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.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM I

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

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

Respondent argues Jones v. State, 2003 WL 297074 (Fla. Feb. 13, 2003), is conclusive of this issue: "Here, as in Jones v. State, 2003 WL 297074 (Fla. Feb. 13, 2003), Duncan's counsel conceded guilt to second degree murder as a trial strategy intended to save Duncan's life. 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." (Response at 5). Like the other cases cited in Mr. Duncan's initial brief, this case is clearly distinguishable. In Jones, counsel told the jury that Jones killed the victims, read the jury the *correct* definition of second degree murder, and then argued:

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

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

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

> The evidence, ladies and gentlemen, indicates that Mr. Duncan is guilty of second degree murder. Should also go through what that is so you'll have an idea when you discuss the evidence, how to apply the evidence to that.
>
> I believe that the court will instruct you that **second degree murder has the same first two elements as premeditated murder. First degree murder, however, the last element is that there was an unlawful killing of Deborah by an act imminently dangerous to another, and evincing a depraved mind, regardless of human life. And they go on to describe an act as one imminently dangerous to another and evincing a depraved mind, regardless of human life**.
>
> **If it is an act or series of acts that a person of ordinary judgment would know is reasonably certain to kill or do serious injury to another, and is, two, done from ill will, hatred, spite, or an evil intent. And, three, that it is of such a nature that the act indicates an indifference to life.**

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

Duncan was guilty of both (R. 766).

Additionally, Respondent cites Jones and Atwater v. State, 788 So.2d 223, 231-32 (Fla.2001), as authority to deny this claim, forgetting to note that both Jones and Atwater are not directly on point. Both Jones and Atwater were 3.850 appeals and involved matters outside of the record, which could not have been raised on direct appeal.[1] Additionally, neither Jones nor Atwater had been decided at the time of Mr. Duncan's direct appeal and Nixon, a direct appeal case, was the relevant authority from this Court.

Respondent argues a Nixon claim would have been meritless because "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" (Response at 5). Even if this were true, it is not a basis to deny relief. In fact, the majority of the cases cited in Mr.

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[1]Given the fact that a Nixon claim will ultimately involve facts outside of the record, it might be more appropriately raised in a motion for post-conviction relief. However, Nixon was a direct appeal case and it was precedent from this Court at the time of Mr. Duncan's direct appeal. For that reason, it is an example of appellate counsel's failure to raise a violation of an extant legal error with all other error, including the introduction of the gruesome photograph, so this Court could determine that "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984),"*confidence* in the correctness and fairness of the result has been undermined." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985) (emphasis in original); Duncan v. State, 619 So.2d 279, 282 (Fla.1993)("[W]e agree that it was error to admit the challenged photograph").

Duncan's petition which found ineffective assistance of counsel involved eyewitnesses and confessions. In People v. Hattery, 488 N.E.2d 513 (Ill. 1985), the court found ineffective assistance of counsel for conceding guilt even though Hatterly gave a statement to the state attorney admitting that he cut one victim's wrist, strangled her, and then undressed her, and then strangled an infant. Id. at 514-16. In State v. Harbison, 337 S.E.2d 504 (N.C. 1985), there was one eye witnesses and the defendant confessed to two different people and testified at his trial. State v. Harbison, 238 S.E. 449, 476-51 (N.C.1977). In Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995), the Eleventh Circuit found ineffective assistance of counsel though Harvey "gave a statement in which he admitted his involvement in the Boyds' murders." Harvey v. State, 529 So.2d 1083, 1085 (Fla.1988). In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), the Eleventh Circuit again found ineffective assistance of counsel despite the fact that Spraggins gave a statement to authorities admitting his involvement. Spraggins v. State, 243 S.E.2d 20, 22 (Ga.1978). Most relevantly, in Nixon, this Court remanded the case even though witnesses identified Nixon with the victim's property, Nixon's brother testified that "Nixon admitted killing a white woman by tying her with jumper cables and burning her," and a taped confession, in which Nixon admitted to murdering the victim, was played to the jury. Nixon v. State, 572 So.2d 1336, 1337 (Fla.1991).

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

Respondent argues the illegal anticipatory rebuttal was properly admitted because "Sara Martin testified that Duncan had told her about his drinking problem" and Una Liebig "testified about Duncan's abuse of drugs and alcohol", supporting the mitigating circumstance that Mr. Duncan's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (Response at 7). Respondent forgets to note however, that neither witness testified that they saw Mr. Duncan at the time of the crime or that he was under the influence of drugs or alcohol at the time of the crime. Thus, this testimony could not have established the mitigator. 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) Una Liebig; 2) Terry Brown at Industrial Labor Service; and 3) Sarah Martin (R. 1270-72). None of the people the defense listed were mental health experts, and none were present at the time of the crime or the night before the crime (R. 929-61 (entire penalty phase defense)).

