IN THE SUPREME COURT OF FLORIDA

ALLEN W. COX

Petitioner,

v. CASE NO. SC06-40

JAMES V. CROSBY, JR.

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of Cox's conviction and sentence, Cox v. State, 819 So. 2d 705, 709-10 (Fla. 2002) (footnotes omitted):

> On February 5, 1999, a grand jury indicted Appellant, Allen Ward Cox, for premeditated murder and battery which occurred in a detention facility. The charges against Cox resulted from a chain of events within the Lake Correctional Institute ("LCI") that culminated in the death of Thomas Baker and an assault upon Lawrence Wood. At trial, the State presented the testimony of numerous corrections officers and inmates

regarding the circumstances surrounding the murder of Baker, who was also a LCI inmate. On December 20, 1998, the appellant discovered that someone had broken into his personal footlocker and stolen approximately $500. Upon making this discovery, Cox walked out onto the balcony of his dorm and announced that he would give fifty dollars to anyone willing to identify the thief. He also indicated that when he discovered who had stolen from him, he would stab and kill that person, and that he did not care about the consequences.

During the prison's lunch period on December 21, the appellant called Baker over to him, and then hit him with his fists to knock him down. During the attack, the victim continuously attempted to break free from Cox, and also denied stealing from him multiple times. At a lull in the beating, the appellant said, "This ain't good enough," and stabbed Baker with an icepick-shaped shank three times. After the stabbing, Appellant walked away stating, "It ain't over, I've got one more . . . to get." He then walked behind the prison pump house and hid the shiv in a pipe. Cox proceeded from the pump house to his dorm, where he encountered Donny Cox (unrelated to the appellant). There, Appellant questioned him about his stolen money and told him that if Cox had his money, he would kill him also. Following this exchange, the appellant returned to his cell, where he next attacked his cellmate, Lawrence Wood, advising him that Wood was "lucky I put it up, or I'd get [you]."

While the appellant was returning to his cell, the stabbing victim fled the attack scene and ran to corrections officers in a nearby building. The officers present at the time testified at trial that Baker had blood coming from his mouth, and that he was hysterically complaining that his lungs were filling with blood. Baker also responded to the prison officials' questions regarding who had attacked him by saying, "Big Al, Echo dorm, quad three." Although the corrections officers attempted to expedite emergency treatment of the victim by placing him on a stretcher and carrying him on foot to the prison medical center, Baker died before arriving at the hospital.

Doctor Janet Pillow testified that upon her autopsy of the victim, she found that the victim had been stabbed three times. Two of the wounds inflicted

were shallow punctures of the lower torso, but the fatal wound had entered the victim's back and traveled through the chest cavity, between two ribs, and finally pierced the lungs and aorta. She testified that a conscious person with this wound would suffer from "air hunger," and would be aware of the "serious danger of dying." She described the wound as being approximately 17.5 centimeters deep, although only two millimeters wide. Doctor Pillow verified that the shank found by the pump house was consistent with the victim's injuries, despite the fact that the wound was deeper than the length of the weapon. She attributed the discrepancy between the length of the weapon and the depth of the wound to the elasticity of human tissue.

The appellant also testified, contending that all of the previous witnesses were correct, except that they had not seen what truly happened when he, Baker, and Vincent Maynard, a third inmate, were close together. According to Cox, it was he who had in fact dodged Baker and Maynard's attempts to stab him, and it was Maynard who actually stabbed Baker in the back accidentally. In Cox's version of the events, he had only struck the victim because he was defending himself from both of the other attacking men. Following the conclusion of the guilt phase testimony and argument, the jury deliberated, apparently rejected the view of the evidence offered by Cox, and found the appellant guilty of first-degree murder.

After hearing the penalty phase testimony presented by both the defense and the prosecution, the jury deliberated and recommended a sentence of death by a vote of ten to two. Following a Spencer, 615 So. 2d 688 hearing, the trial court followed the jury's recommendation and sentenced Cox to death, finding four aggravating circumstances. While the court found no statutory mitigating factors, it found and considered numerous non-statutory mitigators.

On direct appeal to this Court, Petitioner raised the following issues in his 99-page Initial Brief:

POINT I: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING A DISCOVERY VIOLATION IN

THE MIDDLE OF TRIAL THAT RESULTED IN A DENIAL OF A FAIR TRIAL.

