IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Appellant,

v. CASE NO. SC07-1964

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, DONALD BRADLEY raises four claims in an appeal from the denial of his motion for post-conviction relief. References to the appellant will be to “Bradley” or “Appellant”. References to the appellee will be to the “State” or “Appellee”.

The seven volume record on appeal in the instant case will be referenced as “PCR” followed by the appropriate volume number and page number. The evidentiary hearing transcript may be found in Volumes IV and V of the record.

References to the record on appeal from Bradley’s convictions and sentence to death will be referred to as “TR” followed by the appropriate volume and page number. References to Bradley’s initial brief will be to “IB” followed by the appropriate page number. Contemporaneously with the filing of the initial brief in this case, Bradley filed a petition for writ of habeas corpus raising two claims. References to Bradley’s state habeas petition will be to “Pet.” followed by the appropriate page number.

STATMENT OF THE CASE AND FACTS

Donald Bradley, born July 4, 1960, was 35 years old when he, along with Brian McWhite, Patrick McWhite, and Linda Jones, murdered Linda Jones' husband, Jack.

The relevant facts concerning the November 7, 1995 murder are recited in this Court's opinion on direct appeal:

> ...Testimony at trial indicated that Mrs. Jones became distraught and incensed when she learned that Mr. Jones had a sexual affair with Carrie Davis, a teenage girl the Joneses had befriended and taken into their home. When unsuccessful in her numerous attempts to break up the affair, and, upon learning of Mr. Jones's intent to marry the girl, Mrs. Jones sought Bradley's assistance, first to physically intimidate the teenage girl and later to assault and batter Mr. Jones.
>
> Bradley had a landscaping business and Mrs. Jones prepared his tax returns. On October 31, 1995, at the request of Mrs. Jones, Bradley took two of his employees, Brian McWhite and Patrick McWhite, teenage brothers, and Michael Clark, a sometime employee, and set out to retrieve a diamond ring Mr. Jones had given his teenage lover. Once they arrived at the teenager's apartment, however, she refused to open the door. Frustrated, Bradley directed the employees to break the teenager's car windows.
>
> Mrs. Jones then decided to have Bradley assault Mr. Jones, and Bradley and Mrs. Jones agreed on a plan to make the assault look like a burglary of the Joneses' house. On November 7, 1995, at about 8 p.m., Bradley picked up the McWhite brothers and, while at the McWhite brothers' house, Bradley directed Patrick McWhite to pick up a large "zulu war stick" to use on Mr. Jones. The McWhite brothers both testified they agreed to help beat Mr. Jones for a hundred dollars each, but that Bradley never mentioned killing Jones. They also testified to numerous telephone conversations Bradley had with Mrs. Jones immediately before and after the home invasion.

As planned, the McWhite brothers, gloved and ski-masked, entered the Joneses' home through the front door, while Bradley entered through a side door in order to obtain a gun Mrs. Jones told him was kept by Mr. Jones in the kitchen. Mr. and Mrs. Jones were watching television, and when Mr. Jones noticed the McWhite brothers, he immediately told them to get out of his home. When they refused, he started fighting with them.

Thereafter, as described by the McWhite brothers, Bradley administered a brutal and methodical beating to Mr. Jones with the "war stick" and the gun. During the beating, Bradley and one of the McWhite brothers duct-taped Mr. Jones's hands and feet and dragged him to another room, and Bradley continued the beating. At one point, Bradley attempted to shoot Mr. Jones in the head, but the gun malfunctioned. Patrick McWhite testified that Mr. Jones continually begged Bradley to stop the beating, while Brian testified that he too asked Bradley to stop, but Bradley refused. Meanwhile, Mrs. Jones calmly watched the whole episode, and Bradley later duct-taped her hands to make it look like she was a victim. The "burglars" also removed some items of personal property from the house. After they left the house Bradley told the McWhite brothers that he thought he killed Jones. Indeed, Jones died as a result of the beating.

After Mrs. Jones called 911 and reported the episode as a burglary and robbery, Brian McWhite's fingerprints were found, leading to the arrest of the McWhite brothers who later confessed to their participation in the events of that night. A neighbor of the Joneses also reported seeing Bradley's van leave the Joneses' home at the time of the alleged burglary. Bradley later admitted that he had made phone calls to Mrs. Jones on the night of the murder but only about picking up some tax documents from under Mrs. Jones's front door and that he went to the Joneses' home, but left immediately when he did not find the tax documents.

Janice Cole, a long-time friend of Mrs. Jones, testified that a few days before the murder, Mrs. Jones had told her of her desire to take a gun and kill her husband and that she, not some other woman,

was entitled to the proceeds of Mr. Jones's life insurance policies worth some $500,000. Brian McWhite also testified that Bradley burned the clothing and the "war stick" involved in Jones's beating, and Bradley told him that he was expecting a payoff of between $100,000 to $200,000 from Mrs. Jones after she received the life insurance proceeds.

The McWhite brothers, Bradley, and Mrs. Jones were all charged with the murder. Mrs. Jones was tried, convicted, and sentenced to life imprisonment for the murder. The McWhite brothers entered into a plea arrangement whereby they received ten-year sentences upon guilty pleas to third-degree murder. The plea agreement also required their testimonies in the trials of Mrs. Jones and Bradley. Bradley was convicted of first-degree murder, burglary, and conspiracy to commit murder.

At the sentencing phase proceeding, the State presented one witness, and the defense presented fourteen. For the State, Patrick McWhite testified that Mr. Jones was alive throughout the beating and continuously begged Bradley to stop. The trial judge told the jury of the convictions and sentences of Mrs. Jones and the McWhite brothers. The jury was also told of Mrs. Jones's convictions for two other charges of soliciting others to kill her husband. A police detective testified extensively about Mrs. Jones's solicitations of two other men to kill her husband, including proposing a fake burglary plan for the murder that was almost identical to the fake burglary carried out by Bradley during which he killed Mr. Jones. During one of these solicitations Mrs. Jones asked for a silencer for a gun so she could kill herself and her husband's girlfriend. In another, she proposed that the solicited killer kill her husband and the girlfriend.

The defense presented evidence that Bradley came from a very dysfunctional family and was subjected to extensive emotional and physical abuse. The testimony established that Bradley's father was constantly cheating on his wife with the next-door neighbor, Nancy (no last name provided). As a result, Mr. and Mrs. Bradley were constantly fighting as Bradley and his siblings routinely witnessed their father slapping

their mother during these confrontations. Unable to deal with the father's infidelity, the mother eventually left the house and moved into an apartment. Nancy then moved in with the father and the children.

The testimony further revealed that once Nancy moved in, Bradley and his siblings experienced nothing but sheer misery from their father and Nancy. First, the two eldest sisters, Pamela and Cynthia, had to drop out of high school in order to take care of Bradley and the two younger ones since Mr. Bradley and Nancy spent little time with them. The only time spent with Bradley and the siblings consisted mainly of Nancy telling them how much she hated them and the daily beatings by either Nancy or Mr. Bradley upon one or all of them. The beatings could be triggered by a host of events ranging from Nancy telling the father that one of the children was lying to the fact of any of the children drinking or eating before the father got home in the evening. Occasionally, the father would beat them on "general principles," that is, he would beat all of them to ensure that he got the right one or that they already were beaten for the following week Cynthia further testified that their father made them lean over a clothes hamper and grab the bottom of it while he beat them, usually with leather belts, but sometimes with a "switch" he made them pick themselves. She also testified to various marks and scars left by the beatings all over their bodies. Anticipating the beatings, Bradley and his siblings would cry all night, but as soon as they fell asleep, the father would wake them up and beat them.

To complement the beatings, Nancy and the father would play very odd games with the children. For instance, Cynthia testified that Nancy would mark the milk jug and other food containers before leaving the home so she could tell if any of the children had drunk or eaten anything when she returned; if the food item went below the mark, everyone would get beaten. The father hid dirt in the house before he left and told them they had to find it before he returned; if the dirt was still there, they would all get beaten. Whenever their father and Nancy went out, they would put the children in their room, then place a piece of paper in the door to help them determine whether the children had left their room. They would get a beating

for opening the door for any reason, including going to the bathroom, but one of them was beaten for urinating in her room out of fear of dropping the paper off of her room's door.

The testimony also revealed that Bradley received the brunt of the abuse as Nancy and the father took it far beyond the daily beatings. Bradley had broken his arm in some accident and could not move it for days. Nancy, a nurse at the time, and his father refused to take him to the hospital. Because of the pain of the broken arm, Bradley attempted to eat with his left hand but could not and ended up spilling his drink. Nancy then picked up the broken arm, slammed it down on the table and told him the arm was fine. Bradley was finally taken to the hospital after the school threatened to contact the authorities.

In another incident, Bradley was severely suffering from appendicitis, but his father would not take him to the hospital. He eventually took him to Bradley's mother who then immediately took him to the hospital. The hospital treated Bradley and told the mother that Bradley's appendix had ruptured and could have easily killed him. In yet another incident, when Bradley was unable to slice some tomatoes as directed by Nancy, she took the knife out of his hand, stabbed his hand with the knife and asked him, "Now do you know how to cut tomatoes?"

Eventually, after the two older sisters had moved out of the father's home, the latter took Bradley and the two younger siblings and dropped them in front of their mother's one-bedroom apartment. The mother took them in when she got home that evening. Ultimately, Cathy, the eldest sibling, attempted suicide numerous times and Bradley, at the age of fifteen, started frequenting a tough crowd and committing crimes.

Nonetheless, as an adult, Bradley later developed a relationship with his father and helped his mother financially and otherwise. Witnesses also testified to Bradley's intense commitment to his work and family. According to former co-workers and clients, Bradley was an excellent worker. Witnesses testified in great detail about how he took care of his family and was very involved in the lives of his children. On cross-

> examination, however, Valerie Bradley, his wife, testified that Bradley had been arrested for a battery committed upon her. Bradley also had a long history of being involved as a member of a Jehovah's Witnesses congregation and several times a week attended Bible studies. He made many friends within the congregation.

Bradley v. State, 787 So.2d 732 (Fla. 2001).

On May 29, 1998, the jury recommended Bradley be sentenced to death by a vote of 10-2. After a Spencer hearing, the judge followed the jury's recommendation and sentenced Bradley to death. The trial court found four aggravating circumstances: (1) the capital felony was especially heinous, atrocious or cruel (HAC); (2) the murder was committed in a cold, calculated and premeditated manner (CCP); (3) the capital felony was committed for pecuniary gain; and (4) the capital felony was committed while engaged in the commission of the crime of burglary.

The court found, but gave very little weight to, two statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal activity; and (2) the age of the defendant at the time of the crime. The trial court also found and gave "some weight" to certain non-statutory mitigating circumstances: (1) Bradley overcame a chaotic childhood and dysfunctional family life to make real achievements in his own life, including establishing loving relationships in his family and reestablishing a relationship with his father; (2) he had

been a good provider and father for his present wife and his children; (3) he loves his family, and is loved by them; (4) he has maintained a good employment record; (5) he was helpful to other people inside and outside of his family; and (6) he has shown sincere religious faith.

