IN THE SUPREME COURT OF FLORIDA

CURTIS W. BEASLEY,

Appellant,

v. Case No. SC06-2375
Lower Tribunal No. CF95-4842A1-XX

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Curtis Beasley was convicted of first degree murder and related offenses and sentenced to death in 1998 (V1/156-65; V2/174-82). On direct appeal, this Court affirmed the convictions and sentences imposed. Beasley v. State, 774 So. 2d 649 (Fla. 2000). This Court outlined the facts of the case as follows:

> On August 24, 1995, Jane O'Toole, who had not heard from her mother, Mrs. Monfort, for two days, traveled to her mother's home in Dundee, Florida, to make sure that she was alright. Several morning newspapers lay in their wrappers outside the house. While searching through the home, Jane found her mother's body in the blood-stained laundry room. Mrs. Monfort had been severely beaten and was dead.
>
> The last time that Jane spoke to her mother was on August 21, 1995. On that day, Mrs. Monfort, who worked in real estate, had dressed in business clothes in anticipation of her Monday morning meeting. The defendant, Curtis Beasley ("Beasley"), was there, dressed for work. Mrs. Monfort knew Beasley through her daughter's former husband, with whom Beasley had attended high school. Beasley was staying at Mrs. Monfort's house for a few days, while doing some pressure washing and painting at the Lake Marie Apartments (the "apartments"). The apartments were owned by Mrs. Monfort's son-in-law, Neal O'Toole (Jane's husband), and managed by Mrs. Monfort.
>
> Before moving into the Monfort home, Beasley had been living at Steve Benson's house. Approximately one or two months earlier, Beasley had borrowed $600 from Dale Robinson, a friend with whom he had previously resided, to place his old van back into operation to commute to and from the painting job. At this time, however, Beasley had no transportation of his own. For this reason, he had recently been staying as a guest in the Monfort home, so that Mrs. Monfort could drive Beasley to and from work at the

apartments. Dale Robinson had the impression that Beasley spent the night at Mrs. Monfort's house and remained at Benson's home during the day. In fact, on Sunday, August 20, Officer Pierson (a witness at trial) saw Beasley at Steve Benson's house, wearing a checkered "western-style" shirt during the day. However, Beasley apparently spent the night of the 20th at the Monfort home, because he was there at 8 a.m. the next morning, when the housekeeper, Mrs. Ferguson, came to clean the house. While cleaning that day, the housekeeper saw a checkered shirt lying on a wicker chest at the foot of the bed in the guest bedroom, which Beasley was using.

Later on the 21st, Jane called her mother and arranged for Beasley to help Jane move some of her grandmother's furniture. Mrs. Monfort had transported Beasley to work at the apartments at about 8:20 a.m. that day, and he returned to the Monfort home sometime in the late morning, after the housekeeper had left for the day. Jane picked Beasley up before noon (he was by himself at the Monfort home at that time), and he helped her move the furniture. In the process of this furniture move, Beasley told Jane that he would be in Alabama the following week to take care of an inheritance. He also asked Jane for some money. She replied that she had only a few dollars with her, but that her husband would pay him (for pressure washing the apartments) later. After the work had been completed, Jane drove Beasley back to the Monfort home around noon. Again, no one else was at home at that time.

The evidence demonstrated that, until 7:01 p.m. on the evening of August 21, phone calls were being made from the Monfort residence. These phone calls, including some to the United Kingdom, were made to people Beasley knew, but Mrs. Monfort did not know. A newspaper lying on the coffee table in Mrs. Monfort's living room had one of those telephone numbers written on it in Beasley's handwriting.

The evidence established that, after Mrs. Monfort had transported Beasley to the apartments on the 21st, she went to her business meeting at 9 a.m. Later that day, she met with Mr. Rosario, a prospective tenant at the apartments, at 2 p.m. At 5 p.m., she again met with Mr. Rosario at the apartments. He gave her a

deposit (first and last month's rent) in the form of eight $100 bills, and another $100 for a bedroom set which Mrs. Monfort sold to him. She wrote a receipt for the money, a copy of which appeared in the receipt book later found in her car. She left the apartments sometime between 5:30 and 5:45 p.m. That was the last time Mrs. Monfort was seen until the discovery of her body on August 24.

It was Mrs. Monfort's habit, between 6 and 8 p.m. on week days, to prepare and consume one or two drinks before dinner. These would always contain vodka and tonic, with either a lime twist or a lemon twist. When Mrs. Monfort's body was discovered, a drinking glass with a lime twist was found at her feet. Two empty tonic water bottles were in the kitchen garbage can, which the housekeeper had emptied earlier in the day. There were no other signs of food preparation in the house.

