IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-83

BYRON BRYANT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Byron Bryant, was the defendant at trial and will be referred to as the "Petitioner" or "Bryant". Respondent, the State of Florida, will be referred to as the "State". References to the appellate records will be: (1) to the first trial/appellate case number 81,862 - "1TR"; (2) to the second trial/appellate case number 94,902 - "2TR". Supplements to these records will be denoted with an "S". All will be followed by the appropriate volume and pages number(s).

STATEMENT OF THE CASE AND FACTS

On February 6, 1992, Bryant was indicted for Leonard Andre's murder and for armed robbery with a firearm. Upon conviction in 1993, Bryant threw a 26 pound chair 12 feet at the prosecutor and toward the jury. Bryant v. State, 785 So. 2d 422, 428-30 (Fla. 2001). Subsequently, Bryant was sentenced to death; however, this Court reversed because the trial judge was absent during a read-back of testimony without a valid waiver. Bryant v. State, 656 So. 2d 426, 429 (Fla. 1995).

Retrial commenced February 9, 1998, with Bryant shackled before the jury. Bryant, 785 So. 2d at 428-30. On February 13, 1998, the jury convicted Bryant of armed robbery and first-degree murder. (2TR 1041-42). Following waiver of his

penalty phase jury (2TR 3529; S2TR 268-70), Bryant presented his evidence to the trial court on April 14, 1998, and additional testimony September 10, 1998. (2TR 254, 268-70, 1055, 1065-1220, 1247-1312). On September 5, 1999, Bryant was sentenced to death (2TR 1332-40).

On direct appeal, this Court found the following facts:

> ... On December 16, 1991, at approximately 8 p.m., Andre took the receipts of the day to the back of his store. Shortly thereafter, two men came into the store, one going to the back .... At gunpoint, one of the men ordered Andre's wife to open the cash register and demanded money, whereupon she took money from the cash register and gave it to one of the intruders. She then heard gunshots in the back of the store, and the men ran out. She found her husband in the back of the store lying on the floor with blood all around him. The autopsy determined that Andre had been shot three times at close range.
>
> Police developed Bryant as a suspect only after several of his acquaintances contacted the police about his involvement in the murder. Subsequently, Bryant gave police a taped statement in which he admitted to killing Andre during a robbery attempt. In his statement to police, Bryant explained that he was with three other men on the night of the incident and was advised by one of them about the location of Andre's Market and that there was money in the store. Bryant went into the store and walked towards the back ... when Andre turned his back, Bryant pulled out his gun. Andre began to struggle and wrestle with Bryant over the gun, until Bryant got control of the gun and shot Andre. When Andre continued to fight, Bryant shot him

> again. After shooting Andre the third time, Bryant ran out of the store and left the scene. Bryant admitted in his statement that he shot Andre three times with a .357 magnum and admitted that he had a ski mask in his possession. Bryant told the detective that although he did not wear the ski mask, he dropped it when he ran from the store. During the investigation, a ski mask was found in the alleyway near the market.
>
> After returning home from the scene at Andre's Market, Bryant asked his girlfriend to dispose of the gun he had used in the incident. ... At trial, however, Bryant denied any involvement in the robbery or killing, claiming his statement given to police was the result of police coercion.
>
> A jury found Bryant guilty as charged. After Bryant waived his right to a jury for sentencing, the trial judge imposed the death penalty for the first-degree murder of Leonard Andre and life in prison for the armed robbery. The court found three aggravating circumstances applied to Bryant: he previously had been convicted of a capital or violent felony; the murder was committed during a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.... The court found no statutory mitigating circumstances and only one nonstatutory mitigator, remorse, but gave it very little weight. The court concluded that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Bryant to death by electrocution for the first-degree murder and life imprisonment for the armed robbery.

Bryant, 785 So. 2d at 426-27.

Seven issues were raised by Bryant in his direct appeal:

> I - The lower tribunal erred in requiring

> the Defendant to be shackled before the jury.
>
> II - Electrocution is cruel and unusual punishment.
>
> III - The trial court erred in failing to properly evaluate the non-statutory mitigating circumstances of the Defendant's lack of education.
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> IV - The lower tribunal erred in failing to [] evaluate the non-statutory mitigator that the Defendant lacked a positive role model.
>
> V - The lower tribunal erred in determining that the Defendant was competent to stand trial.
>
> VI - The lower tribunal failed to exercise its discretion in evaluating the non-statutory mitigating factor of Defendant's neurological impairment.
>
> VII - The death penalty is not proportionally warranted in this case.

(Briefs in SC94902). Each issue was rejected and the sentence was found proportional. Bryant, 785 So. 2d at 436-38. On May 9, 2001, rehearing was denied and on April 5, 2001, the mandate issued.

The September 5, 2001 United States Supreme Court petition for writ of certiorari raised the sole issue of this Court's resolution of the shackling issue. On November 13, 2001, certiorari was denied. Bryant v. Florida, 121 S.Ct. 557 (2001).

On November 12, 2001, Bryant filed a *pro se* motion with this

Court in case number SC94902 requesting that the mandate be recalled and a new appeal be ordered because he had the same counsel at trial and appeal. The motion was stricken.

Following the striking of one motion, Bryant served an Amended Postconviction Motion under Florida Rule of Criminal Procedure 3.851 on March 4, 2003. (see case number SC03-1618). Relief was denied summarily on August 11, 2003. The instant petition and the rule 3.851 appeal were filed on February 23, 2004.

SUMMARY OF THE ARGUMENT

Issue I - Bryant has failed to prove ineffective assistance of appellate counsel. The motion to suppress the confession was denied properly, therefore, it was not deficient performance to forego the issue on appeal. Similarly, prejudice cannot be shown, because even if the issue had been raised, it was meritless, thus, the result of the appeal would not have been different.

Issue II - Appellate counsel did not render deficient performance nor was his representation prejudicial with respect to the "avoid arrest" aggravator. The finding of the aggravator was proper as it was supported by competent, substantial evidence and complied with the law. As such, Bryant is unable to show ineffective assistance of appellate counsel as the decision not to challenge the matter on appeal did not fall below professional norms and the result of the appeal was not undermined.

Issue III - Bryant waived his penalty phase jury and opted to present his mitigation to the trial judge. Hence, Bryant cannot now complain that he was not sentenced by a jury in violation of Ring v. Arizona, 536 U.S. 584 (2002). Lynch v. State, 841 So. 2d 362, 366 n.1 (Fla.) (holding "[b]ecause appellant requested and was granted a penalty phase conducted

without a jury, he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in Ring....”), cert. denied, 124 S.Ct. 189 (2003).

ARGUMENT

ISSUE I

APPELLATE COUNSEL'S ASSISTANCE WAS EFFECTIVE EVEN THOUGH HE DID NOT CHALLENGE THE DENIAL OF THE MOTION TO SUPPRESS BRYANT'S CONFESSION ON DIRECT APPEAL (restated)

Bryant maintains it was ineffective assistance of appellate counsel to fail to challenge the denial of the motion to suppress the confession. (Petition 7, 21). He presents argument and case law on two aspects of the suppression matter: (1) lack of probable cause for the arrest which led to the confession and (2) inducement to confess in the form of permission to see his mother. (Petition 7, 21). While facts are noted that the interrogating officers carried weapons, and Bryant had at one time alleged that a gun was placed to his head to gain his confession, he apparently abandoned this issue as he does not include argument or case law. (Petition 21).[1] Similarly, he

[1] Failure to fully develop the issue in the appellate briefing will result in a finding that the matter has been waived. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."); Cooper v. State, 856 So. 2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Although part of a suppression motion in the first trial, (1TR initial brief at 6-22), the use of a gun by the officers and the allegation Bryant requested an attorney before he confessed are not the focus of this petition.

raises, then fails to explain the notion that "[w]hile he may have had an imperfect competency issue, he had a better false confession issue which counsel failed to raise." (Petition at 25).[2] As such, for the two factual scenarios identified, but abandoned, the State will not address them further.

