IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Petitioner,

vs. **CASE NO. SC03-1774**

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

Respondent.
_____/

RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW JAMES V. CROSBY, Secretary, Florida Department of Corrections (hereafter, the State), by and through undersigned counsel, and hereby responds as follows to Mungin's Amended Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

Mungin's appeal from the denial of postconviction relief is pending in this Court (Case No. SC03-780). The State's brief in that case sets out a detailed procedural history and statement of the facts, which will not be repeated herein. In his habeas petition, Mungin raises three claims: (1) appellate counsel was ineffective for failing to complain about the introduction of hearsay testimony at the penalty phase of Mungin's trial; (2) this Court should reconsider its ruling on direct appeal that

Mungin's conviction for first degree murder could be sustained on a felony murder theory; and (3) Florida's capital sentencing procedures violate Ring v. Arizona, 536 S.Ct. 584 (2002).

PRELIMINARY DISCUSSION OF APPLICABLE LAW

There are a number of well-settled principles applicable to habeas corpus proceedings filed in this Court. The State will discuss them at this juncture and then elaborate to the extent necessary in its responses to specific claims.

First, this Court has repeatedly stated that capital habeas corpus proceedings were not intended as second appeals of issues which could have been or were presented on direct appeal or in a rule 3.850 proceeding. E.g., Jones v. Moore, 794 So.2d 579 (Fla. 2001); Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999); Hildwin v. Dugger, 654 So.2d 107, 111 (Fla. 1995); Hardwick v. Dugger, 648 So.2d 100, 105 (Fla. 1994); Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Medina v. Dugger, 586 So.2d 317 (Fla. 1991).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (emphasis supplied). To prevail on such a claim, a defendant must show that his attorney's performance was

professionally deficient and that he was prejudiced by that deficiency. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). In other words, "Petitioner must show 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). This Court recently summarized these principles:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

> Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). See also Haliburton [v. Singletary], 691 So.2d 470 [(Fla. 1997)]; Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994). The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. See Knight v. State, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Id. at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. See Medina v. Dugger, 586 So.2d 317 (Fla. 1991); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State, 761 So.2d 1055, 1069-70 (Fla. 2000).

Generally, appellate counsel cannot be considered ineffective for failing to raise issues that were not preserved by trial counsel, unless "trial counsel was so obviously inadequate that appellate counsel had to present that question to render adequate assistance." Page v. U.S., 884 F.2d 300, 302 (7th Cir. 1989). See e.g., Provenzano v. Dugger, 561 So.2d 541, 548 (Fla. 1990) ("Trial counsel did not object . . ., thereby precluding an effective argument on appeal"); Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989) (appellate counsel not ineffective for failing to raise claims as "not properly preserved for

appeal by trial counsel, thus precluding appellate review"); Downs v. Wainwright, 476 So.2d 654, 657 (Fla. 1985)("appellate counsel cannot be considered ineffective for failing to raise issues which he was procedurally barred from raising because they were not properly raised at trial").

In addition, "appellate counsel is not ineffective for failing to raise a claim that would have been rejected on appeal." Downs v. State, 740 So.2d 506, 517 n. 18. Accord, Freeman (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (same); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984)(appellate counsel "need not brief issues reasonably considered to be without merit"). In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable non-frivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(appellate counsel not required to argue all non-frivolous issues, even at request of client). Accord, Provenzano, 561 So.2d at 548-49 ("it is well established that counsel need not raise every nonfrivolous issue revealed by the record"); Atkins v.

Dugger, 541 So.2d at 1167 ("the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points").

Nor can appellate counsel be deemed ineffective if the habeas claim, or a variant thereof, was, in fact, "raised on direct appeal," Atkins v. Dugger, supra, 541 So.2d at 1166-67. Accord, Provenzano, supra, 561 So.2d at 548 (no ineffective assistance where appellate counsel raised the claim on appeal, but it was rejected); Jones v. Moore, supra ("habeas is not proper to argue a variant of an already decided issue"). So long as appellate counsel raised the issue on appeal, mere quibbling with or criticism of the manner in which appellate counsel raised such issue on appeal is insufficient to state a habeas-cognizable issue. Jones; Thompson v. State, 759 So.2d 650, 657 n. 6 (Fla. 2000).

Finally, a claim that has been resolved in a previous review of the case is barred as "the law of the case." See Mills v. State, 603 So.2d 482, 486 (Fla. 1992). Thus, claims properly raised and rejected in a previous rule 3.850 motion for post-conviction relief cannot be raised again on habeas. See Scott v. Dugger, 604 So.2d 465, 469-70 (Fla. 1992).

