IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2143

MARBEL MENDOZA,

Petitioner,

vs.

JAMES R. MCDONOUGH
Secretary, Florida Department of Corrections,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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STATEMENT OF 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. *Mendoza v. State*, No. SC04-1881. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Defendant[1] contends that his appellate counsel was ineffective because he did not raise a variety of issues on appeal or did so ineffectively. All the issues that Defendant asserts should have been raised were either unpreserved, without merit or in fact raised on direct appeal. Appellate counsel cannot be deemed ineffective for failing to raise unpreserved and meritless claims. Defendant's claims should, therefore, be denied.

A. STANDARD OF REVIEW

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Jones v. Moore*, 794 So. 2d 579, 586 (Fla. 2001); *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

[1] Petitioner will be referred to as Defendant and the prosecution and Respondent as the State.

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.

Habeas petitions are the proper vehicle to raise claims of ineffective assistance of appellate counsel. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). However, appellate counsel cannot be considered ineffective under the *Strickland* standard for failing to raise issues that were not properly preserved and that do not present a question of fundamental error. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995);

Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). The same is true for claims that are without merit. Appellate counsel cannot be deemed ineffective for failing to raise non-meritorious claims on appeal. *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.

Even where a claim is preserved or meritorious Defendant might still not be entitled to relief. This Court has held that a claim of ineffective assistance 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). Moreover, 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 non-frivolous issue. *See Jones v. Barnes*, 463 U.S. 745, 751-53 (1983)(appellate counsel not required to argue all non-frivolous issues, even at request of client); *Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990)(noting that Ait is well established that counsel need not raise every non-frivolous issue revealed by the record@). Finally, a claim that has been resolved in a previous review of

the case is barred as Athe law of the case.@ *See Mills v. State*, 603 So. 2d 482, 486 (Fla. 1992).

This Court has further held that:

> [t]o succeed on the ineffective assistance of appellate counsel portion of the claim, [Defendant] must establish that counsel's failure to raise the claim on appeal is 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." Floyd v. State, 808 So. 2d 175, 183 (Fla. 2002) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986)). The failure to raise a meritless issue does not constitute ineffective assistance of counsel. See Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002); Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994). In fact, appellate counsel is not required to raise every conceivable nonfrivolous issue. See Valle, 837 So. 2d at 908.

Fennie v. State, 855 So. 2d 597, 607 (Fla. 2003). In light of these standards all of Defendant’s claims fail and must be denied.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT’S ORDER PROHIBITING DEFENDANT FROM PRESENTING IRRELEVANT EVIDENCE OF VICTIM’S PAST INVOLVEMENT IN *BOLITO*.

Defendant first asserts that appellate counsel was ineffective for failing to raise on appeal the trial court’s ruling that he was prohibited from presenting evidence of the victim’s alleged past *bolito* activities. Defendant acknowledges

that the court permitted evidence that the victim was involved in such operations at the time of the murder. However, Defendant claims that evidence establishing the victim was involved in said activities a year prior to the murder was relevant to establish he did not commit or attempt to commit a robbery as it tended to prove he was merely collecting a *bolito* debt. Defendant concludes that this exclusion amounted to an abuse of discretion by the trial court and consequently a denial of his right to present a defense.

This claim is without merit as evidence of the victim's remote *bolito* activities was not relevant in establishing that Defendant was merely collecting a debt at the time of the shooting. Moreover, Defendant fails to allege sufficiently that any of the proffered evidence would have been admissible even if found to be relevant. Defendant points out that the court excluded this evidence based on relevance. However, following a discussion of the admissibility of this evidence, in which the State objected to it as both relevance and hearsay grounds, the court allowed the question whether Det. Trujillo had *personal knowledge* of the victim's *bolito* activities at the time of his death. (DAT. 795) Clearly the court was excluding both hearsay and irrelevant evidence.

Moreover, Defendant did not proffer any evidence that was not in fact hearsay. Det. Trujillo's "knowledge" of the victim's activities came entirely from the victim's prior arrest. (DAT. 458-59) Similarly, Mr. Calderon's wife had stated in a deposition that she knew about the victim's arrest, which had occurred when he was married to another woman, because he told her about it. (DAT. 742-43) She reiterated that she did not have any personal knowledge of the victim's alleged *bolito* activities other than being told about the arrest during a proffer. (DAT 742-43, 758) Counsel's entire argument of how he intended to enter this evidence, other than through the Defendant's statement to Humberto Cuellar, was through these individuals (DAT. 468-69) Hearsay evidence of arrest is not admissible. *White v. State*, 301 So. 2d 464, 465 (1st DCA 1974) As the evidence was not admissible, the trial court did not abuse its discretion in excluding it. Thus, appellate counsel cannot be deemed ineffective for failing to raise this meritless claim. *Kokal; Groover*; *Hildwin*; *Breedlove*.

Furthermore, evidence of a victim's character is generally inadmissible. *Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991). While character evidence of the victim is admissible under section 90.404(1)(b) when a claim of self-defense is made, *see Dupree v. State*, 615 So. 2d 713 (Fla. 1st DCA 1993), self-defense

was not available to Defendant's robbery charge. Indeed, the idea that Defendant was acting in self-defense is utterly ridiculous when the evidence established he performed reconnaissance of the victim's home in advance of the robbery, armed himself with a hand-gun, and hid behind the car parked in the driveway of victim's home, as he lay in wait for his attack of the victim. (DAT. 1037, 773, 774, 1047, 1067, 1048) To introduce evidence of other crimes tending to prove Defendant did not commit the murder, the defendant must proffer sufficient evidence to allow the trial court to determine whether the evidence is relevant and admissible. *Gore v. State*, 784 So. 2d 418 (Fla. 2001). Defendant did not do so. Thus the trial court did not abuse its discretion in excluding it.

