IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v.

DONN DUNCAN,

Appellee.

CASE NO. SC02-636

APPELLANT'S REPLY BRIEF AND ANSWER BRIEF OF CROSS-APPELLEE

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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 by his proper name.

The record on appeal consists of eleven consecutively paginated volumes, which will be referenced by the letter “R,” followed by any appropriate page number. The trial record consists of ten consecutively paginated volumes, which will be referenced by the letters “TR,” followed by any appropriate page number. “AB” will designate Appellee’s Answer Brief/Initial Brief of Cross-Appellant, 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 State relies on the facts as asserted in its initial brief with the following additions.

The trial court made the following findings of fact regarding “SUBCLAIM VIII-A:”

SUBCLAIM VIII-A

> Mr. Duncan claims that counsel should have pursued an insanity defense based on Mr. Duncan's prolonged alcohol and drug abuse and his post-offense statement to the police, "I guess, I went nuts " As a preliminary matter, Mr. Duncan's use of

that self-serving colloquialism is not evidence that he actually suffered from any mental deficiency, and did not provide counsel with a basis to pursue that theory. At the evidentiary hearing, the Court heard extensive testimony from Dr. Berland about Mr. Duncan's mental health problems. However, at no time did Dr. Berland or any other witness testify that at the time of the murder Duncan did not know what he was doing or its consequences or that, although he knew what he was doing and its consequences, he did not know it was wrong.

(R, 1763-64).

The trial court made the following findings regarding "SUBCLAIM VIII-B:"

SUBCLAIM VIII-B

Mr. Duncan claims that counsel should have argued that Mr. Duncan's long-term alcohol and drug abuse, combined with intoxication at the time of the offense, prevented him from forming the specific intent to commit first-degree murder. However, Mr. Duncan does not state that he was intoxicated at the time of the murder, or that any evidence exists to support that aspect of the claim. Specifically, he states that "[t]here are witnesses who were not interviewed or deposed regarding their knowledge of Mr. Duncan's intoxication at the time of the offense." (Instant motion at 12). He does not say who these people are, or what knowledge they supposedly had. Mr. Duncan also claims that "defense counsel could have impeached State witnesses who testified Mr. Duncan was sober at the time of the offense." (Instant motion at 12). He does not say on what grounds counsel could have impeached them. In essence, Mr. Duncan is asking the Court to find that counsel was ineffective for failing to introduce evidence that Mr. Duncan's long-term alcohol and drug use created a chronic inability to form specific intent.

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As noted in the discussion of Subclaim A, there is no indication in the record that Mr. Duncan had a viable insanity defense. As such, evidence purporting to show that long-term use of drugs or alcohol damaged Mr. Duncan's ability to form

specific intent would have been inadmissible at the guilt phase.

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(R, 1764-65).

The trial court made the following findings of fact regarding "SUBCLAIM VIII-D:"

SUBCLAIM VIII-D

Mr. Duncan argues that counsel was ineffective for conceding his guilt. At the evidentiary hearing, Mr. Larr testified that he adopted a defense strategy of arguing that there was no premeditation, and asking the jury to return a verdict of guilty on a charge of second degree murder. (See attached transcript pages D47-1348, J7-J15). There were several eyewitnesses and, as the Supreme Court of Florida noted, Mr. Duncan confessed to the murder. See Duncan, 619 So. 2d at 280. Given that confession, the Court finds that counsel's strategy was well within the broad range of reasonable assistance under prevailing professional standards. Moreover, although Mr. Larr did not recall if Mr. Duncan ever explicitly stated his support for this strategy, he did ultimately tell counsel to do whatever he thought was best. (See attached transcript page J9).

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(R, 1766-67).

The trial court made the following findings of fact regarding "SUBCLAIM VIII-E:"

SUBCLAIM VIII-E

Mr. Duncan argues that counsel was ineffective "to the extent [he] allowed into evidence irrelevant, gruesome and cumulative photographs . . . ." (Instant motion page 14). Mr. Duncan fails to specify what photographs are at issue.

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(R, 1767).

