IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2864

JUAN DAVID RODRIGUEZ,

Petitioner,

vs.

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

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS

On May 3, 1989, Defendant was charged by indictment with the first degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted murder in the first degree. (R. 7)[1] Defendant's trial commenced on January 23, 1990. (R. 310) The jury returned a verdict of guilty on all counts and recommended a death sentence by a vote of twelve to zero. (R. 1693-96, 1886) The trial court followed the jury's unanimous recommendation of a sentence of death. (R. 1760-64)

The facts adduced at trial, as found by this Court, were:

> According to his testimony at trial, on April 22, 1988, Ramon Fernandez was introduced to the defendant at a bail bondman's office by Carlos Sponsa. Sponsa asked Fernandez to give the bondsman the title to his car for a few hours, so Rodriguez could go get some money to pay his bail. Fernandez complied with the request; however, Rodriguez never returned with the money.
>
> On May 13, 1988, Fernandez met with Sponsa and Defendant and asked Rodriguez to pay the bondsman so his car would be returned. Rodriguez told Fernandez and Sponsa that he knew where he could get the money and told them to follow him. The two followed Rodriguez, who drove a blue Mazda, to a shopping center. According to Fernandez, Rodriguez went to the door of an auto parts store in the shopping center and talked to a man inside. Rodriguez then came over to their vehicle and told Fernandez and Sponsa to wait in

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[1] The symbol "R." will refer to the record from Defendant's direct appeal, Florida Supreme Court Case No. 75,978.

front while he drove around to the back of the shopping center to wait for the owner of the auto parts store. Instead of waiting in the car, Fernandez went up some stairs to the other end of the shopping center, where he saw the owner exit the store through the front door carrying a briefcase. The owner, Abelardo Saladrigas, began walking to the back of the shopping center. When Fernandez could no longer see Saladrigas, he heard two shots. As Fernandez was coming down the stairs, he heard a third shot and then saw Rodriguez chasing the victim with a gun in one hand and the victim's briefcase in the other. Rodriguez was yelling, "Give me the watch; give me the watch." The victim ran behind a car where Rodriguez shot him a fourth time, grabbed the victim's watch and ran to the Mazda.

* * *

Rodriguez explained that he shot Saladrigas first in the leg and then in the stomach because the victim would not surrender his briefcase and watch. After being shot, the victim threw the briefcase at Rodriguez and began screaming. Rodriguez shot him again in an attempt to get the watch. After the victim ran behind a car, Rodriguez shot him the final time and took the watch.

There was also testimony from another witness that pleas of "Don't do this to me, please" were heard coming from the back parking lot prior to the shots being fired.

* * *

According to Fernandez, the day after the murder, he, the defendant, and several other young men went to a residence intending to invade it and rob the occupants who according to Sponsa had large amounts of drugs and cash. Fernandez and two of the men went in one vehicle; Rodriguez and the other two went in a separate vehicle. Fernandez and the two men who rode with him went to the door. When a man answered, the three attempted to push their way in. However, when the man's wife brought him a gun, the three ran from

> the house. The attempted robbery victim shot at the three and one of them returned fire. Although Fernandez was carrying the murder victim's revolver during the attempted home invasion, he did not fire it. Fernandez dropped the revolver on the front lawn while fleeing.
>
> Sergio Valdez, a participant in the attempted home invasion, who rode to the scene with the defendant, also testified. Valdez' account of the attempted home invasion was generally consistent with that of Fernandez. He explained that he, Rodriguez, and another man circled the residence while the other three men went to the door. According to Valdez, Rodriguez told him it was their job to tie up the people in the house and search for money and drugs after the others gained entry. Valdez also testified that while in route to the residence, Rodriguez admitted that he "had done a job" at an auto parts store the day before, and that he had stolen a thousand dollars and the Rolex watch he was wearing from the victim.

Rodriguez, 609 So. 2d 493, 496-97 (Fla. 1992).

Defendant appealed his convictions and sentences, raising four issues:

> I.
>
> THE TRIAL COURT ERRED IN COMPELLING THE DEFENDANT TO PROCEED WITHOUT THE PRESENCE OF A CRUCIAL DEFENSE WITNESS AND IN FAILING TO PERMIT THE DEFENDANT TO INTRODUCE INTO EVIDENCE THAT DULY SUBPOENAED WITNESSES' PRIOR DEPOSITION TESTIMONY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW, HIS RIGHT TO COMPULSORY PROCESS, AND HIS ABILITY TO PRESENT A DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> II.
>
> THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY CONDUCTING A JOINT TRIAL OF THE DEFENDANT FOR THE FIRST DEGREE MURDER OF ABELARDO SALADRIGAS WITH

ENTIRELY UNRELATED CHARGES SURROUNDING THE ARMED BURGLARY OF THE RALPH LIEVA DWELLING THE FOLLOWING DAY, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III.

THE TRIAL COURT ERRED IN PERMITTING THE SISTER-IN-LAW OF THE HOMICIDE VICTIM TO OFFER IDENTIFICATION TESTIMONY OF THE VICTIM, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE INTO EVIDENCE EXTRAORDINARY AMOUNTS OF HEARSAY TESTIMONY TO BOLSTER THE TESTIMONY OF ITS CHIEF PROSECUTION CO-DEFENDANT WITNESS, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND HIS RIGHT OF CONFRONTATION GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

IV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The imposition of the Death Penalty Against Juan David Rodriguez Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment.

B. The Prosecutor’s Improper Comments On the Defendant’s Demeanor Off the Witness Stand During the Advisory Sentencing Proceedings Rendered Those Proceedings Constitutionally Unfair and Vitiate the Jury’s Death Penalty Recommendation.

C. The Trial Court’s Determination As Justification For the Imposition of the Death Penalty That the Capital Felony Was Especially Heinous, Atrocious,

or Cruel was Erroneous Where Such an Aggravating Circumstance Was Neither Proved Beyond a Reasonable Doubt, Nor Appropriate Under the Circumstances of This Case.

D. The Trial Court's Sentencing Order is Deficient as a Matter of Law and Reflects That the Trial Court Failed to Consider the Existence and Applicability of Various Statutory and Nonstatutory Mitigating Circumstances.

