

IN THE SUPREME COURT OF FLORIDA

PAUL ANTHONY BROWN,
Petitioner,

v.

CASE NO. SC01-2713

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,
Respondent.

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

CLAIM I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE
OF COUNSEL TO BROWN BY FAILING TO RAISE ON APPEAL THE
CLOSING ARGUMENT COMMENTS OF THE PROSECUTOR. 3

CLAIM II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE
OF COUNSEL TO BROWN BY FAILING TO RAISE ON APPEAL A CLAIM
THAT HIS MOTION TO SUPPRESS HIS CONFESSIONS OR ADMISSIONS
SHOULD HAVE BEEN GRANTED. 20

CONCLUSION 32

CERTIFICATE OF SERVICE 32

CERTIFICATE OF COMPLIANCE 32

TABLE OF AUTHORITIES

CASES

Brown v. State,
721 So. 2d 274 (Fla. 1998) 3, 10, 11, 19, 20

Card v. State,
803 So. 2d 613 (Fla. 2001) 10, 19, 20

Christian v. State,
550 So. 2d 450 (Fla.1989) 3

Connor v. State,
803 So. 2d 598 (Fla. 2001) 27

Craig v. State,
510 So. 2d 857 (Fla. 1987), *cert. denied*,
484 U. S. 1020 (1988) 12, 13, 14, 15, 16

Davis v. State,
698 So. 2d 1182 16

Downs v. Moore,
801 So. 2d 906 (Fla. 2001) 6, 7, 17, 31

Duest v. Dugger,
555 So. 2d 849 (Fla. 1990) 19, 21

Edwards v. Arizona,
451 U.S. 477 (1981) 28

Floyd v. State,
27 Fla. L. Weekly S75 (Fla. Jan. 17, 2002) 17, 21

Ford v. State,
802 So. 2d 1121 (Fla. 2001) 8, 15, 16

Francis v. State,
27 Fla. L. Weekly S2 (Fla. Dec. 20, 2002) 29, 30, 31

Freeman v. State,
761 So. 2d 1055 (Fla. 2000) 6, 7, 17, 19, 22

Henyard v. State,

689 So. 2d 239 (Fla. 1996), <i>cert. denied</i> ,	
522 U.S. 846 (1997)	13
<i>Johnson v. Dugger</i> ,	
523 So. 2d 161 (Fla. 1988)	4, 21
<i>Jones v. Barnes</i> ,	
463 U.S. 745	5
<i>Muhammad v. State</i> ,	
782 So. 2d 343 (Fla. 2001), <i>cert. denied</i> ,	
122 S. Ct. 323 (2001)	8, 9, 10
<i>Oregon v. Bradshaw</i> ,	
462 U.S. 1039 (1983)	30, 31
<i>Parker v. Dugger</i> ,	
537 So. 2d 969 (Fla. 1989)	17
<i>Parker v. Dugger</i> ,	
550 So. 2d 459 (Fla. 1989)	7, 22
<i>Pope v. Wainwright</i> ,	
496 So. 2d 798 (Fla. 1986)	4
<i>Provenzano v. Dugger</i> ,	
561 So. 2d 541 (Fla. 1990)	5, 21
<i>Reese v. State</i> ,	
694 So. 2d 678 (Fla.1997)	3
<i>Robinson v. Moore</i> ,	
773 So. 2d 1 (Fla. 2000)	10
<i>Rogers v. State</i> ,	
783 So. 2d 980 (Fla. 2001)	8
<i>Rutherford v. Moore</i> ,	
774 So. 2d 637 (Fla. 2000)	6, 7, 31
<i>Shellito v. State</i> ,	
701 So. 2d 837 (Fla. 1997), <i>cert. denied</i> ,	
523 U.S. 1084 (1998)	14, 15
<i>Sims v. State</i> ,	

681 So. 2d 1112 (Fla. 1996), <i>cert. denied</i> ,	
520 U.S. 1199 (1997)	7
<i>Sireci v. State</i> ,	
773 So. 2d 34 (Fla. 2000)	19
<i>Stein v. State</i> ,	
632 So. 2d 1361 (Fla. 1994)	27, 28, 29, 31
<i>Stephens v. State</i> ,	
748 So. 2d 1028 (Fla. 1999)	4
<i>Strickland v. Washington</i> ,	
466 U.S. 668 (1984)	4, 21
<i>Suarez v. Dugger</i> ,	
527 So. 2d 190 (Fla. 1988)	4, 5, 17, 21, 31
<i>Thomas v. State</i> ,	
748 So. 2d 970 (Fla. 1999)	8
<i>Thompson v. State</i> ,	
759 So. 2d 650 (Fla. 2000)	22
MISCELLANEOUS	
§ 921.141(4), <i>Fla. Stat.</i> (1997)	3
Fla. R. App. P. 9.140(h)	3

STATEMENT OF THE CASE AND FACTS

This Honorable Court summarized the facts of the crimes on direct appeal as follows:

On November 6, 1992, Roger Hensley ("Hensley") was found dead on the bedroom floor of an apartment in Ormond Beach, Florida. He had been stabbed multiple times and his throat had been slashed. The police found two steak knives on the floor in the living room, one of which was covered in blood. Investigators documented blood spatter in several areas of the victim's bedroom and bathroom, as well as fingerprints and bloody shoe prints inside the apartment. Investigators also discovered several empty beer bottles and a bag of a substance presumed to be marijuana. Missing were the victim's white Nissan pick-up truck and keys thereto.

In October of 1992, Brown traveled from Tennessee to Daytona Beach where he met Scott Jason McGuire ("McGuire"). McGuire moved into Brown's motel room and the two spent the next two weeks consuming alcoholic beverages and smoking crack cocaine. At some point Brown decided to return to Tennessee. According to McGuire, Brown offered him \$1000 to drive Brown to Tennessee but McGuire's vehicle did not work.