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

> SUBCLAIM IX-B
>
> Mr. Duncan claims that counsel should have introduced evidence of Mr. Duncan's good prison record as a mitigating circumstance. He alleges that he received positive recommendations from his, supervisors during his incarceration, and argues that these should have been presented during the penalty phase. Significantly, Mr. Duncan neglects to discuss how his conviction for the second-degree axe murder of a fellow innate would impact the use of his prison record as a mitigating circumstance.
>
> ****

(R, 1775).

The trial court made the following findings of fact regarding "CLAIM XI:"

> CLAIM XI
>
> Mr. Duncan claims that Florida's prohibition on post-trial juror interviews without judicial permission violates his right to due process. Mr. Duncan alleges no facts specific to his case which suggest a basis for authorizing any such interviews.
>
> ****

(R, 1776).

SUMMARY OF ARGUMENT

REPLY BRIEF

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.”

ANSWER BRIEF

ISSUE I(2)(A)

In this case, there was no evidence, or claim by Duncan, regarding “a given quantity of intoxicants” at the time of the offense. Thus, Dr. Lipman’s testimony regarding Duncan’s alcohol and drug use would not have demonstrated a defense of voluntary intoxication because Duncan was not intoxicated at the time of the offense.

ISSUE I(2)(B)

Given the facts of this case, it was reasonable for Duncan’s counsel to concede guilt to second degree murder as a trial strategy intended to save Duncan’s life. Duncan’s argument cannot succeed because it would have required counsel to present arguments with no credibility and contrary to those facts.

ISSUE I(2)(C)

In addition to being insufficiently pled and procedurally, barred the instant claim is without merit. In this case, the photos were not objected to because they were

of the victim's "clear, clean cut wounds," showing the manner of death and the location of the wounds.

ISSUE I(2)(D)

Duncan's cumulative error argument must fail for the reasons previously stated in the State's responses to Issues I 2(A)-(C).

ISSUE I(3)(A)

Duncan cannot show that it was unreasonable for trial counsel to focus on the self-defense nature of Duncan's prior murder conviction and not otherwise focus on Duncan's time in **prison**. Further, Duncan offers no authority for his claim that a good prison record would have possibly added sufficient weight to the mitigation to change the recommended sentence.

ISSUE I(3)(B)

Duncan alleges that trial counsel's failure to challenge the sole aggravating circumstance by presenting the circumstances of the 1969 prior violent felony was ineffective assistance of counsel. However, the trial record actually reflects that this information, with the exception of the sexual harassment, was extensively covered by the State and by Duncan's trial counsel.

ISSUE I(3)(C)

Duncan's argument to this Court was never raised below and is, thus, procedurally barred. Moreover, Duncan's cumulative error argument must fail for the reasons previously stated in the State's responses to Issues I 3(A)&(B).

ISSUE 2

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.

ISSUE 3

In addition to being procedurally barred, Duncan concedes that this argument is without merit. Given the procedural bar, and consequent failure to exhaust, the State contends that the instant argument fails to preserve any issue for further review. ISSUE 4

Duncan argues that he did not receive the fundamentally fair trial to which he is entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. However, Duncan's argument to this Court was never raised below and is, thus, procedurally barred. Further, Duncan's argument must fail for the reasons previously stated.

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."

Standard of Review

"The standard of review for a trial court's ruling on an ineffectiveness claim ... is two pronged: The appellate court

must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." Bruno v. State, 807 So.2d 55, 61-62 (Fla. 2001).[1]

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), and is outlined in the State's initial brief.[2]

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[1]Although Duncan accuses the State of not completely stating the correct standard of review by failing to include the deference due to the trial court's findings of fact, Duncan apparently overlooked the State's adoption of the trial court's findings of fact. (IB, 1-3, 5-10).