With respect to the allegations the confession should have been suppressed because it was obtained after an illegal arrest and after a promise to permit Bryant to see his mother, the ineffectiveness claim for not raising these issues on appeal is barred as it fails to present anything more that a cursory argument. Furthermore, the claim is without merit as review of the record below establishes there was probable cause to arrest and no promises made for the confession. Merely because there was a motion to suppress raised and rejected at trial does not require that the issue be raised on direct appeal. See Hardwick v. Dugger, 648 So. 2d 100, 106 (Fla. 1994) (noting "appellate

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[2] This issue also should be deemed waived. Bryant does not explain or argue this point. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). Furthermore, the suppression of the confession was not raised before the trial court in terms of either an "imperfect competency" matter or a false confession. As such, appellate counsel may not be deemed ineffective for not challenging an unpreserved issue on direct appeal. See Owen v. Crosby, 854 So.2d 182, 191 (Fla. 2003) (affirming that "counsel cannot be considered ineffective for failing to raise issues that were unpreserved and do not constitute fundamental error)); Downs v. Moore, 801 So. 2d 906, 910 (Fla. 2001) (same); Johnson v. Singletary, 695 So. 2d 263, 266 (Fla. 1996) (same).

counsel need not raise every conceivable claim"); Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989) (noting "[m]ost successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."). Bryant is unable to show ineffective assistance because the trial court's factual findings are supported, and the law was applied properly. As such, even had the matter been raised on appeal, relief would have been denied. Consequently, Bryant cannot show deficient performance and prejudice. The result of the appeal has not been undermined by counsel's decision. Bryant has not satisfied the standard announced in Strickland v. Washington, 466 U.S. 668 (1984).[3]

At the first trial, counsel challenged the confession on the grounds that it was procured after an illegal arrest and that the police had threatened Bryant with a gun. The second trial record reflects these suppression claims were re-adopted, and

[3] Bryant must demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688-89, 694 (1984).

the defense added the argument that the confession was induced by the promise Bryant would be permitted to talk to his mother (2TR V13 2270-71; V15 2570-72; S2TR V2 166).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). See Downs v. Moore, 801 So. 2d 906, 909 (Fla. 2001) In Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000), this Court reiterated the burden a petitioner must meet in order to prove ineffective assistance of appellate counsel:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion. In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.
>
> *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.

> 2d at 470; *Hardwick*, 648 So. 2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So. 2d at 1069. See Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

Initially, it must be recognized that Bryant's argument rests almost entirely on attempting to prove that the confession should have been suppressed. The majority of the cases deal with seizure of drugs following anonymous tips or traffic stops where there was no suspicion of criminal activity. Such analysis and case facts are vastly different from the instant case facts involving the development of leads in conjunction with an ongoing homicide investigation. More important, little

if any of the argument addresses whether counsel's actions were deficient, i.e., whether the decision fell below the professional norm. Likewise, no analysis is presented respecting prejudice; Bryant fails to address whether the result of the appeal would have been different but for counsel's failure to raise the suppression issue on appeal. As such, the claim should be found barred as Bryant has made only a "thinly veiled attempt to have" his appellate suppression issue reviewed on its merits in the habeas litigation. See Freeman, 761 So. 2d 1069-70 (opining "Freeman argues the underlying merits of this issue without citing any cases to demonstrate that appellate counsel's failure to raise the arguments fell measurably below the standard of competent counsel. These issues are a thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition.").

Assuming this Court reaches the merits, Bryant can show neither deficient performance nor prejudice arising from the decision not to present the suppression issue on appeal. The record supports the finding that the police had probable cause to arrest Bryant.[4] Also, he was not induced by the police to

[4] As an interesting point, Bryant had sought a pre-trial release on bond (2TR V2 8-9). Based upon the presentation by the counsel and the trial court's review of the statements of Betty and Tara Bouie, Mary Williams, Cheryl Evans, and Bryant, the trial court concluded the "proof of guilt is evident or the

confess when the detective acquiesced to Bryant's request to see his mother before giving a statement. Hence, appellate counsel's failure to challenge the suppression matter did not fall below the professional norm as counsel need not raise every issue preserved for appeal. Atkins, 541 So.2d at 1167. These challenges will be addressed separately.

Prior to the presentation of evidence at the suppression hearing, defense counsel re-raised all issues presented in the motion to suppress in the first trial and adopted all testimony (S2TR V2 166). The trial court reminded the parties that he presided over the first trial and read the partial transcript of that suppression hearing. (S2TR V2 169).

The evidence developed at the suppression hearing in the second trial established that prior to Bryant's arrest, the police were contacted by Betty Bouie ("Betty") and Mary Williams ("Williams"), who gave taped statements informing the police Bryant had admitted, in their presence, to having committed the murder (S2TR V2 173-75). Detective Hartman ("Hartman") knew Betty, but he did not know she had been arrested previously; Hartman did not know Williams. (S2TR V2 173-74, 212-13). Betty explained that she overheard Bryant admit to killing the victim

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presumption is great", thereby, denying bond. (2TR V2 52). Clearly such a standard is higher than probable cause.

during a robbery and noted a ski mask had been used (S2TR V2 175-76, 212-15).

Williams confirmed Bryant had admitted, in her presence, to committing the homicide during which a mask was used, and that he had used Cheryl Evans' gun or had given it to her. She in turn, gave it to a man, named "Big D", who was presently in federal custody (S2TR V2 176, 214-15). Betty said that her sister, Tara, who was in the hospital after a fight with Bryant, also wanted to disclose what she knew about the homicide (S2TR V2 175-76).

Harman knew Tara Bouie ("Tara") from the streets, and following up on these accounts, took her taped statement (S2TR V2 176-77, 217, 228). She reported hearing of Bryant's involvement in the murder from Cheryl Evans ("Evans") and confronting him about it. He admitted to Tara that he killed a man in an attempted robbery of a market, but had not meant to kill. Bryant also confessed to pointing his gun at the Haitian man in the market and that the man struggled for the weapon. The struggle started in the back of the store and continued to the front. Bryant told Tara the only way he could get the Haitian off of him was to shoot, but one shot was not enough to make the victim stop struggling, so he shot again. However, the victim still would not release him. At that point, the victim

pulled off Bryant's ski mask. Bryant admitted shooting the victim with Evans' gun. (S2TR V2 176-77, 222-23). Hartman testified a ski mask had been found at the scene, and it was not common knowledge the struggle started in the back and progressed to the front of the store (S2TR V2 178, 215-16, 222-24).

The police also contacted Damien Remy, a/k/a Big D ("Remy") who gave a taped statement advising the police he met Bryant through Evans and Bryant had been introduced as the person who shot the Haitian man (S2TR V2 178-80). After Cheryl and Bryant left Remy, he found Cheryl's gun in his car and discarded it along I-95. (S2TR V2 179-80, 224-25). Given the four statements, the police believed they had probable cause to arrest Bryant and started looking for him. (S2TR V2 180-81).

