IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1316

HENRY GARCIA,

Petitioner,

vs.

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

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

TABLE OF CONTENTS

INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols ADAR.@ and ADAR-SR.@ will refer to the record on appeal, which includes the transcript of proceedings, and supplemental record on appeal from Defendant=s last 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. *Garcia v. State*, FSC Case No. SC04-866. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILING TO RAISE "NUMEROUS ISSUES" SHOULD BE DENIED.

Defendant first asserts that his appellate counsel was ineffective for failing to raise issues on appeal. However, Defendant fails to specify any issue that appellate counsel allegedly failed to raise or to explain how there is a reasonable probability that the result of his appeal would have been different had the unspecified issues been raised. As such, the claim is facially insufficient and should be denied. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004).

II. THE CLAIMS RELATED TO THE STATE OF THE RECORD SHOULD BE DENIED.

Defendant next asserts that his appellate counsel was ineffective for failing to see that the record on appeal was complete. Specifically, Defendant complains that the record did not include several unrecorded bench conferences, that counsel did not request a relinquishment of jurisdiction regarding a spelling correction the trial court had made to a portion of the transcript before reading that portion of the transcript back to the jury, that counsel should have claimed that the failure of the record to include a transcript of the reading back of David Rhodes' testimony violated due process, and that counsel did not request a relinquishment of jurisdiction for the trial court to conduct a hearing to "reconstruct" the reading back of David Rhodes' testimony. However, these claims should be denied as procedurally barred and facially insufficient.

With regard to the failure to complain regarding unrecorded bench conferences, Defendant does not assert what issue he could not have raised because the bench conferences were unrecorded or how that unspecified issue would have created a reasonable probability of a different outcome on appeal. As such, this claim is facially insufficient. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); *Ferguson v. Singletary*, 632 So. 2d 53, 58

(Fla. 1993). This is particularly true as the record reflects that the conferences were generally for the purpose of scheduling discussion. (DAR. 492-93, 870-71, 1019, 1096) The claim should be denied.

Defendant next suggests that appellate counsel should have requested a relinquishment for the trial court to determine whether the transcript was accurate where it reflected that Perez stated a Spanish phrase as "Te la Shingastes." (DAR. 1026) However, Defendant does not explain how relinquishing jurisdiction for this purpose would, in any way, affect the outcome of the appeal. As such, the claim is insufficient and should be denied. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004). This lack of pleading is particularly important because Perez testified that "Te las chingastes" was plural. (DAR. 1037) She stated that "las" was feminine. (DAR. 1037) Moreover, the trial court had already held a hearing regarding whether the transcript was accurate and determined that it was not. (DAR. 1467-71) Under these circumstances, counsel was not ineffective for failing to request a meritless relinquishment. *See Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

With regard to the complaint concerning the argument about Rhodes' testimony, Defendant admits the issue was raised on

appeal. He simply suggests that counsel should have made additional arguments. This Court has held that such claims are procedurally barred. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). As such, the claim should be denied.

With regard to requesting relinquishment to reconstruct the read back of Rhodes' testimony, Defendant again does not assert how the failure to have requested such a relinquishment would have created a reasonable probability of a different outcome of the appeal. As such, the claim is insufficient. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004). It should be denied.

III. THE CLAIMS REGARDING MS. FLIGHT SHOULD BE DENIED.

Defendant next claims that his appellate counsel was ineffective for the manner in which he raised an issue regarding the testimony of Rose Flight.

On direct appeal, Defendant argued that his convictions should be reversed because the State had made improper appeals to the jury's sympathy. Initial Brief of Appellant, FSC Case No. 78,411, at 56. In support of this claim, Defendant asserted that the State had made improper reference to the victims' family during opening and through the testimony of Ms. Flight. He complained that prosecutor had assisted Ms. Flight in getting to the witness stand and had elicited hearsay through her. *Id.* This Court rejected these arguments. *Garcia v. State*, 644 So. 2d 59, 62-63 (Fla. 1994). Since the issues were raised and rejected on direct appeal, counsel cannot be deemed ineffective for failing to raise the issues. *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000). The claim should be denied.

In an attempt to avoid the fact that the issues were raised on direct appeal, Defendant asserts that counsel should have presented additional arguments in support of these issues. However, claims that seek to relitigate claims that were raised and rejected on different grounds are procedurally barred and without merit. *Riechmann*, 777 So. 2d at 365-66; *Harvey v.*

Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). The claim should be denied.

Even if this claim was not barred because it was raised on direct appeal, Defendant would still be entitled to no relief. The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

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

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

> assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

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

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

In order to preserve an issue regarding the admission of evidence or comments in opening, it is necessary for a defendant to interpose a contemporaneous objection to the evidence or the comment. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, it is also necessary for the objection to be raised on the same grounds that are asserted as error on appeal.