[2]Duncan charges the State with misstating the Strickland standard, and twice represents that he is quoting the State by putting the sentence "'Unless no reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective'" in quotes followed by a reference to "(AB 16)" - apparently referring to page 16 of the initial brief. (AB, 28). Undersigned is not sure how to respond as the initial brief does not contain that sentence, and Duncan served his answer brief on counsel other than Undersigned, bringing into question Duncan's receipt of the State's initial brief. Nonetheless, to the extent Duncan is attempting to address the direct quote from Chandler v. United States, 218 F.3d 1305, 1318 (11th Cir. 2000), on page 16 of the State's initial brief, the State maintains that the quote is an accurate quote and not a misstatement. Duncan argues it is a misstatement because the issue is whether the strategy, not the lawyer, was reasonable. However, if *competent counsel* would have employed the strategy, the strategy is reasonable; or, conversely, if no *competent counsel* would have employed

The State readily admits that trial counsel did not remember the strategic reason for not calling Dr. Berland as a witness at trial. In assessing counsel's performance for purposes of an ineffective assistance of counsel claim, however, the standard is an objective one, not a subjective one. See Strickland, 466 U.S. at 688; see also Schwab v. State, 814 So.2d 402 (Fla. 2002). Thus, the focus is on what a reasonably competent lawyer, standing in trial counsel's shoes, would have been expected to do.

> "'Judicial scrutiny of counsel's performance must be highly deferential,' " and courts "must avoid second-guessing counsel's performance." Id. at 1314 (quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). "Courts must 'indulge [the] strong presumption' that counsel's performance was reasonable and that counsel 'made all significant decisions in the exercise of reasonable professional judgment.' " Id. (quoting Strickland, 466 U.S. at 689-90, 104 S.Ct. at 2065-66). Therefore, "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken 'might be considered sound trial strategy.' " Id. (quoting Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).
>
> If the record is **incomplete or unclear** about counsel's actions, then **it is presumed that counsel exercised reasonable professional judgment**. See Id. at 1314-15 n.15. Thus, the presumption afforded counsel's performance "is not ... that the particular defense lawyer in reality focused on and, then, deliberately decided to do or not to do a specific act." Id. Rather, the presumption is "that what the particular defense lawyer did at trial-**-for example, what witnesses he presented or did not present**--were acts that some reasonable lawyer might do." Id. (emphasis added).

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the strategy, the strategy is unreasonable. Id.

> Moreover, "[t]he reasonableness of a counsel's performance is an objective inquiry." Id. at 1315. For a petitioner to show deficient performance, **he "must establish that no competent counsel would have taken the action that his counsel did take.**" Id. To uphold a lawyer's strategy, a court "need not attempt to divine the lawyer's mental processes underlying the strategy." Id. at 1315 n.16.

Putman v. Head, 268 F.3d 1223, 1243-44 (11th Cir. 2001), cert. denied, 123 S.Ct. 278 (2002).

The record in the instant case is incomplete due to counsel's inability, due to the extensive delay of the instant proceeding, to remember his strategic reasons for not calling Dr. Berland; however, it is presumed that "counsel exercised reasonable professional judgment." Id. Thus, the trial court did err in placing the onus on the State to rebut that presumption. Duncan labels this argument disingenuous (AB, 27), rather than provide authority for his position that the State bears the burden, more than a decade after his conviction, of establishing the reasonableness of an unknown strategy utilized by his trial attorney.

The State did not take the position that the invocation of the talismanic noun "strategy," invoked the presumption that counsel's actions were reasonable. The United States Supreme Court created that presumption, and Duncan's trial counsel would have been entitled to that presumption even if he had not remembered that it had been a strategic decision.

A presumption is exactly that, simply an inference in favor of a particular fact. Duncan could have overcome the

presumption of reasonableness by demonstrating that "'no competent counsel would have taken the action that his counsel did take.'" Id. In this case, by showing that no competent counsel would have not called Dr. Berland, because his testimony could only have aided the defense. However, the presumption is not overcome simply by showing the witness's testimony could have aided the defense if there is a possibility that competent counsel would have decided not to call the witness because the witness could have testified to, or otherwise exposed the defense to, something detrimental.