Unrelated to this case, Evans telephoned the Delray Beach Police to file a complaint about an officer. (S2TR V2 238).[5] Hartman and Detective Brand ("Brand") learned of this contact. Brand wanted to ascertain whether Bryant would be with Evans who was told she should come to the station to file the complaint. (S2TR V2 180-81, 238). By the time Evans arrived, four taped

[5] Bryant alleges that the police had "Evans pretend to need to obtain something from the Delray Beach Police Department and had Byron Bryant to accompany her on the drive...." (Petition at 10). However, the record establishes that Evans had made the initial call to the police to complain about another matter, Hartman and Brand merely inquired whether, and candidly hoped, Bryant would escort Evans. (S2TR V2 180-81, 238)

statements had been taken regarding the murder (S2TR V2 180-81).[6]

When Evans showed up at the station, the police asked who accompanied her. Upon learning it was Bryant, they arrested and handcuffed him, before escorting him to an interview room. (S2TR V2 186, 192, 231-38). Brand remained with Bryant while Hartman spoke to Evans (S2TR V2 202). Her first (unrecorded) statement was given before Bryant was Mirandized, however, her taped statement, which was "basically" the same as her prior statement, was provided before Bryant gave his taped statement. (S2TR V2 228).

Before talking to Bryant, the police took Evans' statement (S2TR V2 193, 228-29, 233). According to her, Bryant had returned home very excited one night, fearing he had been shot. Smelling of fish, Bryant confessed he had shot a Haitian man in an armed robbery. The gun used was Evan's .357 black snub-nosed revolver. Cheryl confirmed she had given that gun to Remy. (S2TR V2 194).

Prior to his interview, Bryant was given Miranda warnings which he waived orally and indicated he understood his rights. He did not sign the card because he remained handcuffed the

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[6] The trial court ordered that the taped statements be made part of the court file because of the claim that no probable cause existed for Bryant's arrest. A copy of Bryant's confession was also admitted. (STR V2 183-84). Evan's taped statement was later admitted into evidence. (STR V2 198-99).

entire time except while eating and removing his jewelry (S2TR V2 186-87, 191-92, 198-201, 208-10, 220, 234, 239). At no time did Bryant indicate he did not want to talk to the police (S2TR V2 203, 234-36). After the police informed Bryant of the statements they had, that they knew about the gun, and had fingerprints, the ski mask, and an identification from the victim's wife, they played Remy's statement for him.[7] Upon hearing this, Bryant inquired whether the police thought he committed the crime (S2TR V2 203-05, 234-35). When the police replied affirmatively, Bryant asked to see his mother/family and told the detectives he would give a statement explaining what happened (S2TR V2 204-05, 234-35). Bryant did not condition his statement upon seeing his mother (S2TR V2 235).

Bryant's family was called, and several members arrived with food, and stayed for 30 to 60 minutes (S2TR V2 205-06, 210, 235). Evans was present with some children (S2TR V2 235). Following the family visit, Bryant gave a taped statement admitting his involvement in the planning and execution of the robbery and homicide (S2TR V2 208-10). He admitted he did not have to give the statement, and that it was of his "own free will." (S2TR V2 208-10). Further, Bryant acknowledged he was

[7] Hartman admitted he lied to Bryant about the evidence. (S2TR V2 221).

not promised anything and that he had been treated fairly. (S2TR V2 208-09).

Although not read into the record during the suppression hearing, a transcript of Bryant's statement was made a part of the record. (S2TR V2 183-84). At trial, the statement was played, showing Bryant acknowledged he was given his Miranda[8] warnings and had no questions. (2TR V28 811). Bryant confessed, in detail, to the planning of armed robberies on December 16, 1991, one was aborted, and the other was Andre's Market. He spoke of the struggle with Mr. Andre that resulted in the shooting death (2TR V28 812-38). Following his account of the crime, Bryant reaffirmed the police held the Miranda card and read him his rights, but he did not sign it because he was handcuffed. Bryant stated: "Yeah, I had a right not to say nothing, but what, the speech I -- the testimony I give was of my own free will, it wasn't no promises or nothing like that." He acknowledged he was promised nothing and was treated fairly. (2TR V28 837). He confirmed everything which was discussed off-tape was adopted on-tape. Bryant also averred: "And I know I could have of just went ahead and went to jail or went to trial without giving no statement because I understand how the law work with police officer, and anything like that. And the whole

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

thing was on my own free will." (2TR V28 837-38).

Defense counsel argued the statement was involuntary because of the "promise" to Bryant that he could see his mother (S2TR V2 245-47). Also, the defense asserted the statement was involuntary because the informants were unknown to the police and there had been no verification of their statements, thus, the police could not make an arrest (S2TR V2 247-48). The trial court concluded no promises were made and the permission for Bryant to see his family was an accommodation, an act of courtesy, mere kindness on the part of the police. The trial judge found the statement voluntary just as it was voluntary following the suppression hearing from the first trial (S2TR V2 253). Prior to the admission of the taped confession at trial, the defense objected (2TR 808-09).

Bryant, in citing Arizona v. Fulminante, 499 U.S. 279, 295-96 (1991) suggests that the State must show that the admission of the confession was harmless beyond a reasonable doubt. (Petition at 26). Fulminante is a certiorari of a direct appeal decision. Such is not the applicable standard here as the instant matter is a review of appellate counsel's actions for ineffectivness. Thus, Bryant must show that, but for the decision to forego the suppression issue, the result of the appeal would have been different. Freeman, 761 So. 2d at 1069.

He has not, nor can he meet this standard.

Because the police, before Bryant's arrest, had taped statements from his known acquaintances relating his admissions to the robbery and murder, appellate counsel's decision to exclude the suppression issue from appeal did not fall below the professional norm.[9] See Hardwick, 648 So. 2d at 106 (noting "appellate counsel need not raise every conceivable claim"); Atkins, 541 So.2d at 1167 (noting "[m]ost successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points."). However, even if the issue could have been raised, no prejudice flowed from the failure to do so.

Addressing probable cause for an arrest, this Court explained:

> Probable cause for arrest exists where an officer "has reasonable grounds to believe that the suspect has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." ... The question of probable cause is viewed from the

[9] Although not dispositive, a review of the first appeal (case number SC81,862) reveals Bryant's 1993 appellate counsel chose not to challenge the confession. See Bryant v. State, 656 So. 2d 426, 427 (Fla. 1995). Clearly, prior counsel was in agreement that the suppression challenge was without merit.

> perspective of a police officer with specialized training and takes into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Walker v. State, 707 So. 2d 300, 312 (Fla. 1997), (citations omitted). See Francis v. State, 808 So. 2d 110, 124 (Fla. 2001) Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984); McCarter v. State, 463 So. 2d 546, 548-49 (Fla. 5th DCA 1985) (opining "[p]robable cause to arrest exists when facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has or is being committed.").

With respect to confessions and inducement through promises, this Court has noted:

> It is well established that a confession cannot be obtained through direct or implied promises. In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of a free and rational choice. *Leon v. Wainwright*, 734 F.2d 770, 772 (11th Cir.1984) It may not be obtained by either implied or direct promises. *Bram v. United States*, 168 U.S. 532, 542-3, 18 S.Ct. 183, 186-7, 42 L.Ed. 568 (1897)....

