IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2158

ROBERT PATTON,

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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STATEMENT OF THE CASE AND FACTS

In accordance with Fla. R. Crim. P. 3.851(b)(2), this petition is being pursued concurrently with the appeal from the order denying Defendant's motion for post conviction relief. *Patton v. State*, No. SC02-423. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. DEFENDANT'S CLAIM UNDER *APPRENDI* AND *RING* SHOULD BE DENIED.

Defendant first asserts that he is entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 2002 WL 1357257 (2002). He contends that under these cases, this Court should revisit its determination that the original jury did not return a life recommendation, that this Court should find the alleged life recommendation binding, that this Court should revisit its rejection of the request for an interrogatory penalty phase verdict form, that this Court should require that the aggravating circumstances be charged in the indictment, that this Court should find that informing the jury that its sentencing recommendation is advisory violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that this Court should hold that the jury instructions impermissibly shifted the burden of proof and that this Court should reconsider its rejection of the claim that impermissible doubling of aggravators occurred. However, this claim should be rejected because *Ring* and *Apprendi* say nothing about this Court's prior determination that there was no life recommendation. Moreover, this Court has already rejected the claim that *Ring* applies to Florida capital sentencing scheme and that rejection was proper.

In *King v. Moore*, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002), and *Bottoson v. Moore*, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002), this Court rejected the arguments that Defendant is advancing in his claim that his death sentence should be vacated under *Ring*. The Court stated that it was not within its power to overrule United States Supreme Court precedent finding Florida death penalty scheme constitutional. As such, this claim should be denied under *King* and *Bottoson*.

Moreover, neither *Ring* nor *Apprendi* apply retroactively under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to *Witt*, *Ring* and *Apprendi* are only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, provides no basis for consideration of *Ring*

in this case. Moreover, Defendant has not even attempted to assert how *Ring* and *Apprendi* do satisfy these requirements. As such, the claim should be denied.

Ring arises from application of *Apprendi v. New Jersey*, 530 U.S. 466 (2002), to Arizona's capital scheme. Every federal circuit court to address the issue has found that *Apprendi* is not retroactive. *E.g.*, *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that *Apprendi*'s requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir. 2002)("*Apprendi* does not create a new 'watershed rule.'"); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993, 996-1001 (8th Cir. 2001)("*Apprendi* is not of watershed magnitude."); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). Several state courts have similarly held that *Apprendi* (and therefore *Ring*) does not apply retroactively. *E.g.*, *Sanders v. State*, 815 So. 2d 590 (Ala. Crim. App. 2001);

Whisler v. State, 36 P.3d 290 (Kan. 2001); *State v. Sprick*, 59 S.W.3d 515 (Mo. 2001). In fact, the United States Supreme Court is clearly not of the opinion that its holding in *Apprendi* is retroactive. It has itself procedurally barred an *Apprendi* claim. *See United States v. Cotton*, 122 S. Ct. 1781 (2002)(finding that *Apprendi* error did not qualify as plain error, the federal equivalent of fundamental error). As *Ring* does not apply retroactively to this case, the claim should be denied.

Even if *Ring* applied retroactively, Defendant would still not be entitled to any relief. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *Ring* applied the holding of *Apprendi* to Arizona's capital sentencing scheme after the Arizona Supreme Court determined that the statutory maximum for first degree murder was life. In *Harris v. United States*, 122 S. Ct. 2406 (2002), which was decided the same day as *Ring*, the Court made clear that *Apprendi* (and hence its offshoot *Ring*) did not apply to all sentencing factors. Instead, as directly stated in *Apprendi* itself, it only applied

to factors that increased the statutory maximum:

> Yet not all facts affecting the defendant's punishment are elements. After the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed. Though these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements. Some statutes also direct judges to give specific weight to certain facts when choosing the sentence. The statutes do not require these facts, sometimes referred to as sentencing factors, to be alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt.

Harris, 122 S. Ct. 2406 (2002).

