IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-145

DONN DUNCAN,

Petitioner,

v.

JAMES V. CROSBY,
Secretary,
Florida Department of Corrections,

Respondent.

and

CHARLIE CHRIST,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Duncan was deprived of the rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PCR." –post conviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Duncan has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at

issue. Mr. Duncan, through counsel, urges the Court to permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Duncan's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Duncan. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwriqht, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwriqht, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition demonstrates, Mr. Duncan is entitled to habeas relief.

PROCEDURAL HISTORY

Donn Duncan was charged by indictment with one count of first degree murder and one count of aggravated assault. Mr. Duncan plead not guilty to both charges and requested a jury trial. Mr. Duncan was tried from May 20 to May 23, 1991. On May 23, 1991, the jury found Mr. Duncan guilty as charged on both counts. On July 1, 1991, the penalty phase was held and the jury recommended that Mr. Duncan be sentenced to death. On August 30, 1991, the trial court sentenced Mr. Duncan to death.

Mr. Duncan filed a timely Notice of Appeal. Appellate counsel filed a brief raising 3 issues: 1) proportionality; 2)due process violation when the state introduced improper evidence, including a gruesome photograph of Mr. Duncan's prior second degree murder conviction; and 3) the trial court erred in denying special requested jury instructions. The state cross-appealed the trial court's consideration of 3 mitigating circumstances: Mr. Duncan was under the influence of alcohol at the time of the crime, Mr. Duncan was under the influence of an extreme mental or emotional disturbance at the time of the murder, and Mr. Duncan's ability to conform his conduct to the requirements of the law was substantially impaired. This Court affirmed Mr. Duncan's convictions and death sentences, holding that the death sentence was proportional, the trial court did not err in not giving the special requested penalty phase instructions, and

that the introduction of the gruesome photograph was harmless error. Duncan v. State, 619 So.2d 279 (Fla.1993). This Court also granted the state's cross-appeal, holding "the record is devoid of *any* evidence supporting the challenged circumstances" Id. at 283. Justice Kogan dissented in part with an opinion, in which Justice Shaw concurred:

> After viewing the challenged photograph in this case, I cannot agree that simply because no further reference was made to the photograph it did not become a focal point in the sentencing proceedings. The photograph is so inflammatory that I cannot say beyond a reasonable doubt that it did not contribute to the jury's recommendation. *State v. DiGuillo*, 491 So.2d 1129, 1138 (Fla.1986). Because I believe the admission of the challenged photograph was harmful, I would vacate the sentence of death and remand for a new sentencing hearing before a newly empaneled jury and would decline to address Duncan's proportionality at this time.

Duncan, So.2d at 284-85. The United States Supreme Court denied certiorari. Duncan v. Florida, 510 U.S. 969 (1993).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the

judgment of this Court during the appellate process and the legality of Mr. Duncan's death sentence.

This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Duncan's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Duncan to raise the claims presented herein. See, e.g., Way v. Duqqer, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwriqht, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief is proper on the basis of Mr. Duncan's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Duncan asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. DUNCAN'S CONVICTIONS AND SENTENCES.

1. Introduction.

Appellate counsel had the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result". Wilson v.

Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

"Obvious on the record" constitutional violations occurred during Mr. Duncan's trial which "leaped out upon even a casual reading of the transcript", yet appellate counsel failed to raise those errors on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

2. Appellate counsel's failure to raise a clear Nixon error was ineffective assistance of counsel.

In opening statement, before any evidence was presented, defense counsel told they jury that Mr. Duncan was guilty of murder, denying Mr. Duncan his Sixth and Fourteenth Amendment rights to due process and the effective assistance of counsel:

> One thing we'll concede at this point, Donn Duncan did, in fact, take the life of Debbie Bauer on December 29 of 1990. The question you're going to have to decide is was what degree of murder are we talking about? First degree murder or something less? That's the only real issue in this case.

(R. 515).

During initial closing argument, defense counsel pleaded Mr. Duncan to the offense of second degree murder, explaining to the jury, element by element, that Donn Duncan was guilty.

> 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).

> **If you should find, as you should find from the evidence, Donn Duncan is guilty of murder in the second degree**, you'll not be trivializing the life of Deborah Bauer. He will not be going scot free. He will not be rejoicing that he got the lesser sentence. **What it will be is the correct verdict in this case.**

(R. 774).