Johnson v. State, 696 So. 2d 326, 329 (Fla. 1997). "In order to find that a confession is involuntary within the meaning of the Fourth Amendment, there must first be a finding that there

was coercive police conduct." State v. Sawyer, 561 So. 2d 278, 281 (Fla. 2d DCA 1990), citing Colorado v. Connelly, 479 U.S. 157 (1986). "The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained." Sawyer 561 So.2d at 281. The trial court's ruling on the voluntariness of a confession should not be disturbed unless it is clearly erroneous. Whether reasonable suspicion or probable cause exists is reviewed de novo. Ornelas v. United States, 517 U.S. 690 (1996) (holding determinations of reasonable suspicion to conduct stop and probable cause to search should be reviewed de novo as mixed questions of law and fact).

The record supports a finding of probable cause to arrest Bryant when he arrived at the station, hence, not challenging the suppression issue on appeal was not ineffective assistance and the result of the appeal was not undermined. Taped statements had been taken from four named witnesses, Betty and Tara Bouie, Mary Williams, and Damien Remy, prior to Bryant being arrested. Cheryl Evans gave her taped statement before the police spoke to Bryant. The first four statements related that Bryant had admitted using a .357 caliber gun in the shooting death of a Haitian man during a robbery where a ski mask was used. This information was confirmed through the

processing of the crime scene. Also, prior to talking to Bryant, the police had Evans' taped statement which corroborated Bryant's involvement in the armed robbery at a Haitian market where a bucket of fish had been overturned, and a struggle with the owner commenced in the back of the store and continued to the front. The fight ended with Bryant shooting the victim with Evan's .357 weapon, and returning home that night smelling of fish.[10] The police found bullets of the same caliber as the weapon Bryant said he used, a ski mask, a toppled barrel of fish, a Haitian victim, and evidence that the struggle started in the back of the store and proceeded to the front.

Bryant alleges that Betty, Tara, Williams, Remy, and Evans were anonymous informants unable to give the police probable cause for an arrest.(Petition at 11) and directs this Court's attention to those cases dealing with confidential informants, anonymous tipsters, and situations where the police did not know of the crime until after the tip was given and a search was conducted.[11] These cases differ greatly from the situation here.

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[10] While Cheryl Evans did not give her statement until after the police had arrested Bryant, the statement was given before Bryant was interviewed. If there was an illegal arrest, and taint from it was cured by the further links to the crime Evan's reported and the giving of the Miranda warnings an Bryant's contact with his family before confessing.

[11] See Draper v. United States, 358 U.S. 307 (1959) (addressing use of confidential informants); Swartz v. State,

In the instant matter, the police had been investigating a completed crime and evidence had been collected. When Bryant's friends came forward with their accounts, the police had information against which they could evaluate the veracity of the witnesses. Such information as the type of weapon, use of a ski mask, identity of the person murdered, the site of the robbery, the location of the struggle between assailant and victim within the market, and the fact that the combatants had been doused with fish water. Clearly, the police had information of a completed crime gathered independently of the Bouies, Williams, Remy, and Evans. Moreover, the witnesses against Bryant gave sworn, taped statements. Consequently, Bryant's reliance upon cases dealing with anonymous informants discussing crimes unknown to the police before the tipsters came forward are inapplicable here.

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857 So. 2d 950 (Fla. 4th DCA 2003) (suppressing drugs located on defendant after police received tip of possible burglary taking place at home where defendant was found at scene); Pinkney v. State, 666 So. 2d 590 (Fla. 4th DCA 1996) (involving anonymous tip of future crime); Cunningham v. State, 591 So. 2d 1058 (Fla. 2d DCA 1991) (addressing use of anonymous tip, uncorroborated by independent police investigation); Roper v. State, 588 So. 2d 330 (Fla. 5th DCA 1991) (involving allegations from person claiming she had seen drugs in defendant's apartment; police had no knowledge of crime until after search of defendant's residence); Holmes v. State, 549 So. 2d 1119 (Fla. 1st DCA 1989) (dealing with confidential informant); St. John v. State, 363 So. 2d 862 (Fla. 4th DCA 1978), disapproved by, Hetland v. State, 387 So. 2d 963 (Fla. 1980).

Betty and Tara Bouie, were known to Detective Hartman, and all the witnesses gave their names, met with the police, and provided statements. Contrary to Bryant's position, they qualify as "citizen-informants" of high reliability and afforded the police probable cause to believe Bryant committed a felony. In State v. Maynard, 783 So. 2d 226, 230 (Fla. 2001), this Court agreed: "A citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.' State v. Talbott, 425 So. 2d 600, 602 n. 1 (Fla. 4th DCA 1982) (quoting Barfield v. State, 396 So. 2d 793, 796 (Fla. 1st DCA 1981))." See State v. K.V., 821 So. 2d 1127 (Fla. 4th DCA 2002) (finding evidence should not have been suppressed where identity of informant (security guard) was readily available and witness not motivated by pecuniary gain). "Tips from known reliable informants, such as an identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police, will almost invariably be found sufficient to justify police action" J.L. v. State, 727 So. 2d 204, 206 (Fla. 1998). See State v. Evans, 692 So. 2d 216 (1997) (finding restaurant manager's report of impaired driver did not have to be corroborated independently because she was readily identifiable and not motivated by pecuniary gain).

Relying upon Alabama v. White, 496 U.S. 325 (1990), does not

further Bryant's position. In fact, it supports the State's position. While the initial tip in White was anonymous, added police work confirmed the content of the tip and rendering such indicia of reliability to support an investigatory stop. Here, the police had known/identifiable witnesses coming forward, and each was in a position to know of Bryant's criminal behavior; they were friends who heard his admissions. Moreover, the police confirmed the evidence disclosed by the witnesses by comparing it to certain facts known through prior investigation. These facts were that a murder occurred during a robbery of a Haitian market, the caliber of weapon employed, and use of a ski mask by the assailant,[12] in addition to the information obtained from Evans, prior to the police talking to Bryant, involved where the conflict occurred in the market, and that the assailant had upset a bucket of fish. Hence, contrary to Bryant's suggestion, no further independent verification was necessary. (Petition at 14).

Bryant's complaint that search warrants, wire taps, undercover recordings, or other investigatory methods should have been exhausted before the arrest was effectuated is unsupported by the case law cited in his brief. Probable cause

[12] Although the surviving witnesses did not discuss a ski mask, one was found outside the market.

does not require proof for conviction, only that the police have a reasonable basis to believe a felony was committed. Clearly, the sworn statements from these identified witnesses supports the reasoned belief Bryant committed the crimes of armed robbery and murder. Francis, 808 So. 2d at 124 (Fla. 2001) (recognizing police had probable cause based upon citizen reports); Kearse v. State, 662 So. 2d 677, 684 (Fla. 1995) (finding warrantless arrest and subsequent confession proper based upon information police had at time of arrest coupled with information from citizens at arrest site pointing out defendant); Krawczuk v. State, 634 So. 2d 1070, 1071-73 (Fla. 1994) (finding probable cause to arrest where police were informed by witness that he may have purchased stolen items from defendant); Blanco, 452 So. 2d at 523 (finding probable cause based upon officer's belief defendant matched assailant's description and given his proximity in time and place to crime scene), vacated on other grounds, Blanco v. Singletary, 943 F.2d 1477, 1481 (11th Cir. 1991) (granting new sentencing); Routly v. State, 440 So. 2d 1257, 1260-61 (Fla. 1983) (recognizing police had probable cause based upon statement of defendant's girlfriend, an eye witness, who implicated defendant); Milbin v. State, 792 So. 2d 1272, 1274 (Fla. 4th DCA 2001) (opining "witness who provides information to a police officer through 'face to face'

communication is deemed to be sufficiently reliable"). Bryant's subsequent confession following Miranda warnings was admitted properly into evidence. Consequently, appellate counsel was not ineffective for choosing to forego raising the issue.

