IN THE SUPREME COURT OF FLORIDA

CHARLES GROVER BRANT,

Petitioner,

v. **CASE NO. SC14-2278**
L.T. 04-CF-12631

JULIE L. JONES, Secretary, **DEATH PENALTY CASE**
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, Julie L. Jones, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of November 21, 2014. Respondent respectfully submits that the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

In July, 2004, S.R., the young victim was found dead in her home. She had been sexually battered, strangled, and left in a bathtub with the water running. In August, 2007, Charles Brant pled guilty to her murder (first degree), sexual battery, and kidnapping, along with grand theft of a motor vehicle and burglary with assault or battery. Following adjudication of guilt, Brant waived his right to a penalty-phase jury and evidence of aggravating and mitigating circumstances was

presented to the Honorable William Fuente. Judge Fuente found that the murder was heinous, atrocious or cruel and that it was committed during the course of a sexual battery; he also found that statutory and nonstatutory mitigation existed, but concluded that the aggravating factors outweighed the mitigation and sentenced Brant to death.

On appeal, Brant was represented by Assistant Public Defender John C. Fisher. Mr. Fisher filed a 43-page brief presenting one issue, asserting that Brant's death sentence was disproportionate. This Court rejected Brant's argument and affirmed the convictions and sentences. Brant v. State, 21 So. 3d 1276 (Fla. 2009).

No petition for certiorari review was filed in the United States Supreme Court. Postconviction review was sought, an evidentiary hearing was conducted, and collateral relief was denied on February 5, 2014. The appeal from the denial of postconviction relief is currently pending in this Court. Brant v. State, Case No. SC10-1463.

Brant also filed a federal civil rights complaint, challenging Florida's procedures for execution by lethal injection, on April 18, 2013. Brant v. Palmer, et al., United States District Court Case No. 3:13-cv-00412-TJC-MCR. That

action remains pending in the district court as of the filing of this response.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner Brant alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984) standard for claims of trial counsel ineffectiveness. See Valle v. Moore, 837 So. 2d 905 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Brant asserts that Mr. Fisher failed to raise two issues which would have compelled appellate relief: (1) that this Court's appellate review process is inadequate and (2) that the trial court erred in denying the motion to dismiss the

kidnapping charge. However, Brant has not demonstrated that all reasonable appellate attorneys would have raised these issues or that either one of them would have been successful on appeal. To the contrary, both of these issues would have been rejected if presented. Therefore, counsel was not ineffective for failing to present them. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not deficient performance which falls measurably outside the range of professionally acceptable performance); Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Habeas relief is not warranted on Brant's meritless claims.

CLAIM I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER A DIFFERENT PROPORTIONALITY ARGUMENT.

Brant's first argument asserts that his appellate counsel rendered constitutionally deficient performance by failing to present an issue challenging the adequacy of this Court's appellate review process. According to the petition, this Court's proportionality review should not just assess the propriety of a death sentence in light of other cases where death has been imposed, but should consider similar crimes where the defendants were not sentenced to death as well. Brant has not cited any cases which actually agree with his argument, and has not identified any cases where the issue has been presented.

This claim must be rejected as procedurally barred. The bar is appropriate because Brant is presenting this issue as a direct appeal claim rather than a claim of ineffective appellate counsel. This is clear for two reasons. One, Brant boldly states that he is offering this as a substantive claim on the merits in addition to a claim of ineffective assistance of counsel. (Pet.,p.3) Two, appellate counsel did argue a lack of proportionality in his appeal, and the claim, as now presented in the petition, is simply a variation of that argument. Because habeas petitions may not be used as a second appeal, both the substantive Eighth Amendment and the ineffective assistance of counsel aspects of this claim must be denied procedurally. See Nelson v. State, 43 So. 3d 20, 35 (Fla. 2010) ("Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion"); Green v. State, 975 So. 2d 1090, 1115 (Fla. 2008); Brown v. State, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised"); Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) ("Allegations of ineffective assistance of appellate counsel may not be used to evade the rule against using habeas corpus as a second appeal").

Even if considered, both the substantive and the IAC claim are without merit. On the Eighth Amendment claim, Brant relies on "evolving standards of decency" but does not identify any standards that have evolved, or any objective indicia that policies have changed nationwide with regard to the way Florida conducts capital case proportionality review under state law. He cites to law review articles from the 1980s and 1990s and United States Supreme Court decisions from the 1970s, 1980s, and 1990s. None of these authorities have found fault with this Court's proportionality review or suggested that it is inadequate. And although Brant explains that he disagrees with this Court's review for failing to consider similar cases where the defendants were not sentenced to death, he does not explain why his personal preference should prevail over long established Court procedures. Certainly his preference is not constitutionally compelled, since, as he acknowledges, the Eighth Amendment does not require any proportionality review at all. Pulley v. Harris, 465 U.S. 37 (1984).