E. The Trial Court Erred in Considering the Impassioned Plea of a Family Member Which Was Tantamount to a "Impact Statement" Thereby Denying the Defendant the Individualized Sentencing and Reasoned Decision Making to Which He Was Entitled Under the Eighth and Fourteenth Amendments.

F. The Death Penalty in Florida is Unconstitutional on Its Face and As Applied to Defendant Rodriguez.

Initial Brief of Appellant, Case No. 75,978. On October 8, 1992, the Court affirmed Defendant's convictions and sentences, including the sentence of death. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). Rehearing was denied on January 7, 1993. Defendant filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 4, 1993. *Rodriguez v. Florida*, 510 U.S. 830 (1993).

On August 10, 1997, Defendant filed a third amended motion for post conviction relief, raising the following thirty claims:

CLAIM I

ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER

119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED THE PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM III

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANTS, ALL IN VIOLATION OF [DEFENDANT'S] RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

CLAIM IV

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE. COUNSEL WAS INEFFECTIVE DURING VOIR DIRE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM V

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] CONVICTION AND DEATH SENTENCE ARE UNRELIABLE.

CLAIM VI

[DEFENDANT] WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF [DEFENDANT'S] TRIAL AND WHEN THE JURY WAS ALLOWED TO RELY ON IMPROPERLY ADMITTED EVIDENCE. AS A RESULT, [DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S GUILT VERDICT.

CLAIM VII

[DEFENDANT] IS INNOCENT OF THE DEATH PENALTY.

CLAIM VIII

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED ADEQUATELY CHALLENGE THE STATE'S CASE AS WELL AS TO PRESENT EVIDENCE IN SUPPORT OF THE MITIGATING CIRCUMSTANCES. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM IX

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN [DEFENDANT'S] CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, [DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON

FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, *ESPINOSA V. FLORIDA* AND *RICHMOND V. LEWIS*. COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE FOR FAILING TO OBJECT TO THE FACIALLY VAGUE STATUTE AND FOR FAILING TO ADVISE THE TRIAL COURT OF ADEQUATE NARROWING CONSTRUCTIONS OF THE APPLICABLE AGGRAVATING CIRCUMSTANCES.

CLAIM X

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED [DEFENDANT'S] JURY ON THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED [DEFENDANT'S] JURY ON THE MURDER FOR THE PURPOSES OF PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XII

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED [DEFENDANT'S] JURY ON THE CRIME COMMITTED WHILE ENGAGED IN THE COMMISSION OF A ROBBERY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIII

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED [DEFENDANT'S] JURY ON THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTOR, IN VIOLATION OF *ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIV

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION *ESPINOSA V. FLORIDA, STRINGER V. BLACK,*

MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THESE INSTRUCTIONS DURING [DEFENDANT'S] PENALTY PHASE AND SENTENCING.

CLAIM XV

[DEFENDANT'S] SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XVI

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING [DEFENDANT] TO DEATH. FAILURE TO OBJECT OR ARGUE EFFECTIVELY RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

CLAIM XVII

[DEFENDANT'S] SENTENCE RESTS UPON AN UNCONSTITUTIONALLY AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION *STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER*, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XVIII

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XIX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT [DEFENDANT'S] CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XX

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS

AND ARGUMENT, THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND THE SENTENCING COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED [DEFENDANT'S] CONVICTION AND RESULTING DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXI

INEFFECTIVE ASSISTANCE OF COUNSEL AND THE PROSECUTOR'S IMPROPER CONDUCT AND ARGUMENT RENDERED [DEFENDANT'S] CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XXII

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

CLAIM XXIII

[DEFENDANT] WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH.

CLAIM XXIV

[DEFENDANT] WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AR. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION AND FLORIDA STATUTES ANNOTATED, SEC. 921.141(4), DUE TO OMISSIONS IN THE RECORD.

CLAIM XXV

THE RULES PROHIBITING [DEFENDANT'S] ATTORNEYS FROM INTERVIEWING JURORS TO DETERMINE IF CAUSE EXISTS TO DETERMINE IF RELIEF IS APPROPRIATE DUE TO JUROR MISCONDUCT VIOLATE EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XXVI

JUROR MISCONDUCT OCCURRED IN THE GUILT AND PENALTY PHASE OF [DEFENDANT'S] TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XXVII

[DEFENDANT'S] TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XXVIII

[DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL AND SENTENCING BEFORE AN IMPARTIAL JUDGE AND JURY IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THOSE PARALLEL PROVISIONS WITHIN THE CONSTITUTION OF THE STATE OF FLORIDA; BY THE IMPROPER CONDUCT OF JUDGE CARNEY WHO CREATED A BIAS IN FAVOR OF THE STATE AND RENDERED RULINGS CONTRARY TO THE LAW. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING OR MOVING FOR A MISTRIAL.

CLAIM XXIX

[DEFENDANT] DID NOT MAKE A KNOWING AND INTELLIGENT WAIVER OF ANY RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS WERE VIOLATED WHEN HIS PURPORTED STATEMENTS WERE IMPROPERLY ADMITTED INTO EVIDENCE.

CLAIM XXX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES [DEFENDANT'S] RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE FLORIDA CONSTITUTION.

(PCR. 1862-2054)[2] Following a *Huff* hearing, the lower court granted an evidentiary hearing with respect to claims III and VIII as each claim related to Defendant's alleged mental retardation and denied Defendant's remaining claims. (PCT. 382) After the evidentiary hearing, the lower court denied the motion for post conviction relief. (PCR. 2722-25)

Defendant appealed the order denying the motion for post conviction relief, raising 12 issues:

> I.
> THE LOWER COURT ERRED IN DENYING [DEFENDANT] A NEW PENALTY PHASE AFTER THE LIMITED EVIDENTIARY HEARING.
>
> II.
> SUMMARY DENIAL OF THE NON MENTAL HEALTH PENALTY PHASE CLAIM.
>
> III.
> SUMMARY DENIAL OF [DEFENDANT'S] GUILT PHASE.
>
> IV.
> THE PUBLIC RECORDS ISSUE.
>
> V.
> FAILURE BY JUDGE CARNEY TO DISQUALIFY HIMSELF.
>
> VI.
> COUNSEL'S FAILURE TO OBJECT TO UNCONSTITUTIONAL JURY INSTRUCTIONS.
>
> VII.
> THE PROSECUTORIAL MISCONDUCT ARGUMENT.