However, if the arrest is determined to have been made without probable cause, any deficiency was remedied by the subsequent statement of Evans giving more detail about Bryant's involvement in the murder, and the fact that he was given his Miranda warnings and allowed to talk to his family before the confession was provided. Bryant's confession remains voluntary and admissible. The record reflects that Bryant was placed in a room after his arrest. Bryant's reliance upon Brown v. Illinois, 422 U.S. 590 (1975) is not dispositive[13] as in that

[13] Bryant's citing of Faulkner v. State, 834 So. 2d 400 (Fla. 3d DCA 2003) and Findley v. State, 771 So. 2d 1235 (Fla. 2d DCA 2000) does not further his position. In Faulkner, a traffic stop case, the officer stopped a vehicle in which Faulkner was the passenger. Without any suspicion that Faulkner was involved in a crime, the officer detained him and after questioning demanded he show the contents of his pocket which revealed drug paraphernalia. In Findley, based upon an anonymous tip, the police arrived at Findley's home. His 12 year old daughter confirmed her father was using drugs and the officers entered the defendant's residence without permission. Once inside, they asked the defendant to step outside. There the officers asked and were granted permission to search the home where they found cocaine residue. However, in the instant case, Bryant was not arrested in his home, but on the street. Moreover, the police were not led to him by anonymous tips, nor was he detained without any suspicion of criminal activity. These cases are distinguishable from the instant matter.

case, the holding was limited. There, the defendant was arrested after the brother of the victim noted that Brown was an acquaintance of the deceased. After Brown was arrested for questioning, he made incriminating statements. The Supreme Court concluded that the mere giving of Miranda warnings after an illegal arrest would not, in and of themselves, always purge the taint of an illegal arrest.

Here, Bryant was arrested after four friends had reported Bryant's admissions to the murder. After the arrest, Evans gave an unrecorded statement (the fifth corroborating story obtained by the police) before Bryant was Mirandized. Subsequently, Evans gave a taped statement and the police commenced questioning Bryant. (STR V2 228). Clearly, the police had statements linking Bryant to the crime before he was Mirandized. The fifth statement gave further probable cause. Moreover, if the arrest were illegal, any infirmity was cured by the giving of Miranda warnings and the granting of Bryant's request to visit with his family. All of this occurred before a confession was given, hence, any taint from the arrest was removed. Further, Bryant informed the police he knew his rights, that he did not have to talk, but that he confessed of his own free will. Byrd v. State, 481 So.2d 468, 472-73 (Fla. 1985) (noting even if warrantless arrest was improper, any taint was

dissipated when defendant was given Miranda warnings and time to discuss situation with girlfriend, before he agreed to talk to police, and confessed).

Given this state of the law, probable cause existed based upon the fact the witnesses were known, either from prior contact with the police or by giving their names and sworn statements. Hence, counsel did not render deficient performance. The challenge to the confession as one obtained after an illegal arrest is without merit, thus, appellate counsel did not render ineffective assistance by omitting such a meritless issue on direct appeal. See Rivera v. State, 859 So. 2d 495, 509-10 (Fla. 2003) (finding appellate counsel was not ineffective in failing to challenge denial of suppression of confession as underlying claim was meritless); Brown v. State, 846 So.2d 1114, 1128 (Fla. 2003) (reasoning defendant failed to prove ineffective assistance because the trial court conducted a sufficiently detailed inquiry into confession, and properly admitted the statement into evidence, as such, counsel was not deficient in failing to raise a meritless issue); Hardwick, 648 So. 2d at 106 (noting "appellate counsel need not raise every conceivable claim"); Atkins, 541 So.2d at 1167; Davis v. Wainwright, 498 So.2d 857, 859 (Fla. 1986) (rejecting claim of ineffective assistance of appellate counsel for failing to raise

meritless suppression issue); Middleton v. State, 465 So.2d 1218, 1228 (Fla. 1985). As such, appellate counsel cannot be deemed deficient for not raising a claim unsupported by the record.

Turning to Bryant's allegation of coercion of his confession based upon an alleged promise he could see his mother (Petition 22-28; 2TR V15 2570-72), this Court will find record support for the trial court's denial of the motion to suppress, thus, no prejudice can flow from the failure to raise this appellate issue. The record from the suppression hearing supports the finding that Bryant was promised nothing for his confession.

To be voluntary, a confession cannot be obtained through direct or implied promises. See Johnson v. State, 696 So. 2d 326, 329 (Fla. 1997). The detectives explained it was Bryant who said he would give a statement after seeing his family. As the trial court found, the police merely accommodated him. It was Bryant who first requested to see his mother and said he would give a statement after speaking with her. The police offered neither a family visit nor demanded a statement in exchange for such a visit. See Anderson v. State, 863 So.2d 169, 183 (Fla. 2003) (rejecting challenge to admission of confession finding that agreeing to call defendant's mother at his request and reminding defendant the police were fair "could

not have given Anderson the impression that the opportunity to contact his mother was contingent on providing statements); Walker v. State, 707 So. 2d 300, 312 (Fla. 1997) (upholding voluntariness of confession where the defendant was questioned for six hours during the morning and early part of day, was provided with drinks and allowed to use the bathroom when he wished, and was never threatened with capital punishment, or promised anything other than that the officer would inform the prosecutor that the defendant had cooperated); Maqueira v. State, 588 So. 2d 221, 223 (Fla. 1991) (upholding admission of confession where defendant's testimony was inconsistent with all other testimony at suppression hearing); Bruno v. State, 574 So. 2d 76, 79-80 (Fla. 1991) (finding court could properly find no improper promises were made when police responded to Bruno's inquiry about his son by advising that only Bruno knew the depth of his son's involvement in said crime); McDole v. State, 283 So. 2d 553, 554 (Fla. 1973) (reasoning where evidence is contradictory testimony of officers and defendant, finding of voluntariness may be considered supported by preponderance of evidence).

The facts of Bryant's case differ from those presented in Walker v. State, 771 So. 2d 573, 574 (Fla. 1st DCA 2000) (promising no arrest in exchange for information on other drug

activity); Grasel v. State, 779 So. 2d 334 (Fla. 2d DCA 2000) (offering protection on crime under investigation and inferring other protection available); Albritton v. State, 769 So. 2d 438 (Fla. 2d DCA 2000) (suggesting defendant's actions would not be found criminal if they were part of religious ritual); Hanthorn v. State, 622 So. 2d 1370 (Fla. 4th DCA 1993) (involving unrebutted testimony that detective's supervisor suggested defendant would not be charged if he cooperated in criminal investigation); Gaspard v. State, 387 So. 2d 1016 (Fla. 1st DCA 1980) (exerting undue influence through threats of the electric chair and continued questioning the clearly psychologically and mentally exhausted defendant). In each case, there were direct promises or threats. No such promises or threats were made here. Instead, the police had gathered information against Bryant, arrested him, and sought his statement. During the interview, it was Bryant who asked to see his mother. The police put no price on that meeting.