Furthermore, assuming Defendant could provide an evidentiary nexus between the victim's alleged *bolito* operations and Defendant's theory that he was "merely collecting a debt,"[2] such evidence is still irrelevant because collecting a debt using unlawful force is still robbery. *See Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991)(where defendant claimed he was

[2] Other than the bald assertion that the victim's alleged "bolito" activities demonstrated that Defendant was merely collecting a debt, Defendant has not proffered or presented any evidence whatsoever that remotely linked any "debt" to such "bolito" operation. This is true despite the fact that Defendant was granted an evidentiary hearing on this claim.

collecting money that belonged to him, First DCA held that "claim of right" was not a defense to robbery when defendant sought to collect a debt by use of force or threat). Similarly, Defendant is entitled to no claim of right defense negating specific intent for robbery under the pretense he was only "collecting a debt." It is well-settled throughout state courts in the United States that "taking money from a debtor by force to pay a debt is robbery. The creditor has no such right of appropriation and allocation." *Edwards v. State*, 181 N.W.2d 383 (Wis. 1970); see also *Moyers v. State*, 197 S.E. 846 (Ga. 1938); *State v. Pierce*, 490 P.2d 584 (Kan. 1971); *State v. Schaefer*, 790 P.2d 281, 284 (Ariz. Ct. App. 1990); *State v. Self*, 713 P.2d 142, 144 (Wash. Ct. App. 1986); *Commonwealth v. Sleighter*, 433 A.2d 469 (Pa. 1981); *Austin v. State*, 271 N.W.2d 668 (Wis. 1978). "Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding." *Teffeteller v. Dugger*, 734 So. 2d 1009, 1018 (Fla. 1999).

Moreover, any error in the preclusion of testimony that the victim had been previously arrested for *bolito* was harmless. Counsel advised the jury in opening that the victim was a *bolitero,* as did the State. (DAT. 611, 601) Additionally, Humberto Cuellar specifically testified at trial that the victim

was a *bolitero* and therefore presumed to be carrying around $6000 on his person. (DAT. 1034-35) As the jury indeed heard evidence that the victim was a *bolitero*, Defendant fails to establish that if any error had been found on appeal, it would not have been deemed harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As any error would not have resulted in reversal, Defendant has not sufficiently alleged prejudice. *Strickland.*

Defendant's reliance on *Story v. State*, 589 So. 2d 939 (Fla. 2nd DCA 1991) and *Vannier v. State*, 714 So. 2d 470 (Fla. 4th DCA 1998) is woefully misplaced. In *Story*, the defendant was charged with conducting multiple sales of fruit from the same groves and consequently failing to deliver a substantial number of boxes of fruit to the subsequent buyers. *Id.* at 940. The defendant sought to introduce evidence of fraud committed against her by two employees, upon whom it was established that she largely relied upon to conduct her sales transactions. The Fourth DCA declined to find that the evidence of fraud committed by the two employees was "reverse *Williams* rule" evidence. Rather it held that the fraud perpetrated by them upon the defendant demonstrated that she lacked the specific intent to commit the crimes of theft with which she was charged because her sales transactions were based upon fraudulent information

provided to her by the two employees. Thus, the evidence of the two employees' fraud upon the defendant bore directly upon her intent to commit the charged crimes. Conversely, evidence of the victim's alleged past *bolito* involvement matters not to Defendant's intent to commit a robbery, regardless of whether Defendant was merely collecting a debt with deadly force or not.

Likewise, in *Vannier*, the Fourth DCA ruled it was erroneous for the trial court to exclude letters written by the deceased victim, when the letters supported the defendant's argument that the victim committed suicide rather than was killed by defendant. *Id.* at 473. Clearly, if the victim committed suicide, then the defendant was not guilty of murder. Conversely, in the instant case, even if the alleged evidence of the victim's *bolito* involvement proved that Defendant was only collecting a debt using unlawful force, Defendant would still be committing robbery. *See Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991).

Accordingly, the evidence of the victim's alleged past *bolito* activities, at best one year prior to the murder, were wholly irrelevant to Defendant's felony murder case and was properly excluded at trial. Counsel is not ineffective for failing to pursue non-meritorious issues. *Teffeteller*; *Kokal; Groover*; *Hildwin*; *Breedlove*.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S ALLEGED MID-TRIAL REVERSAL OF ITS PRE-TRIAL RULING ON THE ISSUE OF VICTIM'S ALLEGED *BOLITO* ACTIVITY.

Defendant claims that appellate counsel was ineffective for failing to raise on appeal the trial court's alleged error in denying his motion for a mistrial based on the alleged "mid-trial reversal" of the court's ruling pertaining to whether defense counsel could present evidence related to the victim's alleged *bolito* activity. Defendant argues that he detrimentally relied upon the trial court's ruling that he was permitted to adduce evidence of the victim's *bolito* activity by advising the jury in opening that the evidence would establish that the victim was involved in *bolito*. Defendant further contends that the trial court subsequently reversed its ruling and prohibited the defense from presenting such evidence and thereby violated Defendant's right to a fair trial. However, a review of the record patently refutes such contention.

Contrary to Defendant's assertion, the trial court always maintained that defense counsel could adduce evidence that established the victim was involved in *bolito* but was not allowed to elicit hearsay testimony concerning the victim's withhold of adjudication for *bolito* in 1987, as the mere record of an arrest and withhold of adjudication is not properly

admissible evidence nor proof of guilt. The pre-trial motion pertaining to this issue clearly reflected that the trial court advised defense counsel that the victim's prior arrest for *bolito* was irrelevant and inadmissible but that defense counsel could inquire of witnesses whether the victim was a *bolito*:

> I'm going to deny it. I didn't say you couldn't bring out the *bolito* issue. The fact that he got a withhold is irrelevant.
>
> * * *
>
> I am granting that motion in limine, however, if they want to call the wife or son, they can ask them if they knew or know that the victim was a *bolito* operator.

(DAT. 467, 470) Later, the trial court reiterated its earlier ruling:

> Court: Well, I directed the attorney not to get into the racketeering or the withhold, but I did not limit them on bringing out that this gentleman was a *bolito*.
>
> Defense: *bolitero*.
>
> Court: I thought that the asking of that question and the simple answer was permissible. I think that was my initial ruling.
>
> Defense: It was, your honor.