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[2] The symbols "PCR." and "PCT." will refer to the record on appeal and transcript of proceedings from the denial of Defendant's motion for post conviction relief, Florida Supreme Court Case No. SC00-99, respectively.

VIII.

FLORIDA’S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

IX.

THE INCOMPLETE RECORD ARGUMENT.

X.

THE JUROR INTERVIEW AND JUROR MISCONDUCT ARGUMENT.

XI.
IMPERMISSIBLE VICTIM IMPACT.

XII.
THE CUMULATIVE ERROR ARGUMENT.

Initial Brief of Appellant, Case No. SC00-99. The appeal remains pending before this Court.

On December 28, 2001, Defendant filed the instant petition for writ of habeas corpus, alleging three issues:

I.
APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF THE CONVICTION AND/OR THE DEATH SENTENCE.

A. FAILURE TO RAISE MERITORIOUS PENALTY PHASE ISSUES.

1. Improper prosecutorial argument.

2. Improper doubling of aggravating circumstances instruction to the jury and failure by appellate counsel to raise on direct appeal.

3. Failure to raise burden shifting argument.

4. The jury's sense of responsibility was unconstitutionally diluted and appellate counsel failed to raise this claim.

5. The pecuniary gain aggravating circumstance instruction given was unconstitutionally overbroad and vague and appellate counsel failed to raise the claim.

6. Failure by appellate counsel to properly raise the unconstitutionality of Florida' death penalty statute.

7. Improper admission of Dante Perfumo’s opinion testimony.

B. FAILURE TO RAISE GUILT PHASE ISSUES.

1. Introduction of gruesome and misleading photographs.

2. Improper exclusion of testimony regarding “Tata’s” non arrest.

C. FAILURE BY APPELLATE COUNSEL TO ENSURE A COMPLETE RECORD.

II.

THIS COURT FAILED TO CONDUCT A MEANINGFUL HARMLESS ERROR ANALYSIS WHEN CONSIDERING THE EFFECT OF IMPROPER PROSECUTORIAL ARGUMENT AND INADMISSIBLE HEARSAY TESTIMONY.

III.

THE CONSTITUTIONALITY OF THE FIRST-DEGREE MURDER INDICTMENT MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY.

This response follows.

ARGUMENT

I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL SHOULD BE REJECTED.

Defendant asserts that his appellate counsel was ineffective for failing to raise a variety of issues. The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls

> within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Here, appellate counsel cannot be deemed ineffective because the claims were meritless.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR THE MANNER IN WHICH HE RAISE THE ISSUE REGARDING THE COMMENTS IN THE PENALTY PHASE CLOSING.

Defendant first asserts that his appellate counsel was

ineffective for failing to properly raise an issue regarding the prosecutor's comments during the penalty phase closing. However, this claim should be rejected because counsel did raise the issue of comments during the penalty phase closing argument on appeal and because this issue is without merit and unpreserved.

On direct appeal, Defendant asserted that his sentence should be reversed because of comments made during the State's penalty phase closing argument. Initial Brief of Appellant, Case No. 75,978, at 57-60. This Court rejected this argument. *Rodriguez v. State*, 609 So. 2d 493, 500-01 (Fla. 1992). As counsel did raise this issue, he may not be deemed ineffective for having failed to do so. Moreover, asserting different arguments in support of an issue that was raised on direct appeal or claiming that the argument that was made was inadequate are not grounds to reconsider the rejection of an issue. *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000). As such, this claim should be rejected.

Defendant first asserts that State misled the jury by urging it to follow the law and by stating that recommend life would be the easy way out. (R. 1840-43) However, Defendant only objected to the comment that recommending life would be the easy way out. (R. 1840-43) As such, any issue regarding the other comments was

not preserved for review. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). As appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be rejected. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Further, encouraging a jury to follow the law should not be improper. In fact, juries are instructed to follow the law. Fla. Std. Jury Instr. (Crim.) 2.09; Fla. Std. Jury Instr. (Crim.) Penalty Phase Proceedings. As such, appellate counsel was not ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be rejected.

While the one brief comment regarding the easy way out was improper, any error in this comment was harmless. The comment was brief. The State presented overwhelming evidence of three aggravating factors: during the course of a robbery and for pecuniary gain, merged; prior violent felony convictions, including an attempted first degree murder, attempted armed robbery, attempted armed burglary and aggravated assault; and HAC. The only mitigating factor that was found was that Defendant had a good marriage and family life. However, Defendant’s wife, whose testimony was offered in support of this

mitigation, admitted that Defendant had been away from home for 5 years of the 11 year marriage and had only been home for 2 months of his child's life. (R. 1817-22) Moreover, she admitted that Defendant had never discussed what his life was like before the marriage with her and that he had never introduced her to any of his friends. (R. 1823-25) Given the strength of the aggravating circumstances and the paucity of evidence in mitigation, there is no reasonable doubt that the jury would have recommended death regardless of this comment. As such, any error in this comment was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Because the failure to raise this issue would not have affected the outcome of the appeal, appellate counsel cannot be deemed ineffective. *Strickland*, 466 U.S. at 694. The claim should be denied.

Defendant next contends that the prosecutor urged the jury to send a message to the community by imposing a death sentence. Defendant bases this claim on two comments. First, the prosecutor in discussing the seriousness with which the jury should approach its penalty phase deliberation, the prosecutor stated:

> Third, your recommendation is a recommendation to the Judge. He must give it great weight in determining what the appropriate penalty will be, but it's the Judge's final decision with regard to what should be done in this case. Please follow your

> oaths. If you don't follow your oaths individually and collectively as the Judge told you in the first phase of trial, it will be a miscarriage of justice. Everyone is counting on you to follow the law.
>
> As members of this community, the recommendation that you give to the Court is a recommendation of the community based on facts of this case as to what the appropriate penalty should be.

