IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2244

MANUEL PARDO,

Petitioner,

vs.

JAMES V. CROSBY, JR., Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbol AR.@ will refer to the record on appeal, which includes the transcripts of proceedings from Defendant=s direct appeal.

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. *Pardo v. State*, SC03-1966. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL SHOULD BE DENIED.Error! Bookmark not defined.

Defendant first he is entitled to habeas relief because his appellate counsel was ineffective for failing to raise issues on direct appeal. Specifically, Defendant asserts that counsel should have raised an issue regarding the granting of a motion in limine regarding the testimony of Carlo Ribera and regarding the trial court's rulings on a variety of evidentiary issues.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

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

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

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

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

A. THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ISSUE CONCERNING THE GRANTING OF A MOTION IN LIMINE SHOULD BE DENIED.

Defendant first asserts that appellate counsel was ineffective for failing to claim that the trial court abused its discretion in granting a motion in limine and excluding all references to prior bad acts of witness Carlo Ribera. Defendant contends that the trial court's exclusion of evidence of Ribera's drug use prevented him from questioning Ribera's motivation for testifying and from showing that Ribera may have been under the influence when he witnessed the matters to which he testified or first spoke to the police. Defendant also asserts that the State opened the door to questions about drug use. However, the trial court did not abuse its discretion in any of its rulings regarding this matter. Moreover, the issue concerning Ribera's ability to perceive or testify was not preserved. As such, appellate counsel cannot be deemed ineffective for failing to make a nonmeritorious claim to the contrary. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Prior to the testimony of Ribera, the State moved in limine to prevent Defendant from inquiring of Ribera about prior bad acts. (R. 2148) The trial court stated that it understood that the law permitted a defendant to cross examine a witness about his credibility and bias, which would include any deals with the State, but that unconnected bad acts were not otherwise proper

subjects of cross examination. (R. 2148-50) Defendant acknowledged that Ribera had not been offered any plea bargains or immunity with regard to crimes he had admitted to committing. (R. 2150) However, Defendant asserted that a person such as Ribera would usually have been charged and that he should be entitled to inquire about the admission. (R. 2151-52) Defendant added that it showed Ribera's lack of respect for the law, which affected his credibility. (R. 2152) The State responded that Ribera had not been charged because there was not a sufficient corpus to charge him, that he had not been promised anything in exchange for his testimony and that his admissions were therefore inadmissible. (R. 2153-54) The trial court then granted the State's motion in limine. (R. 2154) The trial court did permit Defendant to inquire regarding any arrangement he might have with the State and any action to which he testified in connection with Defendant. (R. 2154-55)

During direct, Ribera testified that he asked Garcia if he could assist him in getting involved in drug trafficking, despite the fact that he knew it was illegal. (R. 2160) Ribera stated that he did not use drugs at the time that Garcia was using cocaine. (R. 2197) Ribera admitted that he did not inform the police or stop associating with Defendant and Garcia after Defendant threatened to kill Alvero. (R. 2202) Instead,

he drove Defendant and Garcia to Alvero's apartment on a later occasion. (R. 2202-03) Ribera testified that he was with Defendant and Garcia and allowed Garcia to drive his car when Defendant did a drive-by shooting at the home of Sergio Godoy. (R. 2207-09)

Ribera described how Defendant and Garcia began to threatened Ribera and his family and confront Ribera when he refused to take them places. (R. 2214-24, 2226) Ribera admitted only that he went to the police after the threats even though he knew that Defendant and Garcia were describing criminal activity well before that time. (R. 2228-29)

On cross, Ribera again acknowledged that he had hoped to be a drug trafficker and that he had not informed the police of Defendant and Garcia's involvements in murders and drug trafficking because of this desire. (R. 2238) Defendant elicited that Ribera owned five guns, including an Uzi, and carried the guns concealed on his person, while knowing it was against the law. (R. 2240-41) Ribera stated that he knew drug trafficking was illegal but did not care and did not think about the potential for harming others when he wanted to do it. (R. 2244)

Ribera admitted that he had used drugs. (R. 2244) When asked if he had said he had used drugs 125 times, Ribera denied

it and stated “it’s in my deposition. I never answered it that in my deposition exactly.” (R. 2244-45) Defendant then attempted to impeach Ribera by asking if the court reporter had been wrong. (R. 2245) The State objected to the form of the impeachment. (R. 2245) At sidebar, the State asked that the testimony be excluded as prior bad acts. (R. 2246) The trial court indicated that it believed the State had opened the door by asking a question concerning whether Ribera had been told that he would be charged for lying to the police if he did so. (R. 2246) The trial court indicated it had interpreted the question as indicating that Ribera would not be charged with any crime if he cooperated. (R. 2246) Defendant then asserted that the State had opened the door by asking about drug use. (R. 2249) The State responded that it had only asked about drug use when he observed the matters about which he testified. (R. 2249-50) Defendant then asked if he could further cross examine Ribera regarding the number of times that he had used drugs, and the trial court disallowed such testimony as going to a collateral issue. (R. 2250-51)