Indeed, as reflected by the record, defense counsel acceded that the trial court's earlier ruling permitted defense counsel to elicit that the victim was a *bolitero* but not delve into the victim's prior arrest. (DAT. 741) Defense counsel merely

attempted to circumvent the trial court's ruling by inquiring of witnesses regarding their knowledge of the victim's arrest. (DAT. 744-45)

Furthermore, "a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review." *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999). Such a motion should only be granted when necessary to ensure the defendant receives a fair trial. *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001) (citing *Goodwin*). No such abuse occurred in this case. For the reasons outlined in the claim above, the excluded evidence was not admissible as it was not relevant and was entirely based on hearsay. Moreover, Defendant suffered no detriment by having stated in opening that the jury would hear evidence that the victim was a *bolitero* in reliance of the court's ruling, as the jury did, in fact, hear such testimony. Humberto Cuellar was allowed to testify that Defendant advised him that the victim was a *bolitero*. (DAT. 1034) In fact, the State mentioned this fact in opening statements. (DAT. 601) Accordingly, the exclusion of further, more remote, hearsay evidence on this issue was not proper grounds for a mistrial. Defendant does not cite a single case to support the proposition that this ruling would warrant reversal had the issue been brought on appeal. Accordingly, appellate counsel cannot be

deemed ineffective for failing to pursue this non-meritorious issue. *Kokal; Groover*; *Hildwin*; *Breedlove*.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO APPEAL THE DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL FOR THE PROSECUTOR'S COMMENT IN CLOSING.

Defendant next contends that his appellate counsel was ineffective for failing to appeal the alleged reversible error of the trial court's denial of Defendant's motion for mistrial for the following comment during the guilt phase by the prosecutor:

> State: [Y]ou promised in jury selection that this part of the trial is the guilt or innocence phase. It has nothing to do with the penalty, nothing. And if you don't like the penalty the other guys got, then adjust your recommendation then. Forget about the death penalty –
>
> Defense: Objection.
>
> Court: Sustained.
>
> Defense: Objection. Move to strike.
>
> Court: I'm going to tell you the same thing. This case must not [be] decided for or against anyone because you feel sorry for anyone or are angry. Your duty is to determine whether the defendant is guilty or not guilty in accord with the law. Ms. Seff, you made your objection before Mr. Suri made his. Please follow the guidelines of the Court.

(DAT. 1337-39) As reflected by the transcript, upon defense counsel's objection, the trial court sustained the objection and gave a cautionary instruction. *Id.* As there was no absolute

necessity for a mistrial, the denial of such a motion was not an abuse of discretion. Thus, appellate counsel cannot be deemed ineffective for failing to raise this meritless claim. *Kokal; Groover*; *Hildwin*; *Breedlove*.

Furthermore, the comment was not improper. Defendant alleges that by telling the jury they could later vote to recommend a life sentence, the jury should feel free to convict Defendant, thus urging them to consider penalty in their deliberation. In fact, a fair reading of the comment indicates that the opposite is true. The prosecutor was telling the jury not consider penalty in determining guilt.

Moreover, the comment was fair response. Defense counsel's theme in closing was the alleged disparity of justice for Defendant when his co defendants were given plea deals. He repeatedly asked the jury "do you see equal justice here anywhere?" (DAT. 1332) He contended that the co-defendant's plea deals rendered Defendant's case unfair:

> Humberto Cuellar told you I went to do a robbery. I smashed Mr. Calderon over the head with a gun and split open his head. I went there to do a robbery and somebody that was with me then shot him to death. You know what that is? That is first degree murder. That is what Humberto Cuellar did, if you believe his words. Is he standing trial for first degree murder? No, he's not. No, he's not. They set the limits on what this case is about. . . . Is that equal justice?

(DAT. 1333-34) Thus, the prosecutor was merely responding to defense counsel's charge that it was unfair that the codefendants were not subject to a first degree murder conviction and the possibility of the death penalty. Defense counsel's comments invited the State's comment and thus any error was invited. *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *Shaara v.State*, 581 So.2d 1139 (Fla. 1st DCA 1991); *Schwarck v. State*, 568 So.2d 1326 (Fla. 3d DCA 1990). Moreover, the comment was brief and the prosecutor moved on after Defendant objected, thus any error was harmless. *State v. DiGuillo*, 491 So.2d 1129 (Fla. 1986). Accordingly, Defendant cannot establish any prejudice resulted from appellate counsel's failure to raise this issue on appeal. *Strickland.* The claim should be denied.

E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES PERTAINING TO THE COMMENTS MADE BY THE TRIAL COURT CONCERNING DEFENDANT'S RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE.

Defendant next claims that his appellate counsel was ineffective for failing to raise on appeal alleged violations of Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by several comments made by the trial court to the jury venire during voir dire. Specifically, Defendant contends that the trial court committed fundamental error by improperly commenting on Defendant's right to remain

silent and shifting the burden to Defendant to prove himself not guilty. Defendant further contends that such errors were exacerbated by the prosecutor's comment in closing. As the issue was not preserved and is without merit, this claim should be denied.

No objection was lodged at trial at the time of either allegedly improper comment. Thus, this claim was unpreserved for appeal. See *Gutierrez v. State*, 731 So. 2d 94 (Fla. 4th DCA 1999)("While an improper comment on a defendant's right to remain silent may be constitutional error, it is not considered fundamental error."); *see also State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985), *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellate counsel is not ineffective for failing to raise unpreserved issues. *See Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995).

Moreover, Defendant fails to demonstrate that the comments in question were improper taken in context. The first comment to which Defendant objects concerns the trial court's admonishment to the jury that Defendant has an absolute right to remain silent:

> You will understand that the defendant has an absolute right to remain silent and you are not to draw any inferences in this conduct. There may be a number of reasons why somebody remains silent; that is, somebody

> may not testify, and I am sure you can give many reasons why they have chosen to do that, whether they can't articulate themselves or perhaps it is their inability to remember the facts, or the lawyer's recommendation not to testify.