In this case, counsel's claim the decision was strategic was not argued to establish the possible detrimental effect of Dr. Berland's testimony to maintain the presumption afforded trial counsel. However, neither was the determination that Dr. Berland's testimony could only have benefitted the defense the basis for the circuit court overcoming that presumption to grant the claim. Nor did the circuit court overcome that presumption by finding that counsel's decision was uninformed.[3]

Below, trial counsel testified that, based on the substantial experience he and his office had dealing with Dr. Berland, he believed that his conversation with Dr. Berland

[3]As argued below, Dr. Berland testified that much of the material he used to form an opinion on Duncan's mental status was not obtained by him in 1991, despite the efforts of Public Defender personnel, due to Duncan's refusal to cooperate. (R, 1672 & R, 23-24, 47, 51, 129, 141-42, 149, 167, 170).

was sufficient for him to determine that he could not use Dr. Berland in this case. (R, 607). Further, as argued below (R, 1735), counsel's testimony regarding his decision-making process, showed that he gave the same careful consideration, based on his conversations with both Doctors, to his un-memorialized decision to not call Dr. Berland that he gave to his memorialized decision not to call Dr. Lipman[4]. Finally, the circuit court in its order granting Duncan's claim, stated that it "could conceive of sound strategic and tactical reasons for deciding not to call Dr. Berland to testify...." (R, 1774).[5]

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

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[4](Index to Evidence - Exhibit 17)(memorandum outlining those reasons, including Duncan's attempted murder, with a brick, of a wheelchair bound individual - R, 589-90).

[5]Without limiting the possible sound strategic reasons for not calling Dr. Berland, two are obvious from the instant record: (1) to avoid the State's use, in rebuttal of any brain injury claim, of the 1969 psychiatric evaluation of Mr. Duncan, which was ordered by the court, wherein the psychiatrist found Mr. Duncan to have a sociopathic personality, (R, 589); (2) to avoid the State's using its own expert, such as Dr. Upson who also found "antisocial behaviors and behaviors that are typical of a psychopath or sociopathic person as opposed to a person having a psychotic attack" (R, 209), to rebut Dr. Berland.

allegation ha[d] satisfied the performance prong of Strickland." Id.

As stated in the initial brief, the instant case illustrates one of the many reasons why counsel's actions at trial are reviewed using a reasonable attorney standard as opposed to evaluating the subjective reasons of trial counsel. That reason 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, 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. Thus, 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," caused the granting of the instant claim. However, as shown, the granting of this claim pursuant to Strickland cannot be upheld under the actual holdings in Strickland.

Finally, regarding the prejudice prong, "there 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. However,

> "[a]t the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. Based upon our case law, it was then for the trial court to resolve the

> conflict by the weight the trial court afforded one expert's opinion as compared to the other."

Porter v. State, 788 So.2d 917, 923 (Fla. 2001). The trial court did not do this. The trial court's order is devoid of any mention of the 1969 psychiatric evaluation that Duncan had a sociopathic personality or of Dr. Upson's, the State's expert, findings that Duncan exhibited psychopathic or sociopathic behavior that were not due to an organic problem. (R, 209-10, 589, 1767-1776). Therefore, it is the State's position that, notwithstanding the error as to Strickland's performance prong, the trial court's order is also deficient regarding its apparent conclusion as to the establishment of the Strickland prejudice prong. Id.

ANSWER BRIEF

ISSUE I(2)(A)

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLEGEDLY FAILING TO INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial

court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that trial counsel rendered ineffective assistance by failing to investigate and present a voluntary intoxication defense. (AB, 42).

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), and is outlined in the State's initial brief. (IB, 13-15). Below, the trial court applied Strickland to Petitioner's claim(s) of ineffectiveness of counsel. (R, 1757-78). More specifically, the circuit court addressed the instant claim, subclaim VIII(B) below, and concluded:

> Mr. Duncan claims that counsel should have argued that Mr. Duncan's long-term alcohol and drug abuse, combined with intoxication at the time of the offense, prevented him from forming the specific intent to commit first-degree murder. However, Mr. Duncan does not state that he was intoxicated at the time of the murder, or that any evidence exists to support that aspect of the claim. Specifically, he states that "[t]here are witnesses who were not interviewed or deposed regarding their knowledge of Mr. Duncan's intoxication at the time of the offense." (Instant motion at 12). He does not say who these people are, or what knowledge they supposedly had. Mr. Duncan also claims that "defense counsel could have impeached State witnesses who testified Mr. Duncan was sober at the time of the offense." (Instant motion at 12). He does not say on what grounds counsel could have impeached them. In essence, Mr.