Thereafter, on November 5, Brown and McGuire approached Roger Hensley outside of a bar and, with Hensley driving, accompanied him to his apartment. McGuire testified that during the drive, Brown held a gun behind Hensley's seat. McGuire also claimed that during before (sic) entering Hensley's apartment, Brown whispered, "How would you like to do it?," to which McGuire made no response. Inside, the three men each drank a bottle of beer, shared half of a marijuana cigarette, and talked about various things, including employment possibilities. Hensley invited Brown and McGuire to spend the night. However, before retiring to his bedroom, Hensley dropped a few dollars on the table and stated, "I don't know what you guys' game is. If you've come here to rob me, this is all the money I have. You can take it." McGuire assured Hensley that they were not there to rob him and

Hensley went to bed.

After Hensley left the room, Brown told McGuire he was going to shoot Hensley and steal his truck. McGuire objected to the use of the gun because of the noise. Appearing angry at McGuire's response, Brown walked to the kitchen and got two steak knives, handing one to McGuire. McGuire threw the knife to the ground and denounced any intention of taking part in murder. Brown said he would take care of it himself and, in a symbolic gesture, dragged his hand across his throat.

Brown told McGuire to stand by the door to block Hensley's escape and he entered the bedroom where Hensley was lying on the bed. McGuire then heard what he thought were stabbing sounds and heard the victim say "no." Upon hearing something hit the floor, McGuire approached the bedroom where he noticed Hensley lying on the floor covered in blood and "making sounds" as if he was "struggling to breathe."

Brown was rummaging through the victim's bedroom looking for car keys. He found the victim's wallet and removed a twenty-dollar bill. Brown, who had blood on his hands, arms, and pants, then tried to wash it off. McGuire did not have any blood on him, but attempted to wipe his fingerprints from everything in the apartment that he had touched.

Ten or fifteen minutes later, the two left the victim's apartment in Hensley's truck, stopped at their motel room to collect their belongings, and drove to Tennessee. There, Brown burned his bloody pants in a stove and McGuire departed on foot a day or two later. Brown was arrested on November 8 at a farmhouse in Tennessee by agents from the Federal Bureau of Investigation (F.B.I.) on unrelated charges.

While in the custody of the F.B.I., Brown stated, "I'm a murderer, not only a bank robber", and declared that he and another man named "Scott" killed "a white male" in Daytona Beach and stole his truck. Brown explained how the two met the victim and went back to the victim's "motel room", where they smoked "crack" cocaine and then stabbed and killed the victim. Brown claimed that it was McGuire's suggestion that they

find someone who owned a car, steal the car, and kill the owner. He also claimed that he stabbed the victim several times in the chest and once in the back but that McGuire slit the victim's throat. Brown's statements to the FBI were admitted in evidence at trial.

Brown also testified at trial and denied any involvement in the homicide, claiming instead that McGuire killed Hensley while Brown was asleep as a result of smoking marijuana. Brown testified that he awoke to find Hensley standing over him with a bloodied knife. He claimed that McGuire had stabbed Hensley once in the back and was attempting to slit his throat. Brown also claimed that after they left the apartment, McGuire threatened to frame him for the murder if Brown told anyone about it.

The jury found Brown guilty of first-degree premeditated murder and first-degree felony murder. After a penalty phase proceeding, the jury recommended a sentence of death by a vote of twelve to zero. The trial court followed the jury's recommendation and sentenced Brown to death. The trial court found four aggravating factors and two non-statutory mitigating factors.

Brown raises five issues on appeal, all of which pertain to the penalty phase of the trial. Although Brown does not contest the sufficiency of the evidence for his conviction of first-degree murder, we must, nevertheless, make an independent determination that the evidence is adequate. See § 921.141(4), *Fla. Stat.* (1997); *Fla. R.App. Pro.* 9.140(h); see also *Reese v. State*, 694 So.2d 678, 684 (Fla.1997); *Christian v. State*, 550 So.2d 450, 451 (Fla.1989). Based upon our review, we find that there is competent, substantial evidence to support the verdict. That evidence has been outlined in detail above.

(footnote omitted) *Brown v. State*, 721 So. 2d 274 (Fla. 1998).

Brown filed his Rule 3.850 motion for post-conviction relief

on November 3, 2000 (R 457). He amended that motion on February 12, 2001, (R 494), and filed a Second Amended Motion on April 26, 2001. (R 582). The initial brief has been filed. Therein, Brown raised three claims, 14 sub-claims and numerous sub-sub-claims. The answer brief is due to be served on March 12, 2002.

CLAIM I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL TO BROWN BY FAILING TO RAISE ON APPEAL THE CLOSING ARGUMENT COMMENTS OF THE PROSECUTOR.

Brown complains that his appellate counsel rendered deficient performance which prejudiced him when he failed to raise on direct appeal a claim of prosecutorial misconduct based on comments made during closing argument. (Petition at 7). The State contends that Brown has failed to meet either prong of the ineffective assistance of appellate counsel standard.

The standard of review of ineffective assistance of appellate counsel under *Strickland v. Washington* is *de novo* review. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). To prevail on such a claim in relation to appellate counsel, Brown must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). When considering a habeas petition alleging

ineffective assistance of appellate counsel, this Court's review is limited to

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.

Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988)(quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). See *Strickland v. Washington*; *Johnson v. Dugger*. The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Suarez*, 527 So. 2d at 193.

