IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-636

STATE OF FLORIDA,

Appellant,

v.

DONN DUNCAN,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE CROSS-APPELLANT

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ARGUMENT I

THE CIRCUIT COURT ERRED IN HOLDING THAT MR. DUNCAN WAS NOT DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

1. Counsel was Ineffective at the guilt/innocence phase of Mr. Duncan's trial.

A. Counsel's concession of Mr. Duncan's guilt was ineffective assistance.

The state claims that "unlike in the cases cited by Duncan, in this case there were eyewitnesses to the murder and a written confession to the murder by Duncan" (State's brief at 17). Even if this were true, it is not a basis to deny relief. In fact, the majority of the cases cited in Mr. Duncan's initial brief in which courts have found ineffective assistance of counsel involved eyewitnesses and confessions. In People v. Hattery, 488 N.E.2d 513 (Ill. 1985), the court found ineffective assistance of counsel for conceding guilt even though Hatterly gave a statement to the state attorney admitting that he cut one victim's wrist, strangled her, and then undressed her, and then strangled an infant. Id. at 514-16. In State v.

Harbison, 337 S.E.2d 504 (N.C. 1985), there was one eye witnesses, the defendant confessed to two different people, and testified at his trial. State v. Harbison, 238 S.E. 449, 476-51 (N.C.1977). In Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995), the Eleventh Circuit found ineffective assistance of counsel though Harvey "gave a statement in which he admitted his involvement in the Boyds' murders." Harvey v. State, 529 So.2d 1083, 1085 (Fla.1988). In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), the Eleventh Circuit again found ineffective assistance of counsel despite the fact that Spraggins gave a statement to authorities admitting his involvement. Spraggins v. State, 243 S.E.2d 20, 22 (Ga.1978). Most conclusive is Nixon, which this Court remanded even though witnesses identified Nixon with the victim's property, Nixon's brother testified that "Nixon admitted killing a white woman by tying her with jumper cables and burning her," and a taped confession, in which Nixon admitted to murdering the victim, was played to the jury. Nixon v. State, 572 So.2d 1336, 1337 (Fla.1991).

The state also cites Jones v. State, 2003 WL 297074 (Fla. Feb. 13, 2003), as authority which supports denial of this issue. ("Here, as in Jones v. State, 2003 WL 297074 (Fla. Feb. 13, 2003), Duncan's counsel conceded guilt to second degree murder as a trial strategy intended to save Duncan's life." (State's brief at 17)). Like the other cases cited in Mr. Duncan's initial brief, this case is clearly

distinguishable. In Jones, counsel told the jury that Jones killed the victims, read the jury the *correct* definition of second degree murder, and then argued:

> Ladies and Gentlemen, I submit to you that beyond doubt at the time and place where these killings occurred and the other lesser crimes were committed that Randy Jones did in fact evince a depraved mind regardless of human life and his conduct throughout the episode indicates a depraved and evil intent and inability to understand the feelings of other people, *but I think that specifically blueprints the crime as second degree murder*.

Jones v. State, 2003 WL 297074 *7 (Fla. Feb. 13, 2003) (emphasis in original).

In Mr. Duncan's case, however, defense counsel argued Mr. Duncan was guilty of second degree murder, explaining to the jury, ***element by element***, that it was first degree murder.

> The evidence, ladies and gentlemen, indicates that Mr. Duncan is guilty of second degree murder. Should also go through what that is so you'll have an idea when you discuss the evidence, how to apply the evidence to that.
>
> I believe that the court will instruct you that **second degree murder has the same first two elements as premeditated murder. First degree murder, however, the last element is that there was an unlawful killing of Deborah by an act imminently dangerous to another, and evincing a depraved mind, regardless of human life. And they go on to describe an act as one imminently dangerous to another and evincing a depraved mind, regardless of human life**.

> **If it is an act or series of acts that a person of ordinary judgment would know is reasonably certain to kill or do serious injury to another, and is, two, done from ill will, hatred, spite, or an evil intent. And, three, that it is of such a nature that the act indicates an indifference to life.**

(R.765-66). In Mr. Duncan's case counsel did not argue that Mr. Duncan was guilty of, *at most*, second degree murder. Counsel precluded consideration of manslaughter or any crime other than first or second degree murder, essentially arguing that Mr. Duncan was guilty of both (R.766). Clearly, Mr. Duncan is entitled to relief.