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). A defendant must also obtain a ruling by the trial court on the objection to preserve the issue. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). If the trial court rules in a defendant's favor on the objection, it is necessary for the defendant to move for a mistrial to preserve the issue. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001).

Here, Defendant did not preserve many of the issues about which he presently complains. During opening statement, the State asserted that it would establish when the victims were killed through Ms. Ballentine's habit of working crossword puzzles and Ms. Flight's testimony concerning her transportation of Ms. Avery. (DAR. 583-84) The State explained how the bodies were discovered. (DAR. 584-87) It also discussed Ms. Flight's actions in notifying the victims' family after she learned that they had been murdered. (DAR. 587) Defendant never objected to any of these comments. (DAR. 583-87)

The State then called Ms. Flight. (DAR. 617) Ms. Flight testified without objection that she knew the victims well because they were elderly and relied upon Ms. Flight to provide transportation. (DAR. 617) She stated without object that Ms. Avery was an avid reader, who read the paper everyday, saving

the sports section for Ms. Flight's husband, and borrowed numerous books from the library. (DAR. 617-18) She also asserted without objection that Ms. Ballentine loved to do crossword puzzles. (DAR. 618) Ms. Flight testified over Defendant's overruled relevance objection that she took the victims to the doctors when they had appointments. (DAR. 619)

When asked if there came a time when something happened to the victims, Ms. Flight responded by explaining how she was notified by a neighbor that something appeared amiss at the victims' home on the morning of January 17, 1983, how she and the other neighbors responded to the unusual state of the victims' home, the attempts made to enter the home and the eventual entry in the home and discovery of the bodies. (DAR. 619-22) She then recounted how she notified the victims' family of their deaths. (DAR. 622-23) Again, Defendant did not object. (DAR. 622-23)

When the State started to show Ms. Flight pictures of the victims, Defendant requested a sidebar. (DAR. 623) At sidebar, Defendant objected to the State assisting the witness in getting to the witness stand, to Ms. Flight's narrative testimony and to "all kind of irrelevant hearsay." (DAR. 624) He then offered to stipulate to the identities of the victims. (DAR. 624) The trial court responded it would take the objections one at a

time. (DAR. 624) It instructed the State not to walk Ms. Flight out of the courtroom. (DAR. 624) The State accepted the stipulation as to identity. (DAR. 624-25) The trial court made no ruling on Defendant's other objections, and Defendant made no request for any additional rulings. (DAR. 625)

After the sidebar, the stipulation was announced. (DAR. 625) Ms. Flight then testified without objection that the victims usually kept their home immaculately clean. (DAR. 626) Defendant elicited from Ms. Flight that Ms. Avery usually arose around 6 a.m. each morning but Ms. Ballentine did not awake until 9 a.m. (DAR. 627) While Ms. Flight did not know when the victims went to bed, she was involved in activities with them during the daytime. (DAR. 627-28)

As can be seen from the forgoing, Defendant did not object to the comments in opening or to most of Ms. Flight's testimony. Moreover, when Defendant did object to the narrative nature of Ms. Flight's testimony and to the elicitation of hearsay, Defendant never obtained a ruling on these issues from the trial court. The trial court found that it was improper for the State to assist Ms. Flight to the witness stand and instructed the State not to assist Ms. Flight when she left the courtroom. However, Defendant never moved for a mistrial based on this. Further, Defendant only objected to the testimony about taking

the victims to the doctors on relevance grounds and not on grounds that its prejudicial value outweighed its probative value or that it was an attempt to garner sympathy from the jury. As such, these issues were unpreserved. *Rose v. State*, 787 So. 2d 786, 797 (Fla. 2001); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Because these issues were unpreserved, counsel cannot be deemed ineffective for failing to raise them. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Further, while Defendant asserts that Ms. Flight's testimony concerning the victims' habits and her driving the victims where they needed to go were irrelevant to any issue in this matter, this is not true. Defendant extensively contested the time the victims' died in an attempt to show that he could not have killed them. To show that the victims died early on Sunday morning, the State relied, in part, on the evidence that the victims' had not yet brought in their Sunday paper but the Saturday paper was found in a condition that showed it had been read and the crossword puzzle had been completed. Under these circumstances, evidence regarding the victims' habits and Ms. Flight's basis for knowledge of those habits was relevant to an

issue in this matter. §90.401, Fla. Stat.