On appeal, Bradley raised eight claims of error in an eighty-five (85) page brief: (1) the evidence was insufficient to support Bradley's conviction for premeditated first-degree murder because there was conflicting evidence regarding his intent to kill; (2) the evidence was insufficient to support his conviction for felony-murder (burglary) because he was allowed entry into the home by one of the occupants; (3) even assuming the finding of premeditation, he is entitled to a new trial because the jury may have convicted him on a legally insufficient theory (felony murder/burglary); (4) the evidence was insufficient to prove conspiracy to commit first-degree murder; (5) the trial court erred in admitting evidence that Bradley vandalized Carrie Davis's car on October 31, 1995, where such evidence was not relevant to any material issue and served only to attack his character; (6) the trial court erred in admitting an out-of-court statement by Detective Redmond to the effect that Bradley's van had been detailed five times since the murder; (7) the trial court erred in instructing the jury on and in finding the CCP aggravator; (8) the sentence was

disproportionate and the trial court erred in instructing the jury on and in finding the burglary aggravator.

On March 1, 2001, the Florida Supreme Court unanimously affirmed Bradley's conviction and sentence. Bradley v. State, 787 So.2d 732 (Fla. 2001). Bradley's motion for rehearing was denied on June 4, 2001. Id.

On September 1, 2001, Bradley filed a Petition for Writ of Certiorari with the United States Supreme Court. On November 26, 2001, the United States Supreme Court denied review. Bradley v. Florida, 534 U.S 1048 (2001).

On November 14, 2002, Bradley filed an initial motion to vacate his judgment and sentence with special leave to amend. On September 22, 2003, Bradley filed an amended motion, raising eighteen (18) claims.

On February 27, 2004, the collateral court held a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). The court ordered an evidentiary hearing on Claims 1, 2, 3, 4, and 18.[1]

In claim one, Bradley alleged trial counsel rendered ineffective assistance of counsel in failing to properly preserve a claim that, under the State's theory of the case, the burglary charge was legally invalid and the evidence

[1] The court reserved jurisdiction to set an evidentiary hearing on Grounds 11 and 17 if or when they become ripe for adjudication. The collateral court ruled that the remainder of Bradley's claims could be decided as a matter of law on the existing record. (PCR Vol. IV 617-618).

insufficient to sustain Bradley's conviction for felony murder. In claim two, Bradley alleged trial counsel was ineffective on several grounds. Among them was Bradley's claim that trial counsel was ineffective for failing to exploit various pieces of duct tape showing Linda's movements through the house after the murder but before the police arrived. Bradley alleged that following the duct tape would have demonstrated that Linda Jones, and not Donald Bradley, was the actual killer.

In claim three, Bradley alleged trial counsel was ineffective for failing to present evidence of Bradley's significant psychiatric history and history of poly-substance abuse. In claim four, Bradley alleged trial counsel was ineffective for failing to ensure he received the benefit of fully informed mental health experts as required under Ake v. Oklahoma, 470 U.S. 68 (1985). Finally, in claim eighteen, Bradley raised a claim of cumulative error.

On September 14, 2005, the evidentiary hearing commenced. Bradley called one witness, trial counsel Alan Chipperfield. Bradley did not call a mental health expert or an expert on crime scene analysis. Bradley put on no additional mitigation evidence at the evidentiary hearing.

At the conclusion of Mr. Chipperfield's testimony, the collateral court recessed the evidentiary hearing, at Bradley's request, to allow collateral counsel to explore additional

matters pertaining to DNA testing of hairs found on the victim's body and potential mental health mitigation. On May 17, 2006, collateral counsel announced to the collateral court that Bradley would not present any additional evidence in support of his post-conviction motion. (PCR Vol. VI 1040).

A copy of a report from the Florida Department of Law Enforcement, containing results of DNA testing, was entered into evidence by stipulation of the parties. (PCR Vol. VI 1038-1039). DNA testing showed that hairs found in the victim's hands and on his right shirtsleeve, belonged to the victim, Jack Jones. No "stranger" hairs were found. (PCR Vol. VI 1038-1039).

On June 21, 2007, the collateral court denied Bradley's amended motion for post-conviction relief. Bradley's motion for rehearing was denied. (PCR Vol. VI and VII 1168-1206).

On October 19, 2007, Bradley filed a timely notice of appeal. Bradley filed his initial brief on September 24, 2008. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

ISSUE I: In this claim, Bradley alleges trial counsel was ineffective for failing to investigate "duct tape" found in the Jones' home after the murder. Bradley alleges a more exhaustive investigation into the duct tape would have revealed that Linda Jones went into her garage, after Bradley left her home but before the police arrived. Bradley alleges that evidence showing Linda went into the garage after Bradley left her home would tend to prove that Linda Jones, and not Donald Bradley, was the actual killer. Bradley avers that proper appreciation of the significance of the duct tape evidence would have led trial counsel to abandon the alibi defense and pursue an "independent act" defense instead. This claim should be denied for three reasons.

First, trial counsel's decision to pursue an alibi defense, was reasonable under the circumstances. Trial counsel investigated and then presented evidence in support of the defense at trial.

Second, at the evidentiary hearing, Bradley presented no evidence in support of his independent act theory. Likewise, Bradley put on no evidence, at the evidentiary hearing, that further exploration or exploitation of the duct tape evidence would have somehow exonerated Bradley from his role in beating Jack Jones to death.

Bradley presented no evidence that his only intent was to beat up Mr. Jones or that Linda actually struck the fatal blow after Bradley and the McWhite brothers left her home.[2] Bradley's independent act theory also ignores the testimony at trial showing that Bradley methodically and brutally beat Jack Jones with a Zulu war stick and attempted to shoot him with Mr. Jones' own gun. It also ignores the fact that no evidence points to Linda Jones as the actual killer. Linda Jones' fingerprints were not found on a single piece of the allegedly critical duct tape evidence. No bloody clothes or shoes belonging to Linda were found at the murder scene. No alternate murder weapon was found. Having presented nothing but conjecture to support an independent act defense, Bradley cannot show trial counsel was ineffective for failing to pursue this theory to the exclusion of every other defense.

Finally, this claim may be denied because trial counsel actually exploited the duct tape, along with the other evidence at trial, in an attempt to convince the jury that Linda Jones, and not Donald Bradley, struck the fatal blow. Trial counsel cannot be ineffective for failing to do something he actually did.

ISSUE II: In this claim, Bradley alleges that trial counsel was ineffective for withholding certain records from defense mental

[2] Bradley did not testify at the evidentiary hearing.

health experts retained to assist trial counsel during the penalty phase of Bradley's capital trial. Bradley points to records indicating that Bradley demonstrated an increased risk of violent behavior without medication and that Bradley suffered from panic attacks. Bradley also avers trial counsel was ineffective for failing to present mental health evidence to the jury and/or to the trial judge at the Spencer hearing.

This claim may be denied because Bradley put on no evidence at the evidentiary hearing to establish that, at the time of the murder, Bradley was suffering from any major mental illness or that either of the two statutory mental mitigators applied. Bradley also put on no evidence to show that Bradley's panic attacks had any nexus to the murder.

This claim may also be denied because trial counsel's testimony at the evidentiary hearing established the decision not to provide the medical experts with a small part of Bradley's medical history or to present mental mitigation evidence, through the testimony of expert witnesses, was reasoned trial strategy. Finally, this claim may be denied because Bradley can show no prejudice from trial counsel's decision not to present this evidence.

ISSUE III: In this claim, Bradley alleges trial counsel was ineffective for failing to preserve, for appeal, the legal sufficiency of Bradley's burglary conviction. Bradley cites to

this Court's decision in State v. Delgado, 776 So.2d 233 (Fla. 2000).

Bradley avers trial counsel should have argued, in a motion for a judgment of acquittal, that Bradley's convictions for burglary and felony murder would be legally insufficient because Linda Jones consented to the murderers' entry into the Jones' home. This claim may be denied for two reasons.

First, at the time of trial, Delgado had not yet been decided. Indeed, it was not decided until some two years after trial. Trial counsel cannot be deemed ineffective for failing to anticipate changes in the law.

This claim may also be denied because at the time of trial, Bradley's convictions for burglary and felony murder were legally sufficient under controlling case law. Accordingly, any motion for a judgment of acquittal would have been properly denied.

Bradley's argument, before this Court, turns on the notion that Bradley was prejudiced on appeal because trial counsel failed to preserve the issue at trial and this Court decided Delgado while Bradley's case was still in the pipeline. Bradley claims, without directly saying so, that Bradley would have prevailed on appeal if only trial counsel would have preserved the issue.

In presenting his argument, Bradley assumes he can satisfy Strickland's prejudice prong by showing that, had trial counsel preserved the issue below, he likely would have been successful on appeal. Bradley is mistaken.

In Carratelli v. State, 961 So. 2d 312, 323 (Fla. 2007), this Court ruled that a defendant alleging that trial counsel was ineffective for failing to object or preserve a claim of reversible error must demonstrate prejudice at the trial, not on appeal. Because Bradley does not even dispute that the trial court would have properly denied his motion for a judgment of acquittal at trial, Bradley cannot show trial counsel was ineffective for failing to raise a Delgado claim at trial.

ISSUE IV: In this claim, Bradley raises a claim of cumulative error. This claim may be denied because Bradley has shown no error. Where there is no error, there is no cumulative error.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE OF BRADLEY'S CAPITAL TRIAL BY FAILING TO INVESTIGATE THE DUCT TAPE EVIDENCE (RESTATED)

In his first claim, Bradley raises a claim of ineffective assistance of counsel during the guilt phase. To establish a claim of ineffective assistance of counsel, two elements must be proven.

First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. It is the

defendant's burden to overcome this presumption. Mungin v. State, 932 So.2d 986 (Fla. 2006).

Strategic decisions are virtually immune from findings that counsel was ineffective. Counsel cannot be deemed ineffective if he makes a reasonable tactical decision to pursue, or refrain from pursuing, a particular course of action during trial. A strategic decision is reasonable unless no other trial counsel, under the same circumstances, would have made the same decision. The defendant has the burden to show counsel's course of action was not the result of a reasoned tactical decision. Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (noting that for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take); Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (noting that counsel's conduct is unreasonable only if petitioner shows "that no competent counsel would have made such a choice"). The presumption that trial counsel's conduct fell within the wide range of professional assistance includes, within it, the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable

under prevailing professional standards and was not a matter of sound trial strategy).

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense. In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

In this claim, Bradley alleges that trial counsel was ineffective for failing to exploit the "duct tape" evidence.. The duct tape at issue is four pieces of duct tape found in the Jones' home. They are: (1) a piece of duct tape found in the bathroom of the Jones' bedroom; (2) a piece of duct tape found in the entry way to the garage; (3) a piece of duct tape used to bind Ms. Jones to make it appear she was another victim of the home invasion burglary; and (4) a piece of duct tape found balled up in a brick in the garage. (PCR Vol. IV 749-750).

An FDLE report, prepared in October 1997, indicated that the piece of duct tape found at the entry of the Jones' garage was torn from the piece of tape found in the master bedroom. The same report noted that the duct tape reported as having come

from Ms. Jones' bindings as well as the ball of duct tape found in the brick were both cut with some sort of saw toothed implement, like a tape dispenser. (PCR Vol. IV 750). The report did not reflect the edges of these latter two pieces matched in any other respect (no fracture match). All of the pieces did appear to come from the same roll of duct tape. (PCR Vol. IV 750).

According to Bradley, this duct tape evidence would have demonstrated that Linda Jones independently acted to murder her husband after Bradley, assigned only to beat Mr. Jones at Linda's request, had left the house. Bradley alleges trial counsel's failure to investigate the significance of the duct tape led him to pursue an alibi defense as his primary defense rather than defending on the "stronger defense" of independent act. (IB 27). Bradley claims now that counsel should have pursued an "independent act" defense to the exclusion of any other defense, including alibi. (IB 29-30).