(DAT. 285-86) Shortly thereafter, the trial court reiterated that "in every proceeding the defendant has an absolute right to remain silent. At no time is it the duty of the defendant to prove his innocence." (DAT. 289) The second comment concerning Defendant's right to remain silent that Defendant contends vitiated the fairness of the trial followed moments later in the same address to the jury venire by the trial court:

> You may be asked who would like to hear from the defendant. Number one, understand that the defendant doesn't have to do anything. You understand that the defendant has an absolute right to remain silent. Now you may personally feel that you would like to hear from him. There is nothing wrong with that as long as you understand that he doesn't have to anything or say anything. Does everybody understand that?

(DAT. 298) The trial court's comments to the jury venire properly reflected the rights accruing to Defendant and absolutely nothing in his address abridged such rights. Thus, defense counsel did not object because there was nothing improper about the trial court's comments. ***Cummings-El v. State***, 863 So. 2d 246 (Fla. 2003) Defendant provides no legal authority to the contrary.

Moreover, the remarks about which Defendant complains were made during the introductory portion of the trial in which the

trial court addressed the jury venire informally. The statements were calculated to provoke thought in potential jurors that go to the heart of their qualifications and were based on hypotheticals as Defendant had not yet asserted his right to remain silent by not testifying. As the comment itself shows, the court was preparing the jury for what would likely be asked by the attorney's in the ensuing questioning.

Similarly, Defendant's contention that the trial court shifted the burden of guilt is without merit. During the same introductory remarks the court stated:

> Now, the I told you the defendant is presumed innocent. That presumption stays with him throughout the trial until those jurors who are selected go into the jury room and find that he has been proven either [guilty or][sic] not guilty, and then the case will be over, or if you should in your deliberations decide that he is guilty beyond and to the exclusion of every reasonable doubt, of course, the presumption of innocence leaves him at that stage. Does everybody understand that?

(DAT. 278). Defendant again provides no support for his blanket assertion that this comment was improper, or that, if objectionable, it would have lead to a different result on appeal.

At the close of all the evidence, the trial court read the standard jury instructions, including both instructions pertaining to Defendant's presumption of innocence/the State's burden of proof and Defendant's right to remain silent, without

deviation or conversational improvisation. (DAT. 1375-80) Accordingly, even if the trial court had mischaracterized Defendant's right to remain silent and the burden of proof, any error would have been harmless in light of the fact that the jury was formally instructed properly prior to deliberation. *See Kiley v. State,* 770 So. 2d 1278 at 1278 (Fla. 4th DCA 2000)

In *Kiley*, the defendant claimed that the trial court's introductory remarks to the venire during jury selection were improper comments on his right to remain silent and on his burden of proof. The comments were unpreserved. Nonetheless, the Fourth DCA held that "[e]ven if preserved, and we concluded that the trial court's preliminary comments at the start of jury selection did not accurately reflect Florida Standard Jury Instruction 1.01, we would affirm...[T]he judge's comments in this case were presented in a conversational manner. After the jury was sworn, however the judge did in fact read the proper instruction." *Id*.

Defendant's claims pertaining to allegedly improper comments by the trial court during voir dire were unpreserved and meritless. Appellate counsel is not ineffective for failing to raise meritless or unpreserved claims. *Johnson v. Singletary*, 685 So. 2d 263, 266-67 (Fla. 1996); *Grossman v. Dugger*, 708

So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995). Thus, the claim should be denied.

Finally, Defendant contends that appellate counsel was ineffective for failing to argue that the prosecutor committed constitutional error with the following comment in closing:

> Let [defense counsel] explain to you how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you should believe Humberto Cuellar.

(DAT. 1318-19) Again, defense counsel did not object at trial and thus, any issue was not preserved for appeal. Accordingly, appellate counsel is not ineffective for failing to pursue unpreserved or meritless issues on appeal. *Johnson*; *Grossman*; *Groover*.

Moreover, this comment was made immediately following the prosecutor's careful review of all the evidence which corroborated Humberto's testimony: Humberto Cuellar's gun was found in Lazaro's car with Mr. Calderon's hair wedged in the handle consistent with having been used to strike the victim in the head as Humberto testified he had done; the police recovered the gun fully loaded consistent with it never having been fired, as Humberto had testified; Humberto had a bullet lodged in him consistent with the victim shooting him; Humberto and Lazaro's hands were swabbed and found to have gunshot residue in an amount consistent with being in close proximity to Humberto's

gunshot wound; Humberto's beeper was recovered from Lazaro's car with Defendant's number in the memory consistent with Humberto's testimony that Defendant had beeped him to come and pick up Defendant to perform the robbery; and Humberto and Lazaro were found at the hospital after the shooting, while Defendant absconded. (DAT. 1315-19) Clearly, the prosecutor's comment merely underscored that no evidence had been presented that contradicted Humberto's testimony while a wealth of evidence had corroborated Humberto's testimony. Hence, the prosecutor's remark was fair comment upon the evidence. *See Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). As such, appellate counsel would not have prevailed on such a meritless issue and cannot be deemed ineffective for opting to forgo raising same on appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999). The claim should be denied.

F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES RELATED TO TECHNICIAN GALLAGHER'S TESTIMONY.

Next, Defendant argues that appellate counsel was ineffective for failing to raise on appeal that the trial court allegedly committed reversible error by denying Defendant's motion to exclude the rebuttal testimony of Technician Gallagher and his motion for a mistrial after the prosecutor allegedly violated the rule of witness sequestration by informing

Gallagher of the testimony of defense witness Rao's testimony, whose testimony he was being called to rebut. However, a review of the record illustrates that Defendant's claim is entirely without merit.