(R. 1843) Defendant's objection to this comment was overruled. (R. 1843)

Later, in a prelude to discussing the aggravators proven in this case, the prosecutor discussed the nature of aggravating circumstances generally:

> It is an unfortunately comment on the community that we live in today that first degree murders happen all too happen. Murders happen much, much too often. We read about, we hear about them. It's not a good comment on the community in which we live in hearing the kind of things that happen. Sixteen year old kids shoot clerks during a robbery. That's a first degree murder, felony murder. That's not a death case. That's not a case in which the jury will consider the death penalty. Drug dealers are shot in the head and dumped in the Everglades. We read about that. That's first degree murder, not necessarily a death case; not a death case.
>
> Those kinds of things that are not considered for the ultimate penalty are first degree murders. What set this case apart from those cases? What makes this case different? What makes this murder terrible? And heinous? Well, those are the aggravating factors that we're going to talk about.

(R. 1844-45) Defendant did not object to this comment. (R. 1844-45)

As Defendant did not object to the second comment, any issue regarding is was unpreserved. *Castor v. State*, 365 So. 2d 701

(Fla. 1978). Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be rejected. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, the comments did not urge the jury to send a message to the community by sentencing Defendant to death. The first comment encouraged the jury to consider its recommendation seriously, in light of the purpose of that recommendation. In fact, this Court has held that a jury recommendation is entitled to great weight precisely because "[w]e choose juries to serve as democratic representatives of the community, expressing the community's will regarding the penalty to be imposed." *Stevens v. State*, 613 So. 2d 402, 403 (Fla. 1992). When read in context, the second comment did not suggest that Defendant had to be sentenced to death because murder happened too frequently in the community. Instead, the comment pointed out that all first degree murders did not merit the death penalty; only those in which certain aggravating factors existed. The comment was made as a way of introducing the State's argument regarding the aggravators. As such, neither of these comments urged the jury to send a message to the community by sentencing Defendant to death. *See Teffeteller v. Dugger*, 734 So. 2d 1009, 1022-23 & nn. 15 & 17 (Fla. 1999); *Jackson v. State*, 704 So. 2d 500, 507

(Fla. 1997). As the issue had no merit, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant next asserts that the State mischaracterized Dante Perfumo's testimony regarding his experience and the amount of suffering the victim endured. However, the courts permit wide latitude during closing argument to argue logical inferences from the evidence. *Franqui v. State*, 26 Fla. L. Weekly S695 (Fla. Oct. 18, 2001); *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982).

During his testimony, Perfumo stated that he had been a paramedic for 10 years, that he had been to numerous trauma scene and that he saw trauma on a daily basis. (R. 1806-08, 1810) He described the victim as being in extreme pain, tremendous amounts of pain, and more agony than most trauma victims. (R. 1810, 1811, 1814, 1815) He also stated that the victim was conscious all the way to the hospital and was constantly asking if he would survive. (R. 1810-11, 1815) This evidence supported the State's argument that Perfumo had been to thousands of trauma scenes and that the victim's suffering was beyond belief. As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*,

718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Defendant next contends that the State's comments regarding the nature of Defendant's prior violent felony convictions were improper as victim impact evidence. In discussing the appropriate weight to be given to the prior violent felony aggravator, the State asserted:

> What were the facts of that separate crime, totally separate from the murder that occurred the following day on an innocent family?
>
> * * * *
>
> What are the facts of the attempted first degree murder? What are the facts of aggravated assault? Remember, an innocent family in their own home, A man was shot, terrorized, kids. Nothing is more precious to use as Americans than to be free and safe within our own homes. We are free from governmental influence. We are free from unreasonable searches by the government. We can tell police officers to get out of our homes. We can tell anybody to leave our home. It is one of the most sacred rights we have. Yet, in this case, the defendant, of his own volition, along with a gang of other teenagers who he led violated that sanctity, violated the home of the Lavas [sic]. If we can't be safe at home, where can we be?
>
> Think about what plan was that the defendant helped mold at that house. Tie up, handcuff people in their own homes. Willy Gonzalez (phonetics). Do you remember Willy Gonzalez, 10 year old kid tied up within the house, handcuffed, terrorized? That's a brutal, brutal crime and we're not even talking about the murder of Abalerdo [sic] Saladrigas now. This is something that you found the defendant guilty of committing unanimously. Remember, he's the director in that scenario. What did Francisco Reyes (phonetics) tell you? They do anything I tell them to. And remember his complaint. Well, Ramone [sic] isn't following the plan. He's not taking the blame

> himself. So he conducts the reign of terror from a position where he's insulated from being identified because he doesn't go to the door of the house. He tells them, I'm too old. Let the kids go. They won't open the door for me. They will open the door for you. And from the car and from the meeting at the gas station, he finally organizes this brutal crime.
>
> So that aggravating factor has been proven to you by virtue of the verdict form that you have rendered, and it should be given great weight by you because of the particular facts surrounding those crimes.

(R. 1846-48) Of the three comments about which Defendant presently complains, he only objected to the first one concerning the facts of the crime against an innocent family. As such, any issue regarding the other two comments was not preserved for review. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Appellate counsel cannot be deemed ineffective for failing to raise the unpreserved issue regarding the other comments. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Even if the issue had been preserved, Defendant would still not be entitled to any relief. This Court has recognized that the facts of a prior violent felony are admissible during the penalty phase. *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000); *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986). This is so because it gives the jury the opportunity to consider the weight that should be given to the prior violent felony aggravator, "so

that the jury can make an informed recommendation as to the appropriate sentence." *Rhodes*, 547 So. 2d at 1204; *see also Slawson v. State*, 619 So. 2d 255, 259-60 (Fla. 1993). This Court has also recognized that whether the victim contributed to the commission of a crime, whether the crime occurred in one's own home and whether the victim was a child contribute to the severity of the crime. *See Slawson*, 619 So. 2d at 259-60(proper for trial court to consider that victims of a prior violent felonies were children); *Haliburton v. State*, 561 So. 2d 248, 252 (Fla. 1990)(fact that attack occurred in victim's home and was unprovoked relevant to severity of offense); *Breedlove v. State*, 413 So. 2d 1, 9 (Fla. 1982)(fact that victim attacked in own home relevant to severity of offense). The proper function of a penalty phase closing argument is to discuss what aggravating and mitigating circumstances have been proven and what weight should be assigned to each. *See Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Thus, comments, such as those made here, regarding the weight that should be assigned to the prior violent felony aggravator were proper. In fact, in *Breedlove*, this Court rejected a claim that the State had made an improper comment by referring to the fact that the crime had occurred in the victim's home. *Id.* at 7-8 & n.11. As the comments were proper, appellate counsel cannot be deemed

ineffective for failing to claim that they were improper. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

B. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING MERGER OF AGGRAVATORS SHOULD BE DENIED.