Defendant also asserts that counsel should have argued that Ms. Flight's testimony should have been excluded because Defendant offered to stipulate to the identity of the victims. However, Defendant would be entitled to no relief. Ms. Flight's testimony was not limited to proof of identity. Instead, her testimony was relevant to factors probative of the time of the victims' death; a fact that was in dispute. Moreover, evidence of how the victims were found dead and entry was gained to do so was relevant to the condition of the crime scene. Defendant extensively questioned the state of the crime scene, placing its condition in dispute. Further, Defendant relies upon ***Old Chief v. United States***, 519 U.S. 172 (1997), and ***Brown v. State***, 719 So. 2d 882 (Fla. 1998), as a basis for this argument. However, neither of these cases had been issued by 1994, when this Court affirmed Defendant's convictions and sentences. As such, counsel cannot be deemed ineffective for failing to make an argument predicated on these decisions. ***Darden v. State***, 475 So. 2d 214, 216-17 (Fla. 1985).

Defendant further suggests that counsel should have argued that some of Ms. Flight's testimony was hearsay. However, Defendant does not identify which testimony he considers to be hearsay except to cite to three pages of transcript. Reviewing

those pages, it appears that many of the statements were not offered for the truth of the matter asserted in the statements. (DAR. 619-21) Statements that are not offered for the truth of the matter asserted are not hearsay. §90.801(1)(c), Fla. Stat.; *Breedlove v. State*, 413 So. 2d 1, 6 (Fla. 1982). Instead, the testimony at issue appears to have been admitted to show how the murders were discovered, the condition of the home prior to the entry by the neighbors, why the neighbors entered the home in the manner they did and the changes to the crime scene based on that method of entry. Under these circumstances, a hearsay objection would have been unavailing. Moreover, given Defendant's challenges to the state of the crime scene, testimony concerning it was relevant. As such, appellate counsel cannot be deemed ineffective for failing to raise these nonmeritorious issues. *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.

Even if the admission of this testimony could be considered erroneous, Defendant would still be entitled to no relief. Defendant admitted, and the evidence showed, that the two elderly victims were attacked in their own home and repeatedly stabbed. Entry to the home was gained through breaking a rear window. The victims were repeatedly stabbed to death, and Ms.

Ballentine was sexually violated with an object like a knife both vaginally and anally. Defendant was observed in bloody clothes and with a bent and bloody knife near the crime scene shortly after the crime. Defendant's explanation for being there in that condition was incredible. Moreover, Defendant was heard making an inculpatory statement. The use of Ms. Flight's testimony by the State was to show the time of the crime and the state of the crime scene. Under these circumstances, the admission of Ms. Flight's testimony was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellate counsel cannot be deemed ineffective for failing to pursue this issue further. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). The claim should be denied.

Defendant further complains about counsel's failure to raise an issue regarding the denial of a motion for mistrial based on statements Ms. Flight made while leaving the witness stand. Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue.

At the conclusion of Ms. Flight's testimony, Defendant noted for the record that as she left the courtroom, Ms. Flight thanked the judge and prosecutor and commented to Defendant that she had recently had three heart attacks. (DAR. 629) Defendant moved for a mistrial claiming that Ms. Flight's comments

prejudiced the jury. (DAR. 629-30) The State responded that Ms. Flight had actually said "thank you all," which included the defense, that the comments about the heart attacks had been directed to the person assisting her in leaving the courtroom, not the defense, and that the tone of Ms. Flight's voice was not raised and probably could not have been heard by the jury. (DAR. 630-31) The trial court noted that Ms. Flight had spoken so softly that it had not even heard all of what was said and that he was almost certain the jury could not have heard the comment. (DAR. 631) As such, he denied the motion. *Id.* Defendant never requested that jury be questioned about whether they had heard the comments.

This Court has held that motions for mistrial are addressed to the discretion of the trial court and should only be granted if necessary to ensure that the defendant receives a fair trial. *Gore v. State*, 784 So. 2d 418, 427 (Fla. 2001)(quoting *Goodwin v. State*, 751 So. 2d 537, 547 (Fla. 1999)); *Ferguson v. State*, 417 So. 2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978), *cert. denied*, 444 U.S. 885 (1979)). This Court has also repeatedly held that reviewing courts should defer to the trial court's judgment in ruling on motions for mistrial when they cannot glean from the record how intense a witness's outburst was. *Thomas v. State*, 748 So. 2d 970, 980

(Fla. 1999); *Arbelaez v. State*, 626 So. 2d 169, 175-76 (1993); *Justus v. State*, 438 So. 2d 358, 366 (Fla. 1983); *see also Torres-Arboledo v. State*, 524 So. 2d 403, 409 (Fla. 1988). This Court has applied this standard even without noting that the jury was colloquied. *Thomas*; *Justus*, *Torres-Arboledo*.