Moreover, in his taped statement, Bryant confirmed he was given his Miranda rights and that he was not promised anything. (2TR V28 837) Bryant averred: "Yes, I had a right not to say nothing ... the testimony I give (sic) was of my own free will. It wasn't no promises or nothing like that. ... I know I could have just ... went to jail or went to trial without giving no

statement because I know how the law work with Police Officer (sic) ... the whole thing was on my own free will." (TR V28 837-38). Given this unassailable evidence, Bryant has not shown that this claim has merit, nor has he shown that the result of his appeal would have been different had the suppression issue been raised. For the same reasons as noted in the analysis of the "illegal arrest" allegation, counsel was not ineffective. Likewise, prejudice cannot flow from the failure to challenge the admission of his confession as the issue would have been found meritless. See Rivera, 859 So.2d at 509-10; Brown, 846 So.2d at 1128; Hardwick, 648 So. 2d at 106; Atkins, 541 So.2d at 1167; Davis, 498 So. 2d at 859; Middleton, 465 So. 2d at 1228. Relief must be denied.

ISSUE II

THE FINDING OF THE AVOID ARREST AGGRAVATOR WAS SUPPORTED BY THE LAW AND SUBSTANTIAL COMPETENT EVIDENCE, THUS, APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CHALLENGE THE ISSUE ON APPEAL (restated)

Bryant contends that appellate counsel was deficient because he failed to challenge on appeal the finding of the avoid arrest aggravator on the grounds it was unsupported by competent, substantial evidence. This failure, Bryant maintains prejudiced him because the death sentence was affirmed by this Court. (Petition at 29). This claim is meritless as the finding of the aggravator was found properly, thus it was not ineffective assistance by appellate counsel to exclude the issue from direct appeal; the result of the appeal would not have been different but for counsel's actions. Moreover, even absent the aggravator, the death sentence is appropriate, thus, no prejudice flowed from the decision not to raise the matter on appeal.

In Valle v. Moore, 837 So. 2d 905 (Fla. 2002), this Court noted:

> The standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), standard for claims of trial counsel ineffectiveness. *See Jones v. Moore*, 794 So.

> 2d 579, 586 (Fla. 2001). However, appellate counsel cannot be considered ineffective under this standard for failing to raise ... claims without merit because appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal. *See* [*Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)]. In fact, appellate counsel is not necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (appellate counsel not required to argue all nonfrivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) (noting that "it is well established that counsel need not raise every nonfrivolous issue revealed by the record").

Valle, 837 So. 2d at 907-08. As recognized in Freeman v. State, 761 So. 2d 1055, 1069 (Fla.,2000), "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla. 1981). 'In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error.' *Id.* at 1001."

As with Issue I, Bryant presents the issue more as an appellate claim than one of ineffective assistance. Moreover, he fails to allege prejudice other than to assert that based

upon the lack of the claim, “petitioner’s appeal was prejudiced.” (Petition at 32). Consequently, this Court should find the matter improperly plead and barred. See Freeman, 761 So. 2d 1069-70 (opining “Freeman argues the underlying merits of this issue without citing any cases to demonstrate that appellate counsel's failure to raise the arguments fell measurably below the standard of competent counsel. These issues are a thinly veiled attempt to have an appeal on the merits, which is clearly not the purpose of a habeas petition.”).

Although trial defense counsel objected to the application of the “avoid arrest” aggravator, (2TR 258-60, 263, 1221-22), the trial court properly employed the aggravator in sentencing Bryant to death. An appellate challenge to the finding would have been meritless. Consequently, the result of the appeal was not undermined and the dictates of Strickland have not been met.

In the sentencing order, the trial judge analyzed those cases where the “avoid arrest” aggravator had been found. (2TR V22 3860-64). It was noted the aggravator had been utilized: “(1) when the victim is a law enforcement officer killed while effectuating a lawful arrest and (2) when the victim is not a law enforcement but is a potential witness who may provide necessary information for an arrest, i.e., the elimination of a crucial State witness.” (2TR V22 3860). The trial court looked

to the language of section 921.141(5)(e), Florida Statues (defining “avoid arrest” aggravator) and noted it would apply to those instances where a citizen witness was effectuating an arrest for a felony committed in his presence. Reviewing the case facts and Bryant’s confession, the trial court reasoned the victim was depriving Bryant the right to leave during the armed robbery, such constituted a citizen’s arrest, and Bryant killed the victim during his detention to escape the victim and the arrest by the police. The strongest evidence of the purpose for killing the victim came from Bryant’s confession where he admitted the victim was stopping him from leaving the store after the armed robbery, and Bryant shot him several times in order to extricate himself from the victim’s grasp to escape. (2TR V22 3863).

Bryant confessed that after pulling his gun and pointing it at Mr. Andre, he grabbed for the weapon and they started wrestling in the back of the store. Continuing Bryant related:

> ... So then he was fighting with me, we was wrestling with each other for the gun. So he was hollering something ... [in French] ... to the wife.
>
> So then Dexter had already got the -- pul the gun on the other lady, or his wife, you know, telling her to lay down, don’t say nothing. So now me and him still fighting, wrestling with the gun. So we was wrestling down the whole aisle.

Then he -- we turned over a bucket of water, fish or something in there. ... I got my hand on the gun, he got his hand on the gun. I am trying to keep the gun from me. I am trying to get away from him at the same time. ... So then I tild Dexter to do something cause the guy, I can't hardly make it now, this man is strong.

...

And I am fighting with him for my life right then. So then Dexter point the gun at him, but he ain't shot him. So thenm I tell hom. Dexter was just standing there with the gun pointed at him, you know like he ain't do nothing. He just standing there. So then I kept wrestling with him, then all of a sudden when he turned a loose for a second, giving me upper leverage with him on the gun, so now I got my hand, my hand on the trigger. So I shot, I shot one time already. Bit nobady ain't get shot, the bullet just, you know, it hit something in the store.

...

So then we up to the front of the store wrestling, so it was like this man strong, he started to get on top of me now. So I am trying with all my might to push him off me. So then he turned his hand loose. He loosed his hand from the gun some kind of way to try to you know, push off. So then he rolled on the side, he wasn't on top of me no more, he rolled over on his side, then I got control of the gun, then I shot him one time. So then he was still fighting with me then. ...

It was from his stomach up to his -- itwasn't his upper part of his body. So then I shot him. So then he hollered one time. But he was still fighting with me. He ain't -- he din't give up. So then I

> shot him again, then he just hollered again, but he was still fighting with me.
>
> ...
>
> So then I shot him again, I was trying to get -- I was pulling away. But he was still holding on. So I shot a third time, then he just hollered for his wife. When I shot him the third time. I just used all the force that I had and I pushed him off me and pulled away. Then when I got up, I was finna (sic), run out the store. Then he grabbed a hold to my pants leg. He was, you know, he was still hollering like that. But he was trying to hold me at the same time. Then I yanked my pants away from -- then I ran out and jumped in the car. I tell Meno let's go.
>
> ...
>
> [Dexter] was, he couldn't shoot the guy because he was tussling, he couldn't take a chance. He could of shoot me because we was back and forth --
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> ...
>
> I don't know ... I wasn't worrying about the money then. I was excited cause I had shot the man, and I knowed the man was gonna die cause I shot him three times with a .357 Magnum. And I was shooting up close range and it was in his body, cause I know then I was kinda worried....

(2TR V28 819-23). Bryant averred: "I was trying to get away. I was trying to get the gun and get away because he was trying just as hard as me to get the gun. And I know if he would have got hold of the gun, he was gonna kill me ....". (2TR V28 828). He explained that when Mr. Andre saw the weapon "[a]utomatically

he jumped at me, he reached out and grabbed my arm and tried to hold to me." (2TR V28 830-31).