Bradley raised this claim in his amended motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim. Bradley called one witness in support of this claim, trial counsel Alan Chipperfield.

Mr. Chipperfield explained why he chose the alibi defense. First, Bradley wanted to pursue the alibi defense. (PCR Vol. V 868). Additionally, there was no physical evidence linking

Bradley to the scene. Bradley had witnesses who would put him at or near his home at the time of the murder.

During its case in chief, the State relied on evidence that three calls were made from Bradley's cell phone to Linda Jones before the murder. Bradley was prepared to, and did, put on witnesses to show that Cindy Bradley not Donald Bradley actually made the phone calls. (PCR Vol. V 867-868).

Trial counsel also had, and presented evidence, that an unknown fingerprint was found on pieces of duct tape found near Mr. Jones' body. Trial counsel would use this evidence to suggest that a person other than Donald Bradley broke into the Jones' home, along with the McWhite brothers, and killed Mr. Jones. (TR Vol. V 867-868). Trial counsel believes he effectively showed the inconsistencies in the McWhite brothers' testimony in support of his alibi defense. (PCR Vol. V 868).

Alternatively, trial counsel pursued an independent act defense. Trial counsel testified the defense had to be careful in pursuing that avenue because it was the defense's position that Bradley was not there. (PCR Vol. V 809).

Trial counsel explained that his strategy in using a secondary defense is a hard thing to do. But he cannot know what a jury is thinking and he had only one chance to talk to them (during closing argument) so he has to cover everything. He argued that if the jury believed Donald Bradley was there,

their job was still not finished. Jurors have to decide if there is evidence he did the murder or whether there is evidence that Linda Jones finished him off after everybody left. (PCR Vol. V 878).

Mr. Chipperfield testified he was aware of the FDLE report. He was also aware that the end of the tape found in the master bathroom matched the duct tape found at the entry to the garage. (PCR Vol. V 810).[3]

Mr. Chipperfield agreed with collateral counsel's suggestion that this fracture match could have been used to support an argument that at some time before the police got there, Ms. Jones removed her tape, left some of it in the bathroom, put some it on the garage, and put some of it wadded up in a ball inside a cinderblock in the garage. (PCR Vol. V 817). Trial counsel suggested this scenario to the jury during closing argument. Mr. Chipperfield could see where this tape evidence could have more strongly supported his independent act theory. (PCR Vol. V 818).

The collateral court denied the claim. The court ruled, in pertinent part, that:

[3] In his initial brief, Bradley alleges that trial counsel admitted that he "truly did not know about the duct tape exact match." (IB 28). This claim is unsupported by the record. Trial counsel testified that he recalled from the FDLE report that the end of the tape found in the master bathroom matched the tape found on the garage door. (PCR Vol. V 810).

Ineffective Assistance of Counsel Claim

The remaining assertion in this claim is that of ineffective assistance of counsel. The Defendant claims that counsel rendered ineffective assistance when he failed to discover certain evidence. The Defendant claims that had counsel performed a thorough investigation and submitted available evidence to experts for forensic review, counsel could have presented additional evidence to the jury to support the contention that the Defendant and the McWhite brothers only planned to rough up the victim and that it was Linda Jones who killed the victim. The Defendant states that while trial counsel did attempt to argue to the jury that Linda Jones was actually responsible for the fatal blows to the victim, trial counsel failed to utilize evidence to support that theory. The Defendant separates this claim under eight headings: other weapons, luminol, duct tape, blood evidence in Linda's car and missing tire iron, wet shower, bloody washcloths, blood in laundry room and a wet mop, and hair evidence.

First, this Court notes that all of the Defendant's claims that trial counsel was ineffective for failing to sufficiently utilize the physical evidence in his case are actually claims that counsel failed to defend on the theory that the Defendant and the McWhite bothers entered the victim's home merely to beat him up and, after they left, Linda Jones actually killed her husband. As explained further below, trial counsel presented an alibi defense, a defense the Defendant himself chose. Notwithstanding this, trial counsel did utilize most of the evidence identified by the Defendant in this ground to support the "back-up" theory that, if the jury disregarded the Defendant's alibi and believed that the State had proven beyond a reasonable doubt that the Defendant was present and involved with the murder, that the victim was alive when the Defendant left and that it was Linda Jones who killed her husband. Trial counsel argued, and requested a jury instruction on, the independent act doctrine.

The record manifests that trial counsel rigorously pursued an alibi defense on the behalf of the Defendant. The record also demonstrates that counsel

elicited evidence from witnesses and argued in closing argument the independent act defense. Clearly, the independent act argument was contrary to the Defendant's claim that he was not present at the Jones' home on the night of the murder. While not as much time was spent on the alternate defense, trial counsel testified at the evidentiary hearing that challenging the physical evidence to show that Linda Jones committed the murder after the Defendant left the home had to be handled with care as it was not consistent with the Defendant's chosen defense at trial. (PC Vol. I at 25.)

For the reasons set forth in the separate sections below, this Court finds that the Defendant failed to establish that trial counsel's assessment was incorrect. While claiming counsel could have used more evidence and argued more strenuously this alternate defense, the Defendant failed to set out how trial counsel could effectively argue an alibi defense and also argue just as strenuously that, if the jury believed the Defendant was there, he did not actually commit the murder — Linda Jones did through an independent act. Each section and the argument presented at the evidentiary hearing on the above-listed evidence disregards the fact that the Defendant claimed he was not present and presented an alibi defense. The fact that the Defendant has now decided that he should have pursued the independent act defense as his primary defense, as opposed to the alibi defense, does not establish a valid ineffective assistance of counsel claim.

Duct Tape

The Defendant claims that Linda Jones' movements could have been traced by the tape to establish that she went into the garage after the Defendant left the home. Had trial counsel used this evidence effectively, the Defendant avers trial counsel could have made a compelling argument that Linda Jones' movements, as evidenced by the tape, were strange for someone who allegedly just had others kill her husband and was merely calling 911 to report a false burglary as a cover up. The Defendant claims that trial counsel rendered ineffective assistance when he failed to effectively use the tape evidence to establish that

Linda Jones, and not the Defendant, delivered the fatal blow to the victim.

This Court notes that trial counsel called witnesses and elicited information about the duct tape. Lieutenant Leary testified that he collected a number of pieces of gray duct tape in different locations in the home. (T.T. Vol. XIV at 1650, 1659-1660.) However, trial counsel focused on the fact that the Defendant's fingerprints were not found on any pieces of the duct tape and that there was an unidentified print on the duct tape found next to the victim's body to support the Defendant's alibi defense. (T.T. Vol. XW at 1650-1653, 1692-1696; T.T. Vol. XV at 1810-1 817.) FDLE agent Dawn Walters testified that she examined numerous pieces of duct tape, approximately seven or eight different pieces, for prints. (T.T. Vol. XIV at 1697.) The only other piece of duct tape which had a latent print was a piece of duct tape found on the bedroom floor, and the print was identified as Brian McWhite's. (T.T. Vol. XIV at 1697-1698.) No prints were found on any other piece of tape, including the tape located in the concrete block inside of the garage. (T.T. Vol. XIV at 1698.)

Trial counsel used this evidence in closing argument, along with the blood found in Linda's car, to argue that Linda went into the garage and subsequently cleaned up before the police arrived. (TR Vol. XV at 18 14-15.) Counsel argued to the jury that this evidence was consistent with a person who actually struck the fatal blow and tried to cover it up. (TR Vol. XV at 1811-1816.) The Defendant now contends that this argument could have been strengthened had counsel utilized the locations that the pieces of duct tape were found to establish some sort of trail. However, the Defendant has failed to show that further exploration of the tape evidence would have exonerated the Defendant from his role in beating Jack Jones to death. Even assuming Linda Jones went into the garage, this fact does not demonstrate that it was Linda Jones and not the Defendant who inflicted the fatal blow. Further, not one piece of duct tape had Linda Jones' prints on it, and there was no evidence that Linda Jones' wore gloves at any point. (PC Vol. I at 98.)

Moreover, Alan Chipperfield testified at the evidentiary hearing that arguing that the victim in this case, Jack Jones, was still alive when the Defendant left the home was tricky as the defense at trial was that the Defendant was not present. (PC Vol. I at 25.) Mr. Chipperfield testified that he did review the tape evidence in preparation of the Defendant's case. (PC Vol. I at 26, 28-30.)

Mr. Chipperfield testified that arguing the tape evidence, as collateral counsel suggested, could have supported his back-up argument at trial that Linda Jones moved around the house and ultimately killed her husband before the police got there. (PC Vol. 1 at 36, 42.) However, Mr. Chipperfield testified the Defendant chose the defense used at his trial, that he was not present at the home. (PC Vol. 1 at 42-43, 83-84, 93.) Alibi witnesses were presented to establish that the Defendant was near or at his own home on the night of the murder. (PC Vol. I at 83.) Mr. Chipperfield testified that the strategy was to focus on the fact that no physical evidence tied the Defendant to the home. (PC Vol. 1 at 83, 93.) Mr. Chipperfield testified that at the Defendant's trial he spent a great deal of time pointing out inconsistencies between the State's primary witnesses, Brian and Patrick McWhite, to establish that they were lying. (PC Vol. I at 84, 93.) Mr. Chipperfield also presented the testimony of Cindy Bradley at the trial to establish that she had the flip phone, which phone records established was used to make calls to Linda Jones' home at or during the time of the murder. (PC Vol. 1 at 84, 93.)

Mr. Chipperfield testified that to support his fall-back defense at trial, he elicited testimony and pointed out in closing arguments that the McWhite's testimony as to the position of the victim's body when they left and the way the body was found by the police did not match. (PC Vol. 1 at 95.) He called witnesses to bring out evidence that blood was found inside of the teal car in the garage, tape in the cinder block in the garage, and that the shower was wet and looked as if had recently been used. (PC Vol. I at 95-96.) While counsel argued that the spot in the passenger side of the car was blood, no blood was

> found in the trunk of the car or anywhere else in the garage. (PC Vol. 1 at 97.)
>
> This Court finds that it was trial counsel's strategy to focus on an alibi defense and to argue as a secondary defense the fact that Linda Jones murdered Jack Jones. In deciding on that particular trial strategy, counsel's testimony was clear that he considered the evidence, including the tape evidence, and his discussions with the Defendant. As tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.")

(PCR Vol. VI 1176-1178, 1183-1185).

Before this Court, Bradley claims the evidence introduced at the evidentiary hearing supports his theory that Linda Jones, a fellow coconspirator, sawed herself loose from her staged bindings, went into the garage, retrieved a tire-iron from the trunk of her car, delivered the fatal blow with the tire-iron, and then later disposed of the murder weapon. (IB 28). Bradley alleges that the duct tape evidence demonstrates that trial counsel was ineffective for pursuing an alibi defense over an independent act defense. (IB 29-30). Bradley's claim should be denied for several reasons.

A. Pursuing an Alibi defense was a reasoned strategy

Trial counsel's pursuit of an alibi defense was a reasoned tactical decision. Bradley chose the alibi defense. (PCR Vol. V 868).

Trial counsel pursued that defense because no physical evidence linked Bradley to the murder. (PCR Vol. V 867). Trial counsel also had witnesses to support an alibi defense.

