IN THE SUPREME COURT OF FLORIDA

DONALD BRADLEY,

Petitioner,

v. CASE NO. SC08-1813

WALTER A. McNEIL, Secretary,
Department of Corrections
State of Florida,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, by and through the undersigned Assistant Attorney General, and hereby responds to Bradley's Petition for Writ of Habeas Corpus filed in the above styled case. Respondent respectfully submits the petition should be denied.

PRELIMINARY STATEMENT

Petitioner, DONALD BRADLEY raises two (2) claims in his petition for writ of habeas corpus. References to petitioner will be to Bradley or Petitioner, and references to respondent will be to the State or Respondent.

References to the record from Bradley's direct appeal will be referred to as "TR" followed by the appropriate volume and

page number. References to the record from Bradley's appeal from the denial of his motion for post-conviction relief will be referred to as "PCR" followed by the appropriate page and volume number. References to the instant habeas petition will be to "Pet." followed by the appropriate page.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

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 was represented by veteran assistant public defender, Nada Carey. Ms. Carey raised eight claims of error in an 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.[1]

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.

[1] Ms. Carey also filed a reply brief and a notice of supplemental authority while the appeal was pending.

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. The court reserved jurisdiction to set an evidentiary hearing on Grounds 11 and 17 if or when they become ripe for adjudication. For the remainder of the claims, the court determined each could be decided as a matter of law on the existing record. (PCR Vol. IV 617-618).

On September 14, 2005, the evidentiary hearing commenced. Bradley called one witness, trial counsel Alan Chipperfield. At the conclusion of Mr. Chipperfield's testimony, upon motion by Bradley's collateral counsel, the collateral court recessed the evidentiary hearing 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. 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 1038-1040). 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.

Contemporaneously with the filing of his initial brief on appeal from the denial of his amended motion for post-conviction relief, Bradley filed the instant petition. This is the State's response.

PRELIMINARY DISCUSSION OF APPLICABLE LAW

A habeas petition is the proper vehicle to raise claims of ineffective assistance of appellate counsel. *See* Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000). The standard of review applicable to claims of ineffective assistance of appellate counsel mirrors the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) for analyzing claims of ineffective assistance of trial counsel. Valle v. Moore, 837 So.2d 905, 907 (Fla. 2002); Jones v. Moore, 794 So.2d 579, 586 (Fla. 2001).

When evaluating an ineffective assistance of appellate counsel claim raised in a petition for writ of habeas corpus, this Court must determine (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and (2) whether the performance deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Johnson v. Moore, 837 So.2d 343 (Fla. 2002). The petitioner bears the burden of alleging a specific and serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000).

It is not enough to show an omission or act by appellate counsel constituted error. Rather, the "deficiency must concern an issue which is error affecting the outcome, not simply harmless error." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981).

A petitioner cannot prevail on a claim of ineffective assistance of appellate counsel when the issue was not preserved for appeal. *See* Medina v. Dugger, 586 So.2d 317 (Fla. 1991). An exception is made only when appellate counsel fails to raise a claim which, although not preserved for appeal, constitutes fundamental error. Kilgore v. State, 688 So.2d 895, 898 (Fla. 1997). Fundamental error is error that "reaches down into the validity of the trial itself to the extent a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So.2d 643, 644-645 (Fla. 1991)(quoting Brown v. State, 124 So.2d 481 (Fla. 1960)).

Likewise, appellate counsel is not ineffective for failing to raise a non-meritorious claim. Downs v. State, 740 So.2d 506, 517 n. 18 (Fla. 1999). *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same). Indeed, appellate counsel is not necessarily ineffective for failing to raise a

claim that might have had some possibility of success. Effective appellate counsel need not raise every conceivable non-frivolous issue. Valle v. Moore, 837 So. 2d 905, 907-908 (Fla. 2002).

RESPONSE TO SPECIFIC CLAIMS

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S DENIAL OF HIS VARIOUS MOTIONS ATTACKING THE CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING SCHEME (RESTATED)

In his first claim, Bradley alleges appellate counsel was ineffective for failing to challenge, on appeal, the denial of a "plethora" of motions challenging the constitutionality of Florida's death penalty statute. (Pet. at page 7). Bradley identifies the motions in footnotes 1-8. (Pet. at page 9-10).

Bradley's first issue should be denied for one simple reason. Bradley has failed to set forth any basis upon which this Court could grant him relief.

