did not obtain a written report from him concerning his findings. I did not note in my files our conversations, just at the time I made an evaluation of what I was told and made a determination that I would not use Dr. Berland in the penalty phase.

Q: Can you recall what your thinking was in that regard?

A: The only thing I can recall is that in attempting to evaluate the value or detriment of that testimony was that it was more detrimental than valuable.

Q: Can you remember why?

A: No, I can't.

Q: But was your final decision made after what you considered to be Dr. Berland's full input of the work he had done to that point?

A: Based upon what he told me, that my determination was made based on what he told me.

Q: Okay. And was that a strategic and tactical decision that you made not to call Dr. Berland that you considered to be based on your professional judgment in Mr. Duncan's best interest?

A: Yes.

Q: And do you recall whether or not you also consulted with Dr. Berland, with Mr. Durocher or Trish Cashman or any of the other experienced attorneys in your office?

A: I'm sure I did but I don't recall. At that time, we had monthly meetings of what we refer to as the capital defense major crimes unit. And Mr. Durocher would have us all there, we would talk about our cases for purposes of, one,

> determining whether there was the need to get experts, financially backed, et cetera, and, two, for purposes of suggestions and recommendations that anybody would have.
>
> So I'm sure that Dr. Berland's and his testimony came up and was discussed briefly. I would say we did not go into great depth but certainly it was considered, talked about.
>
> Q: And that's the something you took into consideration in making your ultimate decision not to call Dr. Berland as a penalty phase witness?
>
> A: That's correct. (R, 1768-74).

SUMMARY OF ARGUMENT

In the instant case, although trial counsel could not remember the specific strategic and tactical reason(s) he did not call Dr. Berland to testify, the trial court could conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify. (R, 1774). As the trial court "could conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify," it cannot be disputed that Duncan failed to prove to the trial court that no competent counsel would have taken the action that his counsel did take. Therefore, it was error for the trial court to conclude that "Duncan's allegation ha[d] satisfied the performance prong of Strickland."

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT REVERSIBLY ERRED BY FINDING THAT "[I]N THE ABSENCE OF A SPECIFIC REASON [FOR EXPLAINING WHY DR. BERLAND WAS NOT CALLED TO PRESENT MENTAL HEALTH MITIGATION], THE COURT [WAS] CONSTRAINED TO FIND THAT MR. DUNCAN'S ALLEGATION HAD SATISFIED THE PERFORMANCE PRONG OF STRICKLAND."

The State contends that trial counsel's inability to recall the specific reason upon which he had based his strategic decision not to call Dr. Berland to present the mental health mitigation evidence does not, in and of itself, satisfy the deficient performance prong of the Strickland test as the reasonableness of a trial counsel's performance is an objective inquiry.

Standard of Review

The issue of whether counsel's performance was deficient and whether the deficiency prejudiced the defendant is a mixed question of law and fact, requiring de novo review. See Strickland v. Washington, 466 U.S. 668, 698 (1984); Stephens v. State, 748 So.2d 1028, 1032 (Fla.1999).

Jurisdiction

This Court has jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution.

Argument

The legal test to be employed by a court reviewing claims of ineffective assistance of counsel was set out by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984); accord Williams v. Taylor, 120 S.Ct. 1495 (2000) (recent decision affirming that merits of ineffective assistance claim are squarely governed by Strickland). The United States Supreme Court articulated the test in the following way:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Thus, in order to prove ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient and (2) there exists a reasonable probability that but for counsel's unprofessional errors the results of the proceeding would be different. Further, unless a defendant

makes both showings it cannot be said that the conviction resulted from a breakdown of the adversary process that renders the result unreliable. Strickland.

> In a capital case, this two-part test applies to claims of ineffective assistance of counsel during the sentencing phase, as well as the guilt phase of the trial, because a "capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and in the existence of standards for decision ... that counsel's role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Collier v. Turpin, 177 F.3d 1184, 1198 (11th Cir.1999) (quoting Strickland, 466 U.S. at 686-87, 104 S.Ct. 2052).

Grayson v. Thompson, 257 F.3d 1194, 1215 (11th Cir. 2001).

> The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. See Strickland, 104 S.Ct. at 2064; see also Williams, 120 S.Ct. at 1511 ("[D]efendant must show that counsel's representation fell below an objective standard of reasonableness.") (internal citations and quotations omitted). The petitioner must establish that particular and identified acts or omissions of counsel "were outside the wide range of professionally competent assistance." Burger, 107 S.Ct. at 3126; see also Strickland, 104 S.Ct. at 2064-65 (stating that petitioner must show "counsel's representation fell below an objective standard of reasonableness"--that is, that counsel's performance was unreasonable "under prevailing professional norms ... considering all of the circumstances").

Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000).

> The reasonableness of a counsel's performance is an objective inquiry. See Darden, 106 S.Ct. at 2474 (noting that counsel's performance did not fall below "an objective standard of reasonableness"); see also Williams, 120 S.Ct. at 1511 (same); Darden, 106 S.Ct. at 2474 (noting that "there are several reasons why

> counsel reasonably could have chosen to rely on" the defense that he did (emphasis added)); United States v. Fortson, 194 F.3d 730, 736 (6th Cir.1999) (determining--without district court findings or even evidentiary hearing--that defendant had not overcome presumption of effective assistance because court "[could] conceive of numerous reasonable strategic motives" for counsel's actions at trial). And because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take. See Waters, 46 F.3d at 1512 (en banc) ("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."); see also Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir.1988) (en banc) ("It is not enough for petitioner to claim his counsel was ignorant of the Florida law. Petitioner must prove that the approach taken by defense counsel would not have been used by professionally competent counsel"); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir.1998)(noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice"); Burger, 107 S.Ct. at 3124 (in concluding that defense counsel's not using character witnesses met reasonableness standard, Court pointed out that district court judge--presumably a reasonable lawyer--who heard the proffered mitigating evidence did not think it would have aided petitioner's case).