Brant's reliance on ineffective assistance of appellate counsel to secure relief on this issue should also be rejected. Since this Court conducts a proportionality review in every case, the claim that this argument is constitutionally compelled suggests that it must be raised in every case, or appellate

counsel is performing deficiently. Yet, it is not presented in every case, and Brant has not cited even a single case where it was presented. A claim is not one which all reasonable attorneys will raise if it applies in every case and has never been asserted. This fact alone is a sufficient reason to reject the allegation of deficient performance.

Moreover, there is no meritorious claim. Once again, Brant has offered no relevant authorities which support his position. It is not clear how he thinks a review of non-death cases could be accomplished, since there would be no development of the aggravating and mitigating circumstances in a case where the State was not seeking the death penalty, and therefore no principled way to compare those cases.

Further, notwithstanding Brant's allegation that his sentence is disproportionate because his crimes were similar to other rape/murders where the defendants were sentenced to life, there has been no showing that any such argument would have prevailed on appeal. He claims that his death sentence is disproportionate and constitutionally arbitrary and capricious because other defendants committing similar crimes have received life sentences. Brant cites to State v. Chatsiam Adam Lioy, Hillsborough County Case No. 03-CF-017367, and Rich v. State, 21 So. 3d 842 (Fla. 1st DCA 2009), but he does not provide

sufficient facts or any reasoning or analysis to support his argument. For example, Brant killed the victim in a heinous, atrocious and cruel manner, but he cites no facts indicating that either the Lioy or the Rich murders were committed in such a manner. He observes that Lioy and Rich had prior records while Brant did not, but makes no attempt to compare their relevant mental states or moral culpability to determine if, in fact, they were comparable, similarly situated defendants.

Brant's argument seems to be that prosecutorial discretion in determining whether to seek the death penalty renders the sentence arbitrary and capricious. Brant would apparently have the State seek the death penalty anytime a defendant is indicted for first degree murder, just to give this Court a broader span of cases with which to conduct a proportionality review. Such a system would unnecessarily waste State resources, in addition to creating anxiety and useless litigation.

As no deficient performance or prejudice has been established, this claim must be rejected and habeas relief denied.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSERT THAT THE TRIAL COURT ERRED IN DENYING BRANT'S MOTION TO DISMISS THE KIDNAPPING CHARGE.

Brant's second claim faults Mr. Fisher for failing to present a claim challenging the trial court's ruling on Brant's preserved motion to dismiss the kidnapping count. According to the petition, Brant's restraints on the victim were merely incidental to the rape, murder and burglary he committed, and did not support a separate charge for kidnapping. Once again Brant does not provide any direct authority, reasoning, or analysis which supports his argument, but he observes that the defense below relied on Faison v. State, 426 So. 2d 963 (Fla. 1983), Gray v. State, 939 So. 2d 1095 (Fla. 1st DCA 2006), and Carron v. State, 414 So. 2d 288 (Fla. 2d DCA 1982), and the State relied on Bedford v. State, 589 So. 2d 245 (Fla. 1991).

In Faison, this Court held that confining a victim for the purpose of committing another crime does not amount to kidnapping where the confinement was slight, inconsequential, or incidental to the other crime, was inherent in the nature of the other crime, and had no independent significance such as making the crime easier to commit or lessening the risk of detection. Faison, 426 So. 2d at 965. In Bedford, this Court held that Faison only applied where the kidnapping was charged with an

intent to commit or facilitate the commission of a felony. Bedford, 589 So. 2d at 251. Since Brant was charged with kidnapping with the intent to inflict bodily harm or to terrorize S.R., Faison has no application. While Brant is aware of that reasoning to deny his motion to dismiss, he offers no argument against Bedford and provides no explanation to support any claim of error in the ruling actually entered below.

The facts of Brant's case, as described in the predicate by the State, include Brant chasing the victim as she managed to work her way toward the front door. He grabbed her repeatedly, forcing her into a bedroom to be choked and raped. While she was confined, Brant both inflicted harm and terrorized the young woman.

Even if the kidnapping had been charged differently, the conviction would be valid. Had the victim been able to escape, it would have made the crime more difficult and increased the risk of detection. These circumstances satisfy Faison. In Faison, this Court upheld the kidnapping convictions on substantially similar facts. There were two sexual assault victims in that case, and both were taken from one room to another location within the same office and apartment, respectively, then assaulted. The fact that Brant's young

neighbor was not transported any significant distance does not compel reversal of his conviction under Faison.

Moreover, there would be no meaningful difference in Brant's case if the kidnapping were to be reduced to false imprisonment pursuant to Faison. Here, Brant is serving other life sentences on the other felonies he indisputably did commit at the time of S.R.'s murder. His death sentence did not rely on the kidnapping for the "during the course of a felony" aggravator, citing the sexual battery exclusively. Because even prevailing on this claim would not change Brant's death sentence or the amount of time he is to serve in prison, there can be no prejudice in the failure to present this meritless issue. Appellate counsel did not perform deficiently and there is no prejudice. Accordingly, habeas relief must be denied.

CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2015, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal system which will send a notice of electronic filing to the following: Marie-Louise Samuels Parmer, Esquire, P.O. Box 18988, Tampa, Florida 33679-8988 [**marie@samuelsparmerlaw.com**].

Respectfully submitted,

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