Respondent also argues: "Duncan is apparently relying on the argument that "if the evidence was insufficient to establish the statutory mitigator, then there was no evidence." (Response at 7, no internal citation). Apparently, Respondent did not

read this Court's direct appeal opinion carefully. On direct appeal, this Court did not hold that there was insufficient evidence to support this mitigator, this Court held: **"the record is *devoid* of any evidence supporting the challenged circumstances.**" Duncan v. State, 619 So.2d at 283 (emphasis added). As such, the anticipatory rebuttal allowed the state to present improper nonstatutory circumstances in aggravation. Maggard v. State, 399 so.2d 973, 977-78 (Fla.1981); Fitzpatrick v. State, 490 So.2d 938 (Fla.1986).

In addition to being repetitive and improper, the introduction of anticipatory rebuttal nonstatutory aggravation was fundamental error which starkly violated the Eighth and Fourteenth Amendments and prevented the constitutionally required narrowing of the sentencer's discretion. Maynard v. Cartwright, 486 U.S. 356, 358 (1988). The United States Supreme Court upheld Florida's capital sentencing scheme as one which requires the sentencers to consider only the statutory aggravating circumstances. Proffitt v. Florida, 428 U.S. 242 (1976). However, by using illegal anticipatory rebuttal, prosecutor encouraged the jury to render a death sentence based on nonstatutory aggravating circumstances, rendering Mr. Duncan's death sentence freakish, wanton, arbitrary, capricious, and standardless, in violation of the Eighth and Fourteenth Amendments. Godfrey v. Georgia, 446 U.S. 420, 427 (1980). Whether as improper, repetitive, or fundamental error, Maggard and Fitzpatrick provided a clear

basis for a compelling appellate argument, and appellate counsel was ineffective for not raising this error on direct appeal.

3. 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.

Respondent's argument: "Although the witness's demonstration would have, of course, *duplicated his own testimony* as he was demonstrating that testimony, it was not cumulative of the testimony of the other eyewitnesses", proves Mr. Duncan's point and must fail (Response at 9). If, as Respondent admits, Ferguson's demonstration "duplicated his own testimony", it was necessarily cumulative and not relevant.

Further, even if the spectacle of a man wrestling with a dummy on the courtroom floor could be considered relevant, it was inadmissible under Florida law. Florida Statute 90.403 provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Fla. Stat. §90.403. This Court has held that when such a re-enactment is offered into evidence, "the trial court must be ever mindful that the "artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful

impression made upon the minds of the jurors by this kind of evidence, it should be received with caution." Cave v. State, 660 So.2d 705, 708 (Fla.1995) quoting Grant v. State, 171 So.2d361, 363 (Fla.1965). This evidence was clearly cumulative; it had already been presented through the testimony of three eye witnesses, slides, and photographs. Any possible relevance of Ferguson's re-enactment was outweighed by the unfair prejudice caused by the forceful impression left on the minds of the jurors. Id. The trial court erred in permitting this evidence, the issue was preserved, and appellate counsel's failure to raise this issue on direct appeal was deficient performance which prejudiced Mr. Duncan, especially in the State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), harmless error analysis.

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.

Respondent argues that Ring v. Arizona, 122 S.Ct. 2428 (2002), is not retroactive (Response at 10). Although Respondent seems to recognize that the retroactivity analysis this Court uses was explained in Witt v. State, 387 So.2d 922 (Fla.1980), Respondent cites to cases which hold that Ring is not retroactive under the

analysis set forth in Teague v. Lane, 489 U.S. 288 (1989). The Teague analysis is based on federal habeas corpus law, considerations of federal comity towards state court decisions, and is vastly different from the analysis this Court explained in Witt. Accordingly, the cases following the Teague analysis are neither relevant nor controlling.

Citing to a First District Court of Appeals opinion regarding the effect of Apprendi v. New Jersey, 530 U.S. 466 (2000), on a sentencing guidelines case, Respondent also argues that Ring does not meet the Witt criteria for retroactive application because it is not a decision of "fundamental significance". While the First District might consider Apprendi not to be of fundamental significance in a sentencing guidelines case, the same logic cannot survive Ring and the death penalty context. As several members of this Court have noted, Ring is a decision of fundamental significance. Justice Shaw wrote in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), that Ring "goes to the very heart of the constitutional right to trial by jury". Bottoson, 833 So.2d at 717 (Shaw, Justice, concurring in result only). Justice Lewis wrote that Ring "set forth a new constitutional framework" Id. at 725 (Lewis, Justice, concurring in result only). Justice Quince wrote, "[b]y referring to the sentence that a defendant may receive based on the jury verdict only, the Court seems to have turned that concept of statutory maximum on its head." Bottoson, 833 So.2d at 701 (Quince,

Justice, concurring). In King, Justice Parriente noted that the Sixth Amendment right to a jury trial in the penalty phase was "unanticipated" by prior law, and that Apprendi, upon which Ring is based, "inescapably changed the landscape of Sixth Amendment jurisprudence." King v. Moore, 831 So.2d 143, 149 (Fla.2002).