The State's theory was that the murder occurred somewhere between 8:15 and 8:30 on the evening of November 7, 1995. Ms. Jones called 911 at 8:31 p.m. to report her husband was hurt. (TR Vol. XI 1061).

In support of her husband's alibi defense, Valerie Bradley testified that on November 7, 1995, her husband came home from work about 7:00 p.m. Bradley left again at 8:00 p.m. for about 45 to 50 minutes to go and get snacks at Winn Dixie. According to Ms. Bradley, her husband returned home about 8:45 or 8:50 p.m. with the snacks.

Ms. Bradley told the jury that she and Bradley watched a movie called "Nothing Lasts Forever" from 9:00 to 11:00 p.m. (TR Vol. XIII 1565-1570). The parties stipulated that "Nothing Lasts Forever" was shown on CBS on November 7, 1995 from 9:00 to 11:00 p.m. (TR Vol. XIV 1587).

Trial counsel did not, however, rely solely on Ms. Bradley's testimony. To lay a foundation for the admission of additional testimony in support of his alibi defense, trial counsel elicited testimony from Ms. Bradley that Charles Shoup, a man for whom Bradley did landscaping work, called about 8:00 p.m. as Bradley was headed out the door to go to Winn Dixie.

Ms. Bradley answered the phone and handed it to her husband who spoke with Mr. Shoup. According to Ms. Bradley, the two did not talk long because Bradley told Mr. Shoup that he was going out the door. Bradley told Mr. Shoup that he would call him back later. (TR Vol. XIII 1567-1568).

Trial counsel then called Mr. Shoup to testify. Mr. Shoup did not specifically recall calling the Bradley home on November 7, 1995 or talking to Bradley. He did call quite often, however. Mr. Shoup's phone records showed a call was made from Mr. Shoup's phone to Bradley home at 7:54 p.m. The call lasted 30 seconds. (TR Vol. XIII 1591).

Mr. Chipperfield called an investigator to testify as to the distance between the McWhite residence and the Jones' home. His purpose was to show that it was impossible for Bradley to have been home at 7:54 p.m. to talk to Mr. Shoup, drive to the McWhites' residence, pick the brothers up, stop at Walmart, stop for gas, drive to the Jones' home, murder Mr. Jones, drop the McWhites off, pick up snacks, and be back home by 8:45 or 8:50 to watch a movie at home.[4] Investigator Watson testified that it was 22 miles from the McWhite residence to the Jones' home. (TR Vol. XIII 1639).

[4] Both McWhite brothers testified that Bradley picked them up from their home and stopped enroute to the Jones' home to purchase masks. (TR Vol. XI 1091-1092; XII 1214-1215). They also stopped for gas. (TR Vol. XII 1215).

Trial counsel also called a witness to rebut the State's evidence that Bradley called Linda Jones several times on the night of the murder. The State's theory was that Bradley called Linda Jones several times in the minutes immediately before the murder to get directions and to coordinate the murderers' entry into the home. Bradley's phone records indicated that three calls were made from Bradley's cell phone to Jones' home at 7:35 p.m., 8:06 p.m. and 8:17 p.m. (TR Vol. 16111-1612).

Cindy Bradley testified that she had Bradley's cell phone and made the calls to Linda Jones. According to Cindy Bradley, she and Jones were best friends. Cindy testified that she did not actually talk to Ms. Jones. She called three times because she had not been able to reach Linda Jones. (TR Vol XIV 1609, 1612). Trial counsel felt it was very important to get the phone out of Donald Bradley's hands and into Cindy Bradley's hands. (PCR Vol. V 868, 877).

Trial counsel also put evidence before the jury that an unknown person left his palm print on pieces of duct tape found near Mr. Jones' body. (PCR Vol. V 867). Dawn Walters, an FDLE analyst, testified that she examined several pieces of duct tape found in the Jones' home, for fingerprints. A palm print was found on the duct tape found near Mr. Jones' body. The print did not belong to Donald Bradley. It also did not match the

known prints of Linda Jones or either of the McWhite brothers. (TR Vol. XIV 1692). It was a print from an unknown person.

Given the defense actually had, and presented, evidence to support an alibi defense and given that Bradley himself wanted trial counsel to pursue an alibi defense, it was not unreasonable for counsel to steer the course he did. The fact it was not ultimately successful, or that collateral counsel believes it was not the right choice, does not render trial counsel ineffective. *See* Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

B. No evidence actually supports the Independent Act theory of defense

The "independent act" doctrine arises when one co-felon, who previously participated in a common plan, does not participate in acts committed by his co-felon, "which fall outside of, and are foreign to, the common design of the original collaboration." Dell v. State, 661 So. 2d 1305, 1306 (Fla. 3d DCA 1995) (quoting Ward v. State, 568 So. 2d 452 (Fla. 3d DCA 1990)). Under these limited circumstances, a defendant whose co-felon exceeds the scope of the original plan is exonerated from any punishment imposed as a result of the independent act. Willacy v. State, 967 So. 2d 131, 141 (Fla. 2007).

Bradley's theory of independent act rests on the notion he only went in to beat up Jack Jones and that after he left, Linda Jones killed Jack, an act not contemplated by Bradley or the McWhites. Bradley put on no evidence to support his claim that admitting he was at the scene but defending, exclusively, on a theory that Linda Jones dealt her husband the final blow probably would have resulted in an acquittal or conviction of a lesser offense.

While Bradley surmises the fracture match on the duct tape found in the master bathroom and at the entry to the garage would have been much stronger evidence of Linda's independent act, Bradley put on no evidence at the evidentiary hearing to show that Linda Bradley actually struck the final and fatal blow. Indeed, his theory of defense is purely conjecture, without any evidence to support it.

Moreover, the evidence at trial, evidence that was not challenged at the evidentiary hearing through newly discovered evidence or recantations, prove that Bradley not only intended to kill Jack Jones but that Jack Jones' murder was not, by any leap of the imagination, outside or foreign to the scheme concocted by Linda Jones and Donald Bradley.

Brian McWhite testified that when the trio entered the house, Mr. Jones ordered him out of the house and then rushed at him. Bradley hit him with a stick. Bradley hit him again.

Bradley kept hitting Mr. Jones. (TR Vol. XI 1106). Patrick told Bradley to stop, that it was over. (TR Vol. XI 1106).

Bradley also pulled out a gun. Bradley pointed the gun at Mr. Jones and pulled the trigger. It did not fire. (TR Vol. XI 1105).

After the trio left, Bradley warned the brothers not to "Bitch up." Bradley told the brothers that if he was caught, he would not say anything because he wanted to get paid his money. Bradley told Brian that Linda was getting a lot of money from the insurance people and that he was going to get a lot of money. Bradley said he would get somewhere between $100 and $200 thousand dollars. (TR Vol. XI 1121).

Patrick McWhite testified that when they entered the house, Bradley struck Mr. Jones on the head with a gun. Patrick and Bradley drug Mr. Jones into the other room. Bradley began kicking Mr. Jones and hitting him with the butt of the gun. Bradley took the stick that Patrick carried into the house. Bradley told Patrick to go and take something. When Patrick came back down the hallway, Bradley was hitting Mr. Jones as he lay on the ground. He was hitting him all over. Bradley told Patrick, once again, to go take something. Patrick went down the hallway again. He went into the master bedroom and into the walk-in closet. He did not find anything. (TR Vol. XII 1227).

He went back down the hallway. Bradley was still beating Mr. Jones. Mr. Jones was in a ball on the floor.

Bradley told Patrick to shut Ms. Jones up. He went and taped her mouth but did not tape her hands and feet. Patrick found some jewelry to take and Brian took $13.00 (TR Vol. XII 1232).

When he went back down the hallway, Bradley was still beating Mr. Jones. (TR Vol. XII 1232). When Patrick came into the room, Bradley tossed him some tape and told him to tape Mr. Jones up.

Mr. Jones would not cooperate and refused to give Patrick his hands so Patrick could bind him with duct tape. Patrick told the jury that Bradley was still beating Mr. Jones. (TR Vol. XII 1233). Patrick finally was able to tape Mr. Jones' hands. He went off again down the hallway to find something to take. Bradley had instructed them to make it look like a burglary. (TR Vol. XII 1234).

When Patrick came back, Bradley was still beating Mr. Jones. (TR Vol. XII 1235). Bradley had a gun. He pointed it once at Mr. Jones' head and pulled the trigger. It clicked and did not go off. (TR Vol. XII 1235).

Bradley told his cohorts, "Let's roll." Before they left, Bradley went and cut or sliced through the tape binding Ms. Jones' hands. (TR Vol. XII 1244). The murderers went out the

kitchen door through the garage. Bradley told the McWhites that "I think I killed him." (TR Vol. XII 1244).

Dr. Arruza, the medical examiner, testified at trial about the extent of the beating that Mr. Jones endured. Mr. Jones was struck repeatedly on the back of the head. He had several deep lacerations on the back of his head and the boney structures (orbits) behind his eyes were fractured. (TR Vol. XII 1346). Dr. Arruza found evidence of at least four to five severe blows to the back of Mr. Jones' head, two of which went through the entire thickness of Mr. Jones' scalp. (TR Vol. XII 1348). Mr. Jones' skull was fractured. (TR Vol. XII 1354).

Dr. Arruza found extensive bruising to Mr. Jones' face. The facial bruises were caused when Mr. Jones was struck with some sort of instrument. He also had a big tear that went through the outer left ear. (TR Vol. XII 1346). Mr. Jones was struck with a cylindrical object on the back of the right knee. (TR Vol. XII 1365). A blow to this area would have caused Mr. Jones to fall to the floor. (TR Vol. XII 1353). Mr. Jones was struck twice in the shoulder area and had injuries to his forearm and bruises and scrapes to the fingers. (TR Vol. XII 1350).

Dr. Arruza also found that Mr. Jones' body had been beaten. Most of the injuries were to Mr. Jones' back. He had two severe contusions, four patterned contusions across the mid-side of his

back and on both lateral sides he had additional patterned injuries. These wounds were caused by a cylindrical instrument. (TR Vol. XII 1350). There were eight separate impacts to Mr. Jones' back. (TR Vol. XII 1352). Two of the blows caused two corresponding rib fractures. (TR Vol. XII 1356).

At the evidentiary hearing, Bradley put on no evidence to support his theory that Linda Jones went into the garage, retrieved a weapon, and killed her husband as he lay helpless on the floor as a result of the beating inflicted by Donald Bradley. Likewise, Bradley put on no evidence that he only intended to rough up Mr. Jones or that killing Mr. Jones was completely foreign to the common plan devised by Bradley and Linda Jones.

In presenting this claim, Bradley simply ignores evidence adduced at trial that Bradley's methodical and brutal beating of Jack Jones belied any notion that he only intended to beat Mr. Jones up. Bradley also ignores evidence that Linda Jones' fingerprints were not found on any of the duct tape found in the Jones' home including the tape found in the master bathroom and garage and there was no evidence that Linda was ever wearing gloves during or after the attack. (PCR Vol. V 882). No bloody

clothing or shoes belonging to Linda was found at the murder scene.[5]

Likewise, no alternative murder weapon was found. (TR Vol. II 1358). After performing the autopsy on Mr. Jones, Dr. Arruza went to the Jones' home to find a weapon that could have inflicted the injuries she found on Mr. Jones' body. She did not find anything she believed could be the murder weapon. (TR Vol. XII 1358). While trial counsel did try to suggest Linda threw away the murder weapon she used in the lake behind her house, no "murder weapon" was ever found.