POINT II: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE A WITNESS VIOLATED THE TRIAL COURT'S ORDER IN LIMINE WHEN HE TOLD THE JURY THAT APPELLANT WAS ALREADY SERVING TWO LIFE SENTENCES.

POINT III: THE TRIAL COURT'S CONTRAVENTION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.202 RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

POINT IV: THE TRIAL COURT ERRED IN REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO HIS PRIOR VIOLENT FELONY CONVICTIONS IN CONTRAVENTION OF OLD CHIEF V. UNITED STATES RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

POINT V: FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR REPEATEDLY MISSTATED THE LAW DURING VOIR DIRE AND ENGAGED IN IMPROPER ARGUMENT THEREBY TAINTING THE JURY'S DEATH RECOMMENDATION.

POINT VI: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER TIMELY OBJECTION AND FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

POINT VII: THE TRIAL ERRED IN INSTRUCTING THE JURY AND FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

POINT VIII: THE TRIAL COURT ERRED IN FAILING TO CONSIDER AVAILABLE MITIGATING EVIDENCE AND IN GIVING LITTLE WEIGHT TO VALID MITIGATION BASED ON A MISTAKE OF LAW.

POINT IX: THE DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE FACTS SURROUNDING THE MURDER AND THE SUBSTANTIAL MITIGATION WEIGHED AGAINST THE VALID AGGRAVATION.

> ISSUE X: FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

This Court affirmed the conviction and sentence in Cox v. State, 819 So. 2d 705 (Fla. 2002). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court. His petition was denied on January 13, 2003, Cox v. Florida, 537 U.S. 1120 (2003).

Petitioner pursued postconviction relief, and after conducting an evidentiary hearing, the lower court concluded that Petitioner had failed to substantiate his claims. Relief was denied and the appeal is pending before this Court in Cox v. State, Case No. SC05-914. Petitioner's habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial

counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's argument is based on appellate counsel's alleged failure to raise an issue that would not have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present this claim. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). The United States Supreme Court has recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is

not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002).

CLAIM

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A NONMERITORIOUS CLAIM ON DIRECT APPEAL.

Petitioner argues that appellate counsel was ineffective for failing to raise an issue on direct appeal regarding trial counsel's failure to obtain Petitioner's consent before admitting in opening statement that he committed the homicide.[1] Petitioner's argument is without merit as a clear review of the record on appeal establishes that trial counsel never conceded Petitioner's guilt during the opening statement. Thus, appellate counsel cannot be faulted for failing to raise a frivolous issue on direct appeal.

[1] Petitioner also raised this claim in his postconviction proceedings as a claim of ineffective assistance of trial counsel. See Answer Brief of Appellant at 44-49, Cox v. State, Case No. SC05-914.

During his opening statement, defense counsel Jeffrey Higgins[2] set forth the defense theory that the State would be unable to prove its case beyond a reasonable doubt. (DAR V14:956-72). Petitioner cites to the following portion of trial counsel's opening statement in support of his argument that counsel "conceded" Petitioner's guilt:

> The purpose of correctional officers in many situations is to protect inmates from themselves and from each other. But in this particular situation there wasn't a guard within sight of this crime. If there had been a guard there, quite possibly Venezuela would have lived. **The fight could have been broken up before it escalated to the point where Venezuela ended up dying**.
>
> . . .
>
> As Mr. McCune told you, there were two far less serious stab wounds to Venezuela's lower half; once in the groin area and once in the butt, on one side, I don't remember if it was the left side or the right side, but once in the butt. Certainly not a lethal wound. Neither one of them was particularly lethal.
>
> The one serious wound was the wound that Mr. McCune talked about, on the left-hand side, just below the shoulder blade, between the seventh and eighth ribs, one wound. Not a lot of blood.
>
> As far as the medical care goes, Venezuela was able to get up, **and if Venezuela was able to get up, given the difference in size between the two men, it's only because Allen let him**.

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[2] Petitioner asserts in his petition that "Higgins' concessions appear to be errors made by inexperienced counsel not qualified to handle death penalty cases." Petition for Writ of Habeas Corpus at 5. Obviously, appellate counsel was not aware of Higgins' qualifications at the time of the direct appeal, as this issue only came to light at the postconviction evidentiary hearing. Furthermore, as noted in the State's brief in the postconviction proceedings, the issue of Mr. Higgins' qualifications is without merit. See Answer Brief of Appellant at 39-40; 47-48, Cox v. State, Case No. SC05-914.