> **Defense in this case does not want anything less than what the evidence shows. We want justice to be done.** But, ladies and gentlemen, justice has got to be done with what the state can prove beyond all reasonable doubt. As of this point in time, they have not proven first degree murder, because they have not proven it was premeditated. What they have done is speculated as to what might have happened when he might have had the knife and all those other things. Where all the evidence points to sudden bursts of anger, going outside and stabbing her, **it would not be a miscarriage of justice for you to come back with a second degree murder**.

(R. 794). Counsel's arguments were the functional equivalent to a guilty plea, requiring a record inquiry of whether Mr. Duncan knowingly and voluntarily consented to this strategy. No such inquiry appears on the record.

In Nixon v. State, 572 So.2d 1336 (Fla.1991), this Court addressed, *on direct appeal*, the question of whether Nixon's counsel's concession of guilt was ineffective assistance of counsel, when no such inquiry appeared on the record. In Nixon, defense counsel argued in opening statement:

> In this case, there won't be any question that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Id. at 1339. In closing, Nixon's counsel told the jury:

> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

The only difference between the arguments this Court addressed in Nixon and those given in Mr. Duncan's case, is that Nixon's counsel did not confuse first and second degree murder. In Mr. Duncan's case however, counsel told the jury that Mr. Duncan was guilty of second degree murder but then explained the elements of second degree murder, *telling the jury it was first degree murder.*

> [S]econd 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). Thus, the same error that forced this Court to remand Nixon's case occurred in Mr. Duncan's case.

This case is distinguishable from those decided by this Court *after* Mr. Duncan's direct appeal which hold that argument amounting to a plea to a lesser crime is not per se ineffective assistance of counsel. In Atwater v. State, defense counsel's concession of guilt to second degree murder was "made only in rebuttal to the State's closing argument". Atwater v. State, 788 So.2d 223, 231-32 (Fla.2001)("At no point during the opening statement or during any of the testimony did defense counsel concede Atwater's guilt.. . . *In response, then, and in rebuttal closing argument*, defense counsel addressed premeditation and argued that the evidence *might* support the lesser offense of second degree murder, but there was nothing to support premeditation." (emphasis added)). In Mr. Duncan's case, the argument was not "made only in rebuttal to the State's closing argument" that the evidence *might* support the lesser offense, it was made conclusively in opening statement and in the initial closing argument. In Brown v. State, "defense counsel made the tactical decision to argue during the guilt phase for a conviction of the lesser offense of armed trespass, rather than armed burglary, which would enable Brown to avoid a first degree murder conviction. As to premeditation, Chalu presented the defense that Brown did not have an intent to kill when he entered the house where the victim was sleeping and

encountered her there, and thus he was guilty *at most* of second degree murder." Brown v. State, 755 So.2d 616, 629-30 (Fla.2000)(emphasis added). In Lawrence v.State , 27 Fla. L. Weekly, S877 (Fla.2002), defense counsel argued to the jury, "[a]nd we told you that you will find Lawrence guilty of something, and we never disputed that. But that something should not be first-degree premeditated murder. That something should be *either second-degree murder or manslaughter*." (emphasis added). 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).

There is a difference between merely attacking the element of premeditation and actively arguing, element by element, that the evidence proved the elements of second (or first) degree murder and therefore, required a conviction. It is precisely this distinction that the Eleventh Circuit noted in McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984).

> McNeal claims the attorney's statements amounted to a guilty plea entered without his consent, relying on a Sixth Circuit case, Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). Wiley is distinguishable from the case at bar. There the attorney repeatedly stated that his clients were guilty of the offenses charged, that the state had proven their guilt,

> but requested that the jury show leniency. Id. at 644-45. In the case at bar, McNeal was being tried for first degree murder. His attorney did not state that McNeal was guilty of murder. Instead, he stated that "at best" the government had proven only manslaughter because they did not prove premeditation. The majority of his defense case centered around this proposition. During the trial, his attorney tried to establish a self-defense claim. In view of the tape recorded confession played at trial, however, such a defense did not play a central role.

McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984). There is a distinction between a conclusive argument by defense counsel that his client is guilty of a crime included within the crime charged on one hand, and an argument criticizing the state's case as "at best" amounting to proof of a lesser included offense. The record in this case shows that defense counsel's argument fell within the former category, and was thus proscribed by Nixon.