Even assuming Linda went into the garage after her husband was murdered, this fact does nothing to demonstrate it was Linda and not Bradley who inflicted the fatal blow. Bradley put on no evidence at all to support his post-conviction theory. On that basis alone, this claim may be denied.

C. ***Trial counsel did exploit the duct tape evidence***.

This claim may also be denied because trial counsel did exploit the duct tape evidence. Trial counsel cannot be ineffective for failing to do something that he actually did. Counsel is not deemed ineffective at trial because collateral counsel, or even trial counsel, believes, years later, that an additional argument could have been made about the duct tape.

[5] Mrs. Jones was not bound when the first officer arrived at her home at 8:39 p.m. (TR Vol. XII 1288).

While Bradley claims in his brief that trial counsel "truly did not know about the duct tape match", the record is to the contrary. Mr. Chipperfield testified that he was aware of the October 1997 FDLE report. He was also aware that the end of the tape found in the master bathroom matched the duct tape found at the entry to the garage. (PCR Vol. V 810).

At trial, Mr. Chipperfield pointed to the duct tape evidence, along with other evidence, to imply that Linda Jones freed herself from the duct tape and actually killed Jack Jones herself. Trial counsel also exploited the duct tape in support of his alibi defense.

At trial, trial counsel called FDLE agent Steve Leary to testify for the defense. Agent Leary said he collected a number of pieces of gray duct tape from the Jones' home. (TR Vol. XIV 1650). He collected two pieces of tape near Mr. Jones' body. (TR Vol. XIV 1651). Police also found a rolled up ball of duct tape in the Jones' garage inside a cinder block brick. (TR Vol. XIV 1660). Another piece of tape was found at the garage door entry. (PCR Vol. IV 749-750). All of the duct tape found in the house came from the same roll of duct tape. (TR Vol. XIV 1663).

Trial counsel also called Dawn Walters to testify. Ms. Walters told the jury that she examined several pieces of duct tape found in the Jones' home, for fingerprints. A palm print

was found on the duct tape found near Mr. Jones' body. The print did not belong to Donald Bradley. It also did not match the known prints of Linda Jones or either of the McWhite brothers. (TR Vol. XIV 1692). It was a print from an unknown person.

Ms. Walters found Brian McWhite's prints on duct tape found in the bathroom. (TR Vol. XIV 1698). No fingerprints were found on the duct tape recovered from a brick in the garage. (TR Vol. XIV 1698).

Trial counsel called Deputy John Ring. Deputy Ring testified that he responded to the Jones' home after the murder. He found that the bathroom shower curtain was wet, the inside of the shower was wet, and the mirrors seemed steamy. To him, it appeared the shower had been recently used. (TR Vol. XIII 1562). Trial counsel also elicited "independent act" evidence from Dr. Arruza who agreed with trial counsel's suggestion that Mr. Jones' injuries could have been caused by a crowbar or tire tool. (TR Vol. XII 1376).

During closing argument, trial counsel argued that, after the McWhites left her home, Linda Jones actually killed Mr. Jones by using another weapon to hit her husband in the head four or five times. (TR Vol. XV 1814). Trial counsel told the jury that the tape found in the garage was from the same roll of tape used to bind Mr. Jones' hands and feet. Trial counsel

argued that it was obvious that Ms. Jones moved around the house. He also pointed out that spots found in Ms. Jones' car tested positive for blood.[6] He asked, rhetorically, what did Linda Jones go into the car for? (TR Vol. XV 1814).

Trial counsel also pointed out that the Jones' shower had been used recently. Trial counsel argued that there was no reason for Linda Jones to take a shower unless she got blood on herself from beating her husband to death. (TR Vol. XIV 1815).[7] He argued that Linda Jones had the opportunity to get rid of the murder weapon before the police arrived by throwing it in the lake near her home. (TR Vol. XV 1815).[8]

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[6] Trial counsel was able to argue at trial that Linda went into the garage because positive Luminol testing suggested there may have been a small amount of blood found in the passenger compartment (not the trunk) of Linda's car. The alleged blood spots were not collected because they were too small, nor were they ever tested prior to trial. Likewise, Bradley did not test the "blood" evidence in preparation for the evidentiary hearing. Because Luminol also reacts to many substances other than blood (it is a screening test only), there is actually no evidence the substance in Linda's car was actually blood, or if blood, that it was Jack Jones' blood. (TR Vol. XI 1667). The fact it remained uncollected and untested benefited Bradley, at trial, because of his ability to suggest it was Jack Jones' blood. Obviously, if testing showed it was anything but Jack Jones' blood, it would not support Bradley's argument that Linda went into the garage, retrieved a weapon and killed her husband.

[7] Mr. Jones was dressed in night shorts. The State's theory was that Jack Jones likely showered and changed his clothes when he came home the night of the murder. (TR Vol. XV 1827).

[8] The police searched the lake behind the Jones' home for the murder weapon. None was found. (TR Vol. XV 1825).

The record reflects that trial counsel exploited the duct tape in support of both of his defenses. Trial counsel is not ineffective for failing to exploit evidence he actually exploited.

Because trial counsel actually had evidence to support an alibi, there is still no evidence that Linda Jones actually finished off Jack Jones, and trial counsel exploited the duct tape evidence, along with other evidence to support both his alibi and independent act defense, Bradley failed to show trial counsel was ineffective. This claim should be denied.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF BRADLEY'S CAPITAL TRIAL WHEN COUNSEL WITHHELD PORTIONS OF BRADLEY'S MENTAL HEALTH RECORDS FROM HIS EXPERT WITNESSES AND FAILED TO PRESENT MENTAL HEALTH MITIGATION EVIDENCE AT TRIAL (RESTATED)

In his second claim, Bradley alleges trial counsel was ineffective in two ways. First, the trial counsel withheld certain information about Bradley's psychological history from defense experts retained before trial. In particular, Bradley alleges trial counsel was ineffective for failing to provide his experts with C.A.R.E. unit records which indicated Bradley had an increased risk of violent behavior without medication. (IB 33).[9]

[9] Bradley seems to acknowledge that trial counsel could properly withhold information from expert witnesses who might be called

Bradley also faults trial counsel for failing to actually present mental health mitigation evidence at trial or at the Spencer hearing. (IB 32). Bradley avers that statutory mitigation could have been found if trial counsel would have put on evidence of Bradley's panic attacks, bipolar personality disorder [sic], and poly-substance abuse. (IB 34-35).

Bradley raised this claim in his motion for post-conviction relief. The collateral court granted an evidentiary hearing on the claim.

At the hearing, Mr. Chipperfield testified he reviewed records outlining Bradley's social and medical history. Among the records that Chipperfield obtained and reviewed were Bradley's drug treatment records from C.A.R.E., his criminal history, medical records, divorce records, child support records and some records from the Department of Children and Families. (PCR Vol. V 905).[10] Mr. Chipperfield obtained records that indicated Bradley had prior drug dependency and possible bipolar disorder. (PCR Vol. V 837).

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to testify. In Bradley's view, trial counsel should not, however, withhold any background material from those who might be called on only to assist trial counsel in preparing for trial. (IB 34). While theoretically, this might be true, Bradley presented no evidence at the evidentiary hearing that trial counsel only intended, from the very beginning, to retain Dr. Krop or Dr. Szuch solely for the purpose of consultation.

[10] C.A.R.E. is an addiction recovery center. The acronym stands for Chemical Addiction Recovery Effort.

Mr. Chipperfield testified that Bradley's C.A.R.E. records, dating back to 1987 indicate that Bradley had a cocaine and marijuana dependency, along with depression, for a long period of time. There was some indication in the record that Bradley was suffering from a moderately severe mental disorder. (PCR Vol. V 843). A note in one of the records indicated that "when patient is not self-medicating, he experiences high anxiety, high anger, possible bipolar symptoms, increased violence and risk of violent behavior without his RX medications." (PCR Vol. V 843). There was also a note indicating that Bradley was experiencing mood swings, and related a history of problems with anger and rage. Bradley also reported that he self-medicated to deal with his rage. (PCR Vol. V 845).

Mr. Chipperfield hired Dr. Harry Krop to help him with any possible mental health defenses. (PCR Vol. IV 837). He hired Dr. Krop because, as a psychologist, Dr. Krop is able to understand psychological problems a lot better than does Mr. Chipperfield. (PCR Vol. V 905). He's also experienced in the criminal justice system. He has evaluated a lot of people who have been charged with first degree murder, a lot of people who are on death row and he is good at putting psychological problems into prospective as mitigation. (PCR Vol. V 905). Trial counsel had used Dr. Krop as a penalty phase witness before the Bradley trial. (PCR Vol. V 906).

Mr. Chipperfield also hired Roger Szuch. He is a family counselor and family therapist. Chipperfield hired Dr. Szuch because he is good at examining and then testifying about dysfunctional families. Bradley had a dysfunctional family and a deprived childhood. (PCR Vol. V 906).

Mr. Chipperfield supplied Dr. Krop and Dr. Szuch with the psychiatric records he had, including six pages of Bradley's C.A.R.E. records. (PCR Vol. V 907, 936). The six pages of C.A.R.E. records contained mention of possible bipolar disorder and mentioned cocaine and cannabis abuse. The records also indicated that Bradley was put on Haldol on a PRM basis to control agitation. Lithium was considered if Haldol side-effects developed. Page 5 of the records noted the impression of Bradley's cocaine dependence, marijuana dependence, and longstanding depression. (PCR Vol. V 940).

Trial counsel also supplied his experts with records of his interviews with family members, a case summary, Brian and Patrick McWhite's statements, a copy of Dr. Larson's records concerning Bradley's treatment for an anxiety disorder and a copy of Bradley's criminal history. (PCR Vol. V 907-909). Mr. Chipperfield discussed Bradley's childhood mental, physical and sexual abuse with his experts.

Dr. Krop conducted neuropsychological testing at Mr. Chipperfield's request. Mr. Chipperfield was aware that Bradley

had suffered a head injury. He got medical records and forwarded those to Dr. Krop. The injury stemmed from 1977 auto accident. Although there was no evidence of a loss of consciousness or a skull fracture, a neurological consult was ordered. Bradley was kept in the hospital one day. (PCR Vol. V 911).

The results of the neuropsychological tests showed that Bradley was relatively normal. (TR Vol. V 913). Bradley had a pretty good history. He was able to hold down a job and made a good living. (PCR Vol. V 914).

Trial counsel intentionally withheld, from his experts, some of Bradley's C.A.R.E. records. One page he did not send was a page that discussed Bradley's increased anxiety, possible bipolar symptoms, increased violence, and increased risk of violence without prescriptions. (PCR Vol. V 941). He did not specifically recall his thought processes in this case but he has done the same analysis dozens of times.

The issue of what records to send arises when Mr. Chipperfiekd is thinking of calling an expert as a witness at trial. On one hand, you don't want to mislead your witness and you have to be honest with him to allow him to reach an honest opinion. One the other hand, if he is to be called as a witness, counsel has to be aware that the expert is going to be subject to cross-examination about every piece of paper he gets

in doing his evaluation. This is so because every piece of paper the expert gets, the prosecutor will get. (PCR Vol. V 941). If there is good fuel for cross-examination, you have to think about whether you are going to send that piece of paper to the expert. If it is likely the other side already has it, you send it to your expert. On the other hand, if you think the other side might not have it, like old medical records, then you might decide to withhold it, so your expert won't be subject to cross on it. (PCR Vol. V 941-942). Mr. Chipperfield decided that it was in Bradley's best interest not to give Dr. Krop records that showed that Bradley had anger problems and was prone to violence when not on his medications. (PCR Vol. V 944).