In Florida, this Court has held that the statutory maximum for first degree murder is death. As this Court recently stated:

> Under section 921.141, Florida Statutes (1987), a defendant is eligible for a sentence of death if he or she is convicted of a capital felony. This Court has defined a capital felony to be one where the maximum possible punishment is death See Rusaw v. State, 451 So. 2d 469 (Fla. 1984). The only such crime in the State of Florida is first-degree murder, premeditated or felony. See State v. Boatwright, 559 So. 2d 210 (Fla. 1990); Rowe v. State, 417 So. 2d 981 (Fla. 1985).

Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002). In fact, three members of this Court stated directly in *Bottoson*, that the statutory maximum for first degree murder in Florida is still death. *Bottoson*, 27 Fla. L. Weekly. at S891 n.6 (Wells, J.,

concurring); *id.* at 893 (Quince, J., concurring); *id.* at 902 (Lewis, J., concurring). Additionally, Justice Harding's concurring opinion did not call into question any prior holdings of this Court, which would necessarily include its prior determination that death was the statutory maximum for first degree murder in Florida. *Id.* at 891. Contrary to Defendant's contention, *Ring* did not change the statutory maximum for first degree murder in Florida. Instead, *Ring* is based on the United States Supreme Court's acceptance of the Arizona Supreme Court's interpretation of its statutory maximum as life. Because the statutory maximum for first degree murder in Florida is death, *Ring* does not apply to Florida. The claim should be denied. *See Mills v. Moore*, 786 So. 2d 532, 537-58 (Fla. 2001), *cert. denied*, 532 U.S. 1015 (2001).

Even if *Ring* was retroactive and did apply to Florida, Defendant would still be entitled to no relief. This Court has previous determined that the original jury did not return a life recommendation. *Patten v. State*, 467 So. 2d 975, 980 (Fla. 1985). This Court has repeatedly refused to readdress this issue. *Patton v. State*, 784 So. 2d 380, 386 n.4 (Fla. 200) *Patten v. State*, 598 So. 2d 60, 63 (Fla. 1992); *Patten v. Morphonios*, 492 So. 2d 1334 (Fla. 1986). These determinations

were proper. *Eutzy v. State*, 536 So. 2d 1014, 1015 (Fla. 1988)(post-conviction attacks and criticisms of the decision of this Court on direct appeal can be summarily rejected). Additionally, this Court has held that decision that are not retroactive do not affect this Court's prior rejection of a claim. *See Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). As such, this Court should deny the claim.

Moreover, *Ring* has nothing to do with the finding by this Court that no life recommendation had been return. *Ring* merely applied the holding of *Apprendi* to Arizona's capital sentencing scheme. The holding of *Apprendi* is that a fact, other than a prior conviction, that increases the statutory maximum for a crime, must be presented to a jury and proven beyond a reasonable doubt. That holding in no way affects this Court's prior determination that the jury did not return a life recommendation in this case. The finding of no life recommendation was entirely proper because the jury did not render a verdict showing a 6-6 tie; they sent a note asking what to do. Defendant asks this Court to speculate that had the trial court told the jury that a tie was a life recommendation, it would have eventually returned such a recommendation. However, it is just as easy to speculate that had the jury been told that a tie was a life recommendation, it would have chosen

to continue to deliberate and returned a death recommendation, as it eventually did. Nothing in *Ring* or *Apprendi* compels this Court to engage in such speculation. As such, this Court should not revisit it prior determination that there was no life recommendation. The claim should be denied.

Moreover, a clear understanding of what *Ring* does and does not say is essential to analyze any possible *Ring* implications to Florida's capital sentencing procedures. Notably, the *Ring* decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). It quotes *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). *Ring*, 122 S. Ct. at 2437 n.4. In Florida, any death sentence that was imposed following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in *Ring*, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); *Ring*, 122 S. Ct. at 2445 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.[1]

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[1] We know this is true because the Court in *Apprendi* held, and reaffirmed in *Ring*, that a prior violent felony

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* that suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, 122 S. Ct. at 2445 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. To the extent that Defendant criticizes state law for requiring judicial participation in capital sentencing, he does not identify how judicial findings <u>after a jury recommendation</u> can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate

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aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. *Espinosa v. Florida*, 505 U.S. 1079 (1992). As such, Florida law would satisfy *Ring*, if *Ring* was applicable to this case. The claim should be denied.