Defendant next asserts his appellate counsel was ineffective for failing to claim that instructing the jury on both the during the course of a robbery aggravating circumstance and the pecuniary gain aggravating circumstance was improper. However, this claim should be rejected as the underlying claim is without merit.

The Court has repeatedly held that it is not improper for a trial court to instruct a jury on two aggravating circumstances, the finding of both of which would constitute improper doubling. *Derrick v. State*, 641 So. 2d 378, 380 (Fla. 1994); *Patten v. State*, 598 So. 2d 60, 62-63 (Fla. 1992); *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992); *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991); *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985). Instead, this Court has held that the appropriate method in which to inform the jury of the manner for handling doubling is to give a limiting instruction on doubling

if one is request. *Derrick*, 641 So. 2d at 380; *Patten*, 598 So. 2d at 63 n.3; *Castro*, 597 So. 2d at 261. This Court has refused to find error in the failure to give the limiting instruction on doubling where a limiting instruction is not requested. *Jones v. State*, 652 So. 2d 346, 350-51 (Fla. 1995); *Derrick*, 641 So. 2d at 380; *Patten*, 598 So. 2d at 62-63 & n.3.

Here, Defendant objected to the State arguing both the during the course of a robbery and pecuniary gain aggravating circumstances on the grounds of improper doubling during the charge conference. (R. 1784-85) The State responded that it was permissible to instruct the jury on both the during the course of a felony and pecuniary gain aggravators but that both could not be found. (R. 1785-86) Defendant responded that allowing argument on both when they could not both be found would mislead the jury. (R. 1786-87) The trial court overruled the objection. (R. 1787) Defendant did not request a jury instruction on doubling. (R. 1783-95) After the jury instructions were read, Defendant did not object to them. (R. 1885-86) In sentencing Defendant, the trial court merged the during the course of a robbery and pecuniary gain aggravating factors. (R. 282, 1762)

As can be seen from the foregoing, Defendant only objected to instructing the jury on both aggravating factors and did not

request a doubling instruction. As such, this issue as no merit. Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, this claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CLAIM THAT THE JURY INSTRUCTION UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the penalty phase jury instructions improperly shifted the burden to him to prove that a life sentence was appropriate. However, this claim should be rejected because the underlying issue was unpreserved and meritless.

In order to preserve a claim regarding the propriety of a jury instruction, it is necessary for a defendant to object to the form of the instruction or request a specifically worded alternative instruction. *See Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994); *Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993). Defendant did not object to the instruction on weighing the aggravating and mitigating circumstances or propose a different instruction During the charge conference. (R. 1783-95) After the jury instructions were read, Defendant did not object to

them. (R. 1885-86) As such, this issue was unpreserved. Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, court have repeatedly rejected the claim that the standard jury instruction on weighing the aggravating and mitigating circumstances unconstitutionally shifts the burden of proof. *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990); *San Martin v. State*, 705 So. 2d 1337, 1350 (Fla. 1997); *Kennedy v. State*, 455 So. 2d 351 (Fla. 1984). As such, this issue is devoid of merit. As appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, this claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A *CALDWELL* CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that comments and instructions that told the jury that their recommendation regarding sentencing was an advisory recommendation and that the judge made the final sentencing decision violated *Caldwell v.*

Mississippi, 472 U.S. 320 (1985). However, this claim should be denied.

In order to preserve an issue regarding a comment, a defendant must make a contemporaneous objection to that comment. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, that objection must be based on the same grounds that are raised later. *See Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). To preserve an issue regarding a jury instruction, a defendant must object to the instruction given or propose an alternatively worded instruction. *See Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994); *Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993). Here, Defendant did not make a contemporaneous objection on the grounds that they violated *Caldwell* to any of the comments that he now alleges were erroneous. (R. 318-19, 423, 495, 514-15, 1839-40, 1843) Defendant also did not object to the wording of the final instructions or propose an alternative instruction during the charge conference or after the instructions were read. (R. 1783-95, 1885-86) As such, this issue was not preserved. As appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied.

Moreover, the issue is also without merit. “To establish

a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). This Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). As such, this Court has held that advising the jury that its recommendation is an advisory recommendation and that the judge makes the final sentencing decision does not violate *Caldwell*. As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

E. AS THE ISSUE REGARDING THE JURY INSTRUCTION ON THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE WAS NOT PRESERVED AND WITHOUT MERIT, APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE IT.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the jury instruction on the pecuniary gain aggravating circumstance was unconstitutionally vague and overbroad. However, this claim is meritless as the underlying claim is unpreserved and without merit.

In order to preserve a claim that a jury instruction is impressibly vague and overbroad, it is necessary for a defendant to object to the form of the instruction or request a specifically worded alternative instruction. *Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994); *Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993). Here, Defendant did not object to the form of the jury instruction on the pecuniary gain aggravating circumstance nor did he propose a different instruction during the charge conference. (R. 1783-95) After the jury instructions were read, Defendant did not object to them. (R. 1885-86) As such, this issue was unpreserved. Appellate counsel cannot be deemed for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, this Court has held that the jury instruction on the pecuniary gain aggravating circumstance that was given in this case was not unconstitutionally vague and overbroad. *Card v. State*, 27 Fla. L. Weekly S25, S29 & n.16 (Fla. Dec. 20, 2001). In fact, this Court has held that the pecuniary gain aggravating circumstance is not limited to circumstances where financial gain is the primary motive for the crime, as Defendant claims. *See Card*, 27 Fla. L. Weekly at S28. As such, this issue is without merit, and appellate counsel cannot be deemed

ineffective for failing to raise a meritless claim. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR THE MANNER IN WHICH HE CHALLENGED THE CONSTITUTIONAL OF THE DEATH PENALTY.

Defendant next asserts that his appellate counsel was ineffective for failing to argue that Florida's death penalty statute is unconstitutional. He contends that counsel should have argued that the statute does not adequately narrow the class of death eligible defendants, that the aggravating circumstances are all vague and overbroad, that the jury instructions on the aggravating circumstances are vague and overbroad, that the statute does not sufficiently establish a burden of proof, that there is not an adequate reweighing of the aggravating and mitigating circumstances, that the statute creates an unconstitutional presumption of death upon the finding of an aggravating circumstance and that the death penalty is applied in an arbitrary and capricious manner. However, this claim should be rejected because counsel raised the issue on direct appeal, and the issue was unpreserved and meritless.