Here, to the extent the record reflects the statement, it supports the trial court's findings and the State's position. At the conclusion of her testimony, Ms. Flight stated, "Thanks, all of you." (DAR. 628) Moreover, both the State and the trial court noted that Ms. Flight was not speaking loudly when she commented about her medical condition. Under these circumstances, the trial court did not abuse its discretion in denying the motion for mistrial. *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999); *Arbelaez v. State*, 626 So. 2d 169, 175-76 (1993); *Justus v. State*, 438 So. 2d 358, 366 (Fla. 1983); *see also Torres-Arboledo v. State*, 524 So. 2d 403, 409 (Fla. 1988). Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

IV. THE CLAIMS REGARDING THE PAYROLL RECORDS SHOULD BE DENIED.

Defendant next contends that his appellate counsel was ineffective for the manner in which he raised issues regarding the State's presentation of evidence regarding his payroll records. Specifically, Defendant complains that counsel did not assert that evidence that Perez always provided her social security number to employers and evidence that certain payroll records were not provided to the police was improperly admitted and that Det. Smith was excused from the rule on witness sequestration. However, Defendant is entitled to no relief.

With regard to his claims regarding the testimony of Perez and Sgt. Radcliff, Defendant appears to assert in a conclusory fashion that this testimony was not proper rebuttal. However, Defendant mainly seems to be complaining about the timing of the admission of this evidence. However, Defendant is not entitled to relief on either basis.

As Defendant acknowledges, he claimed on direct appeal, as part of his prosecutorial misconduct claim, that Sgt. Radcliff's testimony did not rebut Paz's testimony and that it was improper for the State to use it as such. Initial Brief of Appellant, FSC Case No. 78411, at 52-54. This Court rejected this argument. *Garcia*, 644 So. 2d at 62-63. Since the issue was

raised and rejected on direct appeal, counsel cannot be deemed ineffective for failing to have raised the issue. *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000). The claim should be denied.

In an attempt to avoid the fact that the issues were raised on direct appeal, Defendant asserts that counsel should have presented additional arguments in support of these issues. However, claims that seek to relitigate claims that were raised and rejected on different grounds are procedurally barred and without merit. *Riechmann*, 777 So. 2d at 365-66; *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). The claim should be denied.

Even if the claim was properly before this Court, the claim should still be denied. At trial, Defendant did not object to Sgt. Radcliff's testimony on the grounds that it was improper rebuttal testimony. In fact, Sgt. Radcliff testified without objection that he interviewed Trevino in September 1985, in an attempt to locate employment records. (DAR. 1087-88) He obtained no useful records. (DAR. 1088) He stated, without objection, that he had never seen certain records. (DAR. 1088) When the State asked if the records had been produced by Trevino, Defendant's objection was overruled, and Sgt. Radcliff

stated he had not. (DAR. 1088-89) At a subsequent sidebar, Defendant explained that his objection to Sgt. Radcliff's testimony was improper impeachment of the work records he had not yet entered. (DAR. 1099-1100) The trial court found that it was properly admitted in anticipation of the defense. (DAR. 1100) Since Defendant's objection was based on the timing of the introduction of this evidence and not that it was improper rebuttal, Defendant did not preserve the issue he is presently raising. *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 such, appellate counsel cannot be deemed ineffective for failing to raise this unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the issue had been preserved, counsel would still not have been ineffective for failing to claim that it was improper rebuttal. A trial court has broad discretion to admit rebuttal evidence that is inconsistent with the theory of defense or impeaches a defense witness. *See Rimmer v. State*, 825 So. 2d 304, 321 (Fla. 2002). Here, part of the defense in this matter was that Perez could not have heard Defendant make his inculpatory statement because Defendant was not working with Perez after the crimes. In support of that defense, Defendant

admitted records from an employer of Perez and him. Sgt. Radcliff's testimony was that he attempted to obtain work records from the business that eventually produced the records upon which Defendant was relying, that he was unable to obtain any useful records and that the records upon which Defendant was relying were not produced. Such contradictions by omission are permissible manners of impeaching a witness or rebutting a claim. *See State v. Smith*, 573 So. 2d 306, 313 (Fla. 1990); *Raupp v. State*, 678 So. 2d 1358, 1359-60 (Fla. 5th DCA 1996).

While Defendant asserts that this evidence was not probative because Sgt. Radcliff was not looking for Defendant's records, this ignores that the records were not in Defendant's name. Instead, the records were in the name of Enrique Juares. Sgt. Radcliff did not recall if he was aware Enrique Juarez was among Defendant's aliases at the time. (DAR. 1092) Moreover, the name on the records and the name used as an alias were spelled differently. Under these circumstances, the fact that Sgt. Radcliff was not looking for Defendant's records does not explain why he did not receive the records relied upon by Defendant. As such, the lower court did not abuse its discretion in allowing the admission of this evidence as rebuttal, and appellate counsel cannot be deemed ineffective for failing to make the meritless assertion 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.