Ribera admitted that he did not go to the police with the information he knew about the murders initially. (R. 2254) He also did not go to the police when he knew in advance that Defendant was going to kill someone. (R. 2254-55) He did this

because he wanted to be in the drug business. (R. 2255) He admitted that he eventually went to the police because he was scared of Defendant. (R. 2255) Ribera stated that he had not questioned why he was not arrested after he spoke to the police because he was more concerned with protecting his family. (R. 2264)

During the cross examination of MacArthur, Defendant brought out that Ribera had withheld information about the murders before he came forward. (R. 2380) He also elicited testimony that Ribera had admitted to having carried a concealed weapon and using drugs. (R. 2380-82)

As can be seen from the foregoing, the trial court did not exclude all of evidence of Ribera's prior bad acts. In fact, the trial court ended up admitting evidence of most of the bad acts that Ribera admitted to committing, despite having granted the motion in limine. It even admitted evidence that Ribera had admitted to the use of drugs from both Ribera and Sgt. MacArthur. Given that the evidence was admitted, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it was excluded. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, the trial court's initial ruling was correct.

Under Florida law, a witness may not be cross examined regarding specific allege bad acts committed by that witness, where the alleged bad acts did not lead to an arrest or conviction. *Breedlove v. State*, 580 So. 2d 605, 607-08 (Fla. 1991). Here, the trial court's ruling was in accordance with this principle. It permitted Defendant to question Ribera regarding any arrests or convictions and regarding any agreements between Ribera and the State regarding his testimony. As such, the trial court did not abuse its discretion in granting the motion in limine. Appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

This is particularly true here. The State cannot seek a conviction based solely on a confession with a corpus delicti that the crime was committed. *Burks v. State*, 614 So. 2d 441 (Fla. 1993). Here, the only evidence that Ribera used drugs or carried concealed weapons was his own admissions to these activities. Moreover, evidence that Ribera knew that Defendant and Garcia had committed these crimes after they were committed would not be sufficient to show that he was an accessory after the fact without evidence that Ribera gave aid to Defendant and Garcia with the specific intent that they be allowed to avoid

prosecution. *See Bowen v. State*, 791 So. 2d 44 (Fla. 2d DCA 2001); *Helms v. State*, 349 So. 2d 726 (Fla. 4th DCA 1977)(evidence that defendant knew property was stolen and help thieves dispose of it insufficient to sustain conviction for accessory after the fact without proof that defendant did so with intent to aid thieves in avoiding arrest); *Gawronski v. State*, 444 So. 2d 490 (Fla. 2d DCA 1984)(fact that defendant's car was used as getaway car for attempted robbery and that defendant engaged in chase with police and was caught in car with robber after crime insufficient to support conviction for accessory after the fact, where defendant claimed to have loaned car to robber); *Holley v. State*, 406 So. 2d 65 (Fla. 1st DCA 1981)(evidence that defendant was driving people who had committed robbery after crime, fled at sight of police and was found hiding near some money insufficient to convict defendant as accessory after the fact). Nor would evidence that Ribera knew Defendant and Garcia be sufficient to charge Ribera with a crime. Florida abolished the common law offense of being an accessory before the fact in 1957. Ch. 57-310, Laws of Florida; *see also State v. Dene*, 533 So. 2d 265, 266-67 (Fla. 1988). Instead, Florida only criminalizes being a principal to a crime. §777.011, Fla. Stat.; *Dene*, 533 So. 2d at 266-67 & n.2. However, merely knowing that a crime is to be committed is

insufficient to make one a principal.[1] *G.C. v. State*, 407 So. 2d 639 (Fla. 3d DCA 1981). As such, he could not have been charged. The claim should be denied.