Counsel's concession of guilt had the same effect as the concession in Nixon. Accordingly, because there is no record inquiry of whether Mr. Duncan knowingly and voluntarily consented to this strategy, there was a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" which is per se ineffective assistance of counsel. Nixon, 572 So.2d at 1339, citing cases, United States v. Cronic, 104 S. Ct. 2039 (1984); see e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981)

(petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied; People v. Hattery, 109 Ill. 2d 449, 488 N.E.2d 513 (Ill. 1985) (defense counsel is per se ineffective where counsel conceded defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 106 S. Ct. 3314 ((1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C. 1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 106 S. Ct. 1992 (1986); see also Harvey v. Duggger, 656 So.2d 1253, 1256 (Fla. 1995); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). Defense counsel's concession of guilt denied Mr. Duncan due process, a fair trial, and a right to a jury verdict under the Fourteenth Amendment to the United States Constitution. In addition, defense counsel's concession of guilt denied Mr. Duncan effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Strickland v. Washington, 466 U.S. 668 (1984). Appellate counsel's failure to raise this issue in Mr. Duncan's direct appeal was ineffective assistance of counsel.

Reasonable appellate counsel would have raised this claim on appeal. In this case, we have an example of "reasonableness under prevailing professional norms"

upon which to judge appellate counsel's performance. Strickland v. Washington, 466 U.S. at 688. Nixon's appellate attorney raised the same issue in Nixon's direct appeal. When appellate counsel submitted Mr. Duncan's brief appealing his convictions and sentences, Nixon, as well as all of the supporting cases cited therein, had been decided. Nixon, 572 So.2d at 1339. "Where, as here, appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so." Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001).

3. Appellate counsel's failure to raise on direct appeal the reversible error caused by the introduction of improper evidence was ineffective assistance.

During the state's penalty phase case in chief, the state presented Orange County Sheriff Dan Nazarchuck, who testified to double hearsay statements.

> Q. Did the defendant Donn Duncan make any statements to you concerning any prior criminal record?
>
> A. Yes, he did.
>
> Q. What statement did he make?
>
> A. That he had a prior conviction for murder.
>
> Q. In the course of your investigation, did you as a representative of law enforcement become aware that Carrieann Bauer indicated Donn Duncan made certain statements right after or, you know, within minutes after

Deborah Bauer's stabbing?

A. Yes.

Q. And those statements would be, would have included, "I hope you die"?

MR. LORINCZ: I object, your Honor.

MS. SEDGEWICK: In what way?

(Counsel approached the bench, and the following proceedings were had outside the hearing of the jury)

MR. LORINCZ: Although the rules of evidence are relaxed in this type of proceeding, I think we're going, the state is going beyond the bounds of propriety; that witness testified in this matter, there was testimony of the statement that they were afraid.

This is just once again repetitive, a rehash of testimony that's already been entered in this case.

MS. SEDGEWICK: I have – well, I don't know your, what your legal objection is.

What's the legal objection?

MR. LORINCZ: I put it on the record ma'am.

MS. SEDGEWICK: Impropriety? I am questioning this witness, and what I'm establishing is what Carrieann Bauer told law enforcement concerning the defendant's statements, there's actually a remarkable similarity to what he said in 1969, after killing Willie Davis.

That goes directly to – the defense is asking

about whether or not he's, whether or not he has the ability to comprehend the criminality of his conduct. Both of these cases he clearly, he understood the criminality of the conduct.

I'm establishing by identifying the statement, that is Carrieann in no way could have had any idea what he said back in 1969; that he truly said those.

The similarity, I want to establish they knew about the statements and they were recorded before law enforcement ever found the details of his case in Marion County.

MR. LORINCZ: That doesn't –

MS. SEDGEWICK: It makes it clear there was no hankey-pankey about the similarity of the statements.

MR. LORINCZ: That does not address the issue of it being repetitive testimony which has already been presented.

MS. SEDGEWICK: **I am allowed to go into these things on the sentencing**.

THE COURT: Okay.

MS. SEDGEWICK: I have to have him identify what statements his testimony is going to be about.

THE COURT: Okay.

Mr. LORINCZ: The other thing, she was leading the witness.

MS. SEDGEWICK: I can ask him to repeat the statements. I was just trying to move it along.