Contrary to Bradley's suggestion now, Dr. Krop was not kept in the dark about Bradley's risk for violence. Nor was Dr. Krop kept in the dark about Bradley's anxiety disorder and panic attacks.

During Dr. Krop's clinical interview, Bradley told Dr. Krop about his anxiety, rage and panic attacks. (PCR Vol. V 956). Bradley told Dr. Krop that he felt rage and out of control when he beat his wife. (PCR Vol. V 956). Bradley told Dr. Krop that he would "rage until I forget what I'm doing and I reach peaks of great madness." In looking at his notes, Mr. Chipperfield was not confident this last comment related specifically to

Bradley beating his wife. Bradley's report of rage was consistent with the McWhites' testimony that they tried to get Bradley to stop beating Mr. Jones. (PCR Vol. V 958).

While trial counsel did not give Dr. Krop records relating to Bradley's risk for violence, Dr. Krop knew about it because Bradley told him about it. (PCR Vol. V 956). Dr. Krop was aware of Bradley's prior incidents of spouse abuse. (PCR Vol. V 961).

Dr. Krop also explored drug use when he evaluated Bradley. Bradley told Dr. Krop that he did not have a drinking problem but was taking Xanax. Bradley also told Dr. Krop that he was not doing any drugs on the night of the murder. (PCR Vol. V 923). Bradley told Dr. Krop that he had been drug free in the five years before the murder. (PCR Vol. V 923).

Mr. Chipperfield did not have any specific recollection of discussing with Dr. Krop exploring whether Bradley had bipolar disorder. (PCR Vol. V 837). He knows that Dr. Krop did not diagnose Bradley as bipolar. (PCR Vol. V 920).

Trial counsel talked with members of Bradley's family during the course of his investigation. He does not recall specifically whether he discussed bipolar disorder. (PCR Vol. V 837). It is important to know family mental health history. Mr. Chipperfield did not recall whether Bradley's sister, Pamela, had a history of bipolar disorder. (PCR Vol. V 838).

Mr. Chipperfield interviewed Cindy Bradley, another of Bradley's sister. He learned that Pam had been so devastated by her parents' separation that she tried to kill herself a couple of times with pills and was placed on medication for a long period of time. (PCR Vol. V 839). Mr. Chipperfield did not recall getting Pam's medical records. (PCR Vol. V 839). If he got any health or psychological records of Bradley's family members, he would have sent those to Dr. Krop. Pam testified at the penalty phase about her suicide attempt and that she was still undergoing counseling. (PCR Vol. V 840). Mr. Chipperfield was also aware the Bradley's great-grandfather was institutionalized and an uncle showed extremely violent behavior. (PCR Vol. V 840). He does not know whether the defense team ever got those records. (PCR Vol. V 840).

Trial counsel could not recall whether Bradley was on any medications at the time of trial. (PCR Vol. V 944-945). There was a time when Bradley was suicidal, after he was arrested, so he may have been on them then. (PCR Vol. V 945). Some of Bradley's medical records showed that in 1996, Bradley was being treated for a back injury. The records reflect that Bradley reported that in May 1996, he was taking one milligram of Xanax TID for panic disorder. (PCR Vol. V 958).

Mr. Chipperfield decided not to call Dr. Szuch. Dr. Szuch did not think that he could be that strong a witness for the

defense. Dr. Szuch was concerned that if he wasn't strong enough, he might detract from the strength of the witnesses the defense actually did put on. Mr. Chipperfield thought he had some pretty strong witnesses who could tell the jury about Bradley's dysfunctional family life, without calling Dr. Szuch. (PCR Vol. V 915). The main concern about Dr. Szuch was that he really could not provide a connection between Bradley's problematic childhood and the murder. (PCR Vol. V 915). Dr. Szuch told Mr. Chipperfield that any connection between the two was "a stretch" for him. Dr. Szuch was also concerned about the fact that during many times in his life, Bradley was "normal". He had arguably escaped the deprived childhood and shown that he could do well. (PCR Vol. V 916).

Trial counsel also decided not to call Dr. Krop. There were certain aspects of Bradley's life he wanted to keep from the jury. For instance, Bradley had been in prison. He also had child support problems and incidents of domestic abuse with a prior girlfriend and his former wife. (PCR Vol. V 917). During the course of his investigation, Mr. Chipperfield spoke to Bradley's ex wife, Debra Yancy. Ms. Yancy told Chipperfield that Bradley had beaten her half to death when she was pregnant. (PCR Vol. V 917). A former girlfriend reported that Bradley had abused her kids and was "an asshole." (PCR Vol. V 917). Bradley had also, at one point, been charged with aggravated

assault which was eventually pled down to a misdemeanor. (PCR Vol. V 917).[11]

In trial counsel's mind, there was a risk that calling Dr. Krop and Dr. Szuch would increase the chance that some things would come before the jury that he did not want jurors to hear. He did not know whether the State actually knew about Ms. Yancy and Bradley's former girlfriend, but he knew the State knew about Bradley's criminal record and prison sentence.

When deciding whether to call an expert witness, counsel must weigh the pros and cons, what you can gain from his testimony versus what you lose by putting him on. Mr. Chipperfield felt that, in balance, he would lose more than he would gain by calling Dr. Krop. (PCR Vol. V 918). At times he can try to limit an expert's testimony to a very narrow issue, like brain damage, but it is a risky venture. If he considers doing that, he will try to flesh that out by filing a pre-trial motion and having a hearing on it. He did not think there was anything that he could parse out with Dr. Krop's testimony.

[11] Trial counsel investigated the possibility that Bradley was easily manipulated by women. He talked with several women with whom Bradley had relationships including a former girlfriend, a former wife, and Bradley's current wife. He does not remember that being an issue. None of the women he spoke to said that they could manipulate or control Bradley. (PCR Vol. V 847).

(PCR Vol. V 920-921). He could have called Dr. Krop at the Spencer hearing. He did not do so, however. (PCR Vol. V 944).

At trial, Mr. Chipperfield elicited testimony from Bradley's family members about the extensive abuse Bradley and his siblings suffered as well as the dysfunctionality of the entire family. (PCR Vol. V 921). He presented evidence that Bradley was abandoned by his father and was physically and emotionally abused. (PCR Vol. V 921). Bradley's family members testified that Bradley had anxiety attacks and drug problems and that once Bradley saw a psychiatrist because he thought he was having a heart attack. Instead, it was an anxiety attack. (PCR Vol. V 922). Trial counsel recalled that Valerie Bradley testified that her husband's drug problems were all behind him. (PCR Vol. V 922).

His strategy at the penalty phase was to show the murder was an aberration and that otherwise Bradley was a productive, hard working member of society. Drugs go against that. Additionally, putting on psychological testimony would conflict with his strategy. (PCR Vol. V 923).

Calling family members to talk about Bradley's dysfunctional childhood was better in this case because calling Dr. Krop would have allowed the State to cross-examine him about the basis of his opinion. (PCR Vol. V 924). For instance, Dr.

Krop could have been cross-examined about prior violent criminal episodes. (PCR Vol. V 925).

Trial counsel did consider the possibility that Bradley had a panic attack or anxiety attack at the time of the murder. He really did not have any evidence of that except the McWhites' testimony that Bradley just lost it or looked like he was crazed. (PCR Vol. V 924). He would have to be careful because the same evidence showed the brutality of the attack. (PCR Vol. V 925).

In addition to family dysfunction, trial counsel also put on evidence of Bradley's good deeds and his good nature. (PCR Vol. V 925). He also emphasized that Linda Jones was heavily involved and had gotten a life sentence. Trial counsel argued that Bradley should get life too. (PCR Vol. V 926). He emphasized that at the Spencer hearing too. (PCR Vol. V 927). The collateral court denied Bradley's claim. The court ruled:

> In claim three, the Defendant asserts that he was denied a full adversarial testing at the penalty phase due to counsel's failure to adequately investigate, prepare, and present mitigation. The Defendant first claims counsel failed to present as mental health mitigation the Defendant's psychiatric history and severe mental health disorders, including bi-polar personality disorder. The Defendant also argues counsel should have presented in mitigation the fact that he self-medicated by using cocaine, marijuana, and prescription drugs. The Defendant asserted in his Amended Motion that he would call a clinical and forensic psychologist to establish this claim and support the contention that counsel was deficient. However, no such expert was presented at the

> evidentiary hearing. Accordingly, the Defendant has failed to substantiate this claim.
>
> Moreover, Mr. Chipperfield outlined the penalty phase investigation conducted in the Defendant's case. (PC Vol. I at 51-71, 119-143.) Mr. Chipperfield testified that he retained two mental health experts, Dr. Harry Krop and Dr. Roger Szuch. (PC Vol. I at 53, 121-122.) Neither Doctor's opinions support the Defendant's contentions raised in the instant Motion. (PC Vol. I at 129, 13 1-136, 139.) The Defendant presented no documents or evidence overlooked by either Doctor in forming their opinions, and presented no contradicting testimony. Accordingly, the Defendant has failed to establish any error on the part of counsel in investigating mental health mitigation. Further, Mr. Chipperfield set out at the evidentiary hearing the basis for his strategic decisions not to present certain evidence to the jury for its consideration in mitigation. (PC Vol. I at 63, 65, 68, 131-134). This Court notes that trial counsel put on fourteen (14) witnesses during the penalty phase of the Defendant's trial.
>
> In deciding not to present certain evidence in mitigation, Mr. Chipperfield's testimony was clear that he considered the type of evidence, the value of the evidence as well as the evidence that could be brought out by the State that would have hurt the Defendant. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v. State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991). For all of the foregoing reasons, this claim must be denied.

(PCR Vol. VI 1190-1191).[12]

The collateral court's order is supported by competent substantial evidence. Bradley failed to prove that trial counsel was ineffective at the penalty phase of Bradley's

[12] Some internal citations omitted.

capital trial. This Court should deny this claim for two reasons.

First, and most obvious, Bradley has failed to show any prejudice. Bradley did not call any expert witness at the evidentiary hearing. Accordingly, Bradley presented no evidence to support his claim, before this Court, that calling Dr. Krop or Dr. Szuch would have established either statutory mental mitigator or even any additional non-statutory mitigation. Moreover, Bradley presented no evidence at the evidentiary hearing that Bradley has a major mental illness, suffers from brain damage or a low IQ, was at any time within the last five years before the murder abusing alcohol or drugs, or was, at the time of the murder suffering from a panic attack or any other disorder affecting his judgment or impulse control.

Bradley can also show no prejudice from trial counsel's decision to withhold a portion of Bradley's C.A.R.E. record from his retained mental health experts. Bradley faults trial counsel for withholding certain records leaving Mr. Chipperfield to "his own guesses as to the implications of the information in the withheld C.A.R.E. unit records, and not on the professional and competent advice of defense experts Szuch and Krop." (IB 34). In order to show trial counsel's alleged failure to provide all of Bradley's C.A.R.E. record had any adverse impact on Bradley's trial, however, Bradley had to call Dr. Krop and

Dr. Szuch to testify at the evidentiary hearing and ask them whether their opinions would have changed (and been more favorable) had they been provided records showing that, at some point in time, Bradley was prone to violence when he was not taking his medications. Bradley did not do so. By failing to do so, Bradley invites this Court to do what he claims that trial counsel improperly did; to "guess as to the implications of the information in the withheld C.A.R.E. records." (IB 34). This Court should decline the invitation.