Perez's testimony was also proper rebuttal of this same theory. The record presented regarding Perez did not include her social security number. As such, Perez's testimony that she always provided her social security number to her employers and filed her tax returns was properly admitted as inconsistent with the defense theory and Paz's testimony. *See Garcia v. State*, 816 So. 2d 554, 563 (Fla. 2002); *Raupp v.* State, 678 So. 2d 1358, 1359-60 (Fla. 5th DCA 1996). This is particularly true when one considers that Perez testified that she had worked for Trevino since 1965 and Paz attempted to explain the lack of a social security number by claiming that Perez must have not provided one. As such, Perez's testimony was not an abuse of discretion, and 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.

To the extent that Defendant is merely asserting that counsel should have complained about the timing of the admission of the evidence, Defendant is still entitled to no relief. Defendant did not object to Perez's testimony on the grounds

that it was improper to present anticipatory rebuttal. As such, he did not preserve this issue for review. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Since the issue was unpreserved, this claim sgould be denied.

Moreover, Section 90.612, Fla. Stat. gives trial courts broad discretion over the mode and timing of presentation of witnesses and evidence. As such, this Court and other Florida courts have permitted the State to present proper rebuttal evidence during its case in chief. *Consalvo v. State*, 697 So. 2d 805, 814-15 (Fla. 1996); *Walker v. State*, 763 So. 2d 495 (Fla. 4th DCA 2000); *Biondo v. State*, 533 So. 2d 910, 910-11 (Fla. 2nd DCA 1988). These cases are particularly applicable to Sgt. Radcliff's testimony as by the time the State presented this evidence, Defendant had not only raised the issue during opening but had presented evidence in support of the theory during Perez's cross examination. Thus, the trial court did not abuse its discretion in the timing of the admission of the rebuttal evidence, and appellate counsel cannot be deemed ineffective for failing to claim that he had. *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 upon which Defendant relies do not compel a

different result. In *Burns v. State*, 609 So. 2d 600, 605 (Fla. 1992), the State admitted evidence of the victim's training and character as a law enforcement officer to "rebut" a statement in opening that the shooting occurred accidentally during a struggle. In *Jacob v. State*, 546 So. 2d 113 (Fla. 3d DCA 1989), the State presented character evidence to rebut a claim that defendant had reacted to the victim's violent conduct toward him. As such, the issue presented was more than simply the timing of the presentation of the evidence but the propriety in general of the rebuttal evidence. Here, as argued *supra*, the evidence was proper rebuttal evidence. As such, the only issue is the timing of the admission of that evidence. Given that this was the third time this matter was being tried and the fact that presentation of the evidence that was being rebutted was clearly part of Defendant's defense, these cases do not compel a finding that the trial court abused its discretion in allowing the presentation of the testimony when it did. The claim should be denied.

Even if the trial court did abuse its discretion in allowing the State to present this evidence during its case in chief, any error would have been harmless. Defendant did present the work records and did attempt to use as part of his defense that Perez could not have heard Defendant's inculpatory statement because

they were not working together at the time. As such, this evidence would have been properly admissible after Defendant presented Paz. Thus, the jury would have heard the same evidence only slightly later in the proceedings. The fact that the jury may have heard this evidence earlier than they should have did not affect the jury's verdict. As such, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *see also Valle v. State*, 581 So. 2d 40, 46 (Fla. 1991). Thus, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002).

With regard to the claim that counsel was ineffective for failing to raise an issue regarding the trial court exempting Det. Smith from the rule on witness sequestration, again Defendant is entitled to no relief. This Court has held that trial courts have discretion to exempt witnesses from the rule on witness sequestration. *Knight v.* State, 746 So. 2d 423, 430 (Fla. 1998); *Randolph v.* State, 463 So. 2d 186, 191-92 (Fla. 1984). While this Court did require a hearing on whether the presence of the witness was necessary and whether the witness's presence would prejudice the defense, this Court has refused to vacate a conviction where the failure to hold such a hearing did not lead to an improper conviction. *Randolph*, 463 So. 2d at

192. In determining the prejudice to the defense from excluding a witness from the rule, this Court has considered that the purpose of the rule is to prevent witness collusion or the coloring of testimony based on having heard the testimony of other witnesses. *Knight*, 746 So. 2d at 430; *Randolph*, 463 So. 2d at 191. This Court has refused to reverse convictions, where the witness was not a primary actor in the crime, his testimony was not suggested by the testimony of other witnesses, the witness was testifying based on the review of records or was testifying to the authentication of evidence. *Knight*, 746 So. 2d at 430; *Randolph*, 463 So. 2d at 191.

