ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 12-2124

WILLIAM JAMES DEPARVINE,
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
THE STATE OF FLORIDA,
Respondents.
_____/

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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GROUNDS FOR RELIEF[1]

Significant errors which occurred at Mr. Deparvine'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. Deparvine. "[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. Wainwright*, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," *Barclay v. Wainwright*, 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.

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[1] Petitioner is republishing the introductory paragraph to correct scrivener's error in the Petition, to identify Mr. Deparvine as the petitioner.

CLAIM I

MR. DEPARVINE RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DUE TO COUNSEL'S FAILURE TO MAKE SPECIFIC CLAIMS REGARDING FUNDAMENTAL ERROR AND A DENIAL OF DUE PROCESS FOR CONVICTION FOR CARJACKING.

This Court never ruled whether "the indictment insufficiently described the motor vehicle that was the subject of the carjacking." *Deparvine v. State*, 995 So.2d 351, 374 (Fla. 2008). This Court specifically declined to reach the issue because "Deparvine did not attack the indictment on this ground in the trial court." *Id.*

The indictment was insufficient on its face and should have been challenged as fundamental error by appellate counsel. At the evidentiary hearing, the State presented evidence which shows de facto that "the indictment insufficiently described the motor vehicle that was the subject of the carjacking." During cross-examination of Mr. Deparvine, the State introduced a letter from Skye to Mr. Deparvine dated January 10, 2005, to support Skye's claim that his refusal to file a motion for a bill of particulars for the carjacking count was tactical. However, that letter contained additional statements establishing that Skye believed the only possible object of the carjacking was the jeep:

> I recall that you mentioned the "vagueness" problem of Count

Five, the carjacking charge, in an earlier letter. In looking into this aspect of the matter recently, I discovered that there are more substantial problems with the Indictment than the potential "vagueness" in Count Five.

Frankly, given the fact that the truck was found behind your apartment, that no evidence was recovered from the truck, and that the Van Dusens were obviously attacked while they were in the Jeep, I do not believe that there is any real question that the vehicle referred to in Count Five is, in fact, the Jeep.

State Exhibit 16, ROA 37/3081.

When Mr. Deparvine was asked about the letter in redirect, he indicated that Skye's reliance on the Jeep being the object of the carjacking continued throughout the entire representation.

> Q [Quoting from Exhibit 16] ... .I do not believe there's any real question the vehicle referred to in Count 5 is, in fact, a Jeep[.] Is that consistent with every representation he made to you throughout preparations for trial and during your discussions in that in — during trial that it was his belief that it was the Jeep?
> A Oh, yeah, yeah.

PCR 35/685-86.

Thus, defacto proof that the defense was confused by the lack of specificity in the indictment, believing from the start that the State was prosecuting Mr. Deparvine for carjacking the Jeep, a belief confirmed by the State's argument on the motion for judgement of acquittal. Not until closing argument, after the defense mounted a defense to carjacking the Jeep, after the denial of the motion for judgment of acquittal and its renewal at the close of evidence, after the jury

instructions were prepared, did the State abandon any pretense of seeking conviction for carjacking the Jeep, and directed the jury's attention solely to the truck, which fit in with the State's story of the theft of the truck.

Appellate counsel should have argued fundamental error because of the vague indictment. The Jeep was the object of the carjacking all the way until closing argument by the State. The trial court never ruled on the sufficiency of the evidence to sustain a convicting for carjacking the truck because the State argued the Jeep. The question put to the trial court, by the prosecutor's express argument, was whether there was sufficient evidence to conviction for carjacking the Jeep:"[t]he actual ... the actual taking of the Jeep is the actual carjacking." ROA 37A/3071; "To obtain that ultimate goal [of stealing the truck], he necessarily has to hijack the SUV to get back to the truck," ROA 37A/3097-98; "THE COURT: He had to carjack the SUV to do the crime of stealing the truck., PRUNER: Right."

ROA 37A/3100.