Moreover, *Ring* provides no support for Defendant's claims that the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts. These issues are expressly not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. *Sweet v. Moore*, 822 So. 2d 1269 (Fla. 2002); *Cox v. State*, 819 So. 2d 705, 724 n.17 (Fla. 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has

specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989))." *King*, 27 Fla. L. Weekly at 906; *Bottoson*, 27 Fla. L. Weekly at 891; *Mills*, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of these claims.

In addition, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. *See Ring*, 122 S. Ct. at 2441; *Harris v. United States*, 122 S. Ct. 2406 (2002). Defendant's argument, suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth

Amendment as construed in *Ring*. To the extent that *Ring* suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Defendant appears to assert that the jury must determine death to the appropriate sentence, but nothing in *Ring* supports Defendant's speculation that the ultimate sentencing determination is an additional "element" that must be proven beyond a reasonable doubt.

Moreover, to the extent that Defendant's claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based upon an invalid comparison of federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme.[2] For example, in *United States v. Allen*, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the

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[2] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Apprendi*, 530 U.S. at 477 n.3 (2000); *Hurtado v. California*, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim.

Federal Death Penalty Act do not have to be contained in the indictment exclusively on *Walton v. Arizona*, which, of course, *Ring* overruled. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring.*

Moreover, a jury is not required to be unanimous regarding why or if a defendant is guilty. *Schad v. Arizona*, 501 U.S. 624 (1991)(plurality opinion)(holding that due process does not require jurors to unanimously agree on alternative theories of criminal liability); *Johnson v. Louisiana*, 406 U.S. 356 (1972)(holding a conviction based on plurality of nine out of twelve jurors did not deprive defendant of due process and did not deny equal protection); *Apodaca v. Oregon*, 406 U.S. 404 (1972)(holding a conviction by less than unanimous jury does not violate right to trial by jury and explaining that the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states). A jury is also not required to specify which theory of guilt it found. *Cf. Griffin v. United States*, 502 U.S. 46 (1991). As the Sixth Amendment right to jury trial does not implicate these issues, *Ring* did not show that Florida law is unconstitutional under the Sixth Amendment for failing to have these requirements. The claim should be

denied.

Further, Defendant's death sentence was supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. *See Almendarez-Torrez v. United States*, 523 U.S. 224 (1998); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. The Sixth Amendment is satisfied by these jury findings as they are additional facts which authorize the judicially-imposed sentence.[3] As such, the claim should be denied.

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[3] Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. *See Ring*, 122 S. Ct. at 2443 n.7 (remanding case for harmless error analysis by state court); *United States v. Cotton*, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

II. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL SHOULD BE DENIED.

Defendant asserts that his appellate counsel is ineffective for the manner in which he conducted the direct appeal and 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.

Additionally, appellate counsel is not ineffective for failing to raise a nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Appellate counsel is also not ineffective for failing to raise unpreserved issues. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO POINT OUT THAT A MERGER INSTRUCTION HAD BEEN REQUESTED.

Defendant first asserts that his appellate counsel was ineffective for failing to bring to this Court’s attention that he had requested a doubling instruction. However, this claim should be denied because it is insufficiently plead and because

the underlying issue is without merit.

In stating this claim, Defendant points to the fact that this Court stated in a footnote that no doubling instruction was requested and to the portions of the record to show that such a instruction was requested. Defendant then states in a single sentence, "To the extent that appellate counsel failed to bring to the Court's attention that the appropriate instruction was in fact made, counsel rendered prejudicially deficient performance, and Mr. Patton would have been entitled to relief under Castro." However, this Court has repeatedly stated that

Even if the claim had been sufficiently raised in this petition, it should still be denied because the underlying issue is without merit. Defendant's resentencing occurred in 1989. This Court did not issue *Castro v. State*, 597 So. 2d 259 (Fla. 1992) until March 12, 1992. In *Wuornos v. State*, 644 So. 2d 1000, 1007-08 (Fla. 1994), this Court held that *Castro*'s direction to give an instruction of doubling of aggravating circumstances was prospective only. This Court has explained that where this Court has announced a new rule that is to be applied prospectively only, that rule only applies to cases that were tried after the new rule was announced. *Boyette v. State*, 688 So. 2d 308, 310 (Fla. 1996) ("Unless we explicitly state otherwise, a rule of law which is to be given prospective

application does not apply to those cases which have been tried before the rule is announced.") Here, Defendant's resentencing occurred almost 3 years before *Castro* was announced. As such, *Castro* does not apply to this matter. As any claim that *Castro* warranted resentencing would be meritless, appellate counsel cannot be deemed ineffective for failing to make that 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. As such, the claim should be denied.