The reasons why Defendant contends further evidence of Ribera's drug use should have been admitted do not compel a different result. The first reason that Defendant asserts makes little sense. Defendant appears to contend that evidence of Ribera's drug use would show that Ribera's motive for testifying was to avoid prosecution for being an accessory either before or after the fact for homicide. However, Defendant does not explain how evidence of drug use had anything to do with being charged as an accessory. This is particularly true given that the jury was fully advised that Ribera had admitted to have evidence about two of the criminal incidents before they were committed, knowing about other criminal incidents after they occurred and never being charged with anything, including the drug use he also admitted. Moreover, the reason that Ribera decided to go to the police was fully explain on the record. Defendant and Garcia threatened Ribera and his family. Defendant went so far as to attempt to pull a gun on Ribera. Given the lack of connection between drug use and immunity, the

1 Ribera refused to assist Defendant and Garcia with the two criminal episodes he knew of in advance.

inability of the State to charge Ribera with anything, the evidence of Ribera's bad acts (including drug use) that was presented and the explanation of why Ribera went to the police when he did, this reason presents no basis for finding that trial court abused its discretion. Since the argument is without merit, counsel cannot be deemed ineffective for failing to present it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

The second reason that Defendant proffers for trial court error is unpreserved. Trial counsel never asked to present evidence of Ribera's drug use to show that he was under the influence either when he observed the matters about which he testified or when he spoke to the police. Because the grounds presently asserted are not the grounds that were asserted at trial, this issue is unpreserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Since the issue was unpreserved, appellate counsel cannot be deemed ineffective for failing to present this argument. *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 the issue had been preserved, appellate counsel

would not still have been ineffective for failing to raise it as it lacks merit. This Court has held that evidence of a witness's drug use is not admissible unless a predicate is laid to show that the witness was under the influence when he observed the subject matter of his testimony, the witness was under the influence at the time he is testifying or the drug use was shown by other evidence to have affected the witness's ability to observe, remember or recount. *Edwards v. State*, 548 So. 2d 656 (Fla. 1989). Here, there was no evidence presented to show that Ribera was under the influence when he was with Defendant and Garcia. In fact, Ribera denied being under the influence at those times. There was no evidence presented that Ribera was under the influence while testifying. Moreover, no evidence was presented that drug use affected Ribera's ability to observe, remember or recount. In fact, in his petition, Defendant merely speculates that Ribera "was likely" or "may have been" under the influence. Given the lack of a predicate, the lower court would not have abused its discretion in refusing to admit the evidence under this theory had it been presented below. Since the issue is without merit, counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant's last reason by is also unavailing. During direct, the trial court found that the State had opened the door to testimony about Ribera's prior bad acts including drug use. (R. 2246-50) It permitted Defendant to ask if Ribera had experience using drugs, which Ribera admitted. (R. 2244) It allowed Defendant to ask if Ribera had previously said that he had used drugs 125 times. (R. 2244-45) What the trial court refused to allow was impeachment with the deposition of Ribera's denial that he had ever said he had used drugs 125 times. (R. 2250-51) It did so because it found the issue of the number of times Ribera had previously said he had used drugs was collateral. (R. 2250-51) This ruling was proper. When a witness gives an answer regarding a collateral issue, the questioner is bound to take the witness's answer. *Caruso v. State*, 645 So. 2d 389, 394-95 (Fla. 1994); *Dupont v. State*, 556 So. 2d 457, 458 (Fla. 4th DCA 1990). An issue is considered collateral unless "the proposed testimony can be admitted into evidence for any purpose independent of the contradictions." *Dupont*, 556 So. 2d at 458. Here, evidence of regarding the number of times that Ribera, who admitted using drugs, had previously said he had used drugs was not admissible for any purpose other than to contradict Ribera's statement during cross that he had not previously said he had used drugs 125 times. As

such, the trial court did not abuse its discretion in refusing to permit this question. Appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

While Defendant suggests that the trial court refused to allow him to impeach Ribera with an inconsistency between his direct testimony and his deposition testimony, this is not true. The question the State asked on direct was, "At times, when Defendant Garcia was using cocaine, were you also using drugs." (R. 2197) The question about which Defendant sought to impeach Ribera on cross was, "But, isn't it true you said you have used drugs 125 times." (R. 2244, 2250) The fact that Ribera denied using cocaine when Garcia was using cocaine is not inconsistent with his denial that he had previously said he had used drugs 125 times.2 Since these statements were not inconsistent, the trial court did not abuse its discretion. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch &*

2 Contrary to Defendant's suggestion, the State was not misrepresenting the evidence when it stated that there was no evidence that Ribera had denied drug use. Immediately before the objectionable question, Ribera had admitted to using drugs.

Stables, 599 So. 2d 229 (Fla. 3d DCA 1992)(same). Appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

B. THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE "MISCELLANEOUS SUSTAINED OBJECTIONS" SHOULD BE DENIED.

Defendant next asserts that his appellate counsel was ineffective for failing to raise "miscellaneous sustained objections" to matters that were allegedly inadmissible or unduly prejudicial. Specifically, Defendant asserts that the State elicited hearsay and false testimony from Ribera, statements about Millot making silencers, collateral crimes evidence, and evidence that two of the victims were homosexual. Defendant also complains that he was prohibited from asking if Alvero was a convicted drug dealer and that Ribera had made inconsistent statements under oath. However, this claim should be denied because it is insufficiently plead and without merit.

