IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1680

RONNIE JOHNSON,

Petitioner,

vs.

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

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE TO AMENDED PETITION

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols “R.” and “T.” will refer to the record on appeal and transcript of proceedings from Defendant’s direct appeal. The symbol “S.R.” will refer to the supplemental record on 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. *Johnson v. State*, No. SC03-382. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING WHO REPRESENTED DEFENDANT AT TRIAL.

Defendant contends that his appellate counsel was ineffective for failing to raise an issue regarding the counsel who was appointed to represent him at trial. Defendant appears to contend that his case should have been automatically reversed because Arthur Huttoe was appointed to represent him, and instead he was represented by Joy Carr and Ray Badini. However, this claim should be denied as it is unpreserved and without merit.

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 694-95. 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.

In this case, Defendant never objected to being represented by Badini despite Badini’s appearance at the pretrial hearings.

He never raised any claim about Badini having a conflict or being ineffective at the time of trial. As Defendant did not do so, this claim is unpreserved. *See Castor v. State*, 365 So. 2d 701 (Fla. 1978). As appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Even if the claim had been preserved, Defendant would still be entitled to no relief. In *Morris v. Slappy*, 461 U.S. 1 (1983), the United States Supreme Court held that an indigent defendant does not have a right to be represented by a particular attorney. *Accord Koon v. State*, 513 So. 2d 1253, 1255 (Fla. 1987)("An indigent defendant has an absolute right to counsel, but he does not have a right to have a particular lawyer represent him."). Because the right to have a particular attorney represent him did not exist, the Court rejected the concept that no prejudice had to be shown to support a claim the Sixth Amendment was violated because counsel was substituted without a defendant's consent. *Slappy*, 461 U.S. at 14 n.6. As the United States Supreme Court has already rejected the notion that prejudice should be presumed because counsel is substituted, Defendant's claim that his conviction should be reversed merely because he was represented by Badini is without

merit. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

In fact, in *Woodbury v. State*, 611 So. 2d 1291 (Fla. 4th DCA 1992), the case on which Defendant relies, the Court held that substitution of counsel without Defendant's express consent is not per se reversible error. As this is precisely the argument Defendant is presenting here, it is 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.

The cases relied upon by Defendant do not support his claim that he is entitled to relief. In *McKinnon v. State*, 526 P.2d 18 (Alaska 1974), the court removed the attorney who had represented the defendant for at least a year, over the defendant's objection, because he perceived that the attorney had not acted with diligence. In *Smith v. Superior Court of Los Angles County*, 440 P.2d 65 (Cal. 1968), the court removed the attorney who had represented the defendant for years, over defendant's objection, because the attorney did not exhibit appropriate courtroom demeanor and because the attorney had not

previously tried a death penalty case. Here, the Court did not remove Defendant's attorney, and Defendant did not object to being represented by Mr. Badini and Ms. Carr. Moreover, as Defendant admits, Mr. Badini and Ms. Carr represented him throughout most of the proceedings in this case. Given these circumstances, neither *McKinnon* nor *Smith* support Defendant's claim.

Holley v. State, 484 So. 2d 634 (Fla. 1st DCA 1986), is also inapplicable. There, there was a last minute substitution of counsel, who were unprepared to try the case. The defendant was not even informed that there would be a substitution until less than 24 hours before trial. Under those circumstances, the court applied *United States v. Cronic*, 466 U.S. 648 (1984). Here, there was no last minute substitution of counsel. Moreover, Defendant was clearly aware that he was being represented by Badini well before trial, as Badini was appearing as counsel at the pretrial hearings. Under these circumstances, *Holley* does not apply. The claim is without merit and should be denied.

II. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CLAIM THAT HIS CONFESSION SHOULD HAVE BEEN SUPPRESSED BECAUSE HE WAS PLACED UNDER OATH IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the trial court erred in denying his motion to suppress because Defendant's confession was made under oath. However, this claim should be denied, as it is procedurally barred and without merit.