Moreover, even if *Castro* did apply to this matter, counsel could still not be deemed ineffective for failing to alert this Court to the request for a doubling instruction. This Court has repeatedly held that any error in the failing to give the doubling instruction is harmless if the trial court did not consider both aggravators. *Jackson v. State*, 648 So. 2d 85, 91-92 (Fla. 1994); *Valle v. State*, 581 So. 2d 40, 47 n.9 (Fla. 1991). As this Court noted on appeal from resentencing, the trial court expressly merged the aggravating circumstances of avoid arrest and hinder governmental function in its sentencing order. *Patten v. State*, 598 So. 2d 60, 63 (Fla. 1992). As such, any error in the failure to give a doubling instruction would have been harmless had counsel pointed out that a doubling instruction had been requested. As the error would have been

found harmless, there is no reasonable probability of a different result on appeal had counsel pointed to the request for the merger instruction and had *Castro* applied to this matter. *Strickland*. Thus, the claim should be denied.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE MOTION TO SUPPRESS.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue about the suppression of his statements. Defendant appears to claim that his statements were the product of custodial interrogation initiated by the police after Defendant had requested an attorney. However, appellate counsel cannot be deemed ineffective for failing to raise this issue.

Defendant relies upon *McNeil v. Wisconsin*, 501 U.S. 171 (1991), and *Minnick v. Mississippi*, 498 U.S. 146 (1990), to claim that the trial court erred in denying his motion to suppress. However, neither *McNeil* nor *Minnick* had been issued at the time of Defendant’s original direct appeal. As such, his original direct appeal counsel cannot be deemed ineffective for failing to raise this issue. *Darden v. State*, 475 So. 2d 214, 216-17 (Fla. 1985) (finding appellate counsel's performance was not deficient for failing to anticipate a change in the law). Thus, the claim should be denied.

Moreover, Defendant did not object to the admission of his statements at the time the statements were admitted either at the original trial or at resentencing. (DAT. 1068-70, RSR. 1195-98) In order to preserve an issue regarding the

suppression of evidence, it is necessary to move to suppress the evidence pretrial and to object to the evidence at the time that it is admitted. *Terry v. State*, 668 So. 2d 954, 959 (Fla. 1996); *Kokal v. State*, 492 So. 2d 1317, 1320 (Fla. 1986). As Defendant did not object at the time that evidence was admitted, the issue was not preserved. Thus, appellate counsel cannot be deemed ineffective for failing to raise this 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.

Even if counsel could be deemed deficient for failing to raise an unpreserved issue based upon case law that had not issued at the time of the guilt phase appeal, the claim should still be denied. Defendant does not explain how these cases show that the trial court erred in denying his motion to suppress. In *Minnick*, the Court held that once a defendant has requested counsel during custodial interrogation, the interrogation must cease and the police may not reinitiate interrogation unless counsel is present. In *McNeil*, the Court held that an invocation of one's offense specific Sixth Amendment right to counsel did not invoke one's Fifth Amendment right to counsel. Thus, the statements made to the police as the result of police initiated interrogation at which counsel was not present were not suppressible because the defendant had invoked his Sixth

Amendment right to counsel regarding a different offense. Here, the denial of the motion to suppress was not premised on whether the police had complied with Defendant's invocation of his Fifth right to counsel; it was based on the finding that the police had not interrogated Defendant after his invocation. Instead, the trial court found that Defendant's statements were spontaneous statement that were not the product of interrogation or its functional equivalent. Thus, neither *Minnick* or *McNeil* show that the trial court erred in denying the motion to suppress. As claim that they did would be meritless, appellate counsel cannot be deemed ineffective for failing to do so. *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, appellate counsel cannot be deemed ineffective for failing to raise any other issue about the motion to suppress. The trial court properly found that the statements were not the product of custodial interrogation, or its functional equivalent.