By failing to call a mental health expert witness at the evidentiary hearing, Bradley cannot show trial counsel's failure to call a mental health expert undermines confidence in the outcome of his penalty phase. By failing to call Dr. Krop and Dr. Szuch at the evidentiary hearing and questioning the on whether their opinions would change if they were provided with the C.A.R.E. records, Bradley cannot show trial counsel's failure to provide a portion of Bradley's C.A.R.E. records to his experts undermines confidence in the outcome of his penalty phase. On prejudice alone, this Court could affirm.

Bradley has also failed, however, to prove deficient performance. This is true for several reasons.

First, Bradley did not call a single additional witness, at the evidentiary hearing, who he avers trial counsel should have, but did, not call to testify. Second, the record shows that

trial counsel investigated thoroughly in preparation for the penalty phase.

Trial counsel interviewed family members, reviewed records, and retained two mental health experts, one a psychologist who could help him with mental mitigation, the other a family therapist who would assist in exploring the dynamics and impact of Bradley's horrible childhood. Trial counsel called fourteen mitigation witnesses at trial, some of whom testified about Linda's involvement in the murder, Bradley's dysfunctional family life and abuse at the hands of his step-mother. Others testified as to Bradley's good character, strong faith, generosity with family and friends, and excellent employment history. One of Bradley's former employers testified that Bradley started using crack cocaine but voluntarily went to rehab in order to kick his crack cocaine habit. (TR Vol. XV 1945-1958). Trial counsel also called Valerie Bradley, Bradley's wife. Ms. Bradley testified that she and Bradley had a good marriage. Bradley was also a good father. Ms. Bradley testified that Bradley never had a drug or alcohol problem during their marriage. He was past all that. (TR. Vol. XVI 2068-2098).[13]

[13] Through Valerie Bradley, the defense offered "life" photographs depicting Bradley's work, their wedding, Bradley sleeping, his kids and family, etc.

Third, trial counsel made a reasonable tactical decision not to call Dr. Krop or Dr. Szuch. Trial counsel did not call Dr. Szuch because Dr. Szuch advised him that it would probably not be helpful and could do some harm. Dr. Szuch did not believe he would be a strong witness for the defense. He was concerned that if he wasn't strong enough, he might detract from the strength of the witnesses they actually did put on. The main concern about Dr. Szuch was that he really could not provide a connection between Bradley's problematic childhood and the murder. (PCR Vol. V 915). Dr. Szuch told Mr. Chipperfield that any connection between the two was "a stretch" for him. Dr. Szuch was also concerned about the fact that during many times in his life, Bradley was "normal". Bradley had arguably escaped the deprived childhood and shown that he could do well. (PCR Vol. V 916).

Moreover, trial counsel had other strong witnesses he believed could tell the jury about Bradley's dysfunctional family life, without calling Dr. Szuch. (PCR Vol. V 915). It is not ineffective assistance of counsel to refrain from calling a witness who advises trial counsel that he might do more harm than good.

Trial counsel was also not ineffective for failing to call Dr. Krop. If trial counsel would have called Dr. Krop to testify, Dr. Krop would have been vulnerable to cross-

examination on Bradley's prior criminal history and prison record. Even worse, the jury would have learned that Bradley is consistently violent toward women and has "rage" issues. Such evidence would have completely undermined counsel's strategy to show the murder was an aberration for a man who was otherwise a good father and husband, a solid dependable employee, a man of strong faith, and a man who is generous to his friends and family, with both his time and his money.

It is not ineffective assistance of counsel to choose to humanize the defendant with lay witnesses rather than risk "bad character" evidence to be explored with a mental health expert. This is especially true when there is no evidence that Dr. Krop would have opined that any statutory or even non-statutory mental mitigators applied. See Hannon v. State, 941 So. 2d 1109, 1131 (Fla. 2006) (rejecting ineffective assistance claim where introduction of mental health mitigation would have contradicted the nonviolent image counsel attempted to portray of defendant and would have been inconsistent with the defense's claims of innocence).

Finally, trial counsel cannot be deemed ineffective for withholding damning portions of Bradley's C.A.R.E. records from his own mental health experts. Trial counsel testified at the evidentiary hearing, that he withheld records that he feared

might fall into the hands of the prosecutor and become fodder for cross-examination.

Moreover, the only possible harm from withholding the records could come from ignorance on the part of Dr. Krop as to Bradley's tendencies toward violence when not medicated. Trial counsel testified that during the clinical interview, Bradley told Dr. Krop about his violent rages. Bradley also told Dr. Krop about his history of spousal abuse.

Bradley told Dr. Krop that he felt rage and out of control when he beat his wife. (PCR Vol. V 956). Bradley told Dr. Krop that he would "rage until I forget what I'm doing and I reach peaks of great madness." (PCR Vol. V 956-958.)

Dr. Krop was also fully aware that Bradley suffered from anxiety and panic attacks. During Dr. Krop's clinical interview, Bradley told Dr. Krop about his anxiety, rage and panic attacks. (PCR Vol. V 956). However, Bradley presented no evidence at the evidentiary hearing that, had trial counsel called Dr. Krop to testify at trial, Dr. Krop would have testified that Bradley was in the throes of a panic or anxiety attack at the time of the murder.

Dr. Krop also had records which noted possible bipolar symptoms. Dr. Krop did not, however, diagnose Bradley with panic attacks.

Just as it is not ineffective assistance of counsel to refrain from calling a mental health expert who might do more harm than good, it is not ineffective assistance of counsel to withhold portions of records that may be used by the prosecutor to undermine trial counsel's strategy at trial. The collateral court's order denying this claim should be affirmed.

ISSUE III

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR DIRECT APPELLATE REVIEW THE LEGAL SUFFICIENCY OF BRADLEY'S CONVICTION FOR BURGLARY AND FELONY MURDER (RESTATED)

In this claim, Bradley alleges that trial counsel was ineffective for failing to preserve the appellate record as to the legal sufficiency of Bradley's conviction for burglary and felony murder. Bradley does not set forth in his initial brief how trial counsel should have preserved the issue. It is logical to conclude that Bradley believes trial counsel should have filed a motion to dismiss before trial or made a proper motion for a judgment of acquittal (JOA).[14]

Bradley concedes that trial counsel cannot be ineffective for failing to raise a claim pursuant to this Court's decision in Delgado v. State, 776 So.2d 233 (Fla. 2000) because Delgado was not decided until some two years after Bradley's capital trial. (IB 41). Instead, Bradley claims that trial counsel

[14] Trial counsel's motion for JOA is at Volume XIII at pages 1554-1555.

could have made a Delgado-like claim because the evidence introduced at trial showed that Linda Jones consented to Bradley's entry to her home so that Bradley and the McWhite brothers could attack her husband. (IB 41).

Bradley admits that Delgado was not the law at the time of trial. (IB 42). Indeed, at the time of trial, consent, even when freely given, could be deemed withdrawn if the homeowner was violently assaulted. Jimenez v. State, 703 So.2d 437 (Fla. 1997)(the trier of fact could reasonably have found proof of withdrawal of consent to remain beyond a reasonable doubt when Jimenez beat the victim and stabbed her multiple times); Robertson v.State, 699 So.2d 1343 (Fla. 1997)(the Florida Supreme Court determined there was "ample circumstantial evidence from which the jury could conclude that the victim of this brutal strangulation-suffocation murder withdrew whatever consent she may have given Robertson to be in her apartment."); Routly v. State, 440 So.2d 1257 (Fla. 1983)(same).

Nonetheless, Bradley alleges that it was trial counsel's job to preserve that issue for appeal. (IB 43). Bradley claims that, although Delgado was not the law at the time of trial, counsel should have preserved the issue to give "his client the opportunity to try [to change the law] on direct appeal." (IB 43). Without directly saying so, Bradley avers that had counsel preserved that issue for appeal, Bradley's conviction for

burglary and felony murder would have overturned because Bradley's case was still in the pipeline when Delgado was decided.[15]

Bradley raised this claim in his motion for post-conviction relief. While he avers, before this Court, that he is not staking his claim on this Court's decision in Delgado, that is exactly the claim he made before the collateral court. (PCR Vol. II 386-389). An evidentiary hearing was granted on the claim.

Trial counsel, Alan Chipperfield testified that he was aware that one of the issues that Bradley raised in his motion for post-conviction relief was that he had failed to preserve, for appeal, a challenge to the legal sufficiency of Bradley's conviction for burglary. (PCR Vol. IV 799). Chipperfield testified it was his duty to preserve that issue for appeal. (PCR Vol. IV 800). If there were facts to support a challenge to the burglary charge, he would make the legal argument. If he did not do that, then he missed something. (PCR Vol. IV 801).

He did not file any pre-trial motions regarding the burglary issue. (PCR Vol. IV 801). He does not recall making any issue of Ms. Jones' consent during his argument on his

[15] Bradley discusses Delgado's non-retroactivity in his initial brief. Bradley appears to be under the mistaken impression that his conviction and sentence were final at the time Delgado was decided. (IB 43).

motion for a judgment of acquittal (JOA). He does not remember whether he argued that the evidence was insufficient to prove a burglary as an underlying theory of felony murder. He would have to go back and look at his argument in support of a JOA. (PCR Vol. IV 801).

Mr. Chipperfield testified that he looked at the law on burglary. He certainly could have argued that Linda Jones gave consent. (PCR Vol. IV 802). He would not have argued that to the jury because it was a defense inconsistent with the one presented at trial. (PCR Vol. IV 803). Mr. Chipperfield believed that if Jack Jones did not consent to the entry it was not a good legal issue. (PCR Vol. IV 804).

At the time of the evidentiary hearing, Mr. Chipperfield was familiar with the Florida Supreme Court's decision in Delgado. Although Delgado was not the law at the time, he or a paralegal did research on the burglary issue at the time of trial. If he had filed a pre-trial motion to dismiss, Bradley would have to swear under oath that he went into the Jones's house with Linda Jones' consent. (PCR Vol. V 876).

Mr. Chipperfield knew that one of the McWhite brothers had testified that Jack Jones told the intruders to get out of his house. (PCR Vol. IV 876). He was also aware that the burglary charge against Linda Jones had been dismissed. (PCR Vol. IV 948). Mr. Chipperfield believed that, as the homeowner, Linda

Jones was in a completely different posture than was Donald Bradley. (PCR Vol V 954). Mr. Chipperfield did not think, at the time of trial, he had any basis to attack the legal sufficiency of the burglary charge. (PCR Vol. V 876).