Sometime between 8:30 and 10 p.m. that night, Beasley drove Mrs. Monfort's car to Haines City to visit Dale Robinson. At that time, Beasley was driving a light-colored car (either white or blue), which he told Robinson belonged to a lady friend Beasley was working for, and at whose house he had stayed a few nights. During the visit, Beasley showed Robinson a $100 bill, offering it in partial payment of his debt. After Robinson suggested to Beasley that the money should be used to purchase some crack cocaine for them to smoke, Beasley left Robinson's house and did not return.

The next day, Beasley arrived at a bus station in Miami. He no longer had Mrs. Monfort's car with him, (FN1) and, at this point, he called the Malcolms, whom he had not contacted in over three and a half years. Although Beasley was known to Mrs. Malcolm to be a "snappy" dresser, when he arrived in Miami, he was wearing clothes that he said were "new" which looked odd together--a pair of dress shoes, a pair of jeans with no belt, and a brightly colored t-shirt. Beasley claimed to have lost his wallet, his traveler's checks, and all of his clothes on the bus. He told Mrs. Malcolm that he was vacationing in Miami after having visited unidentified friends in Fort Myers. He stayed with Mrs. Malcolm for a few days, then was permitted to stay at the house of Mr. Malcolm's mother

(Mrs. Bennis) while she was away for two weeks. During this time, phone calls began to appear on Mrs. Bennis's bill to some of the same numbers (including calls to the United Kingdom) that had appeared on Mrs. Monfort's bill on August 21. The phone numbers belonged to persons known to Beasley but not to Mrs. Bennis.

> (FN1) After Beasley had been taken into custody, Mrs. Monfort's car was eventually found in a parking lot at a Howard Johnson Hotel in Orlando, approximately two and a half miles from the bus station, and within two miles of three different locations to which telephone calls had been made from the Monfort home on August 21. The relevant telephone numbers belonged to persons known to Beasley (two attorneys and the husband of a former sister-in-law), but not known to Mrs. Monfort. The officer who responded to the call from Howard Johnson's was told that the vehicle had been there approximately two weeks. Although the car's dome light had been removed, the car was not damaged, and the odometer reflected that it had been driven very few miles since an oil change that had occurred on a date prior to Mrs. Monfort's death. The car's license plate had expired three months earlier, the doors and trunk were locked, and there was no evidence that anyone other than Mrs. Monfort and Beasley (whose cigarette butts were in the car) had been inside it.

During this period of time, Mrs. Monfort's body was discovered. She had been bludgeoned to death with a blunt instrument. Near her body was a bloody hammer head, wrapped in two dish towels. The head of the hammer protruded through the fabric of one towel. The hammer head had been broken off of its handle, which also lay near the body. Mrs. Monfort had some hairs (FN2) in her right hand. There was blood on the floor, blood splattered everywhere in the laundry room, blood splattered in the dining room near the laundry room door, and some apparent blood smeared on the laundry room door frame. An earring was found in the dining room, lying next to a table leg. Mrs. Monfort's purse was near her feet, and she was dressed

in the same business clothes she had worn to work on the morning of August 21.

> (FN2) Microscopic examination of these Caucasian human head hair fragments showed that they were consistent with the known head hair sample from Mrs. Monfort. Therefore, the hairs could have come from her. There was nothing inconsistent in any way between Mrs. Monfort's known hairs and the hair fragments. On the other hand, the hairs were microscopically different from Beasley's known head hair sample. Therefore, the hairs could not have come from him.

The medical examiner who conducted Mrs. Monfort's autopsy testified as to the injuries observed upon examination. Mrs. Monfort had been struck with a blunt object, sustaining injuries on her face and head and typical defensive injuries to the backs of both hands (bruises and abrasions), on the back of the upper arms, and on the back of the left forearm (bruises). The left half of Mrs. Monfort's face was severely injured. There was a large laceration (10 inches by 3/4 inch) extending from almost the top of her head down to her mouth. There was a large bruise on the left half of her face, and multiple lacerations in front of her left ear, on her left cheek, and in the area behind her left ear. There were bruises on both eyes and over her right cheek, and lacerations on the right half of her forehead. All of these injuries were inflicted antemortem. There was also a fracture of her cheekbone ("zygoma"), and a fracture of her left upper jaw (left "maxilla"). These were open fractures, well seen through the laceration on her face.

The lacerations on her face and head ranged in size from 3/4 by 1/4 inch up to 10 inches by 3/4 inch. There were about nine lacerations on the left side of her head and face; two more lacerations of the right aspect of her forehead; four lacerations on the back of her head, and two others behind her left ear. This made a total of fifteen to seventeen lacerations on (or blows to) Mrs. Monfort's face and head, not including those consistent with being defensive lacerations.

There was also a depressed fracture of the left temporal (skull) bone having the shape of a figure eight; each half of the shape was 1 3/4 inches in diameter, and consistent with being imposed with the round part of a hammer. Mrs. Monfort's brain was lacerated from small fragment formation in the fracture area. There were subdural subarachnoid hemorrhages under the membrane that covered the brain (contusion hemorrhages into the superficial part of the brain, or the cortex). The cause of death, in the medical examiner's opinion, was blunt trauma to the head; while a hammer could have caused the injuries, the impact pattern did not suggest whether the head or the claw end had been used.