Initially, the State would note that this claim is insufficiently plead. Defendant presents no real argument regarding why the trial court abused its discretion in any of its rulings. He does not cite a single case. In fact,

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(R. 2244) Ribera merely denied using drugs with Garcia.

Defendant does not even discuss the basis of the trial court's rulings in most of the incidents.[3] Having not discussed the basis for the trial court's rulings or why those rulings show an abuse of discretion, Defendant does not discuss how appellate counsel's failure to raise these issues creates a reasonability probability of a different result on appeal. In fact, he does not even include a conclusory allegation of prejudice. Instead, he merely lists the alleged issues, states that appellate counsel did not raise them and then insists that relief is warranted. However, such a pleading is facially insufficient even to raise a claim. *See Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002)(failure to brief issue is a waiver of the issue); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The claim should be denied.

Even if the issue had been sufficiently pled, the claim should still be denied. The trial court did not abuse its discretion in its rulings regarding the admission or exclusion of evidence. As such, appellate counsel cannot be deemed

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3 The one time Defendant does attempt to explain the trial court's ruling, he does not even correctly state the ruling. The trial court allowed Special Agent Nicholas Jacabelas to testify statements that Millot made to him because the statement **was** against Millot's penal interest. (R. 2541-42) As such, Defendant's assertion that the trial court admitted the statement because it was not against Millot's interest is incorrect. Petition at 17.

ineffective for failing to make these nonmeritorious claims. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the claim that appellate counsel was ineffective for failing to raise an issue regarding the alleged admission of hearsay from Ribera, Defendant refers to three questions. First, Defendant asserts that the trial court permitted Garcia had said that he and Defendant had killed Millot. Second, he complains that Ribera was permitted to say that Garcia had told Defendant that Ribera was okay. Third, Defendant points to a question in which the State asked if Garcia said anything. (R. 2187)

The testimony the trial court admitted regarding Garcia's statements about the Millot murder related to a discussion during which both Garcia and Defendant were present and participating. (R. 2166-69) In *Nelson v. State*, 748 So. 2d 237, 242-43 (Fla. 1999), this Court held that statements made by a codefendant in the presence of a defendant and during a conversation in which the defendant was participating are properly admitted as admissions by silence. *See also Globe v. State*, 877 So. 2d 663, 672-73 (Fla. 2004). Given that Defendant was present and participating in the conversation during which Garcia's statements were made, the trial court did not abuse its

discretion in overruling Defendant's hearsay objection. Thus, appellate counsel cannot be deemed ineffective fore failing to claim that it did. *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.

The statement that Garcia told Defendant that Ribera was okay or alright was not admitted to prove the truth of the matter asserted: that Ribera was okay or alright. (R. 2167, 2175) Instead, the statements were offered to explain why Defendant allowed Ribera into his bedroom and why Defendant spoke to Ribera about dealing drugs. (R. 2167, 2175) Statements that are not offered for the truth of the matter asserted are not hearsay. §90.801(1)(c), Fla. Stat.; *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982); *King v. State*, 684 So. 2d 1388, 1389 (Fla. 1st DCA 1996). Since the statement was not hearsay, the trial court did not abuse its discretion in overruling Defendant's hearsay objection.

The objection to the question about whether Garcia said anything was also properly overruled. The State did not ask what Garcia said; merely if he spoke. (R. 2187) In fact, the response was that Garcia did not say anything. *Id.* Questioning whether a person spoke at a particular time does not elicit hearsay. §90.801, Fla. Stat. Moreover, even if the contents of

the nonexistent statement had been elicited, it still would have been proper admitted. Ribera was again referring to a conversation during which Defendant was present and participating. (R. 2181-87) Under *Nelson* and *Globe*, any statement Garcia may have made during this conversation was admissible as an admission by silence. Thus, the trial court did not abuse its discretion in overruling this objection. Appellate counsel cannot be deemed ineffective for failing to claim that it did. *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.

With regard to the claim that appellate counsel should have claim that the State was permitted to present false testimony from Ribera, Defendant appears to be reasserting his claim that the trial court erred in refusing to allow Defendant to impeach Ribera with a prior inconsistent statement. However, as argued in claim IA, the statements were not inconsistent. During direct, Ribera indicated that he did not use cocaine at the times that Garcia used cocaine. The impeachment concerned whether Ribera had previously said that he used drugs 125 times. As these answers are not inconsistent, the trial court would not abuse its discretion in refusing to allow Defendant to impeach the one answer with the other had Defendant tried to do

so. *See Morton v. State*, 689 So. 2d 259, 262 (Fla. 1997)(to be admissible as impeachment, statement must be inconsistent); *Alexander v. Bird Road Ranch & Stables*, 599 So. 2d 229 (Fla. 3d DCA 1992)(same). Appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

With regard to the refusal to allow Defendant show that Ribera had made inconsistent statements under oath, the trial court did not abuse its discretion in refusing to admit this evidence as the alleged inconsistent statements were not inconsistent with Ribera's trial testimony and were merely improper attempts to attack Ribera's character.