"One of appellate counsel's responsibilities is to 'winnow out' weaker arguments on appeal and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527 . . . (1986)." *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Even where a claim is "preserved for appellate review,

it is well established that counsel need not raise every nonfrivolous issue revealed by the record. See *Jones v. Barnes*, 463 U.S. 745 . . . (1983)." *Provenzano*, 541 So. 2d at 1167. Moreover, the failure of appellate counsel to brief a meritless issue, or even one with little merit, is not deficient performance. *Suarez*, 527 So. 2d at 193. For example, where the State elicited improper opinion testimony, and trial counsel objected each time, thereby preserving the claims for appeal, appellate counsel was not ineffective because he does not have to raise every possible argument to be effective. *Floyd v. State*, 27 Fla. L. Weekly S75, S77 (Fla. Jan. 17, 2002). Thus, it is clear that appellate counsel cannot be criticized for failing to raise weak issues. *Id.*; *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Neither will appellate counsel be deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000); *Thompson v. State*, 759 So. 2d 650, 664 (Fla. 2000); *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990); *Knight v. State*, 394 So. 2d 997 (Fla. 1981).

Claims of ineffective appellate counsel may not be used to raise issues which could have been, or were, raised on direct appeal or in a Rule 3.850 postconviction motion. *Freeman*, 761

So. at 1069. It is the defendant's burden to allege a specific, serious omission or overt act which rises to the magnitude of a serious error or substantial deficiency well outside that of professional norms. *Id.* If the defendant meets that burden, he must still demonstrate that the performance deficiency was of such a nature as to undermine confidence in the correctness of the result reached in the case. *Id.* Thus, issues having no merit, or harmless errors, cannot be the basis for a successful claim of ineffective assistance of appellate counsel. *Id.* Appellate counsel is not ineffective where he does not raise issues that are procedurally barred because they were not properly raised during the trial court proceedings and do not constitute fundamental error. *Downs v. Moore*, 801 So. 2d 906, 909-10 (Fla. 2001); *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000); *Freeman*, 761 So. 2d at 1069.

Moreover, the claim presented in this habeas petition is procedurally barred because it was raised in the Rule 3.850 motion pending before this Court. See Case No. SC01-1275, Argument I, sub-claim 2, pp. 45-59. It has long been the law that habeas petition "are not to be used for additional appeals on questions which . . . were raised . . . in a rule 3.850 motion" *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). See *Freeman*, 761 So. 2d at 1069. Raised herein, these

claims are a thinly veiled attempt to have another direct appeal - which is impermissible. *Freeman*, 761 So. 2d at 1070.

In this petition, Brown complains that the prosecutor made improper comments to the jury during his closing argument. (Petition at 7). He admits, however, that "[t]rial counsel did not object to any of these improper comments or argument by the prosecutor." (Petition at 7). His claim should be denied on this basis alone. See *Sims v. State*, 681 So. 2d 1112, 1116-17 (Fla. 1996), *cert. denied*, 520 U.S. 1199 (1997)[Although "the prosecutor called him [Sims] a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sims' credibility by expressing his personal views and knowledge of extra-record matters," the claim was denied "[b]ecause defense counsel failed to object contemporaneously to any of the comments at issue . . ."]. Thus, the instant claim was not preserved for appellate review, and appellate counsel's performance was not deficient. *Downs; Rutherford; Freeman*.

Brown attempts to avoid the long line of precedent which compels denial of his claim at this point by contending that the prosecutorial comments during closing argument were so substantial as to rise to the level of fundamental error. (Petition at 8). He identifies these comments as ones in which

the prosecutor "gave his personal opinion on the credibility of the defense," Brown's "credibility as a witness, inflamed the jury's emotion or passion and argued non-record evidence." (Petition at 8).

The law is clear that "attorneys are granted wide latitude in closing argument." *Ford v. State*, 802 So. 2d 1121, 1132 (Fla. 2001). See *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999). "Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Thomas*, 748 So. 2d at 984. Control of comments made to a jury is a matter within the trial court's discretion. *Ford*, 802 So. 2d at 1132. This Court has long held that "allegedly improper prosecutorial remarks cannot be raised on appeal unless a contemporaneous objection is lodged." *Rogers v. State*, 783 So. 2d 980, 1002 (Fla. 2001). An exception exists "where the prosecutor's erroneous comments constitute fundamental error, which has been defined as . . . error that 'reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *Id.*

In *Muhammad v. State*, 782 So. 2d 343, 359-60 (Fla. 2001), *cert. denied*, 122 S. Ct. 323 (2001), the defendant claimed "the State engaged in impermissible closing argument during the guilt phase by commenting on the fear on the victim's face,

mischaracterizing the detective's testimony . . . , and improperly arguing facts that were not in evidence." Two of the comments were objected to, but the last was not. *Id.* at 360. This Court found one of the objected to comments to invite the jury to imagine the pain and suffering of the victim, but found it harmless because "there is no reasonable possibility that this improper argument contributed [to] the jury's guilty verdict." *Id.* Considering the unobjected to comment which was clearly a comment on facts not in evidence, this Court found the comment improper, but not fundamental error. *Id.* at 360-61.

In the instant case, none of the comments were objected to. Neither were any of them, alone or cumulatively, fundamental error.

Brown complains that "[t]he prosecutor was mocking" him when he repeated Brown's trial testimony that he tried to comfort the victim, and he "'went down and asked him if he was okay.'" (Petition at 11). The State submits that the prosecutor's comment was entirely appropriate as it was a repetition of what Brown, himself, testified to at trial. Moreover, the prosecutor was merely comparing the wealth of evidence establishing that Brown savagely stabbed Mr. Hensley to death to the defense testimony that Brown was concerned for Mr. Hensley, tried to comfort him, and inquired whether the man he had just repeatedly

stabbed with numerous ferocious blows from a knife plunged several inches into the victim's heart was "okay."¹ The prosecutor is entitled to comment on the evidence, and that includes the evidence from the defendant's mouth from the witness stand at trial. See *Robinson v. Moore*, 773 So. 2d 1, 6 (Fla. 2000). There was no improper comment here, much less one rising to the level of fundamental error.