After Mrs. Monfort's body was discovered, an investigation of the crime scene was conducted. The only rooms which appeared to have been disturbed were the dining room, the utility (or laundry) room, and the garage. The investigators testified that they did not look under the beds in either the master bedroom or the guest room. All of the beds were made, and the master bed had folded linens on it, suggesting that no one had slept in the house after the housekeeper had cleaned. Photographs of the interior of the home demonstrated that, other than the three disturbed areas, the remainder of the home appeared to be in impeccable order. The garage door was closed, and Mrs. Monfort's car was missing. The $100 bills Rosario had given to Mrs. Monfort were gone.

Beasley had also disappeared from the premises, but he had left behind a box of his business cards and a box of Doral cigarettes in the guest bedroom. He also left a shaving kit and a can of shaving cream on the back of the toilet fixture in the guest bathroom.

While the crime scene was being investigated, the home was secured, and members of Mrs. Monfort's family were not permitted to enter the house. The family members left the house at the end of the day, after the crime scene was released, but before the investigation team had completed work. Before they left, the lead detective (Detective Cash) asked family members to return to the house the next day, to attempt to identify any missing valuables. They agreed to call Detective Cash after they arrived, so that she could join them at the home.

The next day, Neal O'Toole, Bud Stalnaker (Mrs. Monfort's son) and Bud's wife (Sherry) went to the Monfort home. While looking for missing items of personal jewelry or other valuables, they found a bank bag containing money under the mattress in the master bedroom, but nothing under the bed. In the guest bedroom, Bud also looked between the mattress and the box springs, but found nothing. When he lowered himself to the floor to look under the bed, however, he observed a pair of shoes placed neatly together, with a wadded-up shirt next to the shoes. (FN3)

(FN3) At trial, Bud Stalnaker testified that he did not go near the laundry room, and did not place the shirt under the guest bed.

Detective Cash had already been contacted, and no one touched either the shoes or the shirt until she arrived at the Monfort home and was advised of the discovery made by Bud. Detective Cash and her partner went immediately into the guest room, where she reached under the bed and retrieved the shirt. She obtained a bag from her car, and when she unfolded the shirt on the bag, she discovered apparent blood on the shirt. Detective Cash then placed the shirt in the bag, and the bag in the trunk of her car.

Subsequent DNA testing on the blood taken from the shirt showed that all parameters tested were consistent (none were inconsistent) with Mrs. Monfort's blood. The testing excluded Beasley as a donor of the blood. The housekeeper identified a picture of the shirt as being the same pattern (but a little lighter) as the shirt which she had seen in the guest bedroom where other items belonging to Beasley were located on the morning of August 21. Officer Pierson identified the shirt as being the same shirt Beasley had worn when he saw him at Benson's house on August 20.

A search for Beasley was initiated from central Florida. During this time, Beasley continued to stay at Mrs. Bennis's house in Miami until he became involved in a physical altercation with Mr. Malcolm. After that, Malcolm's brother transported Beasley to a bus station in Fort Lauderdale. Beasley was eventually found in Alabama, living in a motel with Jeff Ellis. Beasley had grown a beard, and was

> working at Herndon Electric Company under the false identity of "William Benson." The signature of "William Benson" on certain electric company employment application papers was positively identified by a handwriting expert as Beasley's. When Beasley was discovered, he identified himself as Curtis Wilkie Beasley, and offered no resistance. He was placed under arrest by Officer Jones, orally advised of his Miranda rights, and transported to the Dale County, Alabama, jail. While taking a cigarette break with Officer Jones at the jail, Beasley told Jones that he knew he was in trouble because, when he had gone back to the house, it was surrounded by FBI agents. Beasley said that after he saw the FBI agents he left.
>
> Beasley was charged with first-degree murder, robbery, and grand theft of a motor vehicle. The jury convicted Beasley of all three charges. Following the penalty phase of the trial, the jury recommended death by a vote of ten to two. The trial court followed the jury's recommendation, sentencing Beasley to death for the homicide, and to concurrent terms of fifteen years and five years of imprisonment, respectively, for the robbery and grand theft convictions.

Beasley, 774 So. 2d at 653-57.

On January 17, 2002, Beasley filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 (V2/248-96). An amended motion (V2/327-V3/399) and response (V3/402-03) were filed, and a case management conference was held (V3/419-20). The court granted an evidentiary hearing on the first three claims presented in the amended motion: ineffective assistance of counsel in guilt phase; ineffective assistance of counsel in penalty phase; and

the alleged improper contact with the jury by a bailiff (V3/419-20).