During opening statements, defense counsel told the jury that the evidence would establish that Lazaro Cuellar had lead particles on his hands, suggesting that he was not in the car during the shooting as would be alleged by one or both of the Cuellar brothers, and that Humberto Cuellar not only had lead particles on his hands, but was also shot on the scene by the victim. In the opinion of defense counsel, the inference to be drawn by this evidence was that the brothers were responsible for the shooting and were naming Defendant as the shooter simply to shift blame from themselves and to negotiate a better deal with the State. (DAT. 607-613)

Humberto's testimony at trial was that Lazaro had stayed in the car while Humberto, armed with Lazaro's gun, and Defendant exited the vehicle to confront the victim. (DAT. 1040-1041, 1047) During the ensuing struggle, Humberto hit the victim in the head with Lazaro's gun and was shot by the victim. (DAT. 1048-1050) After he was shot, Humberto returned to the car and laid down in the back seat. (DAT. 1052-53) Lazaro drove to the

hospital, where Lazaro and Defendant helped Humberto into the hospital. (DAT. 1056)

Defendant presented one witness, Gopinath Rao, to establish that the gun shot residue found on the Cuellar brothers indicated that it was more likely than not that they had fired a gun. Rao's opinion was based on information he obtained from an information sheet that indicated that the shooting occurred at 5:40 a.m. and Lazaro Cuellar's hand swab was taken at approximately 9:00 a.m. (DAT. 1179) During defense counsel's direct, Rao further testified that gun shot residue dissipates very quickly and the amount of residue particles present in Lazaro Cuellar's swab at 9:00 a.m. was concentrated sufficiently such that it was consistent with Cuellar having fired a gun. (DAT. 1181) Rao admitted on cross-examination that the presence and quantity of lead particles on the hands of the Cuellar brothers was equally inconsistent with neither having fired a weapon, but being in the presence of a recently fired weapon or touching Humberto's gunshot wound. (DAT. 1187-88)

To rebut the testimony of Gopinath Rao regarding the timing of Lazaro Cuellar's hand swab, the State presented the testimony of Crime Scene Technician Richard Gallagher to establish that Lazaro's hands had in fact been tested at 7:45 a.m. and that Humberto's hands had been tested at 8:05 a.m. (DAT. 1283, 1289-

1290) Technician Gallagher testified that despite the error in the information provided to Rao, the correct times in which the swabs were taken were properly recorded on the packaging itself. (DAT. 1289-1290) Gallagher also testified that defense counsel had specifically been made aware of these facts during deposition months before trial. (DAT. 1289-1290)

After the defense rested its case and upon the notice that the State intended to recall Gallagher, defense counsel objected, alleging that the prosecutor was seen in the hallway after Rao's testimony discussing the case with Detective Ubeda and Technician Gallagher. (DAT. 1259-61) Ubeda and Gallagher were both called in for voir dire concerning the nature of their conversation with the prosecutor. Detective Ubeda testified that he had previously been advised that he would possibly be called as a witness in the State's rebuttal case if there was a "conflict in I.D. Technician Gallagher's testimony" but that he did not discuss Rao's actual testimony during Defendant's trial. (DAT. 1262) Defense counsel also voir dired Gallagher on the issue of Rao's testimony. (DAT. 1264-65) Gallagher testified that the prosecutor had advised him he would be recalled for rebuttal as Rao had testified regarding the time at which Cuellar brothers had been swabbed. (DAT. 1264) Defense counsel objected and moved to strike the rebuttal testimony of Gallagher

and moved for a mistrial, arguing that the State had violated the rule of sequestration. (DAT. 1264)

The trial court denied defense counsel's motion because he could not establish any prejudice. (DAT. 1264) Indeed, defense counsel had been made aware months before trial that the time of the swabbing indicated in Rao's report was an error. (DAT. 1289-90) The State had anticipated the possibility of presenting rebuttal testimony and had advised Det. Ubeda of the possibility even before the defense put on their case. (DAT. 1262) There was no surprise in the defense calling Rao to testify to raise the issue of the error in the reports relating to when the Cuellar brothers had been swabbed and that the State's rebuttal to address the clerical error. In fact, well in advance of Rao's actual testimony, defense counsel and the prosecutor discussed the anticipated length of the trial and the State indicated it would be calling such rebuttal witnesses. (DAT. 781) In light of Gallagher's deposition testimony it is also clear that the substance of his testimony was both unchanged and known to counsel. As such, Defendant was not prejudiced.

The trial court properly conducted a hearing in which it allowed inquiry of the witnesses who allegedly violated the rule of sequestration, and appropriately found that Defendant was not prejudiced. *See Beasley v. State,* 774 So. 2d 649 *((citing Gore*

v. State, 599 So. 2d 978)(Fla. 1992)(The rule of witness sequestration is designed to help ensure a fair trial by avoiding "the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand.")) Because the lower court found Defendant could establish no prejudice resulting from the rule of sequestration violation, it properly denied Defendant's motion to strike Gallagher's rebuttal testimony and motion for mistrial. "A motion for mistrial is addressed to the sound discretion of the trial judge and '...should be done only in cases of absolute necessity.' *Ferguson v. State*, 417 So.2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So.2d 745, 750 (Fla. 1978)). Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this non-meritorious issue on appeal. *Groover*; *Hildwin*; *Breedlove*.

G. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE ALLEGED FUNDAMENTAL ERROR OF STATE'S IMPROPER USE OF NON-STATUTORY AGGRAVATING FACTORS.

Defendant next contends that he was denied effective assistance of counsel when appellate counsel failed to raise on direct appeal the prosecutor's allegedly improper introduction and argument pertaining to non-statutory aggravating factors. Specifically, Defendant charges that appellate counsel should

have raised on appeal several allegedly improper comments made by the prosecutor during the penalty phase closing argument and the prosecutor's presentation of Defendant's pending robbery charges.

With respect to Defendant's claim with regard to the cross examination of Defendant's expert during which the prosecutor asked whether he was aware of Defendant's other pending robbery charges following said expert's testimony that Defendant could be rehabilitated, this issue was in fact raised by appellate counsel on direct appeal. *Mendoza*, 700 So. 2d at 675-678. Hence, appellate counsel cannot be deemed ineffective for failing to raise this issue, when he, in fact, did. *Strickland v. Washington.*

Additionally, the State notes that on direct appeal, this Court found that the details of the prior crimes were admissible and proper and that any reference to pending charges, although error, was harmless beyond a reasonable doubt. *Mendoza*, 700 So. 2d at 678; *see also Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)(the factual circumstances of prior violent felonies are admissible and proper at the penalty phase as are prosecutorial comments thereon, because, "we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of Defendant to ascertain whether

the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”). Consequently, any ensuing argument in which the State merely restated the testimony with respect to the expert’s lack of knowledge of the pending charges, if found to be error, would, likewise, be harmless. *See Mills* (claim which has been resolved in a previous review of the case is barred as the law of the case).