> THE COURT: Sustain the object as to leading.
>
> As far as the other objection, repetitious is an objection at the discretion of the court.
>
> I think the time lag between the testimony that was given at the trial and **the purpose the prosecutor wants to introduce the statements, at this time, I think its appropriate**.
>
> It would not be appropriate to sustain an objection based on that. So I'll overrule that objection.
>
> (In open Court, in the jury's presence.)
>
> BY MS. SEDGEWICK:
>
> Q. Detective Nazurachuck, could you tell us the statements that Carrieann Bauer was to advise you during the course of the investigation that Donn Duncan had made after the stabbing of her mother?
>
> A. Something to the effect, do you want some of this, of this, bitch. Then said I hope you die, bitch. I did this on purpose. I'll sit here and wait for the police.
>
> Q. Now, at the time that you became aware of Carrieann Bauer's testimony as to what Donn Duncan said and as to his exact words, did you, as far as, you know, or any local representative of law enforcement have any information as to the details of the old Marion County case?
>
> A. I was not aware of any details until much later.

(R. 924-26). Not only was this double hearsay improperly admitted because the state

did not show that Carrieann Bauer was unavailable[1], it was improper anticipatory rebuttal for a mitigating circumstance for which no evidence had been or ever was presented. Duncan v. State, 619 So.2d at 283 ("the record is *devoid* of *any* evidence supporting the challenged circumstances")(emphasis added).

In Maggard v. State, 399 so.2d 973, 977-78 (Fla.1981), this Court reversed a death sentence when the trial court allowed the state, over defense objection, to present anticipatory rebuttal evidence to a mitigating factor of which Maggard waived reliance and presented no evidence. "Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist." Id. In Fitzpatrick v. State, 490 So.2d 938 (Fla.1986), this Court found ineffective assistance of appellate counsel and reversed a death sentence when an attorney neglected to raise a Maggard-type error on appeal.

> [A]ppellate counsel neglected to argue that the trial court had erred in allowing the state to present evidence rebutting the existence of a statutory mitigating circumstance before the defense had presented any evidence of such factor. . .. While appellate counsel challenged the death sentence and the sentencing procedure on numerous grounds, he did not argue that the trial court erred in allowing anticipatory rebuttal. . . .The extant legal principle announced in

[1]See e.g. Rodriguez v. State, 753 So.2d 29, 44-46 (Fla.2000)(citing cases).

> *Maggard*, which was decided before the time for submitting briefs and argument in petitioner's case, provided a clear basis for a compelling appellate argument. The erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor reliance upon which had been waived by the defense in effect allowed the state to present improper circumstances in aggravation.. . .Having found deprivation of a full and meaningful appeal we proceed to consider the point of appeal in question. We find that allowing anticipatory rebuttal of the mitigating circumstance was error under *Maggard v. State.* We therefore reverse the sentence of death and remand for a new sentencing proceeding before a new jury specially empaneled for this purpose.

Id. at 939-40.

At the time of his direct appeal, Mr. Duncan's case was in an indistinguishable posture. The trial court erred in allowing the state to present anticipatory rebuttal of the statutory mitigator that Mr. Duncan's ability to appreciate the criminality of his conduct was substantially impaired *before* Mr. Duncan presented any evidence of the mitigating circumstance. Like Fitzpatrick, Mr. Duncan presented absolutely no evidence of that mitigator. As this Court noted, *"the record is devoid of any evidence supporting the challenged circumstances*." Duncan v. State, 619 So.2d at 283 (emphasis added). Moreover, the state had no reason to anticipate that any evidence of the mitigating circumstance would be presented because the defense witness list listed only 3 witnesses: 1) Mr. Duncan's sister, Una Liebig; 2) Terry Brown at

Industrial Labor Service; and 3) Sarah Martin, Mr. Duncan's friend's sister (R. 1270-72). None of the people the defense listed were mental health experts, and none were present ant the time of the crime (R. 929-61 (entire penalty phase defense)). The extant legal principle was announced in Maggard and re-affirmed in Fitzpatrick, both of which were decided years before the time for submitting briefs and argument in Mr. Duncan's case. Maggard and Fitzpatrick provided a clear basis for a compelling appellate argument. The erroneous permitting of anticipatory rebuttal by the state directed at a statutory mitigating factor, of which the defense presented no evidence and listed no relevant witnesses, in effect, allowed the state to present improper circumstances in aggravation. The anticipatory rebuttal of the mitigating circumstance was error under Maggard and Fitzpatrick, and appellate counsel failed to raise the error on appeal.

4. Appellate counsel was ineffective for not raising on direct appeal the prejudicial violation of Mr. Duncan's due process rights to a fair trial that occurred when the state presented the cumulative spectacle of a witness re-enacting the crime with a dummy.