The evidentiary hearing was conducted on January 9 and 10, 2006 (V3/421-V4/615). The defense presented two witnesses, Byron Hileman and Robert Norgard, both attorneys from Beasley's trial defense team. Norgard, Beasley's lead counsel, had been involved as a defense attorney in about 200 capital cases since becoming a member of the Florida Bar in 1981, and has testified as an expert in capital litigation in "probably somewhere between 12 and 15 cases" (V4/533-34; SV1/104).[1] Hileman was also an experienced capital defender, having practiced predominantly criminal defense since joining the Bar in 1977, including trying over a dozen death penalty cases (V3/427-30). Hileman represented Beasley as second chair counsel, primarily responsible for penalty phase, but also assisted with the guilt phase investigation and discovery (V3/425-26, V4/595).

Norgard and Hileman both recalled having discussed the option of retaining a crime scene or blood spatter expert, but both felt at the time that they did not need an expert to make the common sense argument to the jury that the bloody shirt could not have been deposited under the bed at the time of the

[1] Norgard's extensive experience in capital cases is outlined at length in his pre-hearing deposition, see Supp. Vol. 1, pp. 81-108, and was noted for the record at the evidentiary hearing (V4/580).

murder when the bloodstain was wet, or some indication of the blood would have been evident on the white carpet (V3/436-38; V4/543-44, 560, 597-98). Hileman testified that he felt he had been aggressive in cross examining Det. Cash about the shirt, recalling that she had been upset out in the hall after her testimony, "saying we made her look like, quote, unquote, shit" (V3/437-38).

Both Norgard and Hileman had only vague recollections about Beasley having called Mrs. Monfort from Miami after she was killed and leaving a voicemail message (V3/466-67; V4/606-07). Norgard suggested that the defense was not able to corroborate this claim (V4/606). Norgard was familiar with the case law relating to destruction of evidence and was aware that there would be no basis for any relief unless the State had acted in bad faith in losing or destroying a tape, and he has never received any information suggesting bad faith (V4/607-08).

Hileman testified extensively about the defense efforts to establish a timeline to demonstrate Beasley's actions around the time of Mrs. Monfort's murder (V3/432-36, 463, 476-88). His investigation was impeded by Beasley's refusal to identify the individual that drove him to Tampa (V3/480-83). Norgard recalled that the information Beasley provided was vague and inconsistent (V4/592-95). For example, investigator Burnham

would go to a hotel to check the records, not find anything, then Beasley would tell them to check under a different name (V4/593). According to Norgard, the defense investigator and Hileman spent a great deal of time pursuing leads that Beasley provided, and the investigation went in many different directions; despite these efforts, the defense was never able to verify or corroborate any of the information Beasley offered (V4/592-95).

Norgard and Hileman agreed that it was not necessary to call Michael Lykins to explain Beasley's DNA found in Mrs. Monfort's car (V3/464-66; V4/604-05). Norgard testified that the car was a "non-issue" since there was other testimony explaining that Beasley had been in the car with Mrs. Monfort (V4/604). Norgard noted that the jury was aware that Beasley and Mrs. Monfort knew each other, there was an innocent explanation for Beasley's cigarette having been found in the car, and the State did not emphasize or put much weight on the evidence of the cigarette (V4/604-05). Hileman recalled that the defense was able to show that the car had been abandoned in Orlando at a time when Beasley could not have left it there (V3/466).

The trial attorneys also addressed the issue of Beasley testifying at trial (V3/511-12; V4/514-22, 536-39, 585-91).

Both Hileman and Norgard thought Beasley should testify, as they believed it was important for the jury to hear from Beasley given the nature of the defense and the circumstantial evidence relied on by the State (V3/512; V4/587). The attorneys recalled having several discussions about the issue with Beasley, outlining the positives as well as the negatives involved (V3/512; V4/515, 588). Hileman also recalled having secured additional time from the court after the State rested its case in order to make a final assessment, weighing the pros and cons, and that Beasley was anxious and nervous about his decision but that ultimately Beasley's decision was firm (V4/516-19). Hileman and Norgard acknowledged Beasley's concern about being impeached with his prior convictions (V4/514, 589-90). Neither Hileman nor Norgard recalled having been rushed or denied necessary time with Beasley by the jail officials or hearing Beasley express a desire for additional time to consider the issue (V4/520-22, 539).

Following the hearing, written memoranda were filed with the court (V4/619-632). On October 5, 2006, Circuit Court Judge Cecelia Moore entered an extensive order, denying all of the postconviction claims (V4/633-80). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Beasley's claim of ineffective assistance of counsel during the guilt phase. Following an evidentiary hearing, the trial court concluded that Beasley had failed to establish either deficient performance or prejudice. The trial court's factual findings are supported by competent, substantial evidence, and the legal principles were properly applied in denying relief.

Beasley's other claims for postconviction relief have been waived or abandoned on appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING BEASLEY'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF HIS CAPITAL TRIAL.

Beasley initially challenges the trial court's rejection of his claim of ineffective assistance of counsel with regard to the guilt phase of his capital trial. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered de novo. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. See generally Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000).