Neither did the prosecutor ask the jury to consider him a "thirteenth juror." (Petition at 11). Allegedly improper comments must be viewed in context. *Muhammad*, 782 So. 2d at 360. See *Card v. State*, 803 So. 2d 613, 622 (Fla. 2001)[*"We do not examine allegedly improper comments in isolation."*]. The prosecutor's use of "we" and "us" in addressing the jury was not to place himself in league with the jurors; rather, the "we" and "us" clearly referenced all of those persons who had heard the evidence, and in particular Brown's testimony from the witness stand. Thus, the comment was not improper, and certainly, it is not fundamental error.

Brown next complains that the prosecutor commented "that the

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See Appendix A at 84-85, 87. Appendix A contains excerpts from the record on direct appeal in Case No. 89,537, which was decided by this Honorable Court on Oct. 1, 1998 in *Brown v. State*, 721 So. 2d 274 (Fla. 1998).

victim was 'gurgling'" and claims that statement "was not supported by the record." (Petition at 11). Clearly, trial counsel does not agree with collateral counsel. In his rebuttal argument, trial counsel told the jury:

And the prosecutor can stand up here and talk about gasping and gurgling and gasping and gurgling and gasping and gurgling to make everything just sound horrible when Paul Brown is on trial. There is **no doubt** that **all of that happened**. . . .

(emphasis added)(Appendix A at 99).

Moreover, as this Court recited in its opinion of October 19, 1998, Witness McGuire testified that he saw the victim "lying on the floor covered in blood and 'making sounds' as if he was 'struggling to breathe.'" *Brown*, 721 So. 2d at 276. Further, the medical examiner testified that the stab wounds went "through the chest wall and punctures (sic) the lung." (Appendix A at 83). The doctor explained that Mr. Hensley suffered "bleeding into the chest cavity and has had 600 or 700 cc's of blood in his chest cavity from that stab wound." *Id.* This was "certainly" consistent with Mr. Hensley lying on the floor, gasping for breath, and breathing heavily" during the last few minutes of his life. (Appendix A at 86). Clearly, the prosecutor's comment that the victim was gurgling was a reasonable inference from the evidence, and therefore, a fair comment on it. See *Robinson v. Moore*, 773 So. 2d at 6, cert.

denied, 522 U.S. 1127 (1998)[“prosecutor’s remarks as to what the victims said did not materially depart from what the witness actually testified to or were proper inferences from the witness’s testimony.”]; See also *Davis v. State*, 698 So. 2d 1182, 1190 (Fla. 1997), *cert. denied*, 522 U.S. 1127 (1998)[submission to jury of conclusion state believes can be drawn from the evidence is appropriate, as is “characterization” of the facts and events].

Brown goes on to take exception to the prosecutor telling the jury that Brown’s testimony “wasn’t true,” claiming this invaded their province. (Petition at 12). However, in context, it is clear that the “prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence.” *Craig v. State*, 510 So. 2d 857, 865 (Fla. 1987), *cert. denied*, 484 U. S. 1020 (1988). Such does not invade the province of the jury, but leaves it free “to decide what evidence and testimony was worthy of belief” *Id.* The prosecutor is permitted to submit “his view of the evidence to them for consideration.” *Id.*

Brown complains that the prosecutor gave his personal opinion on the evidence on numerous occasions. (Petition at 12, 14-20). For the most part, whenever the prosecutor used the term “I think” or “I don’t think,” he is accused of giving his

personal opinion. *Id.* However, when the specific comments are evaluated in context, it is generally clear that the prosecutor was merely arguing to the jury the conclusion that he, as the representative of the State, felt could be drawn from the evidence. As in *Craig*, he was "merely submitting his view of the evidence to them for consideration." 510 So. 2d at 865.

For example, when the prosecutor said "I think if someone is to be feared, they would not stand for that being done to them," the prosecutor is commenting on the defense theory that Mr. McGuire was the real killer and Brown was afraid of him. The State's view of the evidence is that if Brown was afraid of Mr. McGuire, he would not have given the gas station attendance Mr. McGuire's ID when he left the station without paying. Certainly, this is a conclusion that could be drawn from the evidence presented at trial and the application of common sense. Such argument is not improper.² *Craig*.

Brown complains that the prosecutor told the jury that he was not going to talk "much about . . . the testimony of Mr. Brown here in court, because it's worthless" (Petition at 15).

²

Neither is this argument a violation of the golden rule as Brown claims at page 14 of his petition. The golden rule is an invitation to the jury to put itself in the place of **the victim**, not in the defendant's place.

The prosecutor was arguing Brown's credibility - or more accurately, his lack thereof - to the jury. Clearly, he is entitled to do so. See generally, *Henry v. State*, 689 So. 2d 239, 250 (Fla. 1996), cert. denied, 522 U.S. 846 (1997)[prosecutor may comment on defendant's truthfulness or lack thereof and on his claims of innocence].

Moreover, in *Craig*, this Court said that even when the prosecutor refers to the defendant "as being a 'liar,'" it is permissible where "it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." 510 So. 2d at 865.