The court and the State were in accord that the truck was merely the subject of a theft, the taking of the property of another, while the additional element of robbery was present in the taking of the Jeep, raising that act to carjacking. Clearly, the trial court believed that the taking of the truck was simple theft, "the

crime of stealing the truck," the result of a ruse which did not involve taking the truck from the possession of the victims by force. Inherent in the court's statement was a ruling that after viewing the evidence in the light most favorable to the State, a rational trier of fact could not find the existence of the elements of the crime of carjacking the truck beyond a reasonable doubt, sufficient to sustain a conviction for carjacking the truck.

While this Court ruled that the evidence was sufficient to sustain a conviction for carjacking the truck, it never ruled on the fact that the indictment could only be fairly read to have charged carjacking the Jeep, that the trial court only ruled on sufficiency of the evidence to sustain carjacking of the Jeep (and inherently ruled that the evidence was insufficient for the truck), and that the jury was presented with an argument for carjacking the truck such that this Court was compelled to rule on the sufficiency of the evidence sustain a conviction for carjacking the truck.

Appellate counsel should have argued as urged in the Petition.

CLAIM TWO

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AND ARGUE THAT PETITIONER COULD NOT BE GUILTY OF CARJACKING THE TRUCK BECAUSE THE

VAN DUSENS DID NOT HAVE "CUSTODY" OF THE TRUCK AT THE TIME IT WAS ALLEGEDLY TAKEN.

On direct appeal, the appellate argument only addressed the lack of evidence as to how Mr. Deparvine came into possession of the truck. Initial Brief at 45-55; Reply Brief at 21-25. The claim here is lack of evidence that the Van Dusens had custody or control over the truck at the time of the alleged taking. Custody requires the property be sufficiently under the victim's control to have been in a position to have prevented the taking. *Jones v. State*, 562 So.2d 346 (Fla. 1995). This Court focused on the appellate argument as to Mr. Deparvine's custody when it ruled that "Whether the Van Dusens were murdered after Deparvine took possession is irrelevant since a reasonable jury could infer from the evidence that the taking was the consequence of a continuous series of acts or events all focused on the taking of the truck."

If the Van Dusens voluntarily relinquished possession of the truck, then the element of sufficient possession to have prevented the taking does not exist. The State's theory was that the Van Dusens relinquished possession based on a fraudulent scheme. Those facts would support a grand theft by fraud conviction, but that charge is not one of the enumerated crimes necessary to support a felony murder conviction.

Appellate counsel was ineffective when he failed to argue that Mr. Deparvine could not be guilty of carjacking because the State failed to prove the Van Dusens had control of the truck when they were killed.

CONCLUSION AND RELIEF SOUGHT

Petitioner requests that he be afforded a new trial, a new direct appeal, or for such relief as this Court may deem proper.

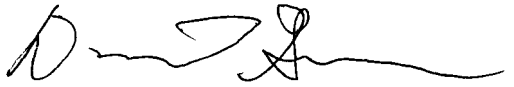
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Steven Ake at capapp@myfloridalegal.com on February 4, 2013.

/s/ DAVID GEMMER

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.



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BILL JENNINGS
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VICKI BUTTS
EXECUTIVE DIRECTOR

February 4, 2013

The Honorable Thomas D. Hall
Clerk, Supreme Court of Florida
ATTN: Tangy Williams
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: *William James Deparvine v. State of Florida*
Case No. SC12-407; SC12-2124

Dear Mr. Hall:

Enclosed for immediate filing in the above-captioned case are:

1. Original and seven copies of the Reply Brief of the Appellant, and Reply To State's Response to Petition for Writ of Habeas Corpus and a copy has also been electronically submitted to e-mail@flcourts.org on this date);

2. A copy of the first and last pages of the above-referenced document for return to CCRC-M after stamping with the date of filing;

3. A pre-addressed, stamped envelope.

Please use the enclosed envelope to return the copy of the date-stamped document to our office.

Copies have been provided to opposing counsel of record by first class mail. Thank you for your assistance in this matter.

Sincerely,

David R. Gemmer
Assistant CCRC

Enclosures

cc: Stephen D. Ake, Assistant Attorney General
William Deparvine, Client