Bradley cannot prevail on a claim of ineffective assistance of appellate counsel for failing to challenge the denial of these boilerplate motions unless he shows that, if raised on appeal, there is a reasonable probability this Court would have granted relief. Downs v. State, 740 So.2d 506, 517 n. 18 (Fla. 1999). *Accord,* Freeman v. State, 761 So.2d 1055, 1069-1070

(Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues); Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000)(same). Bradley cannot show there is a reasonable probability this Court would have granted him relief on direct appeal, unless he shows the trial court erred in denying the motions. Bradley does not even attempt to do so.

Bradley presents no argument in support of the notion that any of these motions should have been granted. Nor does he present any argument in support of his claim that Florida's capital sentencing scheme is unconstitutional. Indeed, he cites to no law at all.

By failing to set forth any argument on which this Court could find the trial court erred in denying the motions or that Florida's sentencing scheme is unconstitutional, Bradley has failed to bear his burden to show appellate counsel was ineffective for failing to raise this claim on direct appeal. Likewise, by failing to set forth any argument to support a finding the trial judge erred in denying his motions, Bradley has failed to present a legally sufficient claim for habeas relief. Belcher v. State, 961 So.2d 239, 253 (Fla. 2007) (finding a claim to be "insufficiently pled" on appeal where counsel did not articulate why the photograph was particularly inflammatory or why they were inadmissible under governing case

law); Patton v. State, 878 So.2d 368, 380 (Fla. 2004) (holding that conclusory allegations are insufficient for appellate purposes). *See also* Parker v. State, 904 So.2d 370, 375 n.2 (Fla. 2005)(declining to review four issues that Parker raised on appeal because the claims of error were bare bones and conclusory). This Court should deny Bradley's first claim.[2]

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENE THE DENIAL OF TWO MOTIONS TO SUPPRESS (RESTATED)

In his second claim, Bradley avers that appellate counsel was ineffective for failing to challenge the denial of two motions to suppress, specifically a motion to suppress "illegally obtained phone records" and a motion to suppress several of Bradley's statements to police. (Pet. at page 12-13). Bradley's claim should be denied for one simple reason.

Bradley has failed to set forth any basis upon which this Court could grant him relief.

[2] This Court has consistently upheld the constitutionality of Florida's capital sentencing scheme. Lowe v. State, 2008 Fla. LEXIS 2053 (Fla. 2008) (The issue of whether section 921.141 is unconstitutional, in whole or in part, has been addressed repeatedly by this Court. This Court has consistently found section 921.141 to be constitutional). *See also* Schoenwetter v. State, 931 So.2d 857 (Fla. 2006); Foster v. State, 929 So.2d 524 (Fla. 2006); Stephens v. State, 787 So.2d 747 (Fla. 2001); Brown v. State, 721 So.2d 274 (Fla. 1998).

Bradley cannot prevail on a claim of ineffective assistance of appellate counsel for failing to challenge the denial of these two motions to suppress unless he shows that if raised, there is a reasonable probability this Court would have granted relief. Freeman v. State, 761 So.2d 1055, 1069-1070 (Fla. 2000) (appellate counsel not ineffective for failing to raise non-meritorious issues). Bradley cannot show there is a reasonable probability this Court would have granted him relief on direct appeal unless he shows the trial court erred in denying the motions. Bradley does not even attempt to do so.

Bradley presents no argument in support of the notion that Bradley's phone records were seized in violation of Bradley's Fourth Amendment rights or that his statements to police were introduced in violation of his Fourth, Fifth or Sixth Amendment rights. Indeed, Bradley cites to no law at all.

By failing to demonstrate that the trial court erred in denying Bradley's motions, Bradley has failed to bear his burden to show that appellate counsel was ineffective. Likewise, by failing to set forth any argument to support a finding the trial judge erred in denying his motions, Bradley has failed to present a legally sufficient claim for habeas relief. Belcher v. State, 961 So.2d 239, 253 (Fla. 2007)(finding a claim to be "insufficiently pled" on appeal where counsel did not articulate

why the photograph was particularly inflammatory or why they were inadmissible under governing case law);Patton v. State, 878 So.2d 368, 380 (Fla. 2004) (holding that conclusory allegations are insufficient for appellate purposes). *See also* Parker v. State, 904 So.2d 370, 375 n.2 (Fla. 2005)(declining to review four issues that Parker raised on appeal because the claims of error were bare bones and conclusory). This Court should deny this claim.

CONCLUSION

Bradley has failed to demonstrate entitlement to relief. Bradley's Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
PHONE: (850) 414-3583
FAX: (850) 487-0997
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by U.S. Mail to Richard R. Kuritz, 200 East Forsyth Street, Jacksonville, Florida 32202, this 19th day of December 2008.

_____
Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this pleading was typed using 12 point Courier New.

_____
Meredith Charbula