SPECIFIC RESPONSE TO CLAIMS

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE ON APPEAL THAT CERTAIN TESTIMONY AT THE PENALTY PHASE WAS INADMISSIBLE HEARSAY OR WAS ADMITTED IN VIOLATION OF MUNGIN'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES

Mungin argues that his appellate counsel was ineffective for failing to litigate on appeal the admissibility of Tallahassee police officer Cecil Towle's penalty phase testimony setting forth Meiha Wan Tsai's description of the Tallahassee shooting/robbery, and the admission of two photographs showing her injuries.[1] With respect to Meiha Wan Tsai's statements, Mungin argues that his Sixth Amendment right of confrontation applied to sentencing at the time of his trial, and that under the law in existence at the time of his appeal, the admission of Meiha Wan Tsai's statements through Towle's testimony violated his constitutional right of confrontation. He

[1] As noted in this Court's opinion on direct appeal and in the State's brief on appeal from the denial of Mungin's consolidated amended motion for postconviction relief, two days before Mungin shot and killed Betty Jean Woods during a robbery in Jacksonville, Mungin had shot and robbed William Rudd in Monticello and had shot and robbed Meihu Wan Tsai in Tallahassee. The jury learned of these two prior shootings at the guilt phase, when they were introduced to prove identity. Additional evidence of the circumstances of these two shootings was introduced at the penalty phase, in support of the prior violent felony aggravator. Mungin v. State, 689 So.2d 1026, 1028 (Fla. 1995).

further argues that Towle's testimony is inadmissible under the standard announced in the recent case of Crawford v. Washington, 541 U.S. 36 (2004). Finally, he argues that the two photographs were irrelevant and inadmissible.

Initially, the State would note that trial counsel did not object to Towle's testimony on constitutional right-of-confrontation grounds. The only objection at trial was "hearsay." Thus, no constitutional confrontation issue was raised at trial, or preserved for appeal. Appellate counsel cannot be deemed ineffective for failing to raise and argue an unpreserved claim. E.g., Atkins v. Dugger, supra.

Furthermore, appellate counsel cannot be deemed ineffective for failing to raise a claim that would have been rejected on direct appeal. E.g., Downs v. State, supra. This was not a case in which the State presented hearsay testimony about a statement by a co-defendant, as was the case in Engle v. State, 438 So.2d 803 (Fla. 1983) and Walton v. State, 481 So.2d 1197 (Fla. 1985). Nor was this a case in which defense counsel was precluded from cross-examining the witness who presented the out-of-court statement, as was the case in Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

The settled law of this State at the time of Mungin's trial and appeal was that "it is appropriate to introduce details of a prior violent felony conviction in the form of hearsay testimony so long as the defendant has a fair opportunity to rebut." Bowles v. State, 804 So.2d 1173, 1184 (Fla. 2001).[2] That is what happened here. Because any confrontation issue would have been rejected on direct appeal, appellate counsel was not ineffective for failing to raise the issue.

To the extent that Mungin argues that, even if this testimony were admissible at the time of trial, it no longer is under Crawford, the State would reiterate that the confrontation clause issue is one that could and should have been raised at trial. That Crawford had not been decided at the time of his trial does not excuse the failure to raise this issue at trial, or afford Mungin the opportunity to litigate his confrontation claim on the merits for the first time in this habeas proceeding.

The confrontation clause issue raised and addressed in Crawford has been raised and addressed many times, as the many cases cited in Crawford amply demonstrate. The very existence of these earlier decisions (and, as well the

[2] In fact, that appears to be the rule today. Fitzpatrick v State, 30 Fla.L.Weekly S269 (Fla. January 27, 2005)

state confrontation clause decisions cited in Mungin's petition) demonstrates that the confrontation issue is not new or novel, and the perceived futility of such a claim prior to Crawford cannot serve as an adequate excuse for ignoring the procedural bar or allow Mungin to litigate a constitutional confrontation issue on its merits for the first time on state habeas.[3] Bousley v. United States, 523 U.S. 614, 623 (1998) ("futility cannot constitute cause [for failing to raise a claim] if it simply means that a claim was unacceptable to that particular court at that particular time"); Turner v. Crosby, 339 F.3d 1247, 1281-82 (11th Cir. 2003) (perceived futility of claim prior to Ring decision cannot excuse failure to raise claim earlier).

Even if Mungin's "Crawford" claim were not procedurally barred, Mungin cannot rely on Crawford because his conviction and sentence were final long before Crawford was decided, and that decision is not retroactive, as at least two federal circuit courts of appeal have held. Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004); Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005).

[3] The State would note that any issue of ***trial*** counsel's ineffectiveness for failing to raise a constitutional confrontation claim at trial could and should have been raised, if at all, in Mungin's circuit court motion for postconviction relief. He raised no such claim.