In *Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997), cert. denied, 523 U.S. 1084 (1998), the defendant complained about comments made in the guilt phase closing argument. According to him, "the prosecutor improperly referred to Shellito's motion as 'either an extremely distraught concerned mother or ... a blatant liar.'" 701 So. 2d at 841. Pointing out that the mother testified at trial and that another witness "testified to the contrary," this Court found that the comments were not erroneous. *Id.* Rather, given the contradiction in the testimony, the prosecutor's comments were made "in the context

of allowing the jury to determine her credibility." *Id.* The same can be said of many of the complained of comments made in regard to Brown and his trial testimony.

Continuing with his long list of complaints about the prosecutor's closing argument, Brown quotes several more "I think" comments. Those at petition pages 16 and 17 are fair comments on the evidence; they are the prosecutor's submission to the jury of conclusions that could be drawn from the evidence. Some are appropriate under *Craig*. Moreover, to the extent that the prosecutor argues that McGuire should be believed over Brown, (comments at petition pages 18 and 19), that is a credibility argument permissible under *Shellito*.³ See 701 So. 2d at 841.

Brown then complains that the prosecutor told the jury that only one verdict was really appropriate "'and that is the top box guilty of both types of first-degree murder.'" (Petition at 19). This comment was made in explaining the verdict form to the jury. (Appendix A at 95-97). It comes near the end of the prosecutor's argument, and it is clear from the context that the prosecutor is submitting that the State's view of the evidence

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Moreover, the prosecutor makes it clear to the jury that the determination of credibility is their choice, i.e., "what you've got here is a choice" (Appendix A at 94).

meets the criteria of only one of the choices on that form - that of first degree murder. Such argument merely states the prosecutor's view of the evidence and submits that the charge has been proved based on that evidence. See *Craig*, 510 So. 2d at 865[prosecutor submitting his view of the evidence is permissible]. It is not unlike a "punishment must fit the crime" argument found to be a "simple and fair representation of the law" in *Ford v. State*, 802 So. 2d 1121, 1132 (Fla. 2001).

Brown's next complains about the prosecutor's comments that the jury should return a verdict "'for the highest offense that has been proved beyond a reasonable doubt.'" (Petition at 20). This, too, is permissible as a "punishment must fit the crime" argument. *Ford*, 802 So. 2d at 1132.

Brown complains that the prosecutor told the jury "'[t]his is a premeditated, first-degree and first-degree felony murder case.'" (Petition at 20). Again, the prosecutor is allowed to argue his view of the evidence and submit that he has proved his case. See *Craig*, 510 So. 2d at 865.

Brown's next complaint is that the prosecutor argued to the jury that Brown "'was proud to be a murderer.'" (Petition at 21). This is undoubtedly a comment on the evidence at trial that after being arrested for the Tennessee bank robbery, Brown volunteered that he had murdered a man in Florida and said, "I'm

a murderer, not only a bank robber." (Appendix A at 62-67). In fact, the next statement out of the prosecutor's mouth clarifies this; he said: "And Mr. Brown was proud to be a murderer. And he so stated." (Appendix A at 97). He also identified the date Brown made the statement, November 9, 1992, the day he made this statement to the FBI. *Id.* Thus, the prosecutor's argument was a fair inference from the evidence, and was, therefore, permissible. See *Craig*, 510 So. 2d at 860. It was also permissible for the prosecutor to characterize Brown as "proud." See *Davis*, 698 So. 2d at 1190.

Finally, Brown complains that the prosecutor asked the jury to "'follow the law,'" and "'applying the evidence to the law, . . . announce through your verdict yes, that's right, Mr. Brown you are a murderer.'" (Petition at 21). This is a continuation of the previous argument, and was, alone and in conjunction with the previous argument, a reasonable reference to the evidence that Brown informed the FBI that he was not just a bank robber, but was also a murderer. Viewed in context, this comment was not a "send a message" argument, at all. Moreover, had it been such a comment, it did not amount to error. See *Freeman*, 761 So. 2d at 1069-70).

The failure of appellate counsel to brief an issue with a little merit, much less a meritless one, is not deficient

performance. *Downs*, 801 So. 2d at 909-10; *Parker v. Dugger*, 537 So. 2d 969, 971 (Fla. 1989); *Suarez*, 527 So. 2d at 193. Appellate Counsel simply does not have to raise every possible argument to be effective. *Floyd v. State*, 27 Fla. L. Weekly at S77. Brown has not carried his burden to prove deficient performance, and thus his claim fails under *Strickland/Suarez*.

Finally, even if some of the prosecutor's arguments "crossed the line of proper advocacy," none of them were objected to, and the evidence of Brown's guilt of the instant crime was overwhelming. Not only did McGuire testify in detail against him, Brown confessed to the FBI when he was arrested in Tennessee on bank robbery charges unrelated to the Florida murder. (Appendix A at 62-67). Moreover, when arrested, Brown had possession of the victim's white pickup truck and had a black tool box containing identifying information on Mr. Hensley, including pay stubs.⁴ (Appendix A at 59-60). When Brown was arrested, his tennis shoes were taken, and he commented he guessed they were taking "them in for evidence;" the tread on his shoes matched bloody shoe prints found at the

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Mr. McGuire had parted from Brown the day before, so desperate to leave that he took off on foot. (Appendix A at 68).

scene. (Appendix A at 61). Shoe prints in blood (from the same pair of shoes) were found on the floor in the hallway of the victim's home and in the bathroom where McGuire testified Brown washed Mr. Hensley's blood off after repeatedly stabbing him. (Appendix A at 69-71). The person making the shoe print "was present at the time of bloodshed" (Appendix A at 72). The expert in "footwear impression analysis" testified that the shoes taken from Brown upon arrest were "positively" those that left the bloody shoe prints at the crime scene. (Appendix A at 73-75, 76-78). Another expert established that Mr. Hensley's blood was present on Brown's shoes.⁵ (Appendix A at 79-82). Finally, in his testimony at trial, Brown admitted being present at the scene of Mr. Hensley's murder when it occurred. (Appendix A at 88-93). In fact, the evidence of guilt was so overwhelming that not a single guilt phase issue was raised on direct appeal (although five penalty phase issues were raised), and this Court, conducting its own sufficiency of the evidence review, upheld the conviction. *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998), *cert. denied*, 526 U.S. 1102 (1999). Thus, the closing argument errors, if any, did not compromise the integrity of the

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Only 1.5% of the Caucasian population would have Mr. Hensley's blood type. (Appendix A at 82).

judicial process and did not deprive Brown of a fair trial. See *Card v. State*, 803 So. 2d at 623[penalty phase closing argument].