The state presented three eye witness who testified that they saw Mr. Duncan stab Deborah Bauer. First, Carrieann Bauer described the stabbing (R. 533-40). During Carrieann's testimony, the state entered into evidence photographs of the crime scene, the knife used, and other knives (R. 540-45). Second, Antoinette Blakely

described the stabbing (R. 588-90). Finally, the state presented Richard Ferguson, who also described the stabbing in excruciating detail (R. 716-21).

After Mr. Ferguson described the stabbing, the state brought out a dummy and asked Mr. Ferguson to attack the dummy as he saw Mr. Duncan attack the victim.

> Q. What – during the stabbing, what was Deborah Bauer doing?
>
> A. She was screaming and trying to block the blows with her leg and arm.
>
> Q. Do you believe that, based upon what you saw, you could demonstrate for the jury what you saw, the way the stabbing occurred?

(R. 721). Defense counsel objected to the re-enactment, "[h]e has described the way she was stabbed with very specific clarity. We would only say this is noting more than repetitive testimony, and also nothing more than trying to inflame the jury with demonstration as to what's already been very clearly depicted in what he's said and his actions and demonstrations on the stand." (R. 721-22). Defense counsel also argued that "its probative value is far outweighed by its prejudicial value, especially in light of the fact that he has demonstrated and spoken with clarity as to how the actions occurred (R. 722). The trial court overruled defense counsel's objection (R. 723).

The state then set up the dummy as if it were the victim, and Mr. Ferguson again described the stabbing while re-enacting the events:

> Q. And then what did he do?
>
> A. Stood up to her and went probably a lot harder, that's why I thought he was punching her, because he hit her so hard. Then after that, he just sort of pulled her back like this, her legs straight out a bit like this – and the chairs a bit cumbersome for demonstration – and as he pulled her back right about here –
>
> MR. LARR: Your Honor, so he doesn't hurt himself, I would ask he can go ahead and do it on the floor.
>
> THE WITNESS: Okay. He swung around like this and at the same time, kept on hitting her, and she was kicking around, trying to block with the elbow and her leg, trying to block the blows, and it was just like boxer went around the blocks. She really didn't have a chance. He hit her arm a couple times.

(R. 723-26). Permitting this prejudicial and cumulative spectacle was an abuse of discretion, and appellate counsel failed to raise this error on appeal.

In Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994), the First District Court of Appeals found reversible error, in part, resulting from the prosecutor's use of a similar demonstrative aid. The prosecution used a surrogate victim and clay heads during the medical examiner's testimony Id. at 1134.

> We conclude the use of demonstrative exhibits in this case exceeded the standard contemplated in *Brown*. There was no dispute to the cause of death or the number of blows struck. The nature of the demonstration, and the distinctly feminine appearance of the clay heads used by the medical examiner to explain the blows, was certain to evoke an

> emotional response in the minds of the jurors. . . .The use of the surrogate victim is even more troubling. . . .any probative value the demonstration could have had was outweighed by the prejudicial impact of this appeal to the emotions of the jurors.

Id.

The use of demonstrative exhibit in Mr. Duncan's case likewise exceeded the standard contemplated in Brown. There was no dispute to the cause of death or the number of blows struck. Prior to Mr. Ferguson's first rendition of the stabbing, two other witnesses described it, and the state displayed slides of the victim taken during the autopsy while the medical examiner detailed each wound[2] (R. 656-84). Duplicate photographs of the slides were introduced into evidence (R. 679) The nature of the demonstration, a man wrestling with a dummy on the courtroom floor, after presentation of the gruesome slides, was certain to evoke an emotional response from the jury. Any probative value the demonstration could have had was outweighed by the prejudicial impact of this appeal to the jury's emotions.

5. Prejudice.

Appellate counsel's failures to raise the above arguments on direct appeal prejudiced Mr. Duncan. As this Court specifically held, Mr. Duncan's capital trial was

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[2]These slides were so gruesome that one juror fainted and was excused from further service (R. 666-77).

not error-free.

> We agree with Duncan that the prejudicial effect of this gruesome photograph clearly outweighed its probative value. Section 90.403, Fla.Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted the extensive injuries suffered by the victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan plead guilty to and was convicted of a violent felony had been introduced. As explained above, there was also extensive testimony from Captain Stephens explaining the circumstances of the prior murder and the nature of the injuries inflicted. Although we agree that it was error to admit the challenged photograph, we find the error harmless beyond a reasonable doubt.

Duncan, 619 So.2d at 282.