Prior to trial, Defendant moved to suppress his statements, claiming that they were the product of police initiated custodial interrogation, or the functional equivalent thereof, after Defendant had invoked his Fifth Amendment right to counsel

and that the statements were not voluntary because Defendant was intoxicated. (DAR. 65-67) At the beginning of the suppression hearing, the State stipulated to the suppression of statements Defendant had made to his probation officer. (DAT. 196) The State also agreed that the statement that Defendant made in response to Sgt. Bohan's question about what Defendant meant would not be suppressible. (DAT. 197-98)

The State then presented the testimony of Sgt. Richard Bohan. (DAT. 199) Sgt. Bohan stated that Defendant was arrested at approximately 5:30 p.m. on the day of the crime and brought to the police station interview room. (DAT. 200) Sgt. Bohan and Det. Hector Martinez read Defendant his *Miranda* rights, and Defendant invoked his right to counsel. (DAT. 201) Defendant later named Russell Spatz as the attorney he wished to consult. (DAT. 207)

After Defendant invoked his right to counsel, the only questions asked of him were the one that elicited the one response that the State had agreed to suppress and questions concerning his Defendant's biographical information for the arrest report. (DAT. 201) As the arrest report was being completed, Defendant inquired what the charges were and was told what the charges were. (DAT. 202) After a pause, Defendant saw a wanted poster for him that was being used to complete the

arrest report, picked it up, read it and stated, "Murder of a police officer, that's heavy. I'll fry for this." (DAT. 203, 210-11) Defendant later commented about the completion of the arrest report, "That will be the last one you will do on me. I dealt my last deal with this one." (DAT. 203) Sgt. Bohan inquired what Defendant meant, and Defendant responded. (DAT. 203)

At one point when the arrest report was being completed, the door to the room in which Defendant was seated was opened, and Defendant turn and looked out the door. (DAT. 204) Defendant saw two police officers standing outside the room and stated, "Oh sure, everybody wants to look at a cop killer." (DAT. 204) The door was then closed. (DAT. 204)

At another point, Defendant was taken to the restroom to use the facilities and to change his clothes so that the police could impound the clothing he was wearing. (DAT. 204) The police also had Defendant's hands swabbed for gunshot residue. (DAT. 205) As the technician swabbed Defendant's hands, Defendant stated, "I know what that's for, that's for ballistics, but you would get anything." (DAT. 205)

Sgt. Bohan stated that all of Defendant's statement, with the exception of the statement in the bathroom, were made within the first 20 minutes that Defendant was in the police station.

(DAT. 209) During this time, the police did not attempt to contact an attorney for Defendant. (DAT. 216-17)

At the end of the suppression hearing, the lower court ruled that Defendant had invoked his right to counsel and that the police had to, and did, cease interrogating Defendant at that point until his attorney was present. (DAT. 435-40) It found that the police were engaged in normal booking procedures when Defendant made spontaneous statements to them that were not the product of interrogation or its functional equivalent. *Id.* It also found that Defendant initiated the statements and that all of Defendant's statement, including the ones the State had agreed were suppressible, were freely and voluntarily made.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court held that only those statements that were the product of custodial interrogation or its functional equivalent were suppressible. The Court stated the interrogation and its functional equivalent "refer[] not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. In *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02, 606-08 (1990), the Court held that routine booking questions were not suppressible.

This Court agreed with that holding in *Allred v. State*, 622 So. 2d 984, 987 & n.9&10 (Fla. 1993). Here, the trial court found, based on the uncontroverted testimony of Sgt. Bohan, that the only questions asked of Defendant, other than the one question that elicited a response that the State agreed was suppressible, were booking questions regarding biographical information. As such, the lower court's ruling on the motion to suppress was proper. Since claim otherwise would have been meritless, appellate counsel cannot be deemed ineffective for failing to do so. *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.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE PROPORTIONALITY.

Defendant finally contends that his appellate counsel was ineffective for failing to raise proportionality. However, appellate counsel was not ineffective for failing to raise this meritless issue and counsel on the original direct appeal did raise the issue.