Finally, a proper contemporaneous objection would not only have give the trial court notice of the basis for the objection, but also would have provided the State with a fair opportunity to establish a basis for the admissibility of the testimony under the confrontation clause.[4]

For example, the State would note that federal courts have long recognized the principle of forfeiture by misconduct. See United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004). Crawford does not eliminate this "equitable" exception to the hearsay rule; on the contrary, it explicitly approves it. 541 U.S. at 62. Thus, if Mungin's own act of shooting Meihu Wan Tsai in the head was responsible for her return to her native country and her absence from trial, the State would contend that he forfeited his right to confront her as a witness, regardless of his motive in shooting her. United States v. Garcia-Meza, 403 F.3d 364, 370-71 (6th Cir. 2005) ("regardless" of defendant's intent, he cannot "benefit through his own wrongdoing" in rendering witness unavailable).

[4] Alternatively, had Mungin contended in his circuit court postconviction proceedings that trial counsel was ineffective for failing to object on confrontation grounds to this testimony, that issue could have been resolved by evidentiary hearing.

Aside from any procedural bar, however, and even assuming, arguendo, that Crawford applies to capital sentencing, despite prior case law from the U.S. Supreme Court, which Crawford does not overrule, noting with approval the "wide latitude" of evidentiary rules at capital sentencing proceedings,[5] Mungin still cannot demonstrate reversible error as he cannot demonstrate prejudice. Mungin pled guilty to the attempted murder of Meihu Wan Tsai and to armed robbery. The State's introduction of a certified copy of that conviction (penalty phase exhibit 4) itself conclusively establishes the prior violent felony aggravator. In addition, the prior violent felony aggravator was established by the introduction of a certified copy of Mungin's conviction for the attempted murder of William Rudd and the robbery of Rudd's store (Penalty phase exhibit 3) (as to the circumstances of which Rudd also personally testified). Thus, any confrontation error in admitting Towle's testimony was harmless. Hudson v. State, 708 So.2d 256, 261 (Fla. 1998); Tompkins v. State, 502 So.2d 415, 420 (Fla. 1986).

[5] See, e.g., Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (rejecting defendant's objection to "the wide scope of evidence and argument allowed" at capital sentencing proceedings in Georgia).

As for the two photographs, Mungin notes that trial counsel objected to them and argues that appellate counsel should have complained about their introduction on appeal. The State offered two photographs of Meihu Wan Tsai, one showing her right hand with a charred contact wound to her middle finger, and the other showing her in the emergency room just before being treated for her wounds (TR 1130). The State offered the two photographs to identify the victim, who had returned to her native China, and to show that the shot had been fired at close range as she had described to detective Towle (TR 1131).

Mungin's claim that appellate counsel "unreasonably" failed to raise the issue of the admissibility of these photographs on appeal is answered by Dufour v. State, 30 Fla.L.Weekly S247, in which this Court stated:

> Dufour next contends that appellate counsel should have challenged on appeal the admission of irrelevant and unfairly prejudicial photographs at trial. At the penalty phase hearing, the State attempted to introduce four photographs of the victim of the Mississippi murder Dufour had committed to assist in explaining to the jury the nature and manner in which the wounds were inflicted. The defense objected to introduction of the pictures. The trial court sustained the objection with regard to two of the photographs and allowed the State to present the other two photographs. One photo displayed the condition of the victim from his mid-torso down his entire body, and the second picture showed the victim's right hand, chest and abdominal area, demonstrating the defensive wound on the right

hand and numerous other stab wounds in the chest area. At the time the photographs were taken the blood had been cleared from the torso of the victim's body.

In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is admissible during the penalty phase of a capital trial. See id. at 1204-05; see also Duncan v. State, 619 So.2d 279, 282 (Fla. 1993). However, this Court cautioned that there are limits on the admissibility of such evidence, emphasizing that "the line must be drawn when [evidence of the circumstances of the prior offense] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." Rhodes, 547 So.2d at 1205. The relevant question is whether the trial judge abused his discretion in admitting the photographs. See Nixon v. State, 572 So.2d 1336, 1343 (Fla. 1990). This Court has previously held: "The test for admissibility of photographic evidence is relevancy rather than necessity." Rivera v. State, 859 So.2d 495, 510 (Fla. 2003) (quoting Pope v. State, 679 So.2d 710, 713 (Fla. 1996)); see also Provenzano v. Dugger, 561 So.2d 541, 549 (Fla. 1990) ("Photographs must only be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy.").

In Duncan, this Court agreed that the prejudicial effect of a gruesome photograph clearly outweighed its probative value. See Duncan, 619 So.2d at 283. In doing so, this Court stated:

> 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 pled 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.

Duncan, 619 So.2d at 282. However, the Duncan Court found the error in admitting the photographs harmless beyond a reasonable doubt. See id.; see also DiGuilio, 491 So.2d at 1129. In concluding the error was harmless, the Court stated that once admitted, no further reference was made to the photograph, the photograph was not urged as a basis for a death recommendation, the photograph was not otherwise made a focal point of the proceedings, and the jury was well aware of the fact that Duncan had previously been convicted of the brutal attack and murder of another person. See Duncan, 619 So.2d at 282.