> Duncan is asking the Court to find that counsel was ineffective for failing to introduce evidence that Mr. Duncan's long-term alcohol and drug use created a chronic inability to form specific intent.
>
> At the time of Mr. Duncan's trial, the controlling law on this issue was found in Chestnut v. State, 538 So. 2d 820 (Fla. 1989). Under Chestnut evidence of psychiatric conditions or mental infirmities that do not rise to the level of legal insanity are inadmissible in a guilt phase proceeding. As noted in the discussion of Subclaim A, there is no indication in the record that Mr. Duncan had a viable insanity defense. As such, evidence purporting to show that long-term use of drugs or alcohol damaged Mr. Duncan's ability to form specific intent would have been inadmissible at the guilt phase. As the Supreme Court of Florida phrased it,
>
> > It could be said that many, if not most, crimes are committed by persons with mental aberrations. If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on that ground and treated for their disease. Persons with less serious mental deficiencies should be held accountable for their crimes just as everyone else. If mitigation is appropriate, it may be accomplished through sentencing . . .
>
> Id. at 825.
>
> The Court will not find counsel ineffective for failing to introduce inadmissible evidence. Accordingly, this subclaim is denied.

(R, 1765-66).

Duncan does not address, or even mention, the trial court's ruling that counsel was not ineffective for failing to introduce evidence of Duncan's alleged diminished capacity as it was inadmissible on the issue of mens rea.

In this case, there was no evidence, or claim by Duncan, regarding "a given quantity of intoxicants" at the time of the offense. Thus, as in Spencer v. State, 2003 WL 60546 (Fla. Jan. 9, 2003)(relying on State v. Bias, 653 So.2d 382-83 (Fla. 1995), Dr. Lipman's testimony regarding Duncan's alcohol and drug use would not have demonstrated a defense of voluntary intoxication because Duncan was not intoxicated at the time of the offense. (R, 416). Accordingly, Duncan cannot show entitlement to relief on the instant claim.

ISSUE I(2)(B)

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLEGEDLY CONCEDING MR. DUNCAN'S GUILT?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that trial counsel rendered ineffective assistance by conceding to his guilt. (AB, 46). The circuit court addressed the instant claim, subclaim VIII(D) below, and concluded:

> Mr. Duncan argues that counsel was ineffective for conceding his guilt. At the evidentiary hearing, Mr. Larr testified that he adopted a defense strategy of arguing that there was no premeditation, and asking the jury to return a verdict of guilty on a charge of second degree murder. (See attached transcript pages D47-1348, J7-J15).[4] There were several eyewitnesses and, as the Supreme Court of Florida noted, Mr. Duncan confessed to the murder. See Duncan, 619 So. 2d at 280. Given that confession, the Court finds that counsel's strategy was well within the broad range of reasonable assistance under prevailing professional standards. Moreover, although Mr. Larr did not recall if Mr. Duncan ever explicitly stated his support for this strategy, he did ultimately tell counsel to do whatever he thought was best. (See attached transcript page J9). Even assuming that counsel erred by failing to get Mr. Duncan's explicit agreement to that strategy, Mr. Duncan is not entitled to relief. Given Mr. Duncan's confession, there is no reasonable probability that outcome of the trial would have been different had counsel not adopted this strategy. Since this claim fails to satisfy either prong of Strickland, it is denied.

(R, 1767-68).

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. Also, 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. Thus, in this case, as in Jones, Duncan's argument cannot succeed because it would have required counsel

to present arguments with no credibility and contrary to the facts to satisfy his theory of representation. Id. This Court has declined to follow such a path, and has previously determined that "'[t]o be effectual, trial counsel should be able to do this without express approval of his client and without risk of being branded as being professionally ineffective because others may different judgments or less experience.'" Id. (quoting Atwater v. State, 788 So.2d 223, 230 (Fla. 2001)[6]). Therefore, Duncan cannot show entitlement to relief on the instant claim, because the trial court correctly found the trial strategy reasonable and the alternative without hope for success.