The state also argues that any strategy other than conceding guilt to second and/or first degree murder "would have required counsel to present arguments with no credibility and contrary to the facts to satisfy his theory of representation" (State's brief at 18). That argument is absurd. Counsel had many options other than pleading Mr. Duncan guilty to second and/or first degree murder. Counsel could have argued that the state did not prove premeditation without conceding that the state proved every element of second degree murder. As in Atwater v. State, 788 So.2d 223, 231-32 (Fla.2001), counsel could have argued in rebuttal that the evidence *might* support the lesser offense of second degree murder. As in Brown v. State, 755 So.2d 616, 629-30 (Fla.2000)(emphasis added), counsel could have

argued that Mr. Duncan was guilty *at most* of second degree murder, or, as in Lawrence v.State , 831 So.2d 121 (Fla.2002), counsel could have argued that the evidence supported--at best-- either second degree murder or manslaughter. Each possible argument would have only required the state to meet its legal burden of proof, left counsel with credibility, and was consistent with the facts of this case. Pleading Mr. Duncan guilty to second and/or first degree murder was not counsel's only reasonable strategy; it was the most unreasonable strategy.

B. Counsel was ineffective for not objecting to the introduction into evidence and display of prejudicial photographs.

The state argues that the circuit court properly denied this claim as insufficiently plead because the photographs at issue were not specifically identified. However, the court erred because the photographs at issue were clear from the amended 3.850 motion. The subclaim at issue was point 13 under the claim heading:

CLAIM VIII

MR. DUNCAN DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA

CONSTITUTION.

(PCR V10 1559). Point 13 referred to "gruesome and cumulative photographs", to which counsel did not object to the admission into evidence:

> 13. To the extent that trial counsel allowed into evidence irrelevant, gruesome and cumulative photographs, and did not object to them being admitted into evidence, counsel was ineffective.

(PCR V10 1564). As these were the only "gruesome and cumulative photographs" to which counsel did not object to the admission into evidence, they were indeed properly identified in the record.

The circuit court also erred as a matter of law in holding that this claim was procedurally barred because it could have been raised on direct appeal. It is well established Florida law that unpreserved errors will not be considered on direct appeal unless the unpreserved errors amount to fundamental error. Since counsel failed to preserve the erroneous introduction and prejudicial display of these photographs, the claim was properly plead as one of ineffective assistance of counsel and properly raised in a motion for postconviction relief; a motion for postconviction relief is the proper place to raise an ineffective assistance of counsel claim. Reichmann v. State, 777 So.2d 342, 348 (Fla.2000).

2. Counsel was ineffective at the penalty phase of Mr. Duncan's

trial

A. Counsel's failure to challenge the sole aggravating circumstance by presenting the circumstances of the 1969 prior violent felony was ineffective assistance of counsel.

The state misleadingly infers that the circuit count found the ineffective assistance of counsel portion of the claim presented in Mr. Duncan's postconviction motion procedurally barred: "Duncan does not challenge the procedural bar imposed by the trial court. Duncan instead argues that "[c]ounsel utterly failed to investigate and present evidence of the crime that would have mitigated, if not eliminated, its prejudice." (State's brief at 25). A simple reading of the circuit court's order reveals that the court did not find a procedural bar to the ineffective assistance of counsel aspect of the subclaim. The court held that the claim regarding counsel's failure to challenge the *validity* of the prior conviction was procedurally barred because a challenge to the *validity* of a conviction is properly raised on direct appeal (PCR V11 1775-76). Regarding the subclaim that "counsel should have offered more information about the circumstances of the prior murder, so as to lessen its weight and significance," the court found no procedural bar (PCR V 11 1775-76). Moreover, even had the court found a procedural bar, it would be error because ineffective assistance of counsel claims are properly raised in postconviction proceedings. Reichmann v. State, 777 So.2d

342, 348 (Fla.2000).