During cross, Defendant asked Ribera if he was an unadulterated liar, which Ribera denied. (R. 2251) Defendant then attempted to inquire if Ribera had lied under oath, and the trial court sustained the State's objection. (R. 2251) Defendant then attempted to ask if Ribera had ever worked for McKeeson drugs, and the trial court again sustained the State's objection. (R. 2251)

At sidebar, Defendant claimed that he was attempting to show inconsistencies between Ribera's testimony in a deposition with

testimony Ribera had given at an unrelated federal trial. (R. 2252) The trial court stated that Defendant had not asked the question in the proper form. (R. 2252-53) When the State suggested that the issues were collateral, the trial court stated that the question was in the wrong form and that impeach was limited to relevant matters. (R. 2253)

During a break in the testimony of the next witness, Defendant proffered that he wanted to show that Ribera had stated in his deposition that he had never lied under oath, that he was never fired from a government job and that he had never lied on an employment application but that these statements were untrue based on the federal trial transcripts. (R. 2309) The trial court accepted the proffer but did not alter its ruling. (R. 2309)

Given the foregoing, the trial court did not abuse its discretion. The methods of impeaching a witness are limited by §90.608, §90.609 & §90.610, Fla. Stat. The methods provided for in these statutes do not including showing that a witness has committed a prior bad act for which is was not convicted or is not presently or recently facing charges or investigation by the State. *See McCoy v. State*, 853 So. 2d 396, 406-07 (Fla. 2003); *Fernandez v. State*, 730 So. 2d 277, 282-83 (Fla. 1999); *Fulton v. State*, 335 So. 2d 280 (Fla. 1976). Moreover, in order for a

prior inconsistent statement to be used as impeachment, the prior inconsistent statement must be inconsistent with the witness's trial testimony. *Smith v. State*, 754 So. 2d 54, 56 (Fla. 3d DCA 2000). Even when the prior statement is inconsistent with the witness's trial testimony, a proper predicate must be laid for the impeachment. §90.614, Fla. Stat.; *Garcia v. State*, 351 So. 2d 1098, 1099 (Fla. 3d DCA 1977); *Urga v. State*, 104 So. 2d 43, 45 (Fla. 2d DCA 1958); *see also Brumbley v. State*, 453 So. 2d 381, 385 (Fla. 1984).

Here, Defendant never claimed that the matters he wished to present were inconsistent with Ribera's trial testimony. Instead, Defendant's claim was that he wished to show that Ribera's deposition testimony was inconsistent with testimony that Ribera had previously given in an unrelated federal trial. Moreover, despite the fact that the trial court informed Defendant he had laid a proper predicate to use the statements as impeachment, Defendant never attempted to do so. As such, the trial court did not abuse its discretion in refusing to allow Defendant to admit the prior statements as impeachment. Since the trial court's ruling was not an abuse of discretion, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

In fact, what it actually appears that counsel was attempting to do was to show that Ribera had been untruthful on prior occasions to show that he was acting in conformity with his untruthful character. However, §90.609 & §90.405, Fla. Stat. limits the method in which a party may launch a character attack on a witness to evidence of the witness's reputation for truthfulness. *Fernandez*, 730 So. 2d at 282-83. Here, Defendant did not attempt to present evidence of Ribera's reputation for truthfulness. He, instead, attempted to admit specific prior acts of untruthfulness. As such, the lower court did not abuse its discretion in refusing to admit this evidence. Appellate counsel was not ineffective for failing to claim that it did. *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.

With regard to the admission of Millot's statement about making silencers, Defendant is simply incorrect about the ruling on this issue. The trial court found that the statement was against Millot's penal interest; not that the statement was not against Millot's interest. Since the trial court did not admit the evidence because it was not against Millot's interests, appellate counsel cannot be deemed ineffective for failing to

claim that it did and abused its discretion in doing 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, the trial court did not abuse its discretion in admitting the statements as they were against Millot's penal interest. Special Agent Nicholas Jacabelas testified that he first met Millot when Agent Jacabelas was an investigator with a district attorney's office in New York. (R. 2536) After both Agent Jacabelas and Millot had moved to Florida, they met again, and Millot volunteered to be an informant for Customs. (R. 2537-38) Millot eventually also worked as an informant for ATF. (R. 2539-40)