Here, just before opening statement, the State requested that Det. Smith be allowed to remain in the courtroom during trial to assist, as he had at the prior trial proceeding. (DAR. 574) Defendant objected to allowing Det. Smith to remain in violation of the rule but did not challenge the State's assertion that it needed Det. Smith to assist or assert any prejudice. (DAR. 575-76) The trial court found that it had discretion to allow Det. Smith to remain. (DAR. 576) The State did not call Det. Smith to testify at trial. Instead, Defendant called Det. Smith to testify that Defendant used the aliases David Garcia and Enrique Juarez. (DAR. 1328-31) Det. Smith's testimony concerning the use and spelling of the alias Enrique

was based on his review of prior information. *Id.*

As can be seen from the forgoing, the lower court had already considered this issue during the prior proceeding. Moreover, through that proceeding, it had seen whether there was any prejudice from Det. Smith's presence. Moreover, Det. Smith's testimony was limited to discussing Defendant's alias based on his review of records. While Defendant asserts that Det. Smith's credibility was enhanced by being present in the courtroom, Defendant does not explain how this prejudiced him since Det. Smith was a defense witness. Moreover, Defendant does not explain how hearing the testimony of Perez, Sgt. Radcliff and Ida Paz would have caused Det. Smith to have testified any differently concerning the aliases he saw that Defendant had used or the spelling of those aliases. Instead, he simply asserts that Det. Smith knew what the State wanted him to say. However, neither Perez or Sgt. Radcliff testified regarding Enrique Juarez. Moreover, having been through the prior trial and presumably being prepared to testify, Det. Smith would have known what testimony was expected. Under these circumstances, there is no reasonable probability that this Court would have reversed Defendant's conviction had this issue been raised. *Knight*, 746 So. 2d at 430; *Randolph*, 463 So. 2d at 191-92. As such, counsel cannot be deemed ineffective for

failing to raise this issue. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). The claim should be denied.

V. THE CLAIM REGARDING THE ALLEGED RESTRICTIONS ON CROSS EXAMINATION SHOULD BE DENIED.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding alleged restrictions on cross examination. However, Defendant is entitled to no relief.

To preserve an issue regarding a restriction on the right to cross examine, the trial court must have sustained the State's objection to that testimony. *See Gibson v. State*, 351 So. 2d 948, 950 (Fla. 1977); *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Moreover, the defendant must proffer the proposed testimony. *Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990). Here, Det. LeClair answered the question regarding discussing the impact of Aguayo's arrest on his cooperation and the trial court did not sustain the State's objection to that testimony. (DAR. 1174) Instead, it merely ordered both parties to stop bickering in response to the exchange concerning the objection. (DAR. 1174) While the trial court found the State objection to the question regarding whether one reason the hairs found at the crime scene were dirty was that they came from a person who did not bathe regularly well taken, it overruled the objection. (DAR. 1177) Moreover, Defendant did not proffer what response he expected to receive from Det. LeClair in response to his

attempt to elicit hearsay about Sam Randel and the answer is not apparent from the record, given that Det. LeClair had just demonstrated a lack of knowledge of Randel and the report upon which the question was based. (DAR. 1184-85) As such, none of these issues are preserved. Appellate counsel cannot be deemed ineffective for failing to raise these unpreserved issues. *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 claims had been preserved, Defendant would still be entitled to no relief. As this Court has stated:

> The proper purposes of cross-examination are: (1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness, which may involve, among other things, showing his possible interest in the outcome of the case. *Burns v. Freund*, 49 So.2d 592 (Fla. 1950); *Louette v. State*, 152 Fla. 495, 12 So.2d 168 (1943); *Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933); *Padgett v. State*, 64 Fla. 389, 59 So. 946 (1912). Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination. *Pearce v. State*, 93 Fla. 504, 112 So. 83 (1927); *Wallace v. State*, 41 Fla. 547, 26 So. 713 (1899). If the defendant seeks to elicit testimony from an adverse witness which goes beyond the scope encompassed by the testimony of the witness on direct examination, other than matters going to credibility, he must make the witness his own. Stated more succinctly, this rule posits that the defendant may not use cross-examination as a vehicle for presenting defensive evidence. *Coco v. State*, 62 So.2d 892 (Fla.1953); *Padgett v. State*, 64 Fla. 389, 59 So. 946 (1912).

Steinhorst v. State, 412 So. 2d 332, 337 (Fla. 1982). Here, the questions to which objections were sustained were not within the proper purpose of cross examination. Moreover, they sought information that was outside the scope of the witness's knowledge and called for hearsay responses. As such, the lower court properly sustained objections to these questions.