The state argues that "this information, with the exception of the sexual harassment, was extensively covered by the State and by Duncan's trial counsel" (State's brief at 25). The state's own words prove the absurdity of this argument. First, the state's "coverage" could not have done much to mitigate the aggravating nature of the prior violent felony; the state argued that the nature of the crime justified the death penalty. Second, "extensive" is a hyperbolic description. The "extensive" "coverage" elicited by the state from Captain Martin Stephens was:

> He told me that the victim had been threatening him, and that the night before he had approached him with his hand in his pockets, and he made a comment to the effect of white cracker, I'm going to get you, or something along those lines.
>
> And he made up his mind at that time that he intended to kill Willie Fred Davis.

(R.895). On cross examination, defense counsel elicited Mr. Duncan's age, height, and weight, and the victim's age height and weight, and that the victim who "had problems with whites and blacks" (R.905-6).

The "extensive" "coverage" by the state from John Marshall Green was:

> A. During the course of the conversation he [Mr. Duncan] indicated to Mr. Smith that there had been some problems between Donn Duncan and the decedent, Mr. Davis. And that **on the previous**

day that Davis had been attempting to fake throwing some punches with closed fists in the directions of Mr. Duncan. He stepped back into the road and asked Davis at that point in time what's the matter with you?
And this was the problem, according to the initial statement, that led up to the assault upon Davis that occurred earlier that day.

Q. Okay, so from the investigation of the first person he talked to, H. R. Smith, the provocation that Donn Duncan originally talked about were some punches faked towards him?

A. That was the statements made to Mr. Smith, yes.

Q. And his statement to Mr. Smith did not include anything about being threatened by a knife, by Willie Fred Davis; is that correct?

A. No, that statement was made later that afternoon to Mr. Martin Stephens an investigator with the Marion Sheriff's Department.

(R.916-17). The "extensive" testimony defense counsel elicited on cross examination was:

Q. And Mr. Davis was known as a bully, was he not?

A. Yes.

Q. Fred Willie Davis (sic)?

A. Yes.

Q. And Mr. Davis did not get along with any of the inmates there, white or black, at that institution, did he?

A. He did not get along with Mr. Duncan, and it's my understanding he, he had problems with other inmates.

Q. Now, do I assume correctly that when threats are made by inmates at those institutions those threats are not taken lightly by other inmates?

A. I can't tell you what other inmates may or may not do.

Q. All right, sir. Did the fact that there were indications there were threats and other things involved, did that have any significance in your mind in the handling of the case?

A. Yes.

Q. And you acquiesced and allowed him to enter a plea to the crime of second degree murder; did you not, sir?

A. Yes.

(R.919). On redirect examination, the state covered defense counsel's "extensive" "coverage" with:

Q. What all did you take into account in exercising your discretion to allow Donn Duncan to plea to second degree murder instead of going to trial on first degree murder?

> A. There were two consideration [sic] that entered into it, one was the fact that under the circumstances of this particular case I did not feel the jury would sentence him to death for the slaying of Mr. Davis. And the second reason was that the plea include [sic] a life sentence in the state prison. And that I did not envision he would be released from that.

(R.920).

Considering the compelling testimony available, the "extensive" testimony elicited by the state and defense counsel did relatively nothing to mitigate the circumstances of the prior violent felony. Rather than relying on state witness testimony that the victim "had been threatening him", "on the previous day that Davis had been attempting to fake throwing some punches with closed fists in the directions of Mr. Duncan", and "was known as a bully", with one telephone call, counsel could have presented evidence that the crime was essentially one of self defense.

> The nature of the harassment is that the man would come up, had approached him for Mr. Duncan to become what the man termed his punk and told him that he wanted sexual favors from Mr. Duncan and started harassing him. . . . Mr. Duncan would wake up at night, and this man would be breathing in his ear. He would make up obscene gestures and comments to him. Duncan resisted him. Eventually they got into arguments. Things started generating. Mr. Duncan – he told Mr. Duncan, that unless he consented to become his punk, that he was going to kill him. I can't remember whether he told him he was going to kill him or he was going to do great bodily harm to him. I think he did

> tell him he was going to kill him.

(PCR V5 509-10). This mitigating evidence is supported by the testimony the state presented and, with investigation, could have been further supported with Mr. Duncan's jail records.

> The prison classification officers responsible for him wrote these lengthy reports describing not exactly a justification but basically their reasoning that he was defending himself and asked for a significant reduction to minimum custody status where he was again placed on unsupervised work assignments and said to be just an outstanding worker.