Beasley specifically alleges deficient performance by counsel with regard to six issues. Each of these will be addressed in turn. As will be seen, the trial court's rejection of Beasley's claim of ineffectiveness is well supported in the record on appeal.

A. The Bloody Shirt

Beasley asserts that his trial counsel should have disputed the evidence relating to a bloody shirt which was admitted at trial. According to Beasley, counsel should have 1) consulted a forensic crime scene expert; 2) consulted a blood spatter expert; 3) objected to the introduction of the shirt into evidence; and 4) aggressively cross examined the State's witnesses with regard to the shirt. However, the court below properly determined that no deficient performance or prejudice can be found in this issue.

Notably, Beasley did not present any testimony from a crime scene or blood spatter expert at the evidentiary hearing, and he has never identified what relevant testimony could have been offered from such an expert. This omission defeats any claim of ineffectiveness premised on the failure of counsel to have presented a crime scene or blood spatter expert. Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005) (noting claim of ineffective assistance of counsel for failure to present witness is legally insufficient where the record does not reveal what testimony could have been presented).

Beasley also claims that counsel could have succeeded in having the bloody shirt excluded from evidence if counsel had filed a motion in limine alleging evidence tampering. However,

Beasley has never presented any evidence to establish any such tampering. The mere fact that his attorneys were suspicious of the circumstances under which the shirt was discovered is not a legally cognizable reason for exclusion. As Beasley acknowledges, the defense would bear the burden of demonstrating a probability of tampering. Murray v. State, 838 So. 2d 1073, 1082 (Fla. 2002). The court below found that there was no evidence of witness tampering and that Beasley had not offered a basis to exclude this evidence (V4/666). Beasley has offered nothing to overcome these findings.

In addition, Beasley's claim that counsel failed to adequately cross examine the State witnesses relating to the discovery of the bloody shirt is clearly refuted by the record. The direct appeal record reflects that CSI Tech Laurie Ward and Det. Ann Cash were extensively cross examined about this evidence; Lt. Elmo Brown was also questioned about the finding of the shirt (DA. V22/2919-22, 2939-41, 2952-62, 2966-77, 2980; V24/3300, 3306-07, 3361-3406).[2] In fact, the defense secured a recess just prior to Det. Cash's cross examination, just to prepare for her questioning about this issue (DA. V24/3358). Beasley did not establish what testimony would have been

[2] The designation "DA" will be used in references to the record from Beasley's direct appeal in this Court, Case No. 93,310.

presented had additional questions been asked or otherwise demonstrate any particular deficiencies with regard to the cross examination of these witnesses.

The court below made the following findings in rejecting this claim:

> The Court does not find that the defense was deficient in investigating and testing the State's case with regard to Deputy Brown or deficient in not hiring a crime scene technician to explain proper crime scene investigation to the jury. At the evidentiary hearing, Mr. Norgard testified that he felt that the defense asked Mr. Brown all the necessary questions it needed to ask. Mr. Norgard said that part of the defense's theory was predicated on the fact that the crime scene had been searched and the shirt was not found. This supported the defense theory that the shirt was planted under the bed by someone other than the Defendant. Mr. Norgard testified that it would have been obvious that if the killer wore bloody clothes and deposited the shirt under the bed that it would have been impossible not to leave blood on the white carpet. Mr. Hileman testified that he was skeptical about testimony from investigator Laurie Ward that she had not looked under the bed where the shirt was found. Mr. Norgard testified that part of the defense theory was that the investigators had looked under the bed and that they were now trying to cover themselves by saying that they did not search under the bed.
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> . . .
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> The Court does not find that the defense was deficient in adequately investigating and the testing the State's case with regard to Detective Anne Marie Cash. A vigorous cross-examination was made of Detective Cash at trial, and Mr. Hileman testified at the evidentiary hearing that he thought the cross-examination of Detective Cash had been effective in showing the ineptness of her investigation and in how she handled the evidence. In addition, Mr. Hileman

> testified he remembered asking Detective Cash why she had turned over the crime scene prior to supervising an inventory with the family to determine what was missing. There is no evidence indicating that the shirt and other evidence collected by Detective Cash were tampered with after Detective Cash took custody of the evidence, despite her delay in putting the evidence in the property room. The Court does not find that there is a basis to exclude the evidence because of an alleged break in the chain of evidence. Mr. Norgard testified at the hearing that in his opinion it was the weight of the evidence not the admissibility of the evidence that was at issue. In addition, Mr. Norgard testified it did not cross his mind to have a DNA expert analyze the shirt because Mr. Beasley indicated to him that it was his shirt that was found under the bed.

(V4/664-67).

To the extent Beasley suggests an expert would have demonstrated that the police should have found the shirt, this was acknowledged by witnesses at trial (DA. V22/2954, 2968, 2975). Moreover, such a claim weighs against the defense argument that the police, in fact, were thorough in looking under the guest room bed, to support the theory that evidence was planted by the family after the scene was released. As Norgard noted, a defense argument that the police had been sloppy with the investigation would have suggested that the bloody shirt was under the bed all along, defeating the implication that it was later planted by family members after the scene had been released (V4/556-58).