In the present case, the photographs were introduced during the penalty phase to assist Mayfield in describing what the pathologist determined to be the nature and cause of the victim's death in the Mississippi murder. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984) ("Photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted."). These photographs were relevant because they related to Dufour's prior felony conviction, and evidence concerning the circumstances of a prior felony conviction is admissible during the penalty phase. See Rhodes, 547 So.2d at 1204. Even if not relevant, admission of the photographs at issue would not have provided a basis for reversible error on appeal because the admission was harmless and the photos do not create the circumstance that the risk of prejudice outweighed the relevancy. See Provenzano, 561 So.2d at 549 ("Photographs must only be excluded when they demonstrate something

> so shocking that the risk of prejudice outweighs its relevancy."); see also Rivera, 859 So.2d at 510-11. Accordingly, this claim is denied.

As in Dufour, the photographs were relevant because they concerned the circumstances of a prior felony conviction, and corroborated testimony and statements describing how that crime had occurred. The photographs were not particularly gruesome or shocking (the victim, after all, survived the shooting), and it cannot be claimed that the probative value of these photographs outweighed their potential for prejudice. In any event, any error in their admission would have been deemed harmless. Dufour. Appellate counsel need not raise every conceivable claim on appeal. Provenzano, supra ("well established that counsel need not raise every nonfrivolous issue revealed by the record"). Mungin's appellate counsel filed a 99-page brief raising nine important issues, many of which had several sub-issues, and many of which Mungin was so impressed with he has reprised them in his state motion for postconviction relief and on appeal from the denial of postconviction relief. Mungin's appellate counsel cannot be deemed ineffective for deciding to focus on the many issues he did raise and not to complain about these photographs on appeal.

CLAIM II

MUNGIN'S CLAIM THAT HIS MURDER CONVICTION MAY NOT BE AFFIRMED ON A FELONY MURDER THEORY WAS RAISED AND REJECTED ON DIRECT APPEAL; IT MAY NOT BE RELITIGATED ON HABEAS

On direct appeal, citing Griffin v. United States, 502 U.S. 46 (1991), this Court held that error in instructing the jury on both premeditated and felony murder was harmless because "the evidence supported [Mungin's] conviction for felony murder and the jury properly convicted Mungin of first-degree murder on this theory." Mungin v. State, 689 So.2d 1026, 1029-30 (Fla. 1995). Mungin now seeks to relitigate this claim, arguing that this Court was confused when the issue was before it on direct appeal. The State would note that this Court's ultimate conclusion on this issue was arrived at only after considerable argument by both parties, each of whom filed motions for rehearing addressing this specific issue. This Court's ultimate resolution of the claim, arrived at only after careful and deliberate consideration and full briefing by both parties, is now the "law of the case." Mills v. State, supra. Mungin is not entitled to a second appeal of this claim. Johnson v. State, 30 Fla.L.Weekly S215 (Fla. March 31, 2005) ("Issues raised and rejected on

direct appeal are not cognizable through collateral attack.").

This claim should be denied.

CLAIM III

THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING PROCEDURES WAS NOT PRESERVED AT TRIAL AND IS NOT ADDRESSABLE HERE; MOREOVER, BECAUSE RING V. ARIXONA IS NOT RETROACTIVE, AND FOR OTHER REASONS, HIS "RING" CLAIM IS MERITLESS

The State will not belabor this claim. Mungin does not even argue ineffective assistance of appellate counsel for failing to contest the role of judge versus jury in Florida's capital sentencing procedures. He merely presents a direct merits arguments based on Ring v. Arizona, 536 U.S. 584 (2002). As such, this is not an appropriate claim for habeas corpus relief. Furthermore, not only does the prior violent felony aggravator in this case take it outside any possible ambit of Ring (Dufour, supra), but this Court has now expressly held that Ring is not retroactive. Johnson v. State, 30 Fla.L.Weekly S297 (Fla. April 28, 2005) ("we now hold that Ring does not apply retroactively in Florida"). Thus, Mungin is entitled to no relief on this claim, and it should be denied.

CONCLUSION

For the foregoing reasons, Mungin's habeas petition should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

CURTIS M. FRENCH
Senior Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Todd G. Scher, Law Offices of Todd G. Scher, P.L., 5600 Collins Avenue #15-B, Miami Beach, Florida 33140, this 27th day of May, 2005.

_____

CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

This habeas response was produced in Microsoft Word, using Courier New 12 point, a font which is not proportionately spaced.

_____

CURTIS M. FRENCH
Senior Assistant Attorney General