The State then elicited that Millot had spoken to Agent Jacabelas about making silencers. (R. 2540-41) When the State to ask when was the first time that Agent Jacabelas heard Millot make such a statement, Defendant objected and claimed that the question called for hearsay. (R. 2541) The State responded that the statement was admissible because it was a statement against Millot's penal interest and Millot was unavailable because Millot was dead. (R. 2541) Defendant replied that the statement was not against Millot's interest because he was an informant. (R. 2542) The trial court overruled Defendant's

objection after looking at the statement against interest exception and admitted the evidence. (R. 2542)

When he eventually was allowed to answer the question, Agent Jacabelas stated that it was while they were both in New York. (R. 2543) Moreover, even while he was an informant, Millot was told that he would be arrested if he was found making and possessing silencers because he was not licensed to do so and it was illegal. (R. 2544-45)

Pursuant to §90.804(2)(c), statements that are against the declarant's penal or pecuniary interest when made are admissible as an exception to hearsay if the declarant is unavailable. Here, Millot was dead and, therefore, unavailable. §90.804(1)(d), Fla. Stat. Millot's statements involved the manufacture of silencers, which is a federal crime. 18 U.S.C. §§921-22. Millot began making these statements before he was an informant and was told that he would be arrested if found in possession of a silencer after he was an informant. Under these circumstances, the trial court did not abuse its discretion in admitting the statement as a statement again Millot's penal interests. §90.804(2)(c), Fla. Stat.; *see also Baker v. State*, 336 So. 2d 364 (Fla. 1976). Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did.

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.

With regard to the collateral crimes evidence, appellate counsel was not ineffective because the trial court did not abuse its discretion in admitting the evidence. Evidence that suggests that a defendant committed bad act with which he is not presently charged is admissible if it is relevant to a material fact in issue other than bad character. *Bryan v. State*, 533 So. 2d 744, 745-48 (Fla. 1988); *see also Lugo v. State*, 845 So. 2d 74, 103 (Fla. 2003); *Williamson v. State*, 681 So. 2d 688, 694-96 (Fla. 1996); *Pittman v. State*, 646 So. 2d 167, 170-71 (Fla. 1994); *Caruso v. State*, 645 So. 2d 389, 393-94 (Fla. 1994).

Here, the evidence was admissible to corroborate Ribera's testimony and to rebut Defendant's insanity defense. Ribera has stated that Defendant has a variety of weapons but none were found in Defendant's apartment. (R. 2398) Ribera has also claimed that Defendant fired his guns into the floor of his closet. Defendant also raised an insanity defense based on an alleged delusion concerning drug dealers. To corroborate Ribera's testimony and rebut Defendant's insanity defense, the State presented the testimony of Agt. Benitez.

Agt. Joseph Benitez of the Treasury Department testified

that in December 1985, he was working undercover investigating federal firearms violations. (R. 2769-71) Agt. Benitez was claiming to be a Colombian or Venezuelan drug trafficker named Jose. (R. 2771-72) During his investigation, he met Defendant. (R. 2774) Defendant did not appear offended that Agt. Benitez said he was a drug dealer, and Agt. Benitez did not feel that Defendant was a threat to him. (R. 2793-94)

When the State asked Agt. Benitez about meeting Defendant, Defendant objected and moved for a mistrial, asserting the testimony concerned collateral crimes. (R. 2772-74) The trial court overruled the objection and denied the motion. *Id.*

On Christmas Eve 1985, Agt. Benitez went to Defendant's apartment as Jose and claimed that he had been the victim of a drug rip off and needed weapons. (R. 2775) Defendant showed Agt. Benitez several guns, including a Mac-10, and silencers. (R. 2776) Defendant also told Agt. Benitez that he could get grenades. (R. 2776) Defendant demonstrated the effectiveness of the silencers by firing on of the guns into the floor of his apartment with and without the silencer. (R. 2776) Agt. Benitez arranged to buy on .22 caliber handgun with a silencer at that time and stated that he would be buying more weapons in the future. (R. 2777-79) The first gun was delivered to Agt. Benitez on New Year's Eve 1985. (R. 2779) When the gun and

silencer were admitted into evidence, Defendant renewed his objection that the evidence concerned a collateral crime. (R. 2781) The trial court stated that it was being offered from a limited purpose and offered a curative instruction. (R. 2781-82)

After Agt. Benitez's direct testimony had concluded, Defendant claimed that the gun had not been listed on the proposed list of exhibits the State had submitted before trial. (R. 2787) The State responded that it had disclosed Agt. Benitez's report, his name and a ballistics report about the gun he had bought. (R. 2787-88) Defendant then withdrew his claim of a discovery violation. (R. 2795)