During direct, Det. LeClair testified he was assigned to the cold case squad in the homicide division and was a co-lead detective to this case. (DAR. 1102-03) As part of his duties, he reviewed the case file, reinterviewed witnesses and interviewed new witnesses. (DAR. 1103)

He described traveling with Aguayo along the route Defendant claimed to have walked on the night of the murders. (DAR. 1103-13, 1170-71) He also showed where the bar Aguayo dropped Defendant, the victims' home, Aguayo's home, Ximena Evans' home and the house where the baby shower was were in relation to one another. (DAR. 1113-23) He testified regarding photographs he had taken showing Feliciano's bathroom window and the view from it. (DAR. 1131-35)

He testified regarding Defendant's statement to the police. (DAR. 1135-57) He showed the jury, on a plat map, the route Defendant claimed to have taken in his police statement. (DAR. 1160-69)

He stated that he had checked to see if anyone had gone to a local hospital or police department as the result of a stabbing such as Defendant asserted happened, with negative results. (DAR. 1157-59) He described getting an impression of Defendant's shoe. (DAR. 1159)

He described how a knife was submitted to the police in 1982. (DAR. 1171) He stated that the knife was analyzed. *Id.*

On cross, Defendant elicited that Det. LeClair had learned from Aguayo that he had been arrested on January 18, 1993. (DAR. 1174) He asked if Det. LeClair had inquired whether that date had impacted Aguayo's claims to the police and Det. LeClair responded negatively. (DAR. 1174) After Det. LeClair responded, the State objected, Defendant objected to the manner in which the State objected, the trial court ordered both counsel to stop bickering and ordered Defendant to continue. (DAR. 1174)

Defendant elicited that hairs that did not belong to the victims were found at the scene. (DAR. 1176-77) The hairs were dirty. (DAR. 1176-77) Det. LeClair did not know how the hairs got dirty. (DAR. 1177) When Defendant inquired if one conclusion was that the hairs came from someone who did not bathe frequently, the State objected that it was beyond Det. Leclair's expertise. (DAR. 1177) The trial court found the

objection well taken but overruled it. (DAR. 1177) Defendant did not attempt to obtain an answer to the question. (DAR. 1177) When Defendant asked if Det. LeClair was aware of any traces of blood left at the crime scene from blood dripping from the bottom of pants, the State objected, and the trial court sustained the objection. (DAR. 1179)

Defendant then asked Det. Leclair if he attempted to contact Sam Randel. (DAR. 1184) Det. LeClair responded in the negative and stated he believed Sam Randel was John Conners. (DAR. 1185) Defendant then attempted to establish who Sam Randel was through questions regarding statements of others. (DAR. 1185) The State's hearsay objection was sustained. (DAR. 1185) When Defendant continued this line of questioning, a sidebar was held. (DAR. 1186) The State objected that the questions called for hearsay. (DAR. 1186-87)

At sidebar, Defendant contended that he was attempting to show that Aguayo's reason from cooperating with the police was his arrest. (DAR. 1189) The trial court pointed out that Det. LeClair was not competent to testify regarding Aguayo's state of mind. *Id.* Defendant also asserted that he was asking these questions to show that before Det. LeClair became involved in the case, the police believed a drifter committed the crime. (DAR. 1190-91, 1192) The trial court ruled that Defendant would

be allowed to present his defense but could not do so by asking questions that attempt to elicit hearsay. (DAR. 1191-92, 1193-95) Defendant then asked if Det. LeClair had attempted to interview a number of people and received negative responses. (DAR. 1195-97, 1202-03)

As can be seen from the foregoing, the questions that Defendant was prevented from asking Det. LeClair on cross examination were not designed to weaken, test or demonstrate the impossibility of Det. LeClair's direct testimony. They did not address Det. LeClair's credibility. Instead, as Defendant explained when he was attempting to ask the questions, they were designed to attempt to elicit evidence in support of a defense. Moreover, they attempted to do so by inquiring about matters outside Det. LeClair's competency as a witness and by eliciting hearsay.

Det. LeClair stated that he never asked about the significance of Aguayo's arrest to his cooperation. Det. LeClair would have thus been asked to speculate about Aguayo's motivations, which was not proper. §90.604, Fla. Stat.; ***Rivera v. State***, 859 So. 2d 495, 507 (Fla. 2003). Det. LeClair stated he did not know how the hairs found at the crime scene got dirty and was being asked to opine about a matter in which he was not qualified. Nor was Det. LeClair qualified as an expert in blood

spatter analysis. As such, the trial court did not abuse its discretion in refusing to allow Det. LeClair to give his opinions on these matters. §90.702, Fla. Stat.; *see Hall v. State*, 568 So. 2d 882, 884 (Fla. 1990). Moreover, Defendant did not assert at trial and does not assert here any theory under which it would be appropriate to attempt to elicit hearsay from Det. LeClair, particularly as Det. LeClainr had already indicated a lack of knowledge of the hearsay materials. §90.802, Fla. Stat.

Under these circumstances, the trial court did not abuse its discretion in sustaining objections to Defendant's questions. *Jimenez v. State*, 703 So. 2d 437, 439-40 (Fla. 1997); *Echols v. State*, 484 So. 2d 568, 573 (Fla. 1985). As such, 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.