ISSUE I(2)(C)

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT OBJECTING TO THE INTRODUCTION INTO EVIDENCE AND DISPLAY OF ALLEGEDLY PREJUDICIAL PHOTOGRAPHS?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is

[6]Quoting McNeal v. State, 409 So.2d 528, 529 (Fla. 5th DCA 1982)

two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that trial counsel rendered ineffective assistance by not objecting to the introduction and display of prejudicial photographs. (AB, 53). The circuit court addressed the instant claim, subclaim VIII(E) below, and concluded:

> Mr. Duncan argues that counsel was ineffective "to the extent [he] allowed into evidence irrelevant, gruesome and cumulative photographs . . . ." (Instant motion page 14). Mr. Duncan fails to specify what photographs are at issue. Therefore, this claim is insufficiently pled. It is also procedurally barred, since it could have been raised on direct appeal.[5] The procedural bar cannot be avoided merely by couching the claim in terms of ineffective assistance of counsel. See Kight v. Dugger 574 So. 2d 1066 (Fla. 1990). Accordingly, this claim is denied.
>
> [5]Indeed, the gruesome nature of one photograph was raised on direct appeal, and addressed by the Supreme Court of Florida. See Duncan 619 So. 2d at 281. The Supreme Court found any error is the admission of the photograph was harmless in the context of the entire case.

(R, 1768).

In his initial brief, Duncan identifies the photographs that are the basis of this claim, but only provides record cites to the trial record. He does not provide cites to the postconviction record showing where the instant argument,

actually identifying the objectionable photographs, was made below. Given the trial court's ruling on this claim, Petitioner's reliance on the direct appeal record is improper.

In addition to being insufficiently pled and procedurally, barred the instant claim is without merit. "This Court has upheld the admission of photographs where they are relevant to 'explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim.'" Floyd v. State, 808 So.2d 175, 184 (Fla. 2002). In this case, the photos were not objected to (TR, 650-51), because they were of the victim's "clear, clean cut wounds," showing the manner of death and the location of the wounds. (TR, 660-66).

Duncan's claim that the State could have used less prejudicial photographs is completely unsupported. (AB, 55). Regarding juror Anderson's inability to deal with the photos (AB, 55), as the trial court noted: "[o]bviously, it doesn't take a whole lot to put [juror Anderson] under." (TR, 670). The trial court's comments demonstrate that any objection to the photographs by counsel would likely have been to no avail as the trial court obviously did not think the photographs overly shocking.

ISSUE I(2)(D)

WHETHER TRIAL COUNSEL'S ACTS AND ALLEGED OMISSIONS, CUMULATIVELY, DENIED DUNCAN HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that his trial counsel's acts and omissions denied him his sixth and fourteenth amendment rights to effective assistance of counsel at the guilt phase of his trial. (AB, 56). The circuit court addressed the instant claim, subclaim VIII(F) below, and concluded:

> Mr. Duncan argues that counsel's various errors during the guilt phase cumulative establish ineffective assistance of counsel. In light of the Court's disposition of the individual claims, the cumulative claim is denied.

(R, 1768).

The circuit court was correct, Duncan's argument must fail for the reasons previously stated in the State's responses to Issues I 2(A)-(C).

ISSUE I(3)(A)

WHETHER TRIAL COUNSEL'S ALLEGED FAILURE TO INTRODUCE MITIGATING EVIDENCE OF MR. DUNCAN'S GOOD PRISON RECORD WAS INEFFECTIVE ASSISTANCE OF COUNSEL?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that trial counsel' failure to introduce mitigating evidence of his good prison record was ineffective assistance of counsel. (AB, 57). The circuit court addressed the instant claim, subclaim IX(B) below, and concluded:

> Mr. Duncan claims that counsel should have introduced evidence of Mr. Duncan's good prison record as a mitigating circumstance. He alleges that he received positive recommendations from his, supervisors during his incarceration, and argues that these should have been presented during the penalty phase. Significantly, Mr. Duncan neglects to discuss how his conviction for the second-degree

> axe murder of a fellow innate would impact the use of his prison record as a mitigating circumstance. The Court finds that counsel was well within the broad range of reasonable assistance contemplated by Strickland when he declined to introduce Mr. Duncan's prison record as a mitigator. Moreover, the Court finds that there is no reasonable probability that the outcome of the proceedings would have been different if such evidence had been introduced. Accordingly, this subclaim is denied.