(PCR V1 117). Clearly, the mitigating difference between "some punches faked towards him" and serious threats of rape and murder is substantial. See e.g. Fla. Stat. § 782.02 ("The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her. . . ")

The state also argues that "any "mental" mitigation regarding some evidence of brain injury from the record of the 1969 murder (AB, 62), would have been of no benefit given the 1969 court ordered psychiatric evaluation finding Duncan to have a sociopathic personality." (State's brief at 25-26). This argument is flawed for many reasons. First, the state does not cite to the evaluation, rather the state only cites to a hearsay account of the evaluation from the attorney for whom the state claims had memory problems, making him unable "to remember his strategic

reasons" (State's brief at 9). Second, counsel never mentioned this as a reason for not investigating the mitigating nature of this aggravator. This statement was in reference to counsel's memorialized decision not to call Dr. Lipman as a witness (PCR V5 589). Third, any negative inference that could have come from "the 1969 court ordered psychiatric evaluation" could have been refuted or explained by Dr. Berland and Mr. Duncan's prison records, and the jury would have made the decision regarding the weight to be given this aggravator.

B. Cumulatively, counsel's acts and omissions denied Mr. Duncan his Sixth and Fourteenth Amendment rights to effective assistance of counsel at the penalty phase of his capital trial.

The state argues that "Duncan's argument to this Court was never raised below and is, thus, procedurally barred."(State's brief at 27). Once again, the state is incorrect. This argument was both raised below and considered by the lower court. Strickland's prejudice analysis requires a determination of whether "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[es] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams v. Taylor, 529 U.S. 362, 376-78 (2000). Strickland v. Washington, 466 U.S. 668

(1984). The circuit court found that counsel was ineffective at the penalty phase of Mr. Duncan's trial, necessarily considering this issue.

ARGUMENT II

MR. DUNCAN'S DEATH SENTENCE IS DISPROPORTIONAL, ARBITRARY, AND DISPARATE IN VIOLATION OF HIS RIGHTS UNDER FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AS WELL AS JUDICIAL AND STATUTORY LAW.

The state attempts to make a law of the case argument to refute this claim: "the issue of the proportionality of Duncan's death sentence was raised on direct appeal and rejected by this Court. . . "It is not appropriate to revisit this issue in a new guise" (State's brief at 28). Though the state would be correct if this were an average case, this is not an average case. The circumstances of this case warrant, as a matter of grace, that this Court reconsider proportionality as a matter of law. Strazzulla v. Hendrick, 177 So.2d 1, 5 (Fla.1965).

The law of the case doctrine requires that "questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." Florida Department of Corrections v.

Juliano, 801 So.2d 101, 105 (Fla.2001). An exception exists, and an appellate court may reconsider or correct a ruling that is the law of the case when reliance on the prior ruling would result in a "manifest injustice". Id. at 106. In this case, such a manifest injustice would occur. The trial court found that the results of the penalty phase upon which this Court based its ruling were unreliable. Strickland, 466 U.S. at 461. Those facts are no longer the facts of the case, therefore reliance on those facts would result in "manifest injustice". Id.[1]

ARGUMENT III

THE RULES PROHIBITING MR. DUNCAN'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. DUNCAN ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

This issue was raised as a facial challenge to the constitutionality of Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar (Cross Appeal at 28-29). In its answer brief, the state warped the issue into an allegation of ineffective assistance

[1]Additionally, a ruling from this Court that the death sentence is disproportional in this case would save the state of Florida the expense, state, and judicial resources that new proceedings would require.

of trial counsel. The issue was neither plead nor argued as such. Additionally, the state argues that the standard of review is the standard this Court uses when evaluating claims of ineffective assistance of counsel. As this is not an ineffective assistance of counsel claim, the correct standard of review is that which was presented in Mr. Duncan's initial brief.

ARGUMENT IV

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DUNCAN OF A FUNDAMENTALLY FAIR CAPITAL TRIAL AND PENALTY PHASE GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The state argues: "Duncan's argument to this Court was never raised below and is, thus, procedurally barred. Again, the state is wrong. This issue was raised below, in Mr. Duncan's amended motion for postconviction relief (PCR V7 870-71).

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of the Cross-Appellant was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Cross-Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of June, 2003.

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