> And the only reason when I shot because that was the only way I could get [the victim] off me. We was struggling and it was like both of us was fighting for our life. And my only out, the only way I could leave that store was to shoot him. Because that is the only was I was gonna get him off me. Cause if I would have losed (sic) control of the gun, well, if for one second, he would of shot, he would of shot me.

(2TR V28 832).

Although the "avoid arrest" aggravator usually is associated with homicides of police officers, it may be found where a witness is killed. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). The State must show something more than the victim's death, the State must show that witness elimination is the dominant purpose of the murder. Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992). The court will consider "whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." Farina v. State, 801 So. 2d 44, 54 (Fla. 2001). See Philmore v. State, 820 So. 2d 919, 935 (Fla. 2002) (finding "avoid arrest" aggravator based upon defendant's statement that it was his intent to kill the victim after car jacking); Consalvo v. State,

697 So. 2d 805, 819 (Fla. 1996) (judging avoid arrest aggravator proven where victim knew defendant, was pressing charges for prior crime, and awoke during burglary threatening to call police); Harvey v. State, 529 So. 2d 1083, 1087 (Fla. 1988) (finding avoid arrest aggravator where victims knew defendants and defendants discussed killing victims to avoid detection), cert. denied, 489 U.S. 1040 (1989).

Other than asserting there is no competent, substantial evidence supporting the "avoid arrest" aggravator and citing case law discussing the aggravator (Petition at 32), Bryant fails to address any of the facts relied upon by the trial court in concluding the aggravating factor was proven. As noted above, the trial court found that Bryant was in the course of committing a robbery and the victim attempted to stop him by effectuating a citizen's arrest. Further, the trial court based his finding upon Bryant's own words to the police in describing why he shot the victim. See Floyd v. State, 850 So. 2d 383, 406 (Fla. 2002) (reaffirming avoid arrest aggravator may be based on defendant's statements describing his motivation for killing). Bryant's confession established he entered the store armed and with a mask, which he dropped while fleeing, grappled with the owner over the gun, and shot the victim three times at point blank range with a .357 magnum revolver, knowing it would

kill the victim, all in order to escape. As Bryant stated: "And the only reason when I shot because that was the only way I could get [the victim] off me. We was struggling ... both of us was fighting for our life. And my only out, the only way I could leave that store was to shoot him. ... Cause if I would have losed (sic) control of the gun ... he would of shot me." Clearly, his sole motivation for the shooting was to eliminate the victim who was detaining him after the robbery and preventing his flight. Bryant confessed to this motivation. In fact, according to him, he kept shooting at close range with a .357 magnum, which he knew would kill the victim, until the victim released Bryant from his hold. His sole purpose for shooting the victim was to effectuate an escape. Such establishes the "avoid arrest" aggravator. See Philmore, 820 So. 2d at 935; Consalvo, 697 So. 2d 805, 819 (finding avoid arrest based in part on fact when victim screamed, defendant stabbed her).

Appellate counsel's failure to challenge this aggravator on direct appeal was not deficient performance as the factor is supported by the record. Merely because the issue was preserved for appeal does not require counsel to present it for review. Hardwick, 648 So. 2d at 106; Atkins, 541 So.2d at 1167. Here, the evidence supported the finding of the aggravator, thus, the

appellate claim was meritless. Counsel cannot be deemed ineffective for failing to raise a meritless issue. Rutherford, 774 So. 2d at 643.

Furthermore, no prejudice has been established by Bryant. Again, the evidence supports the finding of the aggravator thus, the result of the appeal was not undermined by the failure to raise the claim. Cf. Sweet v. Moore, 822 So. 2d 1269, 1275 (Fla. 2002) (rejecting ineffectiveness claim where appellate counsel's failure to challenge "avoid arrest" instruction where case facts supported finding of the aggravator); Arbelaez v. State, 775 So. 2d 909, 915 (Fla. 2000) (explaining even if counsel was deficient for failing to object to aggravator instructions, there would be no prejudice because evidence established the existence of the aggravator).

Moreover, had this Court reviewed the issue and stricken the aggravator, the resulting analysis would have proven the reliance upon the aggravator harmless error beyond a reasonable doubt and the sentence proportional. Consequently, no prejudice, as defined in Strickland, can be shown. Absent the "avoid arrest" aggravator, two valid aggravators remained: "prior violent felony convictions" and "homicide committed during a robbery." In mitigation, only remorse was found, and it was given "very little weight." This Court has affirmed

cases with this type of aggravation and such little mitigation. See Pope v. State, 679 So. 2d 710, 716 (Fla. 1996) (finding death sentence proportional in murder and robbery where pecuniary gain and prior violent felony aggravators outweighed two statutory mitigating circumstances and several nonstatutory mitigating circumstances); Heath v. State, 648 So.2d 660 (Fla. 1994) (concluding death sentence proportional and affirming two aggravators of prior violent felony and felony murder committed (robbery) outweighed statutory mitigator of extreme mental or emotional disturbance); Melton v. State, 638 So. 2d 927, 930 (Fla. 1994) (holding death sentence proportional based upon pecuniary gain and prior violent felony aggravators and some nonstatutory mitigation).

Given this, Bryant cannot show prejudice arising from appellate counsel's failure to challenge the "avoid arrest" aggravator on direct appeal. Hryant has not carried his burden under Strickland, to show that the result of the appeal would have been different. This Court must deny habeas relief.

ISSUE III

BRYANT'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA AND APPRENDI V. NEW JERSEY EVEN THOUGH HE WAIVED HIS PENALTY PHASE JURY IS PROCEDURALLY BARRED AND MERITLESS (restated).

Bryant, without challenging appellate counsel's effectiveness, makes a direct challenge to his death sentence on the grounds it violates Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000) because a jury was not involved in his sentencing. (Petition at 34). Further, he argues that the aggravating factors are elements of first-degree murder and must be included in the indictment and found by a unanimous jury before a defendant is death eligible.

This claim fails on several levels. Dispositive is the fact that **Bryant waived his penalty phase jury**, thus, he has not shown that Ring could apply to his situation. Further, the Sixth Amendment claim raised in Apprendi and Ring was not argued below, hence, it was not preserved for appeal and is procedurally barred. Moreover, neither Apprendi nor Ring are retroactive. Death is the statutory maximum in Florida, as such Ring does not apply. Finally, Bryant admitted he had prior violent felony convictions and that he committed the instant murder during the course of a felony (robbery). (2TR V30 1057-58). Consequently, even under Ring, the death sentence is

constitutional.

Ring cannot form the basis for relief here as Bryant knowingly and voluntarily waived his penalty phase jury. Bryant cannot complain he did not have a jury sentencing recommendation when he sought and was granted the dismissal of the jury.[14] See Lynch v. State, 841 So. 2d 362, 366 n.1 (Fla.) (holding "[b]ecause appellant requested and was granted a penalty phase conducted without a jury, he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in Ring...."), cert. denied, 124 S.Ct. 189 (2003). There is nothing in Ring which deprives a defendant of the option to waive a constitutional right including the right to a jury trial. Patton v. United States, 281 U.S. 276 (1930). Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged "[i]t has never [been] suggested that jury sentencing is

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[14] Bryant's knowingly and voluntarily waived his penalty phase jury based upon defense counsel's statement to the trial judge and the colloquy the court conducted with Bryant. (2TR V22 3529, 3857; STR V2 254, 268-70). See State v. Hernandez, 645 So. 2d 432, 434-35 (Fla. 1994) (finding written waiver of penalty phase jury unnecessary); Holmes v. State, 374 So. 2d 944, 949 (Fla. 1979) (finding waiver of penalty phase jury knowing and voluntary pursuant to State v. Carr, 336 So. 2d 358 (Fla. 1976) where "[d]efendant was represented by counsel and the record contains an expressed waiver by counsel in the presence of the defendant.").

constitutionally required",[15] rather Ring involves only the requirement that the jury find the defendant death-eligible.[16] Ring, 536 U.S. 597, n.4. Moreover, the jury determination is for the guilt phase, while sentencing rests with the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury on sentencing issue). Consequently, Ring does not further Bryant's position and relief must be denied.