During closing argument, the State mentioned that bullet holes in Defendant's apartment were consistent with the testimony of Ribera and Agt. Benitez. (R. 3995) The State also pointed out that Defendant had not killed or attempted to kill Agt. Benitez even though Agt. Benitez had claimed to be a drug dealer and Defendant had claimed that he killed his victims because he was exterminating drug dealers. (R. 3997-99) The State also pointed out that Defendant had given the gun that Defendant retrieve from the Miramar Police after Millot's murder to Millot so that a silencer could be made and the gun sold to Agt. Benitez. (R. 3998) During his closing argument, Defendant

contended that Agt. Benitez's testimony supported his insanity defense. (R. 4027-28) During its rebuttal argument, the State responded that Defendant had mischaracterized Agt. Benitez's testimony and that the fact that Defendant did not kill Agt. Benitez showed that Defendant was not insane. (R. 4056, 4074)

As can be seen from the foregoing, Agt. Benitez's testimony was relevant to an issue other than Defendant's illegal sale of weapons. It was relevant to corroborate Ribera's testimony and to rebut Defendant's insanity defense. As such, the trial court did not abuse its discretion in admitting this testimony. *Bryan v. State*, 533 So. 2d 744, 745-48 (Fla. 1988); *see also Lugo v. State*, 845 So. 2d 74, 103 (Fla. 2003); *Williamson v. State*, 681 So. 2d 688, 694-96 (Fla. 1996); *Pittman v. State*, 646 So. 2d 167, 170-71 (Fla. 1994); *Caruso v. State*, 645 So. 2d 389, 393-94 (Fla. 1994). Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *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.

With regard to the testimony of Regina Musa, the trial court did not abuse its discretion in admitting the testimony. The testimony was relevant. The trial court did not abuse its

discretion in finding that the probative value was not outweighed by the undue prejudice.

Defendant has used his diary to record indications of the murders he had committed by writing notes on the days upon which they were killed. (R. 237-38, 239, 245, 246) On the day Musa and Quintero were killed, Defendant had written "Dikes 2." (R. 245) To show the reference was to Musa and Quintero, the State presented the testimony of Ortensia Delafe that she was a friend of Quintero, knew that Quintero had relationships with both men and women, knew that she was living with Musa and knew that they were lovers. (R. 3002-04) The State also presented the testimony of Regina Musa, Musa's brother. (R. 3068-69) Mr. Musa's brief testimony included the fact that Musa was living with Quintero, that they may have been lovers and that Musa had been involved in other homosexual relationships. *Id.* Given the references in the diary generally and this reference in particular, the trial court properly found that this evidence was relevant. §90.401, Fla. Stat. Since the trial court did not abuse its discretion in finding the evidence relevant, appellant counsel cannot be deemed ineffective for failing to make the meritless claim that it did. *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, the trial court did not abuse its discretion in failing to exclude the evidence as unduly prejudicial. Defendant's claim of undue prejudice at trial was that the testimony was cumulative and was presented through a family member. (R. 3070-71) The trial court did not abuse its discretion in overruling this objection. The testimony of Mr. Musa was not entirely cumulative to the testimony of Ms. Delafe. While Ms. Delafe testified that Quintero engaged in homosexual relationships other than with Musa, she did not offer similar testimony with regard to Musa. Instead, testimony that Musa engaged in homosexual relationships with persons other than Quintero came from Mr. Musa. The fact that Musa and Quintero were homosexual tended to establish that they were the people to whom Defendant was referring in his diary. As such, the trial court did not abuse its discretion in not granting a mistrial based on the brief testimony of Mr. Musa. *See Fernandez v. State*, 730 So. 2d 277, 282 (Fla. 1999). Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

With regard to the limitation on cross, the claim is

meritless. The trial court properly ruled that the question was beyond the scope of direct. (R. 3167) Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue that does not even address the merits of the trial court's ruling.

It is well settled under Florida law that cross examination is limited to the scope of the direct testimony and matters affecting the witness's credibility. *Jimenez v. State*, 703 So. 2d 437, 439-40 (Fla. 1997); *Penn v. State*, 574 So. 2d 1079, 1082 (Fla. 1991); *Steinhorst v. State*, 412 So. 2d 332, 337 (Fla. 1982). Here, any question about Alvero's prior convictions was not within the scope of the direct. Moreover, it had nothing to do with the witnesses' credibility. As such, the trial court did not abuse its discretion in refusing to allow the question.