Defendant raised the trial court's denial of his motion to suppress on direct appeal. Initial Brief of Appellant, Case No. 79,383, at 37-43. He asserted that the trial court should have suppressed his confession because it was induced by threats and promises and was not voluntary. He also asserted that the trial court erred in failing to make sufficient findings in support of its denial of the motion to suppress. This Court rejected those claims. *Johnson v. State*, 696 So. 2d 326, 329-31 (Fla. 1997). Defendant now asserts that his counsel should have claimed that motion to suppress should have been granted because he was placed under oath at the time of his confession. However, this Court has held that it is improper to assert that counsel was ineffective for failing to different grounds in regard to an issue that counsel did raise. *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). As this is precisely what Defendant is

doing, this claim should be denied.

Even if the claim was cognizable, Defendant would still be entitled to no relief. Defendant did not claim in his motion to suppress that his confession was involuntary because he had been placed under oath. (S.R. 2-3) The only evidence presented at the suppression hearing concerning the oath that Defendant took was at the beginning of his stenographically recorded statement. (T. 118) Additionally, Defendant testified at the suppression hearing and did not claim that any oath compelled his statement. (T. 107-27) Defendant did not argue that his confession was involuntary because he was placed under oath. However, in order to preserve an issue for appeal, the specific grounds that the defendant wishes to assert on appeal have to be argued in the trial court. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). As an issue concerning the administration of an oath was not raised as a basis for suppression in the trial court, this issue was not preserved for appeal. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the claim was cognizable and the underlying issue

had been preserved, Defendant would still be entitled to no relief because the issue is not meritorious. Defendant contends that *United States v. Bram*, 168 U.S. 532 (1897), holds that the administration of an oath compels a defendant to confess. However, *Bram* does not so hold. Instead, *Bram* merely states that English courts had previously held that the giving of an oath compels testimony. *Id.* at 544-50. Thus, *Bram* does not support Defendant's assertion that his confession should have been suppressed simply because he was administered an oath.

Moreover, the giving of an oath does not compel testimony as a matter of law. Both this Court and the United States Supreme Court have stated that the purpose of giving an oath is to ensure that the person placed under oath does not lie. *See Maryland v. Craig*, 497 U.S. 836, 845-46 (1990); *Harrell v. State*, 709 So. 2d 1364, 1371 (1998). The United States Supreme Court has held that the Fifth Amendment protection against self-incrimination does not give a defendant the right to lie. *Brogan v. United States*, 522 U.S. 398, 404-05 (1998). In fact, courts have held that informing a suspect of the penalty for making a false statement during an interrogation is not coercive, whether the suspect is given *Miranda* warnings or not. *United States v. Braxton*, 112 F.3d 777, 782-83 (4th Cir. 1997)(en banc); *Rivers v. United States*, 400 F.2d 935, 943 (5th

Cir. 1968); *see also United States v. Barfield*, 507 F.2d 53, 56 (5th Cir. 1975)("[I]t is now clearly the law that *ordinarily* [] an admonishment [to tell the truth] does not furnish sufficient inducement to render objectionable a confession thereby obtained unless *threats* or *promises* are brought into play."). As such, placing Defendant under oath did not compel his statement as a matter of law. As the issue is 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.

Moreover, even if the claim had any legal merit, it has no factual merit. The record reflects that the oath that Defendant took was at the beginning of his stenographically recorded statement. (T. 118) The stenographically recorded statement did not begin until 1:43 a.m. on April 2, 1989. Defendant had executed a waiver of his *Miranda* rights at 7:30 p.m. on April 1, 1989, six hours before he was placed under oath. (T. 64, 76) During this six hour period, Defendant was interviewed and provided statements about this crime, the Lawrence murder and the King attempted murder. (T. 80, 97) Additionally, Defendant testified at the suppression hearing and did not claim that any oath compelled his statement. (T. 107-27) As Defendant had

waived his rights six hours before any oath was administered, had been speaking to the police for those six hours before the oath was administered and never claimed that he felt compel to speak because of the oath, the record refutes Defendant's assertion that an oath compelled him to speak to the police. Thus, the claim is without merit, and 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.

III. DEFENDANT'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE JURY INSTRUCTION ON CCP SHOULD BE DENIED.

Defendant contends that his appellate counsel was ineffective because he did not raise an issue regarding the jury instruction on CCP. However, any claim regarding the CCP instruction was unpreserved, and any error in the instruction was harmless. Thus, appellate counsel cannot be deemed ineffective for failing to raise it. The claim should be denied.