(R, 1776).

Initially, the State would note that having a **prison record**, no matter how "excellent," is not commendable. It would not have been unreasonable for trial counsel to have decided that he would focus on the self-defense nature of Duncan's prior murder conviction and not otherwise focus on Duncan's time in **prison**. Duncan offers no authority for his claim that a good prison record would have possibly added sufficient weight to the mitigation to change the recommended sentence. (AB, 57). As argued below (R, 1735), a prior murder conviction is attributed great weight. Ferrell v. State, 680 So.2d 390, 391 (Fla. 1996) (finding a prior second degree murder conviction alone sufficient to outweigh a number of mitigating circumstances). Therefore, Duncan cannot show entitlement to relief as he has shown neither deficient performance nor the reasonable probability of a different result.

ISSUE I(3)(B)

WHETHER TRIAL COUNSEL ADEQUATELY CHALLENGED THE SOLE AGGRAVATING CIRCUMSTANCE BY PRESENTING THE CIRCUMSTANCES OF THE PRIOR MURDER?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that trial counsel' failure to challenge the sole aggravating circumstance by presenting the circumstances of the 1969 prior violent felony was ineffective assistance of counsel. (AB, 57). The circuit court addressed the instant claim, subclaim IX(C) below, and concluded:

> This subclaim raises several-grounds relating to Mr. Duncan's prior second-degree murder conviction. First, Mr. Duncan claims that counsel was ineffective for failing to challenge the validity of his prior conviction, which was used as an aggravating circumstance. However, Mr. Duncan fails to articulate a basis for such a challenge. Regardless, a challenge to an aggravating circumstance is a matter for direct appeal, and the procedural bar cannot be avoided merely by couching the claim in terms of ineffective assistance of counsel. See Kight v. Dugger,574 So. 2d 1066 (Fla. 1990). Mr. Duncan also claims that it violated the

> Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution for either the jury or the trial court to consider the prior second-degree murder conviction. The only authority he offers for this proposition is Johnson v Mississippi, 486 U.S. 578 (1988), wherein the United States Supreme Court found that a prior conviction that was subsequently vacated cannot be used as an aggravating circumstance. However. Mr. Duncan's prior conviction was not vacated, and therefore appropriately considered. Finally, Mr. Duncan argues that counsel should have offered more information about the circumstances of the prior murder, so as to lessen its weight and significance. The Court finds that the spending more time discussing the prior murder in the manner Mr. Duncan suggests would not likely have led to a different outcome, given the nature of that crime, and the circumstances of the instant murder. Therefore, Mr. Duncan does not satisfy the prejudice prong of Strickland. This subclaim is denied.

(R, 1775-76).

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.” (AB, 60). Duncan then goes on to relate information testified to by his attorney from the 1969 murder conviction detailing the alleged threats and sexual harassment by the victim and the large difference in size between Duncan and the victim. (AB, 60-61). The problem with Duncan’s argument is that the trial record actually reflects that this information, with the exception of the sexual harassment, was extensively covered by

the State and by Duncan's trial counsel.[7] Further, any "mental" mitigation regarding some evidence of a 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. (R, 589). Clearly, the record shows that the trial court correctly determined that Duncan has shown neither deficient performance nor the reasonable probability of a different result.

ISSUE I(3)(C)

WHETHER DUNCAN'S ALLEGATION THAT TRIAL COUNSEL'S ACTS AND ALLEGED OMISSIONS, CUMULATIVELY, DENIED DUNCAN HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

[7](R, 895)(testimony covering threats to Duncan by victim); (R, 905-06)(testimony covering Duncan's stature of 5'9" 149 lbs., and the victim's stature of larger than 6' 250 lbs., and the victim's reputation among inmates as a bully); (R, 916-17)(testimony covering the victim threatening Duncan with a knife and throwing fake punches at him the day before the murder);(R, 919-20)(testimony that the evidence of the threats and "other things involved" resulted in acquiescence of the State to Duncan entering a plea to second degree murder, rather than the charged first degree murder).