Beasley has not identified any potential prejudice or demonstrated any likelihood of a different result at trial. Clearly, Beasley's conviction is well supported by other strong circumstantial evidence, and the jury was well aware of the facts regarding the discovery of the shirt. On these facts, no basis for relief exists and this Court must affirm the ruling below.

B. The Missing Voicemail

Beasley next contends that his attorneys were deficient in failing to litigate the alleged existence of a voicemail message which Beasley claimed to have left on the victim's telephone a day or two after Beasley left town (the night of the murder). Notably, even in postconviction there has never been any testimony that this voicemail ever existed. Both Beasley's attorneys, Hileman and Norgard, testified that they only vaguely recalled hearing that Beasley had called the victim and left a message. Norgard thought this may have been one of those things the defense explored without any success (V4/606). Norgard knew the applicable law: in order to pursue a successful claim for destruction of evidence, Beasley would have to establish bad faith on the part of the State (V4/607-08). Arizona v. Youngblood, 488 U.S. 51 (1988); McDonald v. State, 952 So. 2d

484, 495 (Fla. 2006). Beasley has failed to identify any bad faith or any other basis for relief based on the alleged disappearance of the alleged voicemail message.

The trial court rejected this claim as follows:

> The Defendant claims that he left a message on Mrs. Monfort's voice mail service after he left on August 21. The Defendant alleges that a prosecutor at the court proceedings confirmed that another prosecutor had subpoenaed the voice mail information from GTE, but the records could not be located for them to be given to defense counsel. Mr. Norgard testified that he had no evidence of any destruction of evidence by the State in bad faith to support a motion attacking the validity of the prosecution based on the State allegedly suppressing a voice mail message.

(V4/673).

Although Beasley now claims that counsel should have, at a minimum, advised the court that the alleged message was "missing" and identified the content of the conversation, he has not revealed what the content was to have been. He also has not alleged any difference such revelation could have made. As Norgard correctly surmised that no basis for relief under Youngblood was available to the defense, this claim has not been proven. This evidence would not be critical to the defense, since any message would not be exculpatory. Such message could not establish that Beasley was not aware of Mrs. Monfort's death, or otherwise suggest his innocence. Regardless of the content of any message, it would be only a self-created, self-

serving piece of evidence with little value to the defense. In addition, Beasley advised the police in Alabama that he had seen the FBI at Mrs. Monfort's house before he left and knew he was in trouble (DA. V22/3010); presumably any later telephone message would have been inconsistent with this admission.

On these facts, Beasley has failed to establish that there was a voicemail message which was lost or suppressed by the State. No error has been demonstrated with regard to the denial of this subclaim by the court below, and this Court must affirm the denial of relief.

C. Timeline

Beasley also asserts that counsel should have established a timeline to demonstrate his actions on the night Mrs. Monfort was killed. At the evidentiary hearing, both counsel testified as to efforts to determine Beasley's actions around the time of the murder. Attorney Hileman was primarily responsible for securing records to corroborate Beasley's activities.

Hileman testified that he and the defense investigator, Darrell Burnham, travelled to Tampa, Miami and Alabama to investigate (V3/430-32). According to Hileman, corroborating a timeline to establish Beasley's whereabouts was critically important, and the defense put considerable effort into doing

this (V3/476). It was well established that Mrs. Monfort was last seen alive on August 21 and Beasley made it to Miami on August 22. From what Beasley told his attorneys, he met someone around the time of the murder that took him from Mrs. Monfort's house to Tampa, where he stayed in a motel, then took a bus down to Fort Myers and later met some friends in Miami (V3/432-33). Hileman tried to find records to show the motel where Beasley had claimed to stay in Tampa; Hileman spoke with them by phone, and investigator Burnham went there in person to look through their records (V3/433-34). Burnham also went to the bus station to get information or itineraries to support Beasley's story (V3/433-34). Although there was strong evidence about his arrival in Miami, there was not much to show how he got there (V3/434). They had bus schedules, but they couldn't show the precise times for the buses Beasley would have been on, and they couldn't corroborate any ticketing information (V3/434-35).

One difficulty with the timeline was that Beasley was vague about the initial person that gave him the ride to Tampa (V3/480). According to Beasley, the person was in the drug business, and the person's family would be at risk if the person got involved (V3/480-81). Beasley was afraid of the person and, although the defense attorneys told Beasley that it was critical

to share all the information he had, Beasley would not reveal the individual's name (V3/480-483).

In addition, Norgard recalled that the information provided by Beasley changed over the course of the defense investigation (V4/593-94). Norgard agreed that the defense team reviewed Beasley's activities with Beasley in detail, and that extensive efforts were made to develop a timeline, to no avail (V4/591-95).