Moreover, even had he shown deficient performance, he utterly failed to show prejudice. He has not even adequately alleged it. Such allegations are required to state a legally sufficient ineffective assistance claim. See *Sireci v. State*, 773 So. 2d 34, 40 n.11 (Fla. 2000)[Defendant must specifically allege "how he was prejudiced by counsel's failure."].

Further, only where a deficiency in performance affects "the outcome" will habeas relief be found. *Freeman*, 761 So. 2d at 1069[quoting *Knight v. State*, 394 So. 2d 997 (Fla. 1981)]. Any errors the prosecutor made in his closing argument pale in comparison to the overwhelming evidence of Brown's guilt of Mr. Hensley's murder and did not affect the outcome. Appellate counsel is not deemed ineffective for failing to raise a point, which even if correct, would amount to no more than harmless error. *Duest*, 555 So. 2d at 853. Brown has not carried his burden to prove prejudice affecting the outcome of the guilt phase of his trial,⁶ and thus his claim fails under

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Although Brown insufficiently pled any deficient performance or prejudice in regard to the penalty phase from the closing argument made at the guilt phase, had he done so, he could not have met his burden to prove either. The jury issued a unanimous

Strickland/Suarez.

He is entitled to no relief.

CLAIM II

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL TO BROWN BY FAILING TO RAISE ON APPEAL A CLAIM THAT HIS MOTION TO SUPPRESS HIS CONFESSIONS OR ADMISSIONS SHOULD HAVE BEEN GRANTED.

Brown complains that his appellate counsel rendered deficient performance which prejudiced him when he failed to raise on direct appeal that the trial court erred in denying his motion to suppress his confessions or admissions. (Petition at 23). Specifically, he complains that the statements he made to the FBI after his arrest on bank robbery charges in Tennessee should have been suppressed. (Petition at 23). He admits that trial counsel moved to suppress these statements, and evidence was taken on the issues. (Petition at 23). However, he disagrees with the result reached by the trial court and argues that appellate counsel should have appealed the denial of the motion.

recommendation of death, and the trial court found four aggravators, including CCP and HAC, "two of the 'most serious aggravators . . .'" *Card v. State*, 803 So. 2d at 623, and only two nonstatutory mitigators. *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998). The complained-of comments, even if erroneous, clearly did not affect the outcome of the penalty phase proceeding, and therefore, no relief would be appropriate. See *Card*, 803 So. 2d at 623.

As stated in more detail in Claim I above, in order to prevail on an ineffective of appellate counsel claim, Brown must show that his attorney's performance was professionally deficient and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So. 2d 161 (Fla. 1988). The deficiency must be such that had it not occurred, the result of the proceeding would have been different. *Suarez*, 527 So. 2d at 193. See also Claim I, *supra*, at 4-5.

Appellate counsel is expected to "winnow out" weaker claims and focus on those points most likely to prevail. *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990). Only the strongest points should be raised.

Moreover, counsel need not raise every nonfrivolous issue supported by the record. *Provenzano v. State*, 561 So. 2d at 549. Thus, the failure of appellate counsel to brief a meritless issue, or one with some merit, is not deficient performance. *Id.*; *Suarez*, 527 So. 2d at 193. See *Floyd v. State*, 27 Fla. L. Weekly S75, S77 (Fla. Jan. 17, 2002)[appellate counsel does not have to raise every possible viable argument to be effective]. Neither will he be declared ineffective for failing to raise a point, which even if correct, would be no more than harmless error. *Duest v. Dugger*, 555 So. 2d 849 (Fla.

1990). See also Claim I, *supra*, at 5-6.

Claims of ineffective appellate counsel may not be used to raise issues which could have been, or were, raised on direct appeal, or in a Rule 3.850 postconviction motion. *Freeman v. State*, 761 So. 2d 1055, 1069-70 (Fla. 2000); *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). Defendant bears the burden to establish a specific omission or overt act which rises to the level of a serious error or substantial deficiency well outside the professional norm. *Freeman*, 761 So. 2d at 1069. If the defendant meets that burden, he must still demonstrate that the deficient performance was of such importance that it undermined confidence in the correctness of the result of the case. *Id.* See also Claim I, *supra*, at 7.

Finally, it has long been the law of this State that habeas petitions do not serve as a forum for a second appeal. See *Parker*, 550 So. 2d at 460. An appellate attorney is not ineffective for failing to raise issues on direct appeal which would not have constituted reversible error. *Thompson v. State*, 759 So. 2d 650, 664 (Fla. 2000).

Agent Childs testified at the suppression hearing that when he arrived at the scene of Brown's arrest for the Tennessee bank robbery, Brown had already been advised of his *Miranda* rights and had requested an attorney before talking. (Appendix A at 1).