With respect to the other allegedly improper comments which Defendant advances amounted to an argument that Defendant should be sentenced to death to eliminate the threat to the community created by him, the issue was not preserved. In order to preserve an issue regarding a comment in closing, a defendant must interpose a contemporaneous objection to the comment. *See McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999)*; Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). Here, Defendant did not object to any of the comments about which he complains. As such, the issues were not preserved. Appellate counsel is not ineffective for failing to raise unpreserved or meritless issues. *See Grossman*; *Johnson*; *Groover*.

Even if defense counsel had objected to the allegedly improper comments, any issue pertaining to the same would have

been meritless, as the comments were completely proper viewed in context. The prosecutor correctly charged that the death penalty is justified in certain cases in which sufficient aggravating circumstances exist and the mitigating circumstances do not outweigh such aggravating circumstances. (DAT. 1647) Likewise, the other comments to which Defendant objects merely indicated that Defendant had committed such crimes which, under the circumstances of the aggravating circumstances and lack of mitigating circumstances, justified the death penalty. (DAT. 1651, 1656). Contrary to Defendant's assertion, stating that the Defendant committed crimes "in this community" does not amount to a future dangerousness argument. *See Rodriguez v. State*, 31 Fla. L. Weekly S 39. (no error in prosecutor's comment asking the jury to return a recommendation as members of the community) Defendant cites no authority in support of this assertion.

Moreover, any error in these comments was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The State's initial closing argument comprises nearly twenty pages of transcript, and the comments were brief. Further, the State presented overwhelming evidence of Defendant's guilt. The testimony at trial established that Defendant had approached Humberto Cuellar and enlisted his help in robbing the victim, who Defendant stated was known to carry large amounts of money. (DAT. 1034-35)

The men cased the victim's house prior to the robbery. (DAT. 1037) At approximately 4:00 a.m. on the morning of the murder, Defendant beeped Humberto Cuellar, who called his brother Lazaro to make arrangements to use Lazaro's car and have Lazaro drive to the robbery scene. (DAT. 1042-1044) According to Humberto, Lazaro stayed in the car while Humberto, armed with Lazaro's gun, and Defendant, armed with a chrome .38 revolver, exited the vehicle to confront the victim. (DAT. 1040-1041, 1047, 1067) During the ensuing struggle, Humberto hit the victim in the head with Lazaro's gun and was shot by the victim. (DAT. 1048-1050) After he was shot, Humberto returned to the car and laid down in the back seat. (DAT. 1052-53) As he was running back to the car, Humberto heard more gun shots. (DAT. 1052-1053) When Defendant returned to the car, he told Humberto that he had shot the victim. (DAT. 1055) Lazaro drove to the hospital, where Lazaro and Defendant helped Humberto into the hospital. (DAT. 1056) The Cuellar brothers were apprehended at the hospital. (DAT. 829) Palmetto Hospital employee Jack McColpin identified Defendant as the man he saw helping Humberto Cuellar into the hospital for treatment of a gunshot wound on the morning of the murder. (DAT. 725-729, 812) Lazaro's white Datsun was recovered at the hospital together with a 9mm automatic with a full clip and hair caught in the slide, Humberto's telephone book containing

Defendant's address and telephone number, and Humberto's beeper containing Defendant's telephone number. (DAT. 695-98, 702, 819, 848-849, 862, 865) Humberto's testimony was further corroborated by the fact that Defendant's fingerprints were recovered from the scene near the victim's body and the fact that the victim had a wound on his head which was consistent with having been hit in the head by the gun recovered from Lazaro's car. (DAT. 893, 903, 905, 1151-1153) Moreover, at the penalty phase evidence of Defendant's prior violent felony, a very similar robbery to the one for which he was being sentenced, was introduced. In light of the evidence of guilt and aggravation, any comment, if found to be error, would be harmless. ***DiGuilio***.

Finally, Defendant contends that the comments resulted in the jury not being given proper guidance regarding what was required before finding an aggravating circumstance. The record reflects that the trial court advised the jury:

> The aggravating circumstance that you may consider are limited to any of the following that are established by the evidence.
>
> The defendant has been previously convicted of another felony involving the use of violence to some person.
>
> The crime for which the defendant is to be sentenced was committed while he was engaged, or an accomplice in the commission, or an attempt to commit or flight after committing or attempting to commit the crime of robbery and/or burglary.
>
> The crime for which the defendant is to be sentenced was committed for financial gain.

* * *

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered in arriving at your decision.

(DAT. 1691-92). Hence, the jury was instructed that any aggravating circumstance must be proved beyond a reasonable doubt. As such, this issue was meritless. Appellate counsel is not ineffective for failing to raise meritless or unpreserved issues. *Grossman*; *Groover*.

H. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL AN ALLEGEDLY ERRONEOUS JURY INSTRUCTION PERTAINING TO EXPERT TESTIMONY.

Defendant next asserts that appellate counsel was ineffective for failing to raise on direct appeal the allegedly fundamental error of the trial court's instruction concerning when a particular witness is qualified as an expert. However, Defendant did not object to the instruction at trial. As the issue was unpreserved, appellate counsel cannot be deemed ineffective for failing to pursue it on appeal. *Grossman*; *Groover*.

Moreover, such a claim is insufficient as a matter of law, as the failure to appeal instructions that have been upheld and not invalidated by this Court does not establish deficient conduct within the meaning of *Strickland v. Washington*. *Downs v. State*, 740 So. 2d 506, 517-18 (Fla. 1999).

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL NON-MERITORIOUS ISSUES RELATING TO VARIOUS ARGUMENTS BY THE PROSECUTOR AND TRIAL COURT'S STATEMENTS.