Respondent also argues that, even if Ring were to apply retroactively in Florida, it would not affect Mr. Duncan's case because his death sentence rests on a prior violent felony aggravator. It is clear however, that any recidivist exception that might have once existed did not survive Apprendi and Ring. In Almendarez-Torres v. United States, 523 U.S. 224 (1998), the United States Supreme Court held, in a 5-4 decision, that recidivism was an exception to the constitutional rule that any fact that increases the maximum punishment from that authorized by the jury's verdict is an element of an offense which must be charged in an indictment. Id. The narrow majority based this decision on what it termed a "tradition" of treating recidivism as a sentencing factor rather than an element of an offense. Id. Four Justices dissented, noting that the majority opinion was inconsistent with the Court's jurisprudence emanating from In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Id. at 249-260. They noted that because the fact of recidivism substantially increased the maximum permissible punishment, it was an element of the crime. Id. The dissent further contended that recidivism was not traditionally a

sentencing factor because, at common law, "the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime. Id. at 261 (internal citations omitted).

The next term, in Jones v. United States, 526 U.S. 227 (1999), the Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). The Court noted that several features of the statute at issue in Jones distinguished that case from Almendarez-Torres. Jones, 526 U.S. at 232. The Court noted that Almendarez-Torres was not conclusive of the question presented in Jones for two reasons. First, Almendarez-Torres involved only the rights to indictment and notice, while Jones also implicated the Sixth Amendment right to jury trial. Jones, 526 U.S. at 248-49. Second, the Court noted, "the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." Id. at 249. The Court did not address the issue of whether the holding of Almendarez-Torres could survive a Sixth Amendment challenge.

The next term, in Apprendi v. New Jersey, the Court held that the Fourteenth

Amendment affords citizens the same protections announced in Jones under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000). Again, the issue of whether the holding of Almendarez-Torres could survive a Sixth Amendment challenge was neither raised nor decided. In his concurrence however, Justice Thomas, one of the Almendarez-Torres majority, revisited the issue. Explaining that Apprendi was "nothing more than a return to the *status quo ante*–the status quo that reflected the original meaning of the Fifth and Sixth Amendments", Justice Thomas explained that the recidivism exception announced in Almendarez-Torres was an error. Apprendi, 530 U.S. at 519-20. Justice Thomas affirmed the Almendarez-Torres opinion that, at common law, prior convictions which increased the punishment for a crime were elements of a new, aggravated crime. Id. Thus, the holding of Almendarez-Torres is no longer the view of the majority. See Sattazahn v. Pennsylvania, 123 S.Ct. 732, 739-40 (2003)(Justice Renquist, who dissented in Ring, joined Justices Scalia and Thomas in extending the principles announced in Ring to the Double Jeopardy Clause of the Fifth Amendment.)

The United States Supreme Court has never addressed the issue of whether Almendarez-Torres (which implicated only the Fifth Amendment indictment and notice clause) can survive challenge under the Sixth and Fourteenth Amendments, and the Court specifically did not address the issue in Ring. However, the Court's other decisions indicate that Almendarez-Torres cannot survive a Sixth Amendment

challenge. First, as discussed above, the Almendarez-Torres majority is now a minority. Second, Jones, Apprendi, and Ring mark a return to the common law and the principles announced in Winship and Mullaney. Consistent and, in fact implicit, in this jurisprudence, is the fact that the majority of the Supreme Court believes that any *fact* that increases the maximum possible punishment for a crime beyond that authorized by the jury verdict is an element of the offense subject to the Sixth Amendment's jury trial guarantees. Third, the Eighth Amendment mandates that capital punishment is subject to special protections. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). Justice Breyer, who authored the Almendarez-Torres majority opinion, concurred in Ring because "the Eighth Amendment requires individual jurors to make, and take responsibility for, a decision to sentence a person to death." Ring, 122 S.Ct. at 2446-48. (BREYER, J., concurring). Surely, in light of that opinion, his Almendarez-Torres opinion could not survive Eighth and Sixth Amendment challenges in a capital context.

Further, relying upon a prior violent felony "exception" to Ring is unconstitutional under Florida's capital sentencing scheme. Florida Statute 921.141(3) requires three findings before a person is eligible for the death sentence. The sentencer

must find: (1) the existence of at least one aggravating circumstance, (2) that "*sufficient* aggravating circumstances exist" to justify imposition of the death penalty, and (3) that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3). As Justice Lewis and the State of Florida have acknowledged, a jury override cannot survive Ring. See Bottoson, 833 So.2d at 728; Answer Brief of the Appellee in Ault v. State, No.SC00-863 at 63 ("In Florida, only a defendant in a jury override case has any basis to raise an *Apprendi* challenge to Florida's death penalty Statute."). If the jury override cannot survive Ring, neither can the prior violent felony be an exception to Ring under Florida's death penalty scheme. See Jenkins v. State, 692 So.2d 893, 895 (Fla.1997) (This Court reversed a jury override because the jury could have given little weight to the prior violent felony aggravator; under Florida's scheme the jury could have determined that the prior violent felony aggravator was not "sufficient" to make Mr. Jenkins eligible for the death sentence.)

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 Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

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

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