William Ricard testified that he was married to Daisy, with whom he had three children, but that they had been separated since 1984. (R. 3160) He ran a medical lab, and Daisy and Alvero worked there. (R. 3161-62) He was aware that Alvero and Daisy were dating. (R. 3163)

On April 23, 1986, Daisy arrived at work in Alvero's car and left work between 4:30 and 5:00 p.m. in Alvero's car. (R. 3164) When Daisy did not come to work the next morning, Dr. Ricard became concerned and contacted Daisy's mother. (R. 3164-65)

When he learned that Daisy had not spoken to her mother, he became more concerned. (R. 3165) When he learned that Alvero had been found dead, he contacted the police regarding Daisy. (R. 3165) The next day, Dr. Ricard learned that Daisy had been murdered. (R. 3165)

Lourdes Aguilera testified that Daisy Ricard was her sister-in-law, and Daisy worked at a lab run by Daisy's husband. (R. 3171-72) Daisy was separated from her husband and had been dating Alvero. (R. 3172) She stated that she learned a day or two after April 23, 1986, that Daisy was missing and subsequently found dead. (R. 3173)

Ms. Aguilera identified picture of Daisy and Alvero, as well as Daisy's watch. (R. 3173, 3175-76) She identify something labeled "The Sports Log," which she had received from Daisy's mother and given to the police. (R. 3174) She did not recognize the handwriting in The Sports Log and did not know of any significance it had. (R. 3174-75)

As can be seen from the foregoing, Alvero's alleged prior conviction had nothing to do with the limited scope of the direct examination of these witnesses. It was not related to their credibility. As such, the trial court did not abuse its discretion in sustaining the objections because the questions were beyond the scope of direct. *Jimenez*, 703 So. 2d at 439-40;

Penn, 574 So. 2d at 1082; *Steinhorst*, 412 So. 2d at 337. Since the issue was without merit, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant's claim that the question should have been allowed because it indicated that the witnesses knew or suspected that Daisy was involved in the drug trade does not compel a different result. The issue is unpreserved, misstates the records and does not make the question proper. Defendant never claimed that his questions should have been permitted because it showed that the witnesses knew or suspected that Daisy was involved in the drug trade. As such, this issue is unpreserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Appellate counsel cannot be deemed ineffective for failing to raise an issue that it unpreserved. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, Ms. Aguilera never stated that she asked if Daisy had been found dead when she learned that Alvero had been found dead. As such, Defendant's theory of admissibility does not even apply to her testimony. Moreover, Dr. Ricard knew that

Daisy and Alvero were dating and that Daisy had left work in Alvero's car before they went missing. Dr. Ricard knew that Daisy had not arrived at work and had not spoken to her mother; both of which caused him to be concerned for Daisy's welfare before Alvero was found murdered. Given these facts, it is far from clear that his decision to go to the police when Alvero was found indicated that he knew or suspected that Daisy was involved in the drug trade. Instead, Dr. Ricard's concern logically follows given that he had last seen Daisy leaving in Alvero's car, Daisy was missing and Alvero was dead, regardless of the motive for the murders. Moreover, knowing or suspecting that Daisy was involved in the drug trade would still not have been in the scope of the limited direct testimony. As such, Defendant's argument does not show that counsel was ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

II. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO HAVE A TRANSCRIPT INCLUDED IN THE RECORD ON APPEAL SHOULD BE DENIED.

Defendant next asserts that his appellate counsel was ineffective for failing to ensure that the record on direct appeal was complete. Specifically, Defendant complains that the record does not include a portion of the transcript of the first trial that ended in a defense requested mistrial and does not include a page of transcript from the testimony of witness Joseph Ubeda.

This Court has repeatedly held that in asserting a claim that appellate counsel was ineffective for failing to ensure that the record was complete, the defendant must assert what meritorious issue was not raised because of the omission from the record. *Griffin v.* State, 866 So. 2d 1, 21 (Fla. 2003); *Armstrong v. State*, 862 So. 2d 705, 720 (Fla. 2003); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993); *see also Darling v. State*, 808 So. 2d 145, 163 (Fla. 2002); *Turner v. Dugger*, 614 So. 2d 1075, 1079-80 (Fla. 1992). Here, Defendant does not assert what meritorious issue he was unable to raise because of the omission of the transcripts from the record. In fact, Defendant does not even assert what occurred during the missing portion of the

record.[4] However, the record reflects that voir dire of alternate jurors was conducted, alternate jurors were selected, preliminary instructions were read, opening statements were presented, Carlo Ribera began to testify, Defendant moved for a mistrial, the trial court granted the motion, Garcia moved for severance of the defendant and his motion for severance was granted. (R. 41-45) Given what occurred, it does not appear that any issue could have been raised. As such, the claim should be denied.

4 Contrary to Defendant's suggestion, page 2992 is not missing from the record. A copy of the page is attached hereto and made a part hereof as Exhibit A.

CONCLUSION

For the foregoing reasons, the 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 was furnished by U.S. mail to Lucrecia Diaz, Assistant CCRC, CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 21st day of February, 2005.

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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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