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan alleges that his trial counsel's acts and omissions denied him his sixth and fourteenth amendment rights to effective assistance of counsel at the penalty phase of his trial. (AB, 63). However, Duncan's argument to this Court was never raised below and is, thus, procedurally barred. Thomas v. State, 28 Fla. L. Weekly S106 (Fla. Jan. 30, 2003). Moreover, Duncan's argument must fail for the reasons previously stated in the State's responses to Issues I 3(A)&(B).

ISSUE II

WHETHER DUNCAN CAN USE THE INSTANT POSTCONVICTION MOTION TO RELITIGATE THIS COURT'S PROPORTIONALITY REVIEW OF HIS DEATH SENTENCE?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

The circuit court addressed the instant claim, subclaim IX(C) below, and concluded:

> Mr. Duncan claims that his death sentence is disproportionate given the number of aggravating circumstances and the number of mitigating circumstances that were allegedly available but not presented. This claim incorporates Claims VIII and IX and - in light of the Court's disposition of those claims - it is unnecssary to address it separately.

(R, 1777-78).

Duncan alleges that his death sentence is disproportional, arbitrary, and disparate in violation of his rights under the law. (AB, 65)[8]. However, the issue of the proportionality of Duncan's death sentence was raised on direct appeal and rejected by this Court. Duncan, 619 So.2d at 284. "It is not appropriate to revisit this issue in a new

[8]Duncan's arguments before this Court rely upon 19 direct appeal opinions. (AB, 66-77).

guise." Arbelaez v. State, 775 So.2d 909, 919 n.8 (Fla. 2000); Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994)("Proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue.").

ISSUE III

WHETHER DUNCAN'S ALLEGATION THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING THE JURORS FROM HIS TRIAL IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

The circuit court addressed the instant claim, subclaim XI below, and concluded:

> Mr. Duncan claims that Florida's prohibition on post-trial juror interviews without judicial permission violates his right to due process. Mr. Duncan alleges no facts specific to his case which suggest a basis for authorizing any such interviews. Because it could have been raised on direct appeal, this claim is procedurally barred.

(R, 1777).

In addition to being procedurally barred[9], Duncan concedes that this argument is without merit. (AB, 77). Given the procedural bar, and consequent failure to exhaust, the State contends that the instant argument fails to preserve any issue for further review.

ISSUE IV

WHETHER DUNCAN'S CUMULATIVE ERROR ARGUMENT IS COGNIZABLE IN THE INSTANT ACTION?

Statement of the Issue

The State restates the issue because Duncan's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Standard of Review

The standard of review applied in reviewing a trial court's application of the law to a Florida Rule of Criminal Procedure 3.850 motion following an evidentiary hearing is two-pronged: "'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de

[9]Ragsdale v. State, 720 So. 2d 203, 205 (Fla. 1998).

novo.' Bruno v. State, 807 So.2d 55, 62 (Fla.2001)." State v. Lewis, 27 Fla. L. Weekly S1032 (Dec. 12, 2002).

Argument

Duncan argues that he did not receive the fundamentally fair trial to which he is entitled under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AB, 81). However, Duncan's argument to this Court was never raised below and is, thus, procedurally barred. Thomas v. State, 28 Fla. L. Weekly S106 (Fla. Jan. 30, 2003). Further, Duncan's argument must fail for the reasons previously stated.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court reverse that portion of the trial court's order granting Duncan a new penalty phase proceeding.

Regarding Duncan's claims before this Court, the State respectfully requests, based on the foregoing discussions, that this Honorable Court otherwise affirm the trial court's order denying relief.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Leslie Anne Scalley, Assistant CCC, and Kevin T. Beck, Assistant CCC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, by MAIL on April ____, 2003.

Respectfully submitted,

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_____

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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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