At the time of the original direct appeal, appellate counsel contended that Defendant's sentence was disproportionate. Initial Brief of Appellant, Florida Supreme Court Case No. 61,945, at 63-68. This Court chose not to address the issue, in light of its decision to remand the manner for a new sentencing hearing. *Patten v. State*, 467 So. 2d 975, 979 (Fla. 1985). As appellate counsel did raise this issue, he cannot be deemed ineffective for failing to do so. *Strickland*. The claim should be denied.

Moreover, an attempt to relitigate a claim that was raise and rejected on direct appeal under the guise of ineffective assistance of counsel results in the claim being found procedurally barred. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). As this is precisely what Defendant is attempting to do, the claim

should be rejected as procedurally barred.

With regard to resentencing appellate counsel, he cannot be deemed ineffective for failing to raise this issue as it is meritless. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright*, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied*, 498 U.S. 1110 (1991). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." *State v. Henry*, 456 So. 2d 466, 469 (Fla. 1984).

At the time of resentencing, the trial court found two aggravating factors: prior violent felony conviction based on a 1975 armed robbery conviction and the contemporaneous conviction for the armed robbery of Maxime Rhodes; and hinder governmental function and avoid arrest, merged. (RSR. 3837-39) The trial court gave great weight to each of these aggravators. *Id.* The trial court found no statutory mitigating circumstances, specifically rejecting Dr. Toomer's testimony

about the mental mitigators on credibility grounds. (RSR. 3839) The trial court did found as nonstatutory mitigation that Defendant was abused as a child and used drugs. (RSR. 3839-40) This Court affirmed the trial court's findings of aggravation and mitigation. *Patten v. State*, 598 So. 2d 60 (Fla. 1992).

In *Burns v. State*, 699 So. 2d 646 (Fla. 1997), *cert. denied*, 522 U.S. 1211 (1998), this Court found a death sentence proportionate in similar circumstances. In *Burns*, only the merged aggravating circumstance of avoid arrest and hinder law enforcement was found. Here, Defendant not only had the merged law enforcement aggravator, but he also had the prior violent felony aggravator. The mitigation in *Burns* involved the statutory mitigating circumstance of no significant criminal history, and insignificant nonstatutory mitigation; more than was presented here. As such, Defendant's sentence should be deemed proportionate consistent with *Burns*. *See also Kearse v. State*, 770 So. 2d 1119 (Fla. 2000)(aggravators: during the course of a felony and avoid arrest, hinder law enforcement and murder of a law enforcement officer, merged; mitigators: age, behavior at trial, difficult childhood that resulted in emotional problems); *Reaves v. State*, 639 So. 2d 1 (Fla.), *cert. denied*, 513 U.S. 990 (1994)(aggravators: prior violent felony and avoid arrest; mitigators: honorable military service, good

reputation in community and good family man).

The cases relied upon by Defendant are inapplicable. In *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996), two aggravating factors were found: during the course of a robbery and for pecuniary gain, merged, and prior violent felony, based on a contemporaneous aggravated assault conviction as a principle. Several nonstatutory mitigators were present. Here, the trial court found more aggravating, including the merged aggravator of avoid arrest/hinder governmental function, and the prior violent felony aggravator was based on a 1975 robbery as well as a contemporaneous robbery conviction. As this Court noted in *Burns*, the merged aggravating circumstance is a particularly weighty aggravator. *Burns*, 699 So. 2d at 649. As such, *Terry* does not show this case is disproportionate.

In *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), the trial court had overridden a jury's life recommendation but found both statutory mental mitigators and the age mitigator. As this Court noted in *Burns*, override cases are analyzed under legal standard and are not comparable to death recommendation cases such as this. *Burns*, 699 So. 2d at 649 n.5. Moreover, in this case, the trial court rejected all of the mental health mitigation, and this Court affirmed that decision. As such, *Fitzpatrick* does not show that Defendant's sentence is

disproportionate.

As Defendant’s sentence was proportionate, appellate counsel cannot be deemed ineffective for failing to claim otherwise. *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.

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 Suzanne Myers, Assistant CCRC, 101 N.W. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida, 33301, this 6th day of January, 2003.

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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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