The trial court rejected this claim with the following findings:

> In his Adoption and Supplement To Amended Motion To Vacate Judgment Of Conviction And Sentence, etc., the Defendant claims that part of his alibi is that Mrs. Monfort had not arrived home when a friend drove him to Tampa. Although trial counsel was advised of matters concerning his trip to Tampa, his bus trip to Naples, and his stay at the Day's Inn in Naples, the Defendant alleges that an investigator was not asked to corroborate the information in a timely manner and evidence was lost. The Defendant claims that the lost evidence would have shown that he could not have driven Mrs. Monfort's car to meet with and give a $100.00 bill to Dale Robinson between 8:30 and 10:00 p.m. on the night Mrs. Monfort was killed, as the State alleged. In addition, the Defendant claims the evidence would have shown that he could not have been present when Mrs. Monfort arrived home after her 6:00 p.m. meeting with Mr. Rosario.
>
> Mr. Hileman testified that they were not able to establish when Mr. Beasley left on the journey that ultimately got him to Miami. Mr. Hileman discussed both his own efforts and that of the investigator to track down information on this subject. This included efforts to get bus records and hotel records that would have corroborated Mr. Beasley's story. Mr. Hileman testified that there were no inordinate delays

> in doing the investigation once they had the information from Mr. Beasley and the resources to pursue the information. Mr. Hileman said the actions were taken in a fairly short period of time once he was appointed to the case and assigned to take investigative action. The Court finds that the Defendant has not shown that his defense counsel at trial were deficient or dilatory in their efforts to investigate the information given to them by the Defendant or otherwise investigate the Defendant's case.

(V4/673-74).

Beasley has not identified any particular actions that should have been taken and were not, and he has not alleged what his attorneys could have established with any further investigation. Once again, no error has been shown in the lower court's denial of Beasley's claim of ineffective assistance of counsel in this regard, and this Court must affirm the denial of relief on this subclaim.

D. Michael Lykins

Beasley's next claim asserts that counsel should have presented Michael Lykins as a defense witness. According to Beasley, Lykins could have testified that Beasley sometimes borrowed Mrs. Monfort's car. Beasley claims that this testimony would have been useful to explain the presence of his DNA on a cigarette butt found inside the car.

The defense attorneys both testified that they were aware of the option of calling Mr. Lykins, but did not believe that his testimony was useful for the defense (V3/464-66; V4/604-05). The trial record reflects, as Norgard recalled, that testimony was presented from Jackie Ferguson, the cleaning lady, that Mrs. Monfort had driven Beasley to work in Mrs. Monfort's car (DA. V17/2083). In addition, the trial record established that the car had been left in Orlando at a time when Beasley could not have put it there (DA. V22/3002-07; V23/3233-36). The court below credited this testimony in rejecting this claim:

> Mr. Norgard testified that there was evidence Mrs. Monfort had transported Mr. Beasley in her car on many different occasions thus providing an innocent explanation for how cigarettes with Mr. Beasley's DNA could have been in the car. Mr. Hileman also testified that the defense brought out at trial that someone had dumped Mrs. Monfort's car at the parking lot in Orlando at a time when it could not have been left by Mr. Beasley.

(V4/672-73).

Beasley does not explain the necessity for Lykins' testimony, given the other evidence about the car presented to his jury, and has not shown either deficient performance or prejudice in counsels' strategic decision against calling Lykins as a trial witness. See Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) (noting strategic decisions do not constitute ineffective assistance if alternative courses have been

considered and rejected). This Court must affirm the lower court's denial of this subclaim.

E. Preparation to Testify

Beasley also criticizes counsel for failing to adequately prepare Beasley to testify. Beasley claims that, although both defense attorneys believed Beasley should testify in his own defense, the attorneys did not adequately prepare Beasley to testify and Beasley did not have sufficient knowledge to make a decision as to whether or not to testify.

Both trial attorneys recalled discussing the issue of Beasley testifying on several occasions (V4/515, 537, 588). While both Hileman and Norgard thought Beasley should testify, Beasley was concerned about his prior convictions, and this was a major factor in his ultimate decision not to testify (V3/511-12; V4/514, 536, 589). There was no evidence presented that Beasley felt rushed in his decision, and Beasley has not identified any additional preparation or discussion that should have taken place.

The trial court rejected this claim as follows:

> Mr. Hileman testified that Mr. Beasley was anxious about making a decision about whether to testify, but he did not recall Mr. Beasley expressing any desire for more time. Mr. Hileman testified that Mr. Beasley went back and forth about the pros and cons of testifying, but he had no doubt Mr. Beasley

> firmly made his decision not to testify. Mr. Norgard testified that he felt very strongly that Mr. Beasley should testify. Mr. Norgard said Mr. Beasley was concerned that his prior convictions would come out if he testified, and Mr. Beasley thought he would be damaged if the jury found out about other criminal charges. The Court does not find the evidence supports a conclusion that defense counsels' performance fell below an objective standard of reasonableness with respect to conferring with the Defendant and preparing him for trial.