Agent Childs was transporting Brown from the scene to jail when Brown "started to make voluntary comments" to the agents. *Id.* at 3. Brown explained that he had planned "to come out shooting," but had not, and that it looked "like they're going to put me away for the rest of my life." *Id.*

Brown continued to make voluntary statements after they arrived at the jail. *Id.* He commented that they wanted his tennis shoes "for evidence." *Id.* at 6. The agents were not aware of Brown's involvement in any murder, and they "didn't ask him questions." *Id.* at 6-7.

Agent Childs saw Brown again the next day to process him. *Id.* at 7. He and another agent transported Brown from jail to the FBI office for fingerprinting. *Id.* at 8. Brown resumed talking with them as he had the day before. *Id.* There were periods when "he was quiet and he would start up talking again." *Id.* at 9. Brown gave "the impression that he wanted to get things off his chest. And then he also stated that they'll be putting me away for a long time and a lot of people will want to talk to him." *Id.* at 9. He also said "[h]e had done a lot of things" *Id.* at 9. He was not asked any questions, or interrogated in any way. *Id.* at 10.

Brown was talkative throughout all of the contact Agent

Childs had with him, and while being fingerprinted, Brown "made comments that led me to believe he wanted to get something off his chest." *Id.* at 11. Brown "repeated he had done a lot of things and that he wanted to get everything over right away." *Id.* The robbery case file was on the table, and Brown asked: "What do you have over there?" and "he was looking over" at the file. *Id.* at 11. Brown denied that he was the man in a photograph taken of "a teller's window of a bank robbery" *Id.* at 12.

Brown again said "he had a lot of things, he had done . . . and that he wanted to take care of things right away." *Id.* at 12. He added that "[h]e wanted to get it off his chest" *Id.*

The agents wanted "to clarify what his intentions were," and Agent Childs "asked him, Do you want me to advise you of your rights again?" *Id.* Brown "said, Yes." *Id.* He was re-Mirandized, and was questioned "on each point" to be sure "he understood each point" *Id.* at 13. Brown told the agents that "he understood his rights." *Id.*

Two other FBI agents were present. One of the others, Agent Grant, testified at the hearing. Both agents said that Brown was sober and coherent and understood his rights. *Id.* at 20-21,

35. He never expressed any hesitancy or doubts about talking to the agents at any time after they came in contact with him. *Id.* at 21. He declined to sign the form because "he doesn't sign anything." *Id.* at 13. Thereupon, he announced that he was "ready to plead guilty right now. I want to get everything done right now. . . . he also stated he didn't need an attorney to tell the truth to the FBI." *Id.* at 13-14. Agent Childs wrote that Brown "understands his rights" and "[d]oes not want an attorney at this time" at the bottom of the form. *Id.* at 15. This document was admitted into evidence without objection. *Id.*

Brown proceeded to admit his involvement in three bank robberies, and denied participation in others. *Id.* at 16. In connection with a photograph made during one of the robberies, Brown said: "I didn't rob that bank. That's not me. I don't know who they are. They're way out of my league. I'm a murderer, not only a bank robbery (sic)." *Id.* He "continued on and admitted to murdering a white male in a motel room in Daytona Beach, Florida, on approximately November 4, 1992." *Id.* Brown added that he was "ready to pay for my mistakes." *Id.* After confessing to the murder, he "lean[ed] back and relax[ed] and said, I feel a lot better now." *Id.* at 17-18.

A document was prepared by one of the FBI agents which set

out some of what Brown had said. It was written in Brown's presence, read by him, and initialed and signed by him. *Id.* at 18-19.

Brown makes much of the fact that he had allegedly asked for an attorney when first arrested on the bank robbery at the Tennessee farm house and claims he should have not been talked to at all until one was provided. The record shows that he was arrested at about 3:00PM on Sunday afternoon. *Id.* at 23. He was transported from jail to the FBI office for fingerprinting early the next morning. *Id.* Thereafter, he was taken to "the U.S. Marshal's office . . . around 12:30" *Id.* After arrival there, Brown was to go before a magistrate and an attorney would be appointed for him. *Id.* at 25. This was the same process used with all prisoners; Brown was not treated differently. *Id.*

Agent Grant rode with Agent Childs and Brown from jail to the FBI office. *Id.* at 28. Brown appeared normal and relaxed. *Id.* He was talkative and made "some voluntary statements" *Id.* at 28-29. These statements were not made in response to questioning by the FBI agents. *Id.* at 29. Brown continued to make statements after they arrived at the FBI office. *Id.*

After Brown inquired about the Agent's investigative file and a photograph, "[h]e indicated to us he wanted to talk to

us." *Id.* at 30. That he wanted to talk to them was clarified, and thereafter, Brown was advised of his rights. *Id.* at 31. Brown indicated that he understood all of his rights and specifically said so. *Id.* at 31-32.

Agent Grant corroborated what Agent Childs reported that Brown had said during the contact they had with him. *Id.* at 32-33. After confessing to the murder, "he stated he felt better" *Id.* at 33.

The trial court entertained oral arguments on the suppression issue. Defense Counsel stated: "It's our position that once he said he wanted a lawyer, . . . they should not have listened to anything he said or discuss (sic) the matter with him, or they should have put Mr. Brown in touch with an attorney." *Id.* at 40. The State's position was that "the defendant can initiate statements with law enforcement that would lead to him being asked questions" even after a prior invocation of the right to remain silent and the right to an attorney. *Id.* at 41. Moreover, Brown fully understood his rights and voluntarily talked to the Agents. *Id.* at 45.

The trial judge made extensive findings of fact on each of the statements Brown made to the FBI agents. *Id.* at 48-58. Included in those findings was that "the defendant did unequivocally voluntarily initiate further contact in that he

did advise that he did want to talk to the officers, and thereupon, the officers . . . advised him of his rights" *Id.* at 52. Moreover, "the defendant specifically told the officers he did not want to have an attorney present." *Id.* at 53. Based on the extensive factual findings and on this Court's decision in *Stein v. State*, 632 So. 2d 1361 (Fla. 1994), the trial court ruled that none of Brown's statements should be suppressed and denied the motion. *Id.* at 52, 58.