Id. at 1315.

Accordingly, “[t]o uphold a lawyer’s strategy, a court ‘need not attempt to divine the lawyer’s mental processes underlying the strategy.’” Putnam v. Head, 268 F.3d 1223, 1244 (11th Cir. 2001)(quoting Chandler, 218 F.3d at 1315 n.16).

In the Order Granting in Part and Denying in Part Fifth Amended Motion to Vacate Judgments of Conviction and Sentences, the trial judge found that trial counsel’s testimony did not:

> adequately explain why Dr. Berland was not called to present the mental health mitigation evidence which he developed. Simply asserting that something was done for unknown strategic reasons is not sufficient. An evidentiary hearing is held so that the Court may hear what the actual reason was, and may then determine whether that reason is consistent with professional standards. In the absence of a specific reason, the Court is constrained to find that the [sic] Mr. Duncan's allegation has satisfied the performance prong of Strickland.

(R, 1774).

The trial judge went on to note that it believed:

> that the attorneys acting as Mr. Duncan's trial counsel were and are competent and professional people who acted in what they believed was the best interest of their client. Mr. Lorincz likely had strong reasons for deciding not to call Dr. Berland to testify about Mr. Duncan's mental health. Unfortunately, at the evidentiary hearing many years after the trial, neither he nor Mr. Larr was able to articulate those reasons. While the Court **can conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify**, such speculation would not be a valid basis to deny this claim.

(R, 1774)(emphasis added).

Initially, it should be noted that the trial judge, "by placing the onus on the State to demonstrate that counsel had a valid strategic or tactical basis for declining to present those factors" (R, 1772), improperly shifted the burden under Strickland. The burden of persuasion was on Duncan to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. See Strickland, 104 S.Ct. at 2064; see also Gudinas v. State, 816 So.2d 1095, 1101 (Fla. 2002); State v. Freeman, 796 So.2d 574, 576 (Fla. 2001); Asay

v. State, 769 So.2d 974, 984 (Fla. 2000); Jones v. State, 732 So.2d 313, 319 (Fla. 1999).

Notwithstanding this improper burden shifting, the trial judge noted that he could "conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify...." (R, 1774). As the trial court could "conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify," it was not established that "no competent counsel would have taken the action that [Duncan's] counsel did take."[1] See Darden v. Wainwright, 106 S.Ct. 2464, 2474 (1986)(noting that "there are several reasons why counsel reasonably could have chosen to rely on "the defense that he did"); United States v. Fortson, 194 F.3d 730, 736 (6th Cir. 1999)(determining – without district court findings or even an evidentiary hearing – that defendant had not overcome presumption of effective assistance because court "[could] conceive of numerous reasonable strategic motives" for counsel's actions at trial); see also Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.")

[1]Quoting Chandler, 218 F.3rd at 1315.

Below, the trial court misapplied Strickland by both shifting the burden to the State to prove that trial counsel's actions were reasonable and by attempting to apply a subjective analysis based on the specific justifications of trial counsel. However, "[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, **the defendant must show** that counsel's representation fell below an **objective standard** of reasonableness." Strickland, 104 S.Ct. At 2064 (emphasis added). In the instant case, although trial counsel could not remember the specific strategic and tactical reason(s) he did not call Dr. Berland to testify,[2] the trial court could "conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify." (R, 1774). As the trial court could conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify, it cannot be disputed that Duncan failed to prove to the trial court that no competent counsel would have taken the action that his counsel did take. Therefore, it was error for the trial court to conclude that "Duncan's allegation ha[d] satisfied the performance prong of Strickland." Id.

The instant case illustrates one of the many rationales for using a reasonable attorney standard, as opposed to a subjective standard, to review counsel's actions at trial. That

[2]He did remember that it had been a strategic and tactical decision that he would have discussed with other counsel in the Capital Defense Major Crimes Unit. (R, 1773-74).

rationale being the possibility, or even probability, that the actions will be reviewed "many years after the trial," as in this case. (R, 1774). During the evidentiary hearing below, Dr. Berland, Mr. Lorincz, and Mr. Larr were all unable to recall why the available mental health information on Duncan was not introduced in mitigation. The trial court granted the instant claim based on counsel's inability to remember the specific reason why he had decided not to call Dr. Berland to testify; therefore, in this case, the elapsed time and consequent dulling of memories, not whether the actions of counsel "were outside the range of professionally competent assistance," were the basis for the granting of the instant claim. However, as shown, the trial court's granting of this claim cannot be upheld under Strickland.

Finally, regarding the prejudice prong, "[t]here is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 2069.

CONCLUSION

Wherefore, the State, with all due respect, asserts that the trial judge, who "could conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify," erred by finding that Duncan's trial counsel's inability to recall the specific reason upon which he had based his strategic decision not to call Dr. Berland to present the mental health mitigation evidence could alone be a basis for

satisfying the deficient performance prong under Strickland v. Washington.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to:**Kevin Beck,** Assistant CCC, and **Leslie A. Scalley**, Staff Attorney, Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, by MAIL on October ____, 2002.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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