On direct appeal, counsel claimed that Florida's death penalty statute was unconstitutional. Initial Brief of Appellant, Case No. 75,978, at 75. This Court rejected the issue without discussion. *Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992). As counsel did raise this issue, he cannot be deemed ineffective for failing to have done so. Moreover, asserting different arguments in support of an issue that was raised on direct appeal or claiming that the argument that was made was inadequate are not grounds to reconsider the rejection of an issue. *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000). As such, this claim should be rejected.

Moreover, Defendant did not preserve any of these issues at trial. He did not challenge the constitutionality of the statute in any respect. He did not object to any of the aggravators on the grounds of vagueness. He did not object to any of the jury instructions on any of the aggravators and he did not propose alternative instructions. Thus, these issues were not preserved. *See Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995); *Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994); *Espinosa v. State*, 626 So. 2d 165, 167 (Fla. 1993). As appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved, this claim should be rejected. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111;

Breedlove, 595 So. 2d at 11.

Moreover, this Court has repeated rejected the various claims regarding the constitutionality of the death penalty in Florida.[3] This Court has held that neither the prior violent felony aggravator, the during the course of a robbery aggravator or the jury instructions regarding these aggravators are unconstitutionally vague. *Card v. State*, 27 Fla. L. Weekly S25, S29 & n.16 (Fla. Dec. 20, 2001)(during the course of a felony); *Gaskin v. State*, 737 So. 2d 509, 513 n.7 (Fla. 1999)(prior violent felony). While the jury instruction on HAC has been held to be unconstitutionally vague, this Court has refused to grant relief to those defendant, such as Defendant, who were tried before *Espinosa* was issued unless the issue was raised at trial, which was not done here. *James v. State*, 615 So. 2d 668, 669 & n. 3 (Fla. 1993). This Court has found that the statute does properly narrow the class of death eligible defendants and that death sentences are not arbitrarily and capriciously imposed. *See Larzelere v. State*, 676 So. 2d 394, 407 & n.7 (Fla. 1996); *Fotopoulos v. State*, 608 So. 2d 784, 794 n.7 (Fla. 1992). This Court has held that issue regarding reweighing is

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[3] As Defendant has raised independent claims about the alleged burden shifting and the alleged vagueness of the pecuniary gain aggravators, the State will rely upon its arguments in Sections I.C. & I.E. regarding these issues.

without merit. *See Fotopoulus*, 608 So.2d at 794 n.7. This Court has rejected the claim that the statute creates a presumption of death. *Clark v. State*, 443 So. 2d 973, 978 (Fla. 1983). As this Court has found all of Defendant's claims regarding the constitutionality of the statute to be without merit, appellate counsel cannot be deemed ineffective for failing to raise these issues. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. This claim should be rejected.

G. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING PARAMEDIC PERFUMO'S TESTIMONY.

Defendant next contends that his appellate counsel was ineffective for failing to claim that the trial court abused its discretion in admitting the testimony of Dante Perfumo. However, this claim should be denied as the underlying issue was unpreserved and meritless.

During the penalty phase, Perfumo testified that he was a paramedic, had been one for 10 years and had worked rescue for the last 3-4 years. (R. 1806-08) During that time, he had been to numerous trauma scenes. (R. 1808) Perfumo responded to the murder scene and found the victim alive and conscious. (R. 1809) Perfumo stated that he had observed individuals in pain and

distress on a daily basis. (R. 1809-10) Perfumo described the signs of pain and distress in the victim:

> Well, Mr. Saladrigas was in extreme pain. Like I said, I've been in this business 10 years and his case stands out in my mind. He asked me all the way into the hospital if he was going to make it, and I told him we were going to do everything we could for him and there was a good chance that he would survive.
>
> He stayed conscious all the way to the hospital. He did not have a easy time. I held his hand most of the way into the hospital. At that point there was not much else we could do for him.

(R. 1810) Defendant did not object to this testimony. (R. 1810) When the State attempted to ask Perfumo if he truly believed that the victim would survive despite his assurance to the victim, Defendant objected on the grounds that Perfumo was not a doctor and the trial court overruled the objection. (R. 1810-11)

In order to preserve an issue regarding the admission of evidence, it is necessary for a defendant to make a contemporaneous objection to the admission of that evidence. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, that objection must be made regarding the issue raised on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As seen above, Defendant did not object to the

admission of Perfumo's testimony regarding the pain and suffering of the victim. Instead, Defendant only objected to Perfumo's opinion of the victim's chances of survival. As such, the issue was not preserved. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be rejected. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, appellate counsel could not be deemed ineffective for failing to raise this issue even if it had been preserved. Defendant appears to assert that Perfumo could not render an opinion regarding the pain and suffering of the victim because he was not a "qualified medical doctor or pain specialist." Petition at 24. However, pursuant to §90.702, Fla. Stat., a witness may give an opinion if he qualifies "by knowledge, skill, experience, training, or education." Here, Perfumo testified that he had been a paramedic for ten years and had seen the pain and suffering caused by trauma on a daily basis during that time. (R. 1806-10) As such, the trial court did not abuse its discretion in finding that he had amply experience with pain and suffering to give an opinion. *See Brooks v. State*, 762 So. 2d 879, 892 (Fla. 2000)(person who had sold drugs on almost daily basis for two years qualified to give opinion about drugs); *Jones v. State*, 440 So. 2d 570, 574 (Fla.