Defendant argues that various comments and alleged misconduct by the prosecutor during both the guilt phase and penalty phase and statements from the trial court, most of which are raised above in separate claims, amounted to fundamental error that deprived him of a fair trial. He further contends that appellate counsel was ineffective for failing to raise the totality of the following errors individually and/or cumulative on appeal: (1) the prosecutor's allegedly improper accusation that defense counsel was deliberately attempting to perpetuate a fraud upon the jury; (2) the prosecutor's violation of the rule of sequestration; (3) the prosecutor's discovery violation regarding the medical examiner's opinion that the victim's head laceration was consistent with being struck with Lazaro Cuellar's gun; (4) the prosecutor's comments during the guilt phase of Defendant's trial; (5) the trial court's failure to instruct the jurors on taking notes; and (6) the prosecutor's comments during the penalty phase of Defendant's trial. However, a review of the record illustrates that these claims were either raised on direct appeal, unpreserved and/or meritless. Appellate

counsel is not ineffective for failing to raise unpreserved or meritless claims. *Grossman*; *Groover*.

Defendant's claims with respect to the prosecutor's violation of the rule of sequestration, the prosecutor's and trial court's comments that allegedly shifted the burden and commented on Defendant's right to remain silent, the introduction of and argument with respect to Defendant's pending robbery charges, and the prosecutor's other allegedly inflammatory penalty phase closing comments have all been addressed above. For all the reasons stated in those discussions, none presents a claim with merit. Thus, cumulatively, they do not create a reasonable likelihood of a different result. *Downs.*

Defendant also complains that the prosecutor improperly accused defense counsel of deliberately trying to perpetuate a fraud upon the jury when, in discussing defense counsel's presentation of Rao's testimony regarding the gunshot residue, she stated:

> ...I suggest to you that what happened in regards to Technician Gallagher and the attempt to have Criminalist Rao tell you that all his opinions were based on nine o'clock in the morning. That the gunshot residue tests were performed at nine o'clock in the morning on Lazaro Cuellar is what the rest of the this defense is about because you all know that is not true. Not only do you all know that the tests were not

> done at nine, you heard the witness and you saw it on the bag. They knew, Mr. Wax, in June of 1992. That was told to them by the technician when he took those tests and yet he proceeded to put on an expert witness who based aan opinion on something that wasn't accurate. He knew it wasn't nine o'clock all along. Back in June of 1992 he knew that that was not accurate and he put that man in front of you to try to confuse and mislead you to based an opinion on something that is not true.

(DAT. 1302-03) Defendant also complains that the prosecutor reiterated this improper theme when she later repeated that defense counsel had presented Rao's testimony to suggest Lazaro Cuellar had fired a gun when Dr. Rao's "whole conclusion is based on the wrong time and they purposely put it on to mislead you because they knew the right time." (DAT. 1318-19) However, neither comment was objected to and, therefore, both comments were unpreserved for appeal. Appellate counsel is not ineffective for failing to raise unpreserved issues. *Grossman*; *Johnson*.

Moreover, the prosecutor's comments were fair comment on the evidence adduced at trial. *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). Technician Gallagher testified that he had advised defense counsel during his deposition months prior to trial that Rao's report reflected the incorrect time that the Cuellar brothers' hands were swabbed and that defense counsel was advised the evidence bag and other reports reflected the correct

time. (DAT. 1289-1290) Indeed, defense counsel did present Rao's testimony as if his report reflected accurate data, rather than merely for the purpose of demonstrating the inconsistencies in the reports and arguing error. Thus, the prosecutor's comment that defense counsel was attempting to mislead the jurors as to the issue of when the Cuellar's hands had been swabbed was not an unfair characterization of the evidence. Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this non-meritorious issue on appeal. *Groover*; *Hildwin*; *Breedlove.*

Furthermore, both comments were brief and not a feature of the prosecutor's closing. Any error was certainly harmless in light of the overwhelming evidence that Defendant: enlisted the assistance of Humberto Cuellar and his brother to rob the victim, performed reconnaissance of the victim prior to the robbery, lay in wait in the bushes outside the home of the victim in the early morning hours before attacking him with drawn pistol, informed a wounded Humberto Cuellar he had, in fact, killed the victim, and then absconded to his mother's home where he shaved his head and attempted to alter his appearance. (DAT. 1034-34, 1035-38, 1042-44, 1040-41, 1047, 1055, 830, 874-75, 1068, 1070) Accordingly, Defendant has not sufficiently

alleged prejudice with respect to appellate counsel's failure to raise this claim. *Strickland.*

Similarly, Defendant argues that appellate counsel was ineffective for failing to raise on appeal that the State violated the rules of discovery by failing to advise the defense that the medical examiner was going to testify that the laceration on the victim's head was consistent with having been caused by Humberto Cuellar striking the victim with Lazaro's Taurus nine millimeter. However, the record reveals that upon counsel's objection, a full *Richardson* hearing was conducted. (DAT. 895-904) The hearing revealed that the State's medical examiner had previously been deposed by defense counsel and testified that the wound to the victim's head was consistent with a blow to the head from a gun. (DAT. 900-01) Although at the time of her deposition she had not been shown the specific Taurus nine millimeter gun, at the *Richardson* hearing she testified she could still not say that that specific gun caused the wound to the victim's head. (DAT. 900) Thus, faced with the fact that, in sum, the medical examiner's testimony had not changed from the time of her deposition to the time of trial, defense counsel properly conceded he had not been prejudiced. (DAT. 901) As such, Defendant clearly was not prejudiced and

appellate counsel cannot be deemed ineffective for failing to pursue this meritless issue. *Groover*; *Hildwin*.

Next, Defendant charges that the prosecutor denigrated the law by advising the jury that they may find that some of the instructions that will be read to them by the trial court may not apply to Defendant. (DAT. 1300) Such comment was an accurate reflection of the province of the jury and the prosecutor committed no misconduct. *Gonzalez v State*, 786 So. 2d 559, 568 (Fla. 2001) Defendant cites no authority to the contrary. Accordingly, appellate counsel cannot deemed ineffective for failing to pursue such claim. *Groover*.