On June 29, 1992, the United States Supreme Court determined that the jury instruction on Florida's heinous, atrocious and cruel aggravating factor was unconstitutional. *Espinosa v. Florida*, 505 U.S. 1079 (1992). In *Jackson v. State*, 649 So. 2d 85, 87-89 (Fla. 1994), this Court applied *Espinosa* to invalidate the standard jury instruction on CCP. However, this Court has held that claims of error in the jury instructions based on *Espinosa* must be preserved for appeal, even where the trial occurred before *Espinosa* issued. *Hodges v. State*, 619 So. 2d 272 (Fla. 1993). This Court has stated that in order to preserve such a claim for appeal, a defendant must have objected to the instruction or have proposed a special jury instruction. *Pope v. State*, 702 So. 2d 221, 223-24 (Fla. 1997). As such,

this Court has rejected the claim that *Jackson* error is fundamental error.

Here, the issue was not preserved for review. When the parties reviewed the jury instructions at the beginning of the penalty phase, Defendant did not object to the form of the instruction on CCP. (T. 967-72) When jury instructions were again discussed after all the evidence was presented, Defendant again raised no issue regarding the CCP instruction. (T. 1067-69) The trial court instructed the jury on CCP as follows:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification.

(T. 1088) After the instructions were read, Defendant did not object to the form of any instruction. (T. 1093)[1] Defendant never proposed a special instruction on CCP. Since the issue was not preserved for review, Defendant's appellate counsel cannot be deemed ineffective for failing to raise this issue. *Cooper v. State*, 856 So. 2d 969, 979-80 (Fla. 2003); *Pace v. State*, 854 So. 2d 167, 180-81 (Fla. 2003). Thus, the claim should be denied.

Even if the claim was preserved, Defendant would still be

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[1] In should be noted that Defendant's trial occurred in November, 1991, and he was sentenced to death in December 1991. (R. 5, 92, 111-17) This was before *Espinosa* and *Jackson*.

entitled to no relief. This Court has held that a claim of ineffective assistant of appellate counsel should be rejected when the alleged error that counsel did not raise would have been found harmless if it had been raised. *Valle v. Moore*, 837 So. 2d 905, 910 (Fla. 2002).

In *Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994), the Court held that any error in the giving of a vague instruction on CCP was harmless if the evidence shows that CCP would have applied under a proper instruction. Such a holding is in accordance with *Sochor v. Florida*, 504 U.S. 527, 537 (1992). In *Sochor*, the Court recognized that any error in giving a vague jury instruction on an aggravating circumstance would be harmless if the facts of the case showed that the aggravating circumstance applied under a narrow construction of that circumstance.

Here, the record shows that Defendant executed Ms. Larkins with a single gunshot fired at close range after she had fallen to the ground. Moreover, Defendant was hired for the purpose of committing this murder. Jerry Briggs testified that immediately upon gaining entry into the laundromat, Defendant started to argue with Ms. Larkins and beat her in the face. (T. 612) Ms. Larkins tried to move away from Defendant and fell to the floor. (T. 613) Defendant then got on top of Ms. Larkins, pulled out

a gun and shot Ms. Larkin. (T. 618-19)

Dr. Jay Barnhart testified that Ms. Larkins had a laceration to the left side of her face and a gunshot wound that entered her the left side of the back of her chest. (T. 706-12) The bullet severed Ms. Larkins' spinal cord and aorta and damaged her heart. (T. 715-16) Ms. Larkins died from the gunshot wound. (T. 718) Ray Freeman, a firearms expert, testified that this gunshot wound was fired from a single action revolver, which was no more than 6 inches from Ms. Larkins when it was fired. (T. 727-52) The gun that fired the shot was wrapped in a towel. (T. 752-53)

In his oral confession, Defendant stated that he was hired to kill Ms. Larkins.(T. 787-88) Defendant stated that he had first met with the person who hired him about this job a week or two in advance. (T. 788) Defendant averred that on the night of the murder, he waited in a car behind the laundromat until Ms. Larkins came. (T. 788-89) When she got there, Defendant took the gun from his employer, went to the laundromat, gained entry by a ruse, attacked Ms. Larkins, chased her and shot her. (T. 789)

Termain Tift testified that Defendant offer him money to go to the south part of the county and kill someone. (T. 840-43) Tift later saw Defendant leave with someone named Bob and return

with a hand full of cash. (T. 843-46) Defendant told Tift that he had killed Ms. Larkins. (T. 846-47)

