IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1645

JOHN BUZIA
Petitioner,

v.

WALTER McNEIL, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

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RESPONSE TO INTRODUCTION

The "Introduction" found on page 2 of the petition is argumentative and denied.

RESPONSE TO GROUNDS FOR RELIEF

No error occurred in Buzia's case, and he is not entitled to relief.

FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case prior to postconviction proceedings was summarized by this Court:

> ### I. FACTS AND PROCEDURAL BACKGROUND
>
> Buzia was indicted on charges of the first-degree murder of Charles Kersch, attempted first-degree murder of Thea Kersch, armed burglary of a dwelling with an assault or battery, and robbery with a deadly weapon. Trial was held in March 2003.
>
> **A. The Guilt Phase**
>
> The Kersches, both 71 years old and retired, lived in a gated community. In the past, Buzia had performed odd jobs around their residence and rental properties. On the morning of March 14, 2000, Charles Kersch and his wife Thea expected Buzia at their residence for work, but he did not appear. In a videotaped interview with the police, Buzia stated that he had a "money issue" with the Kersches and, on that day, decided to steal money from them.
>
> Buzia arrived at the residence at about 2:30 p.m. He waited twenty minutes for someone to arrive. Mrs. Kersch arrived home between 4 and 4:30 p.m. Buzia told her that his brother had been beaten up and that he needed to talk to her husband. She allowed him to wait in the enclosed patio area until Mr. Kersch returned.
>
> On the patio, Buzia retrieved a serving tray he found and approached the sliding glass door that led into the kitchen. Mrs. Kersch opened the door,

and he handed it to her. Once she placed the tray on a table inside, Buzia entered. They briefly conversed. Mrs. Kersch said nothing to upset him. Yet, without warning, Buzia struck her several times with his fist. Blood sprayed from her nose. Buzia admitted that he was trying to make her unconscious so that he could take her money. He knocked her down and kicked her. She lost consciousness. He took her keys and removed about $80 from her purse. He dragged her into the back bedroom and covered her with a blanket. Then he searched the house and removed a Mastercard from her purse.

Buzia then heard the garage door open and assumed that Mr. Kersch had arrived home. He considered at this point whether he should tell Mr. Kersch that he had attacked his wife, or whether he should assault him, too, and leave. As soon as Mr. Kersch entered the house through the garage entrance, Buzia hit him with his fist, causing him to fall on the floor and hit his head on the tile. Mr. Kersch was breathing, but bleeding severely. Buzia told the police, "I was ... thinking ... you know ... he's gonna die, if [I] leave right now." Mr. Kersch attempted to rise to his feet, getting up on his hands and knees. Buzia stated that his "intention was ... obviously to keep him down longer, so maybe [he] could drive away and get more time." He was "committed" at this point. He struck him again with his fist, and Mr. Kersch again fell to the floor. He removed about $100 from Mr. Kersch's wallet.

Buzia obtained one of the two axes from the garage. He thought about "using it to make 'em unconscious" but then "threw it on the ... puddle of mess." He claims he never hit Mr. Kersch with that ax. However, after hearing moaning and groaning from Mrs. Kersch in the back bedroom, he went to the garage a second time and returned with another ax. It is unclear which ax he used on the Kersches-the first one or the second one. It seems that he used the second one and hit Mr. Kersch once in the head with the flat side of it. He stated that his intention in hitting Mr. Kersch with the ax was to "slow him" and "put him out." In the back bedroom, Mrs. Kersch was awake and attempting to get up, but he also hit her once with the same flat side of the ax. She lost consciousness again.

He covered Mr. Kersch with a blanket, and he duct-taped the door handle

in the back bedroom where Mrs. Kersch lay unconscious. After looking in closets and other things, he tried to clean up the residence a little bit, but he admitted that it was "overwhelming." Buzia then took Mr. Kersch's car keys and one of his T-shirts. He changed his shirt because it was "nasty" and "dirty." The Kersches were both moving, moaning, and groaning when he left. He drove away in Mr. Kersch's car. Shortly thereafter, the paramedics arrived. Mrs. Kersch survived, but Mr. Kersch died of blunt force injuries to the head.

The following morning, the police arrested Buzia at a bank after he attempted to cash a check for $830 drawn from Mr. Kersch's account. Buzia appeared to understand the officers' commands, did not have any trouble walking, and did not resist the officers' efforts to search him.

Investigators found Mr. Kersch's body lying near the garage door and covered with a blanket. They also found a single-headed ax on the chair at the dinette table inside the house and a double-headed ax behind the couch. The medical examiner also testified regarding the various injuries Mr. Kersch suffered and the causes of those injuries.

The jury found Buzia guilty of the first-degree premeditated murder of Mr. Kersch, the attempted first-degree murder of Mrs. Kersch, armed burglary of a dwelling with an assault or battery, and robbery with a deadly weapon.

B. The Penalty Phase

At the penalty phase, Buzia presented several lay witnesses, as well as a psychologist, who testified about his problems with drugs and alcohol, including his cocaine dependence. The State rebutted this evidence with its own expert, who stated that Buzia's actions suggested goal-directed and purposeful behavior. The jury, by a vote of eight to four, recommended the death penalty.