(DAR V14:962-63) (emphasis added). The following day, the prosecuting attorney, William Gross, brought to the court's attention the case of Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), and suggested that the court conduct a Nixon inquiry of the defendant. (DAR V15:1111). The following exchange then took place:

> THE COURT: Based on what I heard, I am trying to remember everything I heard.
> Mr. Stone [defense counsel], do you think that is an issue at this point?
> MR. STONE: I don't know what he is referring to in the opening statements. It's not an issue, as far as I am concerned.
> THE COURT: Could you be more specific if you think it's appropriate, Mr. Gross.
> MR. GROSS: I can tell you that as I understood Mr. Higgins' argument, the Defense conceded that the defendant was the person who attacked and killed Mr. Baker.
> **MR. STONE: Not at all.**
> MR. GROSS: If that's not true, then I must not have been listening very carefully.
> **MR. STONE: No, sir. That wasn't the gist of the opening statement.**
> MR. GROSS: I guess, my bad, as they say.
> **THE COURT: I heard him talk about what lack of evidence and what prison folks saw, et cetera, et cetera. But I never heard him admit that Mr. Cox stabbed the victim**.

(DAR V15:1111-12). As defense counsel and the trial court stated, defense counsel never conceded Petitioner's guilt during opening statements. The defense theory during the case was that Petitioner was in a fight with the victim, but the fatal stab wound was inflicted by another inmate. This theory was made

clear via defense counsel's questioning of the witnesses, Petitioner's own trial testimony, and the argument of defense counsel in both opening and closing arguments. On the face of the record, it is clear that trial counsel did not concede Petitioner's guilt. Accordingly, Appellate counsel was not ineffective for failing to raise a frivolous issue on direct appeal. See Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994).

Even had appellate counsel raised this issue on appeal, he would not have obtained relief. The comments made in Nixon were much different than those in the instant case. In Nixon, this Court addressed an ineffective assistance of counsel claim based on trial counsel's concession of guilt at the trial without an express waiver from the defendant on the record. This Court found that trial counsel's concession that there was no question whatsoever that his client was responsible for the murder was the "functional equivalent of a guilty plea," and stated that such a concession requires a defendant's affirmative, explicit acceptance, without which counsel's performance is *per se* ineffective under the standard set forth in United States v. Cronic, 466 U.S. 648 (1984). Nixon, 758 So. 2d at 620-24. The court remanded the case to the lower court for an evidentiary hearing on the issue of Nixon's consent to the strategy. Id. at

625. On appeal from the remand, this Court reversed for a new trial because there was no evidence of the defendant's acquiescence to the strategy. Nixon v. State, 857 So. 2d 172 (Fla. 2003).

The United States Supreme Court unanimously reversed this Court's subsequent Nixon decision. Florida v. Nixon, 543 U.S. 175 (2004). The Court noted that although an attorney has a duty to consult with his client regarding important decisions, that obligation does not require counsel to obtain the defendant's consent to every tactical decision. The Court found that Nixon's attorney fulfilled his duty of consultation by informing Nixon of his proposed strategy of conceding guilt, but counsel was not required to obtain Nixon's express consent before conceding his guilt. Furthermore, the Court noted the narrow applicability of the Cronic exception and found that defense counsel's concession of Nixon's guilt did not rank as a failure to function in any meaningful sense as the Government's adversary. The Court made clear, "if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." Nixon, 543 U.S. at 192.

As previously noted, trial counsel did not concede Petitioner's guilt to the offense. Trial counsel acknowledged that a fight had occurred between Petitioner and the victim, but this was a matter that realistically could not be disputed given the fact that the fight occurred in front of hundreds of inmates during lunch on the prison yard. Furthermore, Appellant testified and admitted this fact. Clearly, trial counsel's strategy of conceding that a fight took place was a reasonable strategy given the evidence in this case. Because Petitioner would not have obtained relief even if appellate counsel had raised this issue on direct appeal, this Court should deny the instant petition.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Eric C. Pinkard, Assistant CCRC-Middle Region, Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, on this 14th day of April, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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