The collateral court denied the claim. The court ruled that:[16]

> In claim one, the Defendant asserts that counsel rendered ineffective assistance of counsel when he failed to properly preserve the issue that under the State's theory of the case, the burglary charge was legally invalid and that the evidence was insufficient to sustain a verdict of guilt to felony murder. Specifically, the Defendant avers that counsel was ineffective for failing to argue at trial that because Mrs. Jones invited the defendants into the Jones' home, both the burglary and felony murder charge were legally insufficient. The Defendant states that appellate counsel raised this issue on direct appeal, however the Florida Supreme Court ruled that the claim was barred as it was not preserved in the trial court. Bradley, 787 So.2d at 739
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> The Defendant relies upon Delgado v. State, 776 So.2d 233 (Fla. 2000) in support of his argument. First, this Court notes that Delgado was decided some two years after the defendant's trial. The Florida Supreme Court has 'consistently held that trial counsel cannot be deemed ineffective for failing to anticipate changes in the law. Suggs v. State, 923 So.2d 419, 437 (Fla. 2005), *citing* Cherry v. State, 781 So.2d 1040, 1053 (Fla. 2000). Moreover, in deciding Delgado, the Florida Supreme Court receded from law that was settled since 1983 and 1988. Delgado, 776 So.2d at 242 (Wells, C.J., & Lewis & Quince, JJ. Dissenting). Accordingly, counsel cannot be deemed ineffective for failing to anticipate this change.

[16] Some internal citations omitted.

> Further, trial counsel testified at the evidentiary hearing that he did consider filing a motion claiming the Defendant had been invited in. Trial counsel testified that he had a paralegal do research on the issue and that he discussed the issue with the Defendant. Trial counsel testified that after researching the issue, he felt that there was no basis to attack the charge. Trial counsel testified that "the way I understood the law, if there was not consent by Mr. Jones", it was not a good legal issue. Trial counsel testified he was aware that the law regarding the "remaining in" part of the statute had changed after the Defendant's trial, however, counsel testified that the key issue in the Defendant's case was the ownership of the home. Trial counsel also testified that if he filed a motion to attack the charge, the Defendant would have to swear in a pre-trial motion that he went into the victim's home with Linda Jones' consent, which was inconsistent with the defense the Defendant chose to present.
>
> This Court finds that trial counsel's decision to not file a motion to attack the charge of burglary, and the felony murder based on the underlying charge of burglary, was a tactical decision made by counsel with the best interests of the Defendant in mind. Trial counsel's testimony was clear that in deciding on that particular trial strategy he considered the law as it was at the time of the Defendant's trial as well as the fact that the Defendant would have had to make sworn allegations that were inconsistent with the defense the Defendant chose to present. Since tactical decisions do not constitute ineffective assistance, this Court finds that counsel's performance was not deficient. Songer v. State, 419 So.2d 1044 (Fla. 1982); Gonzalez v. State, 579 So.2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.") Accordingly, this claim must be denied.

(PCR Vol. VI 1172-1174).

The record supports a finding that trial counsel was not ineffective for failing to raise this issue at trial. This is so for two reasons.

First, Bradley can show no deficient performance. Trial counsel cannot be deemed ineffective for failing to object (preserve an issue for appeal) when the prevailing law at the time of trial provides no legal basis for an objection.[17] At the

[17] Even if Delgado did have any impact on Bradley's claim, it is logical to conclude that Delgado does not apply to cases in which one co-defendant grants consent to another co-defendant to enter her home for the sole purpose of assaulting or killing an unaware and unconsenting co-occupant. In Delgado, the court was not called upon to examine the validity of the consent to enter into the premises. Instead, valid consent was assumed. This is not the case here. In looking to the commentary to the Model Penal Code, the Court in Delgado observed that the crime of burglary was created to proscribe the invasion of premises under circumstances especially likely to terrorize occupants. The Court noted that, "[i]n the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." Delgado at 240. The court expressed concern that such an interpretation would allow conviction for burglary the moment a defendant commits an offense in the presence of an aware host even though he had been licensed or invited to enter. The Court noted that burglary was actually intended to "criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant." Id.

In this case, there is no question Bradley's entry was intended to shock, terrorize and surprise Mr. Jones. Bradley and his criminal cohorts did not knock on the front door. Instead, they surreptitiously entered the home through doors left unlocked by a murderous coconspirator. At the time of entry, they were wearing ski masks and gloves and the trio made their entry so as to avoid detection by Mr. Jones until such time as they were ready to commence their attack upon him. Bradley went through the garage door for the purpose of surreptitiously retrieving a gun from the kitchen, a gun he used to beat Mr. Jones. Bradley and the McWhites surreptitiously entered and remained in the home at least for the period of time necessary to retrieve a weapon and to surprise Mr. Jones. Unlike the situation where an invited guest commits a violent offense sometime after his consensual entry (e.g. stabs his host after being invited over to watch the Super Bowl), Bradley entered the Jones' home under circumstances designed, and sure, to terrorize, shock, and surprise Mr. Jones.

time Bradley murdered Mr. Jones, was indicted, and went to trial, a person was guilty of burglary if he entered or remained in a dwelling with the intent to commit an offense therein. § 810.02(1), Florida Statutes (1995). The "remaining in" portion of the burglary statute could be established by proof that any prior consent to enter was withdrawn. Such proof could be in the form of circumstantial evidence. The law also recognized that consent could be both implicitly and explicitly withdrawn. Raleigh v. State, 705 So.2d 1324 (Fla. 1997)(ruling there was ample circumstantial evidence from which the jury could conclude

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Moreover, any "consent" given by Mrs. Jones was invalid and cannot serve to defeat the legal sufficiency of either the first degree murder or burglary conviction. Bradley cannot in good faith argue he reasonably believed Mrs. Jones had any legal or moral authority to consent to the entry of a co-conspirator for the purpose of battering or killing her husband. *See* Fotopoulos v. State, 608 So.2d 784 (Fla. 1992)(son-in-law of the owner and occupant of burglarized home had no legal and moral authority to consent to entry by his co-conspirator for the purpose of murdering another occupant); K.P.M. v. State, 446 So.2d 723 (Fla. 2d DCA 1984) (son of owner and occupant of the burglarized home had no legal or moral right to consent to friend's entry into family home for purpose of stealing property that did not belong to son); Damico v. State, 153 Fla. 850, 16 So.2d 43 (1943) (corporate officer had no legal or moral right to consent to entry into jewelry store by co-conspirator for purpose of committing theft). *See also* Gonzales v. State, 931 S.W.2d 574 (Tex.Crim.App. 1996) (consent given by the murder victim's teenage daughter, a co-conspirator in the killing, not valid consent to vitiate burglary conviction. Because the daughter was aware of the defendant's illegal purpose in entering the house, the court found she was unable to give valid consent to the entry); People v. Carr, 97 Cal. Rptr.2d 143 (Cal. 4th App D., 2000) (consent given by son to enter parents' property not valid when consent given for the illegal purpose of cross burning).

that the victim withdrew whatever consent he may have given for Raleigh to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody); Jimenez v. State, 703 So.2d 437 (Fla. 1997)(the trier of fact could reasonably have found proof of withdrawal of consent to remain beyond a reasonable doubt when Jimenez beat the victim and stabbed her multiple times); Robertson v. State, 699 So.2d 1343 (Fla. 1997)(this Court determined there was "ample circumstantial evidence from which the jury could conclude that the victim of this brutal strangulation-suffocation murder withdrew whatever consent she may have given Robertson to be in her apartment."); Routly v. State, 440 So.2d 1257 (Fla. 1983) (same); Ray v. State, 522 So.2d 963, 966 (Fla. 3d DCA 1988) ("remaining in" portion of the burglary statute could be proven by showing the commission of a crime following consensual entry. The court reasoned that a victim, upon learning of the crime, implicitly withdraws consent to the perpetrator's remaining in the premises).

As such, at the time Bradley was tried and convicted for the beating death of Jack Jones, the law permitted the jury to conclude that Mr. Jones implicitly withdrew any prior consent, given by his wife, when Bradley began brutally and methodically beating him with a "war stick" and his own gun, duct-taped his

hands and feet and dragged him to another room, and continued the beating while Jones pleaded for Bradley to stop.

Even if this were not enough, Mr. Jones explicitly withdrew any "consent" to entry previously granted by Mr. Jones. The evidence at trial established that while Mrs. Jones apparently left entry doors unlocked in order to allow Bradley and the McWhite brothers to gain surreptitious entry into the home, Mr. Jones, upon seeing the intruders, ordered them out of his home. (TR Vol. XI 1103).

At the time Bradley was tried and convicted, the evidence supported Bradley's conviction for burglary because the jury could have found that Mr. Jones either implicitly withdrew any consent given for the entry once Bradley began beating him, or explicitly withdrew consent when he ordered the intruders out of his home. Trial counsel cannot be ineffective for failing to present an argument contrary to controlling case law in effect at the time of the crime and at the time of trial. Nor can counsel be ineffective for failing to anticipate a change in the law. Darling v. State, 966 So.2d 366, 383 (Fla. 2007)(trial counsel was not ineffective for failing to raise a meritless objection); Suggs. V. State, 923 So.2d 419, 437 (Fla. 2005), *citing* Cherry v. State, 781 So.2d 1040, 1053 (Fla. 2000).

Bradley's claim should also be denied because Bradley can show no prejudice from trial counsel's failure to challenge the

legal sufficiency of the burglary and felony murder charge. Bradley frames this issue as an ineffective assistance of counsel for failing to preserve an issue for appeal. By admitting that Delgado was not "clearly not the law at the time of Appellant's trial", Bradley concedes that if trial counsel would have filed a pre-trial motion to dismiss or raised the issue of Linda Jones' consent in a motion for a judgment of acquittal, the motions would have been properly denied. (IB 42).

Trial counsel is not ineffective for failing to preserve an issue for appeal at trial if there is not a reasonable probability he would have been successful at trial had he made an objection or filed a motion. This is so because the focus of an ineffective assistance of trial counsel claim is on the fundamental fairness of the trial and not on the appeal to follow.

In Carratelli v. State, 961 So. 2d 312 (Fla. 2007), this Court rejected the notion that Strickland's prejudice prong focuses on the appeal when the defendant claims his trial counsel failed to properly preserve an objection for appeal. Instead, this Court ruled that a defendant, alleging that counsel was ineffective for failing to object or preserve a

claim of reversible error, must demonstrate prejudice at the trial. Carratelli v. State, 961 So.2d at 323.[18]

In this case, Delgado had not been decided at the time of trial. Instead, years of case law, controlling at the time of trial, permitted the jury to find that any valid consent, previously given, could be withdrawn when the defendant violently attacked the victim in his own home. Moreover, evidence at trial demonstrated that Jack Jones ordered the intruders out of home. They did not comply. Instead, Bradley beat Mr. Jones to death.

Any motion for a JOA or pre-trial motion to dismiss on the grounds that Linda Jones gave consent to enter the Jones' home for the purpose of attacking her husband would have been properly denied. Pursuant to this Court's decision in Carratelli, Bradley's claim should be denied.

ISSUE FOUR

WHETHER CUMULATIVE ERROR DEPRIVED BRADLEY OF A FAIR TRIAL

In this claim, Bradley makes a cumulative error claim. Bradley's claim of cumulative error must fail because Bradley failed to show that trial counsel was ineffective during the guilt phase and penalty phase of Bradley's capital trial. If, after analyzing the individual issues above, the alleged errors

[18] Carratelli was decided after the collateral court issued its order denying Bradley's motion for post-conviction relief.

are either meritless, procedurally barred, or do not meet the Strickland standard for ineffective assistance of counsel, there can be no cumulative error. Because Bradley's alleged individual errors are without merit, his contention of cumulative error is similarly without merit. Griffin v. State, 866 So.2d 1, 22 (Fla. 2003) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim.").

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm the collateral court's order denying Bradley's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to Richard Kuritz, 200 East Forsythe Street, Jacksonville, Florida 32202, this 19th day of December 2008.

_____
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA
Assistant Attorney General