The standard of appellate review has been recently set out in *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001). "[A]ppellate courts should continue to accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact" 26 Fla. L. Weekly at S581. Reviewing courts "would still give a strong presumption of correctness to the trial court's determinations of historical fact, reversing those only if not supported by competent substantial evidence in the record." *Id.* However, this Court will make "an independent determination and review the application of law to those facts *de novo*." *Id.*

In *Stein v. State*, this Court was presented with facts very similar to those of the instant case. Acknowledging that "once

an accused asks for counsel, an accused may not be subjected to further interrogation until counsel has been made available to the accused, absent initiation of further communication with law enforcement officers by the accused,"⁷ this Court considered Stein's claim that once he asked for an attorney, "there can be no continued interrogation or valid waiver of the defendant's rights without the actual presence of counsel." 632 So. 2d at 1364. The trial judge had found "that Stein had made the statements freely and voluntarily and that Stein had initiated the conversation." *Id.* This was based on Stein "knocking on the door and stating, 'I want to talk about part of it.'" *Id.* "[B]efore the investigators asked Stein any more questions, they again advised him of his right to an attorney." *Id.*

This Court upheld the denial of Stein's suppression motion. "Once an accused asks to speak to counsel, law enforcement officers should refrain from making any comments to an accused other than those necessary to properly process the accused through the system." *Id.* at 1364-65. Although an officer had made a comment about Stein needing God's forgiveness as he left after the invocation of rights, this Court found any error

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This is the *Edwards v. Arizona*, 451 U.S. 477 (1981) standard.

caused by that comment harmless beyond a reasonable doubt.⁸ *Id.*
at 1365.

More recently, in *Francis v. State*, 27 Fla. L. Weekly S2 (Fla. Dec. 20, 2001), this issue was revisited. Francis claimed that the trial judge had "erred in concluding that he had reinitiated contact with detectives after he had invoked his right to an attorney." 27 Fla. L. Weekly at S6. This Court said: "[T]he trial court's ruling with regard to the factual circumstances is accorded great deference." *Id.*

In *Francis*, the defendant "refused to sign the rights waiver card," but "agreed to speak to the officers." *Id.* He made some incriminating statements, and then "invoked his right to counsel." *Id.* The officers stopped questioning him and left, leaving Francis in the room while they continued to work on the case. *Id.* After several hours had passed, "Francis summoned the officers with a knock on the door of the interview room." *Id.*

8

Although it is not clear from *Stein* that this Court found the knock on the door and the statement by Stein to the officers to be a reinitiation of contact with police given the inappropriate statement of the officer, in a later case this Court clarified that that was the holding of *Stein*. See *Francis v. State*, 27 Fla. L. Weekly S2, S7 (Fla. Dec. 20, 2002)[*Stein* "reinitiated contact when he knocked on the door and stated 'I want to talk about part of it.'"]].

He said "he wanted to talk to the police officers again," and upon being told they could not do so because of his invocation of the right to counsel, Francis said "he no longer wanted a lawyer." *Id.*

Francis claimed "that any contact initiated by him was merely perfunctory in nature." *Id.* This Court noted that the facts of *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) were similar to those in Francis' case, although the request to reinitiate contact was "ambiguous" in *Bradshaw*. *Id.* at S7. Nonetheless, the U.S. Supreme Court concluded that Bradshaw's "question . . . as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.*(quoting *Bradshaw*). Since no further discussion proceeded until after Bradshaw was reminded of his right not to talk to them, and he indicated that he understood that right, there was no constitutional violation. *Id.*

This Court said that Francis' knock "on the door because he wanted to find out what was going on is nearly identical to Bradshaw's question to the police." *Id.* Moreover, after so indicating, Francis was again advised of his rights. *Id.* The denial of the motion to supplement in *Francis* was upheld. *Id.*

In the instant case, the trial judge specifically found that Brown unequivocally, voluntarily initiated further contact with the Agents. In so doing, he advised them that he wanted to talk to them. Certainly, the evidence from the hearing as set out above, far exceeds the competent, substantial evidence standard for this factual finding. It likewise supports the factual finding that after being so advised by Brown, "the officers . . . advised him of his rights" *Id.* at 52. Moreover, "the defendant specifically told the officers he did not want to have an attorney present." *Id.* at 53. Thus, based on *Francis*, *Stein*, and *Bradshaw*, the trial judge's denial of the suppression motion would have been affirmed on direct appeal had this issue been raised.⁹

Appellate counsel is not ineffective for failing to raise meritless issues. *Downs v. Moore*, 801 So. 2d 906, 909 (Fla. 2001); *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988). Thus, Brown has failed to carry his burden under the deficient performance prong of *Strickland*, and that defeats his instant habeas claim.

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Of Course, *Francis* was not in existence at the time of the direct appeal, however, the cases to which it cites for authority on the instant issue, *Stein* and *Bradshaw*, were.

Id. Finally, the State submits that had counsel's performance been deficient, and had Brown alleged prejudice therefrom in his claim, he would still not prevail because he cannot show prejudice. The evidence of his guilt is overwhelming without the statements he made to the FBI agents. See Claim I, *supra*, at 16-17.

Brown is entitled to no relief.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **John J. Bonaccorsy**, 1326 S. Ridgewood Ave., Suite 6, Daytona Beach, FL 32114, on this _____

_ day of March, 2002.

JUDY TAYLOR RUSH
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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