Even if the refusal to allow the questions was error, it did not affect the jury's verdict and was harmless. During his case, Defendant presented evidence that the hairs found at the scene probably were dirty because the person who shed the hairs did not bathe regularly. (DAR. 1268) Evidence was also presented that there was indication at the crime scene of blood

dripping from clothing. (DAR. 1247, 1255) Further, Defendant presented evidence regarding other suspects through other witnesses, including Tech. Gilbert. Under these circumstances, it cannot be said that the trial court's actions in sustaining objections to the cross examination of Det. LeClair affected the jury's verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellate counsel cannot be deemed ineffective for failing to raise this issue. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). The claim should be denied.

VI. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE WITH REGARD TO THE CLAIM ABOUT REJECTION OF MITIGATION SHOULD BE DENIED.

Defendant next claims that his appellate counsel was ineffective for the manner in which he raised issues regarding the trial court's consideration of mitigation. However, this claim should be denied, as the issues were raised on appeal, the attempt to raise them again under a different theory is procedurally barred and without merit and the claim is insufficiently plead.

As Defendant acknowledges, his counsel argued on direct appeal that the trial court erred in failing to find and weigh both statutory and nonstatutory mitigation. Initial Brief of Appellant, FSC Case No. 78,411, at 82-95. Specifically, he argued that the trial court should have found that Defendant committed these murders under the influence of extreme mental or emotional disturbance, that Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, that nonstatutory mental mitigation existed, that Defendant drank beer on the night of the murders, that Defendant had been a good prisoner, that Defendant could have been sentenced to life without the possibility of parole for 50 years, and that there was a lack of evidence of premeditation, that Defendant had been

employed, that Defendant was a peaceful person, that the codefendant was sentenced to life, that Defendant had no significant criminal history. *Id.* This Court rejected these claims:

> [Defendant] also claims that the trial court erred in failing to find any of the following mitigating circumstances: (1) defendant was under the influence of extreme mental or emotional disturbance; (2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (3) defendant's consumption of beer; (4) defendant's exemplary prison record; (5) the alternative to the death penalty was life in prison without chance of parole for fifty years; (6) lack of premeditation; (7) defendant's employment; (8) defendant's peaceful nature; (9) codefendant sentenced to life in prison; and (10) defendant had no significant history of prior criminal behavior.
>
> The record establishes that the trial judge expressly addressed and rejected the extreme mental and emotional disturbance factor, as well as the defendant's capacity to appreciate the criminality of his conduct. Further, the trial judge could properly find from the evidence that there was insufficient evidence of intoxication to establish that as a mitigating factor. Finally, we find that the trial judge did not err in rejecting the remaining alleged mitigating factors because the record does not support any of these factors. We note that defense counsel at trial expressly considered whether to place evidence before the judge and the jury concerning the sentence of the codefendant and, after consulting with [Defendant], rejected presentation of that evidence for tactical reasons.

Garcia, 644 So. 2d at 63. Since the claim was raised and rejected, appellate counsel cannot be deemed ineffective for failing to raise the issue. *State v. Riechmann*, 777 So. 2d 342,

365 (Fla. 2000). The claim should be denied.

In an attempt to avoid the fact that the issue was raised and rejected on direct appeal, Defendant asserts that counsel should have presented a different argument in support of this issue. However, claims that seek to relitigate claims that were raised and rejected on different grounds are procedurally barred and without merit. *Riechmann*, 777 So. 2d at 365-66; *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). The claim should be denied.

Even if this claim could be properly presented, Defendant would still be entitled to no relief. In presenting this claim, Defendant merely recites the issues concerning the rejection of mitigation that counsel raised on direct appeal and asserts that counsel should have argued that the failure to find these alleged mitigating circumstances violated the United States Constitution. Defendant does not explain how the failure to find these factors would have violated the constitution. He does not assert how presenting this additional argument would have created a reasonable probability of a different result on appeal. This lack of pleading is particularly important, as this Court found that the evidence was insufficient to support the mitigation Defendant asserted existed. Since the claim is

not sufficiently plead, it should be denied. *Patton*, 878 So. 2d at 380.

VII. THE CUMULATIVE ERROR CLAIM SHOULD BE DENIED.

Defendant finally asserts that he is entitled to relief based on the cumulative effect of the errors he has alleged. However, where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As seen above, Defendant's individual claims are all procedurally barred or without merit. As such, this claim should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

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SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 650
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5655

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to William M. Hennis, III, 101 N.E. 3rd Avenue, Suite 400, Miami, Florida 33301, this 31st day of October 2005.

_____

SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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SANDRA S. JAGGARD
Assistant Attorney General