After the SpencerFN1 hearing, the trial court issued its sentencing order, in which it found that the evidence supported the following six aggravating circumstances: (1) that Buzia was previously convicted of another capital offense or of a felony involving the use of violence to

some person; (2) that the murder was committed while he was engaged in the commission of or flight after committing or attempting to commit the crime of kidnapping; (3) that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) that the murder was committed for financial gain; (5) that the murder was especially heinous, atrocious, or cruel ("HAC"); and (6) that the murder was committed in a cold, calculated, and premeditated manner, and without any pretense of moral or legal justification ("CCP"). However, the court assigned great weight to only four aggravators-prior violent felony, avoid-arrest, HAC, and CCP. The court did not consider the other two-during the course of a robbery/burglary/kidnapping and pecuniary gain.

FN1. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

After reviewing the record for mitigation, the court assigned little weight to two factors under the statutory catchall provision, section 921.141(6)(h), Florida Statutes (2003), specifically Buzia's interaction with the community and his work record. The court also found seven nonstatutory mitigating factors and ascribed weight as follows: (1) influence of a mental or emotional disturbance, not extreme in nature (substantial weight); (2) Buzia's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, but not substantially (substantial weight); (3) gainful employment (little weight); (4) appropriate courtroom behavior during the guilt and penalty phases of the trial and during the Spencer hearing (little weight); (5) cooperation with law enforcement (little weight); (6) difficult childhood (little weight); and (7) remorse (little weight). The trial court concluded that the aggravating circumstances outweighed the mitigation and sentenced Buzia to death. In addition, the court sentenced Buzia to three concurrent life sentences for the attempted first-degree murder, armed burglary, and armed robbery convictions.

Buzia v. State, 926 So. 2d 1203, 1206-1208 (Fla. 2006).

After this Court affirmed the convictions and sentences,[1] Buzia filed a petition for writ of certiorari. The United States Supreme Court denied certiorari on October 2, 2006. *Buzia v. State*, 549 U.S. 874, 127 S.Ct. 184, 166 L.Ed. 2d 129 (2006).

Buzia filed a Motion to Vacate Judgments of Conviction and Sentence on August 30, 2007. An evidentiary hearing was held June 23-27 and August 27-28, 2008. The trial judge denied relief in a 26-page order rendered on March 11, 2004. The appeal from that denial is pending before this Court. Case No. SC10-31.

[1] The issues on appeal were: (A) trial court erred in finding the prior violent felony aggravating circumstance; (B) trial court erred in finding the avoid-arrest aggravating circumstance; (C) trial court erred in finding the HAC aggravating circumstance; (D) trial court erred in finding the CCP aggravating circumstance; (E) the death penalty is not warranted in this case; and (F) Florida's capital sentencing procedures violate *Ring v. Arizona*, 536 U.S. 584 (2002).

ARGUMENT

APPELLATE COUNSEL WAS NOT INEFFECTIVE

Buzia alleges appellate counsel was ineffective for:

> (1) failing to raise the denial of the motion for judgment of acquittal on the burglary charge (Petition at 6-10); and
>
> (2) failing to raise the fact that the trial judge gave the kidnap instruction at the penalty phase because it was an uncharged crime (Petition at 10-11).

(1) Burglary. Buzia claims that because Mrs. Kersch invited him to come into the pool enclosure for a sandwich, "he was treated as an invitee to the entire home." (Petition at 8). Further, he did not have an intent to commit a crime and did not remain in the home surreptitiously. (Petition at 9). Buzia claims that without the Burglary conviction, his Felony Murder conviction would be reversed.

Buzia was convicted of both premeditated and felony murder. Not only was the murder premeditated, this Court affirmed the aggravating circumstance of cold, calculated, and premeditated. Buzia was also convicted of robbery, which supports the felony murder. In any case, the trial judge gave no weight to the burglary/robbery during-a-felony aggravating circumstance, and this was the subject of the State's cross-appeal on direct appeal. Thus, even if appellate counsel raised this issue and won,

Buzia would not be entitled to relief. Further, Buzia's claims have no merit under the facts of this case, and appellate counsel is not required to raise meritless claims.

The criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel. *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, the Court must consider first, 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, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000) (*quoting Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002).

(2) Kidnap instruction. This claim has no merit. The State is not required to

charge the aggravating felony during the guilt phase in order to argue the murder was committed during the commission of that felony. *Turner v. State*, 530 So. 2d 45, 50 (Fla. 1987); (Section 921.141(5)(d), Florida Statutes (1983), does not require that a defendant be charged or convicted of the enumerated felonies, it requires only that the aggravating circumstances be proven beyond a reasonable doubt).

There was no prejudice. The trial judge held that the State had, in fact, proved kidnapping beyond a reasonable doubt but did not find the aggravating circumstance. This was the subject of the cross-appeal on direct appeal.

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2d 637, 643 (Fla. 2000) (*quoting Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994)). Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Respondent respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. mail to Maria Chamberlin and Marie-Louise Samuels Parmer, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 on this __th day of November, 2010.

BY:_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____
Attorney for Appellee