At the time of Mr. Duncan's appeal, this Court had held that "constitutional errors, with rare exceptions, are subject to harmless error analysis". State v. DiGuilio, 491 So.2d 1129, 1134 (Fla.1986). This Court had also held that harmless error analysis "requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition and even closer examination of the impermissible evidence which might have possibly influenced the verdict." Id. at 1135. Once error is found, it is presumed harmful unless the state can prove beyond a reasonable doubt

that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable probability that the error contributed to the [verdict]". DiGuilio, 491 So.2d at 1138. Accordingly, reasonable competent performance obligated counsel to raise and address all "of the impermissible evidence which might have possibly influenced the verdict" to hold the state to its burden of proof. Id; Fitzpatrick v. State, 490 So.2d 938 (Fla.1986). Counsel had "a duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland, 466 U.S. at 688. Appellate counsel failed to do so. Had appellate counsel addressed the errors that occurred when defense counsel essentially pleaded Mr. Duncan guilty to second degree murder or, depending on the jury's reliance on counsel's argument, first degree murder, when the trial court committed reversible error by allowing the state to present anticipatory rebuttal evidence during the penalty phase, and the prejudicial display of a grown man attacking a dummy on the courtroom floor, with the prejudicial effect of the gruesome photograph, there is a reasonable probability that the outcome of the appeal would have been different. Strickland, 466 U.S. at 688. See Fitzpatrick v. State, 490 So.2d 938 (Fla.1986)("Having found deprivation of a full and meaningful appeal we proceed to consider the point of appeal in question. We find that allowing anticipatory rebuttal of the mitigating circumstance was error under *Maggard v. State.* We therefore reverse the sentence of death and remand for a new sentencing

proceeding before a new jury specially empaneled for this purpose.") Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001)("Where, as here, appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so.")

CLAIM II

MR. DUNCAN'S DEATH SENTENCE VIOLATES HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE DID NOT HAVE A CONSTITUTIONAL JURY VERDICT ON EACH ELEMENT OF THE CAPITAL OFFENSE.

This Court has held that this claim has no merit, however, it is raised herein to preserve the issue for future review.

In Ring v. Arizona, 122 S.Ct. 2428 (2002), the United States Supreme Court overruled Walton v. Arizona, 497 U. S. 639 (1990), "to the extent that . . . [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Id. at 2443. Ring mandates that capital sentencing must comply with the Sixth and Fourteenth Amendment rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] ... to a penalty *exceeding* the maximum he would

receive if punished according to the facts reflected in the jury verdict alone.'" Ring, at 2432 quoting *Apprendi*, 530 U.S. at 483. "Capital defendants, no less than non-capital defendants,"are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id.

This rule renders Mr. Duncan's death sentence unconstitutional because he did not receive a constitutional jury verdict, due to the trial court's illegal instructions, on the aggravating element of his capital offense. Throughout his capital trial from voir dire to penalty phase jury instructions, Mr. Duncan's jury was told that their recommendation was simply advisory, and that the trial judge, not the jury, was responsible for the sentence imposed which, under Florida law, was conditioned on the finding of an aggravating circumstance. Fla. Sta. 921.141 (1989). Before the jury left to deliberate on their recommendation, the trial court instructed them: "as you've been told, the final decision as to what punishment be [sic] imposed is the responsibility of the judge." (R. 1025).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held that, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". Id. at 328-29. Likewise, it is constitutionally impermissible to rest a verdict on a

determination made by a jury who has been led to believe that the responsibility for determining the appropriateness of the verdict rests elsewhere. Mr. Duncan did not have a jury verdict, within the meaning of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and his death sentence, therefore, is unconstitutional.

CLAIM III

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

Mr. Duncan did not receive the fundamentally fair trial and direct appeal to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Duncan' trial, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Mr. Duncan' 3.850 motion, 3.850 appeal, and in his direct appeal.

Had appellate counsel addressed the errors that occurred when defense counsel essentially pleaded Mr. Duncan guilty to second degree murder or, depending on the

jury's reliance on counsel's argument, first degree murder, when the trial court committed reversible error by allowing the state to present anticipatory rebuttal evidence during the penalty phase, and the prejudicial display of a grown man attacking a dummy on the courtroom floor, with the prejudicial effect of the gruesome photograph–error that this Court found, there is a reasonable probability that the outcome of the appeal would have been different. Strickland, 466 U.S. at 688.

While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted Mr. Duncan' trial and direct appeal. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Duncan his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Duncan respectfully urges this

Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to all counsel of record on this ____ day of January, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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