1983)(experience as crime scene technician qualified officer to give opinion about cause of mark on window sill); *A.A. v. State*, 461 So. 2d 165 (Fla. 3d DCA 1984)(experience of police officer with marijuana sufficient to permit opinion); *Dragon v. Grant*, 429 So. 2d 1329 (Fla. 5th DCA 1983)(experience as accident investigator sufficient to permit opinion). As appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, this claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

The cases relied upon by Defendant do not compel a different result. In *Kendrick v. State*, 632 So. 2d 279 (Fla. 4th DCA 1994), no issue regarding opinion testimony was presented. Instead, the court held that it was improper to permit a police officer to testify to hearsay statements. As such, it is irrelevant to the issue of whether Perfumo was qualified to testify to the victim's pain and suffering. In *Gianfrancisco v. State*, 570 So. 2d 337 (Fla. 4th DCA 1990), a police officer testified regarding the culpability of two coconspirators to bolster the their testimony. Relying on cases that hold that it is improper for one witness to testify regarding the credibility of another, the court reversed. The issue of the officer's qualification to give that opinion was never mentioned. As such,

this case is also irrelevant to the issue. Moreover, Perfumo did not testify regarding any other witnesses credibility. Instead, he testified regarding the suffering of the victim, an issue relevant to HAC. As such, the cases relied upon by Defendant do not support his claim, and it should be denied.

H. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISES ISSUES REGARDING PHOTOGRAPHS.

Defendant next contends that his appellate counsel was ineffective for failing to raise an issue regarding the admission of allegedly gruesome photographs and crime scene photographs. However, this claim should be rejected.

While Defendant has not specified which photographs were allegedly objectionable, it appears that Defendant is referring to autopsy photographs and the photographs of the murder scene taken on the night of the crime as unduly gruesome, irrelevant and prejudicial. However, Defendant only objected to one autopsy photograph at the time of trial: State's Exhibit 53, the legal identification photograph. (R. 811-12) Defendant's objection to State's Exhibit 53 was that it was inflammatory, unnecessary and morbid. (R. 811) The trial court overruled this objection. (R. 811) The remainder of the autopsy photographs were admitted without objection. (R. 849-50) Defendant did not object to any of the crime scene photographs of the murder scene

taken on the night of the crime. (R. 571, 585-86, 590-92)

To preserve an issue regarding the admissibility of evidence, it is necessary for a defendant to object to the evidence contemporaneously with the admission of that evidence. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, the grounds for the objection asserted at the time are the only grounds that are preserved for appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). The only issue that was preserved the inflammatory nature of State's Exhibit 53. As such, appellate counsel cannot be deemed ineffective for failing to raise any other issue regarding the gruesome nature of any other photograph. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim that appellate counsel was ineffective for failing to raise these unpreserved issues should be denied.

Moreover, this Court has also held that the test for the admissibility of such photographs is one of relevance and not necessity. *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996); *Jones v. State*, 648 So. 2d 669, 679 (Fla. 1994); *Straight v. State*, 397 So. 2d 903 (Fla. 1981). In fact, this Court has recently held that crime scene photographs used to assist officers in describing the scene as it was found and autopsy photographs

used to assist the medical examiner in testifying regarding the nature of the victim's injuries and cause of death are admissible. *Hertz v. State*, 26 Fla. L. Weekly S725 (Fla. Nov. 1, 2001); *see also Hannon v. State*, 638 So. 2d 39, 43 (Fla. 1994)(prejudicial effect of bloody clothing used by expert to explain testimony did not outweigh evidence's probative value); *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997)(photo showing stick protruding from deceased victim's vagina was not more prejudicial than probative where photo assisted expert's testimony and supported element of HAC factor); *Pope*, 679 So. 2d at 713-14 (photographs of bloody bathroom, autopsy, and victim's bloody clothes were not more prejudicial than probative where they assisted the witnesses explain their testimony); *Jones*, 648 So. 2d at 679 (photos of victim's body after recovered from a pond and autopsy photos were not more prejudicial than probative where they assisted expert in his testimony); *Mordenti v. State*, 630 So. 2d 1080, 1084 (Fla. 1994)(morgue photos which helped medical examiner explain nature of victim's wounds were not more prejudicial than probative).

Here, the medical examiner testified that the autopsy photographs assisted him in describing the nature of the victim's wounds. (R. 850) He subsequently used the photographs for this purpose. (R. 853-61) Det. George Gil used to murder

crime scene photographs to explain the discovery and collect of evidence of this crime. (R. 572-79, 586-92) State Exhibit 53, which was admitted during the testimony of Jose Arzola, was used to establish that the person upon whom the medical examiner conducted the autopsy, was Abelardo Saladrigas, the victim named in the indictment. (R. 8, 812, 842-43) This Court has also held that photographs are admissible for such purposes. *Jones v. Moore*, 794 So. 2d 579, 587 (Fla. 2001); *Brooks v. State*, 787 So. 2d 765, 781 (Fla. 2001); *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995). Moreover, as the trial court noted, State's Exhibit 53 was not particularly gruesome, as it merely shows the face of the victim, together with the medical examiner's case number. As such, the trial court did not abuse its discretion in admitting the photographs. As the issue was without merit, appellate counsel cannot be deemed ineffective for failing to raise it, and the claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the claim that certain photographs were misleading, again Defendant does not identify the photographs to which he is referring. However, it appears that Defendant is referring to certain photographs of the murder scene that were not taken on the night of the crime: State's Exhibits 24-30.

Defendant did object to these photographs on the grounds that they were not relevant. (R. 593-95) The State proffered that the photographs showed Ramon Fernandez's vantage point during the commission of the crime.[4] (R. 594-95) The trial court overruled the relevancy objection. (R. 595) Defendant next objected on the grounds that the pictures did not fairly and accurately depict the scene at the time of the crime because the cars around the building had been moved and the pictures were taken during the day. (R. 596) The trial court overruled that objection was well. (R. 596)

Defendant appears to assert that his appellate counsel should have argued that the trial court abused its discretion in admitting these photographs because they were taken sometime after the crime and during the daylight hours. However, the fact that a photograph was taken sometime after a crime and in different lighting conditions does not render the photograph inadmissible. *Grant v. State*, 738 So. 2d 1020, 1022 (Fla. 4th DCA 1999); *see also First Federal Savings & Loan v. Wylie*, 46 So. 2d 396, 400 (Fla. 1950).

In *Grant*, the court found no abuse of discretion in almost identical circumstances. There, the police had observed the

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[4] In fact, this was the use made of these photographs during trial. (R. 597-601, 679-81, 697)

defendant and another person engage in a series of drug transactions for the rooftop of a building across the street. These observations were made during the evening. A year later, the police took a photograph of the officers' view of the scene from the rooftop during the daylight hours. In rejecting a claim that the admission of these photographs was error, the court stated:

> The defense did not identify a change in the area in the year after the crime which would have made the photographs so misleading that their admission would justify reversal. Jurors are not potted plants. They are capable of appreciating the photographs for their geographical value, while comprehending the significance of photos taken during the day when called on to evaluate events that occurred at night. The defense was fully capable of exploring any deficiencies in the photographs on cross examination of the [witnesses].