Further, Bryant's claim is procedurally barred. It is well established that for an issue to be preserved for appeal, it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved." Archer v. State, 613 So. 2d 446 (Fla. 1993), quoting Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Here, Bryant did not challenge the constitutionality of the death penalty in the same terms he

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[15] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

[16] Death eligibility occurs at the time the defendant is convicted of first-degree murder; it is at this time that the defendant faces the maximum penalty of death. Mills v. Moore, 786 So. 2d 532, 536-38, cert. denied, 532 U.S. 1015 (2001).

raises here, i.e., that aggravators are elements of the crime of first-degree and that the failure to include them in the indictment and have them proven beyond a reasonable doubt to a unanimous jury is a Sixth Amendment violation. In fact, he withdrew those motions which dealt with the penalty phase jury issues as the defense had waived the jury. (S2TR V2 254, 259-70). Because the issue was never preserved for appeal, he is not allowed to raise the claim in this collateral proceeding. See Parker v. State, 550 So. 2d 449 (Fla. 1989) (finding collateral challenge to Florida's capital sentencing scheme based on Booth v. Maryland, is procedurally barred for failure to preserve the issue at trial or on direct appeal). Furthermore, at trial, Bryant conceded that the prior violent felony and felony murder aggravators were established (2TR V30 1057-58). Bryant, 785 So. 2d at 436-37, n. 12 and 13. Consequently, given Bryant's waiver of a penalty phase jury, his failure to preserve this issue for appeal, and his affirmative concession that two of the aggravating factors had been proven beyond a reasonable doubt, he is not entitled to application of Ring on collateral review.

Bryant's assertion he is in the "appellate pipeline" (Petition at 36), thus, Ring should be applied to him is unsupportable. Bryant's conviction and sentence became final on

November 13, 2001 with the denial of certiorari by the United States Supreme Court. Bryant, 121 S.Ct at 557. Moreover, Ring is not retroactive under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to Witt, Ring is entitled to retroactive application only if the decision is of fundamental significance, which so drastically alters the underpinnings of the death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52 (Fla. 2001). In determining whether the standard has been met, the analysis includes a consideration of three factors: (1) the purpose served by the new case; (2) the extent of reliance on the old law; and (3) the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Ring does not qualify for retroactive application. See Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (rejecting retroactive application of Ring); Trueblood v. Davis, 301 F.3d 784, 788 (7th Cir. 2002); Arizona v. Towery, 64 P.3d 828 (Ariz. 2003) (finding Ring is not retroactive); Colwell v. State, 59 P.3d 463 (Nev. 2002) (same).[17] See also, Tyler v. Cain, 533 U.S.

[17] The correctness of the opinions Ring is not retroactive is supported by the fact the Supreme Court has already held that a violation of an Apprendi v. New Jersey, 530 U.S. 466 (2000) claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (2002) (holding indictment's failure to include quantity of drugs was Apprendi error but did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and

656, 663 (2001) (holding "new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive").

Moreover, this Court has rejected Ring challenges to death sentences repeatedly because death is the statutory maximum in Florida under Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015 (2001) and the United States Supreme Court has not overruled any of its cases finding Florida's capital sentencing scheme constitutional.[18] See Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (rejecting constitutional challenge based upon Ring); Owen v. State, 862 So. 2d 687, 703-04 (Fla. 2003) (same); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors to be presented at sentencing or a special verdict form indicating the aggravating factors found by the jury); Jones v. State, 845 So.2d 55 (Fla.2003);

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thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. United States v. Sanders, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing finding something to be structural error would seem to be necessary predicate for new rule to apply retroactively and thus, concluding Apprendi not retroactive). Because Ring is predicated solely on Apprendi, Ring is likewise not entitled to retroactive application.

[18] See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242, 252 (1976).

Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" including that aggravators read to the jury must be charged in indictment, submitted to jury and individually found by unanimous jury); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Cox v. State, 819 So. 2d 705 (Fla. 2002); Conahan v. State, 844 So. 2d 629, 642, n.9 (Fla. 2003); Spencer v. State, 842 So. 2d 52, 72-73 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So. 2d 940 (Fla.), cert. denied, 123 S.Ct. 2647 (2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002); Bottoson v. Moore, 833 So. 2d 693, 694-95 (Fla.), cert. denied, 123 S.Ct. 662 (2002); Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) (reaffirming "Court has defined a capital felony to be one where the maximum possible punishment is death").

Furthermore, Bryant admitted that the prior violent felony and felony murder aggravators were proven. Where such aggravators are shown, this Court has affirmed the sentence when challenged under Ring. Recently, in Robinson v. State, 29 Fla. L. Weekly S50 (Fla. 2004) this Court addressed this issue:

> In cases involving two of the aggravating factors found in the case at bar

(prior violent felony and that the murder was committed during the course of a sexual battery and kidnapping), this Court has also relied on the existence of those factors when denying *Ring* claims. This Court has held that the aggravators of murder committed "during the course of a felony" and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with *Ring*. *See Owen v. Crosby*, 854 So. 2d 182, 193 (Fla. 2003) (rejecting the defendant's *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), claim in light of *Ring* on the basis of *Bottoson*, but noting that the "during the course of a felony" and the prior violent felony aggravators "involve[d] circumstances that were submitted to the jury and found to exist beyond a reasonable doubt"); *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003) (denying *Ring* claim pursuant to *Bottoson*, but pointing out that the "during the course of a felony" and the prior violent felony aggravators also justified denying the claim); *see also Anderson v. State*, 28 Fla. L. Weekly S731, --- So.2d ----, 2003 WL 22207892 (Fla. Sept. 25, 2003) (denying *Apprendi/Ring* claim consistent with similar Florida cases, also because the jury unanimously recommended death and the trial judge found the aggravator of prior violent felony), petition for cert. filed, No. 03-8065, --- U.S. ----, --- S.Ct. ----, --- L.Ed.2d ---- (U.S. Dec. 18, 2003); *Rivera v. State*, 859 So.2d 495, 508 (Fla.2003) (finding that Rivera was not entitled to relief based on *Bottoson*, the fact that he had a unanimous jury death recommendation, and the existence of the two aggravators prior violent felony and murder committed "during the course of a felony").

In short, this Court has rejected similar *Ring* claims and has held that the

> aggravators of prior violent felony and "murder committed during the course of a felony" are exceptions to a *Ring* analysis because they involve facts already submitted to and found by a jury. Robinson's *Ring* claim is without merit because he has not argued law or fact that distinguishes his case from our recent decisions.

Robinson, 29 Fla. L. Weekly at S52. See Parker v. State, 29 Fla. L. Weekly S27, S35 (Fla. January 22, 2004). Given the fact Bryant has the prior violent and felony murder aggravators, he, like the defendants in Robinson and Parker, is not entitled to relief.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to Jo Ann Barone Kotzen, Esq. Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on April 5, 2004.

_____
LESLIE T. CAMPBELL

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately on April 5, 2004.

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LESLIE T. CAMPBELL