(V4/671).

The direct appeal record confirms the lower court's ruling as to this issue. After the State rested its case, attorney Hileman advised the court that he had spent five hours with Beasley the previous day (DA. V26/3616), and attorney Norgard advised that, over the lunch hour, there had been further discussions with Beasley about testifying (DA. V26/3613). Beasley then verified, under oath, that he fully understood his right to testify, that he wanted to waive that right, and that he did not have any questions about his right or need any further time with counsel to discuss the issue (DA. V26/3625-26).

Beasley does not allege that he would have testified if provided more time or information on the issue. On this record, the trial court's rejection of this subclaim was proper, and this Court must affirm the denial of relief.

F. Testing the State's Case

Finally, Beasley submits that his attorneys failed to test the State's case. According to Beasley, counsel should have shown a photopak to Tomas Rosario in order to establish that Steven Benson was present when Rosario gave Mrs. Monfort the $800 and should have emphasized the discrepancy in Rosario's trial testimony about the timing of his meeting with Mrs. Monfort. However, Beasley has never established that Rosario would have identified Benson from any photopak, so this claim is wholly speculative. In addition, in rejecting this claim, the court below noted that attorney Hileman testified at the evidentiary hearing that the defense could not use any discrepancy in Rosario's testimony because there was no way to establish with any precision when Beasley actually left for Tampa (V4/672).

Beasley also criticizes counsel for failing to develop a coherent theory of defense beyond reasonable doubt, yet he does not identify any other credible theory for counsel to have presented. He claims that the evidence offered alternative theories as to who committed the crime, how, and when, but he fails to offer any specifics to support this assertion. His conclusory suggestion of other suspects does not refute the testimony of defense counsel below that their attempts to

identify another potential perpetrator and develop a realistic "straw man" defense were unsuccessful (V4/565-70).

Beasley's attempt to fault counsel for failing to further litigate the trial court's ruling to grant the State's motion in limine regarding potential testimony that Benson had witnessed a family member die by hammer and was also a suspect in a similar murder in Orlando is also unpersuasive. Beasley has not identified any legal basis to seek reconsideration of the issue in circuit court, and does not allege that the court's ruling would have been any different had reconsideration been sought. To the extent he suggests counsel should have presented the issue on appeal, his argument is misplaced. Allegations of ineffective assistance of counsel on appeal must be pursued by the filing of a petition for writ of habeas corpus in this Court, and the court below had no authority to consider the actions of attorney Norgard with regard to Beasley's appeal.

The trial court rejected this claim as follows:

> Mr. Norgard and Mr. Hileman testified that the defense did look into the matter of developing evidence that Mr. Benson was a potential suspect. Mr. Hileman testified that they did not have enough information to make a viable presentation of Mr. Benson as a suspect, and Mr. Norgard testified that the defense would have fallen on its face had they tried to call Mr. Benson as a witness for the purpose of showing he had committed the murder.

(V4/670).

Once again, Beasley has offered nothing to demonstrate that the lower court's denial of his claim of ineffectiveness with regard to testing the State's case was improper. This Court must affirm the rejection of relief.

The trial court concluded, following evidentiary hearing, that Beasley had failed to establish that his trial attorneys were ineffective as to any aspect of the guilt phase of his capital trial:

> The Court finds that the performance of the Defendant's trial counsel did not fall below an objective standard of reasonableness with respect to Claim One of Defendant's Motion. The Court finds that the defense counsel investigated the case in a timely and thorough manner, and they made reasonable tactical decisions regarding the best available defense and how to best present the case to the jury. Claim One of Defendant's Motion is denied.

(V4/674).

The lower court's thorough analysis of the issues presented below clearly defeats Beasley's arguments on appeal. The court's factual findings are well supported by the testimony of the trial attorneys at the evidentiary hearing, and no basis for reversal has been shown. Therefore, this Court must affirm the denial of postconviction relief.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING CLAIMS TWO AND THREE FROM THE MOTION FOR POSTCONVICTION RELIEF.

Beasley addresses the denial of Claim Two (asserting ineffective assistance of counsel at penalty phase) and Claim Three (asserting improper contact with jury by bailiff) in one sentence, stating that he "stands on the record without further argument" on these points (Appellant's Principal Brief, p. 73). This comment is clearly insufficient to present any cognizable legal claim on appeal. As this Court has repeatedly recognized, the failure to fully brief an issue amounts to a waiver of appellate review. Simmons v. State, 934 So. 2d 1100, 1111, n.12 (Fla. 2006); Coolen v. State, 696 So. 2d 738, 742, n.2 (Fla. 1997); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Thus, this Court must find that these claims have been waived, and deny all relief.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Daniel F. Daly, P. O. Box 172446, Tampa, Florida, 33672-0446, this 4th day of January, 2008.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

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

_____
COUNSEL FOR APPELLEE