This Court has consistently held that CCP applies to contract killing and executions. *Lynch v. State*, 841 So. 2d 362, 372-73 (Fla. 2003); *Philmore v. State*, 820 So. 2d 919, 934 (Fla. 2002); *Looney v. State*, 803 So. 2d 656, 678-79 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923, 934-35 (Fla. 2000); *Foster v. State*, 778 So. 2d 906, 921 (Fla. 2000); *Jennings v. State*, 718 So. 2d 144, 152-53 (Fla. 1998); *Donaldson v. State*, 722 So. 2d 177, 187 n.11 (Fla. 1998); *Ferrell v. State*, 686 So. 2d 1324, 1330 (Fla. 1996); *Hartley v. State*, 686 So. 2d 1316, 1323 (Fla. 1996) *Archer v. State*, 673 So. 2d 17, 19 (Fla. 1996); *Herring v. State*, 446 So. 2d 1049, 1057 (Fla. 1984), *overruled on other grounds by*, *Rogers v. State*, 511 So. 2d 526 (Fla. 1987). As the evidence above demonstrates, the murder of Ms. Larkins was both a contract killing and an execution. Thus, any error in the CCP instruction would have been harmless. *Walls v. State*, 641 So. 2d 381, 387 (Fla. 1994). Thus, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Valle v. Moore*, 837 So. 2d 905, 910 (Fla. 2002). The claim should be denied.

IV. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF BURGLARY.

Defendant next contends that his appellate counsel was ineffective for failing to claim that the evidence was insufficient to support his burglary conviction because the laundromat was allegedly open to the public. However, appellate counsel was not ineffective for failing to raise this issue.

To the extent that Defendant bases his claim on *Miller v. State*, 733 So. 2d 955 (Fla. 1999), it should be denied. Defendant's conviction became final in 1998, when the United States Supreme Court denied ceritorari. *Johnson v. Florida*, 522 U.S. 1095 (1998). This Court did not issue *Miller* until 1999. To the extent *Miller* constitutes a change in the law, counsel cannot be deemed ineffective for failing to have anticipated it. *Muhammad v. State*, 426 So. 2d 533 (Fla. 1983); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995). The claim should be denied.

Moreover, in *Miller*, this Court determined that the "unless the premises are at the time open to the public" language in §810.02(1), Fla. Stat., created an absolute defense to the charge of burglary. In *Johnson v. State*, 786 So. 2d 1162 (Fla. 2001), this Court determined that whether a premises (or an area thereof) was opened to the public was a factual question.

Here, the evidence showed that the laundromat was not open to the public at the time Defendant entered it. Jerry Briggs testified at trial that he saw Ms. Larkins lock the door to the Sparkle City Laundromat around 9:00 p.m., which was closing time. (T. 607-10) After the laundromat was closed, Defendant knocked on the door and asked for change. (T. 610-11, 620) When Ms. Larkins got her keys and unlocked the door, Defendant forced his way into the laundromat and attacked Ms. Larkins. (T. 611-13)

In his confession, Defendant admitted that the laundromat was locked when he went to shoot Ms. Larkins. (T. 789) He asserted that he lied to Ms. Larkins about needing change to get her to unlock the door and forced his way into the laundromat. (T. 789) Defendant present no evidence to contradict this testimony.

In its closing argument, the State asserted that the laundromat was closed and that Defendant forced his way inside as soon as Ms. Larkins unlocked the door. (T. 904-05) As such, the State argued that there was no consensual entry. (T. 905-06)

As the evidence here was unrebutted that the laundromat has already closed for the night at the time Defendant entered it, *Miller* does not apply to this case. Thus, 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.

To the extent that Defendant asserts that *Miller* and *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), should apply because Ms. Larkins may have consented to the entry into the closed laundromat, this claim would also be unavailing. Defendant secured that consent under false pretenses. As Mr. Briggs testified, Ms. Larkins unlocked the door when Defendant asked for change. (T. 610-11, 620) Defendant admitted in his confession that he got Ms. Larkins to unlock the door by claiming falsely to need change. (T. 789) Courts of this State have held that any consent to enter a premises obtained by such artifice is not valid and does not act as a defense to a burglary charge. *E.g.*, *Alvarez v. State*, 768 So. 2d 1224 (Fla. 3d DCA 2000); *Gordon v. State*, 745 So. 2d 1016 (Fla. 4th DCA 1999); *Thomas v. State*, 742 So. 2d 326 (Fla. 3d DCA 1999); *Howard v. State*, 400 So. 2d 1329 (Fla. 4th DCA 1981); *Pedone v. State*, 341 So. 2d 352 (Fla. 3d DCA 1977). As such, Defendant's claim that his burglary conviction is invalid is meritless. Appellate counsel cannot be deemed ineffective for failing to

claim that it was. *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.

V. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE ALLEGING *CALDWELL* ERROR.

Defendant next that his appellate counsel was ineffective for failing to claim that comments that the jury's recommendation was advisory violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This claim should be denied as appellate counsel cannot be deemed ineffective for failing to raise an unpreserved and nonmeritorious issue.

Defendant did not object to informing the jury that its recommendation was a recommendation. In order to preserve an issue regarding comments, it is necessary to object to those comments contemporaneously. *See Castor v. State*, 365 So. 2d 701 (Fla. 1978). As Defendant did not do so, this issue is unpreserved. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Even if the issue had been preserved, Defendant would still be entitled to no relief because the claim lacks merit. In *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)(quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)), the Court held that "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role

assigned to the jury under local law." In *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988), this Court held that informing the jury that their recommendation regarding sentencing is advisory is a correct statement of Florida law. As such, there was no *Caldwell* violation in this case. *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003). Since there was no *Caldwell* error, counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that such error occurred. *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 reliance on *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and *Adams v. Wainwright*, 804 F.2d 1526 (11th Cir. 1986), is misplaced. *Adams* was reversed by the United States Supreme Court in *Dugger v. Adams*, 489 U.S. 401 (1989). Moreover, the Eleventh Circuit recognized that the United States Supreme Court had overruled *Mann* in *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). As such, neither *Mann* nor *Adams* is good law. Defendant's reliance on them is misplaced. The claim should be denied.

VI. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE JURY INSTRUCTION ON NONSTATUTORY MITIGATION.

Defendant next that his appellate counsel was ineffective for failing to claim that the jury instruction on nonstatutory mitigation violated *Hitchcock v. Dugger*, 481 U.S. 393 (1987). However, this claim should be denied because appellate counsel is not ineffective for failing to raise an unpreserved and meritless issue.

Defendant did not object to the standard jury instruction on nonstatutory mitigation at trial. He did not propose a special jury instruction on this issue. In order to preserve a claim regarding the giving of a jury instruction, it is necessary for a defendant to object to the instruction given and propose an alternate instruction. *See Pope v. State*, 702 So. 2d 221, 223-24 (Fla. 1997). As such, the issue is unpreserved. Because the issue is unpreserved, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the issue was preserved, Defendant would still be entitled to no relief. In this case, the trial court gave the standard "catch-all" instruction on nonstatutory mitigation, which informed the jury that it could consider in mitigation

"[a]ny other aspect of the defendant's character or record, and any other circumstances of the offense." (R. 84, T. 1089) This Court has repeatedly held that a trial court is only required to give this instruction on nonstatutory mitigation. *E.g., Belcher v. State*, 851 So. 2d 678, 684-85 (Fla. 2003); *Downs v. Moore*, 801 So. 2d 906, 912-13 (Fla. 2001); *Rose v. State*, 787 So. 2d 786, 804 (Fla. 2001); *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). As such, any claim that the trial court erred in giving this instruction is without merit. Thus, appellate counsel cannot be deemed ineffective for failing to raise it. *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 reliance on *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *White v. State*, 729 So. 2d 909 (Fla. 1999), is misplaced. In *Hitchcock*, the Court held that it was unconstitutional to tell the jury that it could only consider statutory mitigation and that the jury had to be informed that it could consider any other aspect of the defendant's character or record, and any other circumstances of the offense. In *White*, this Court applied *Hitchcock*, to invalidate a death sentence. However, here, the jury was not told that it could also consider statutory mitigation and was informed that it

could consider any other aspect of the defendant's character or record, and any other circumstances of the offense. (R. 77, 84, T. 1088-89) As such, *Hitchcock* and *White* do not apply. The claim should be denied.

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 Charles G. White, 1031 Ives Dairy Road, Suite 228, Miami, Florida 33179, this 15th day of June, 2004.

_____
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
SANDRA S. JAGGARD
Assistant Attorney General