Defendant also complains that the trial court erroneously permitted the jury to take notes without properly instructing them regarding the use of such notes. Additionally, Defendant contends that the error was made worse by the prosecutor's encouragement that they compare notes during deliberation. Defendant did not object at trial regarding this issue; accordingly, any claim with regard to this issue was unpreserved for appeal. *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Flanagan v. State*, 586 So.2d 1085 (Fla. 1st DCA 1991), *see also Herera v. State*, 532 So.2d 54 (Fla. 3d DCA 1988).

Additionally, as Defendant concedes, permitting the jurors to take notes during the trial falls within the sound discretion

of the trial court. *U.S. v. Rhodes*, 631 F. 2d 43 (5th Circ. 1980). Defendant fails to allege any grounds for his conclusory assertion that such note-taking was improper or the prosecutor's comment that the jurors might compare their notes during deliberation was improper. As such, this issue is insufficiently plead and meritless. Appellate counsel is not ineffective for failing to pursue meritless or unpreserved issues on appeal. *Teffeteller*.

Finally, Defendant contends that appellate counsel was ineffective for failing to raise on appeal the alleged error of the prosecutor's comments during the penalty phase of Defendant's trial. Defendant claims that the prosecutor denigrated Defendant's case for mitigation. However, the transcript reflects that the prosecutor's comments were appropriate comment on the evidence presented at the penalty phase. The prosecutor only argued that Defendant failed to establish evidence that he suffered from drug addiction to the extent he was unaware of his conduct during the murder. (DAT. 1653-61) Rather, the evidence at trial established that Defendant coldly and methodically planned the robbery. Thus, this issue is meritless and appellate counsel is not ineffective for failing to raise it on appeal. *Teffeteller*.

While Defendant contends that appellate counsel should have

argued that the result of his trial and sentencing were not reliable due to the cumulative effect of the above alleged errors, appellate counsel cannot be deemed ineffective for failing to make such argument when the alleged errors were either unpreserved or without merit. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

J. APPELLATE COUNSEL WAS NOT INEFFECTIVE IN THE MANNER IN WHICH HE APPEALED THE TRIAL COURT'S ALLEGED EX PARTE COMMUNICATION WITH THE JURY.

Defendant asserts he was denied his fundamental right to a fair and impartial trial when the trial court had out-of court, ex parte communications with the jury. As Defendant concedes, appellate counsel did raise this issue on appeal. Defendant argues counsel was ineffective in the manner in which the issue was argued without identifying what manner a reasonable competent appellate attorney would have argued the claim. Instead, Defendant merely offers the conclusory allegation that "direct appeal counsel was ineffective in the manner this issue was argued on direct appeal." Thus, the claim is facially insufficient, and should be denied.

Moreover, it is without merit. With respect to this claim this Court found:

> First, we point out that this communication does not fall within the scope of Florida Rule of Criminal Procedure 3.410, which provides that if, after the

> jury retires to consider the verdict, the jurors request additional instructions, such instructions shall be given only after notice to the prosecuting attorney and to counsel for defendant. Fla. R.Crim. P. 3.410....These comments were made during the type of normal encounter between a judge and a jury which is likely to occur during a trial recess. In the courthouse in which this trial took place, the dining area is necessarily used by both the judge and jurors during a trial. Thus, the judge and jurors cannot avoid encountering one another outside the courtroom. It would be unrealistic and wrong for us to instruct a judge not to respond at all to jurors who ask questions during such encounters. Rather, we expect a judge to respond to jurors with no more than minimal, courteous answers. In this case, the record of the judge's response reflects exactly the course we would expect a trial judge to take. The judge replied as succinctly and as innocuously as common courtesy permitted under the circumstances. Shortly thereafter, the court put the encounter into the record so that the parties and the reviewing court would be aware of what had occurred. Accordingly, we find no error.
>
> Finally, even if we considered the judge's comments to be error, communications outside the express notice requirements of rule 3.410 should be analyzed using harmless-error principles....We find harmless in this case any error in the judge's responding to jurors during a lunch break by courteously indicating a constraint upon engaging in conversation. The court correctly informed the parties in open court of the brief exchange with jurors and allowed the parties an opportunity to object on the record. Thus, any error in the judge's brief communication with jurors was harmless.

Mendoza, 700 So. 2d 670 at 674. It is clear from this Court's extensive discussion of the issue that counsel effectively presented those issues. Appellate counsel's failure to persuade this court does not amount to deficient performance. *See Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003); *Haliburton v.*

State, 691 So. 2d at 472; *Sims v. Singletary*, 622 So. 2d 980, 981 (Fla. 1993); *Douglas v. State*, 373 So. 2d 895, 896 (Fla. 1979). The claim, therefore, should be denied.

K. DEFENDANT'S CLAIM THAT THE STATE'S ARGUMENT TO THE JURY TO CONSIDER DEFENDANT'S PENDING ROBBERY TRIAL VIOLATED HIS EIGHTH AMENDMENT IS MERITLESS.

Defendant asserts that to the extent that appellate counsel failed to raise that the State's questions and argument concerning Defendant's pending charges for other robberies using a firearm violated the Eighth Amendment, appellate counsel was ineffective. The claim of unauthorized presentation of nonstatutory aggravating factors was raised on direct appeal, and as such, is procedurally barred in these post-conviction proceedings. Post-conviction proceedings are not a second appeal, and issues raised on direct appeal are procedurally barred. *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990); *Francis v. Barton*, 581 So. 2d 583, 584 (Fla. 1991); *Mills.*

Finally, the State notes that on direct appeal, this Court specifically found that the details of the prior crimes were admissible and proper and that any reference to pending charges was harmless beyond a reasonable doubt. *Mendoza*, 700 So. 2d at 678; *see also Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)(the factual circumstances of prior violent felonies are admissible and proper at the penalty phase as are prosecutorial

comments thereon, because, “we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of Defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”).

As this Court fully considered and rejected this claim, Defendant fails to establish how raising the same claim on different grounds creates a reasonable likelihood of a different result. Thus, the claim should be denied.

CONCLUSION

For the foregoing reasons, the claims should be denied.

Respectfully submitted,

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_____
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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 **Rachel L. Day**, Assistant CCRC, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301, this 3rd day of March, 2006.

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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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