Grant, 738 So. 2d at 1022. Here, Defendant explained the differences between the photographs and the scene to the jury during voir dire of Det. Gil. (R. 596) As the photographs were not inadmissible, appellate counsel cannot be deemed ineffective for failing to claim that they were. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. This claim should be rejected.

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE TIMING OF THE ADMISSION OF EVIDENCE ABOUT THE FACT THAT TATA HAD NOT BE

ARRESTED.

Defendant next claims that his appellate counsel was ineffective for failing to raise an issue regarding the admission of testimony regarding whether Tata had been arrested. However, this claim should be rejected as the underlying issue is meritless.

During the State's case, it indicated that it planned to call Det. Frank Castillo, the lead detective, several time and that the purpose of calling him the first time was limited to eliciting prior consistent statements that Ramon Fernandez had made before being offered a plea bargain. (R. 927-32) On direct examination, the State elicited testimony from Det. Castillo concerning how Ramon Fernandez was found, the statement that he initially gave the police and changes in that statement after Fernandez entered into a plea agreement. (R. 932-60)

During cross examination, Defendant attempted to inquire if Tata had been arrested. (R. 971) The State objected that the question was beyond the scope of its direct examination. (R. 971) The trial court sustained the objection. (R. 971) Defendant then argued that the trial court had given him permission to inquiry about this area pretrial. (R. 971-72) The trial court refused to change its ruling but added "perhaps at another time." (R. 972)

Later during the State's case, Det. Castillo was recalled. (R. 1218-19) During this subsequent testimony, Det. Castillo stated that Tata had not been arrested despite the fact that the police had looked for him and had a probation violation warrant. (R. 1260-61)

Pursuant to 90.612, Fla. Stat., a trial court has discretion to control the mode and manner of examination and can limit the scope of cross examination to matters addressed during direct examination and matters concerning the credibility of the witness. *See Green v. State*, 688 So. 2d 301, 305 (Fla. 1996)(trial court abused discretion in permitting state to question defense witness about use of alcohol at times other than time of crime where direct questions only concerned time of crime); *Jones v. State*, 440 So. 2d 570, 576 (Fla. 1983)(where direct testimony concerned only matters before police arrived, refusal to permit cross regarding matters occurring later proper); *Johnson v. Rhodes*, 56 So. 439 (Fla. 1911); *Britton v. State*, 414 So. 2d 638 (Fla. 5th DCA 1982). Here, Det. Castillo's initial testimony was limited to issues regarding the prior consistent statement of Ramon Fernandez. Testimony regarding whether Tata had been arrested or not were not relevant to this subject matter or to Det. Castillo's credibility. As such, the trial court did not abuse its

discretion in refusing to permit questions regarding Tata's arrest at that time. As the issue was meritless, appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, when Det. Castillo was recalled to discuss his general investigative efforts in this matter, the testimony regarding the fact that Tata had not been arrested was admitted. As the testimony came in during the State's case, Defendant was not affected by the delay in the presentation of this testimony. As such, any error in the refusal to permit Defendant to elicit this testimony the first time Det. Castillo testified was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Thus, counsel cannot be deemed ineffective for failing to raise this issue, and the claim should be denied.

J. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE A COMPLETE RECORD SHOULD BE DENIED.

Defendant next asserts that his appellate counsel was ineffective for failing to ensure that the record was complete. Defendant asserts that the record does not include the transcripts of any pretrial hearings, Defendant's opening statement during the guilt phase and several bench conferences.

However, Defendant does not assert what errors allegedly occurred during the portion of the trial that were not transcribed. In *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993), this Court held that in order for Defendant to state a successful that appellate counsel was ineffective for failing to ensure a complete record, a defendant must allege what errors he was allegedly prevented from raising because the record was incomplete. *See also Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). As Defendant has not done so, this claim should be denied.

II. THE CLAIM REGARDING THIS COURT'S HARMLESS ERROR ANALYSIS ON DIRECT APPEAL IS NOT COGNIZABLE.

Defendant next asserts that this Court conducted an inadequate harmless error analysis regarding the admission of certain testimony and a comment made by the prosecutor during the State's penalty phase closing. However, this issue is not cognizable in this proceeding.

This Court has repeatedly stated that "'habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial.'" *See*, *e.g.*, *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994)(quoting *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla.1989); *see also State v. Riechmann*, 777 So. 2d 342, 346 n.22 (Fla. 2000). In fact, this Court specifically refused to consider a claim in a post conviction proceeding that this Court applied an allegedly incorrect harmless analysis in *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000). *See also Bottoson v. State*, 27 Fla. L. Weekly S119 (Fla. Jan. 31, 2002). As such, this claim should be denied.

III. DEFENDANT'S *APPRENDI* CLAIM SHOULD BE REJECTED.

Defendant finally asserts that the proportionality of his sentence should be reconsidered because of *Apprendi v. New Jersey*, 530 U.S. 466 (2001). However, this claim should be rejected because the claim is procedurally barred and without merit.

Claims that could have and should have been raised on direct appeal are barred on post conviction relief. *Francis v. Barton*, 581 So. 2d 583 (Fla.), *cert. denied*, 501 U.S. 1245 (1991). Here, Defendant asserts that the State should have been required to allege the aggravating circumstances in the indictment and to prove them to the jury beyond a reasonable doubt and that the jury should have been required to have specifically found the aggravating circumstances. As these issues could have and should have been raised on direct appeal, they are now barred.

Even if the claim was not procedurally barred, it should still be rejected. In *Mills v. State,* 786 So. 2d 532 (Fla. 2001), and later in *Mann v. Moore,* 794 So. 2d 595 (Fla. 2001), this Court clearly held that *Apprendi*, by its terms, does not apply to capital sentencing in general, or to Florida capital sentencing in particular. As such, this claim should be denied.

CONCLUSION

For the foregoing reasons, Defendant's petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE** was furnished by U.S. mail to **Rachel Day**, Assistant CCRC-SOUTH, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, this _____ day of February, 2002.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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SANDRA S. JAGGARD
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