IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1490

NOEL DOORBAL,

Petitioner,

vs.

JAMES MCDONOUGH, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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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.[1] *Doorbal v. State*, FSC Case No. SC05-383. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. THE BRADY CLAIM.

Defendant first his appellate counsel was ineffective for failing to assert on direct appeal that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence that Schiller was involved in Medicaid fraud. However, Defendant is entitled to no relief because appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue.

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. In *Strickland v. Washington*, 466 U.S.

[1] Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols “R.” and “T.” will refer to the record from Defendant’s direct appeal.

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.

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). 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).

While it is true that Defendant's appellate counsel did not raise this issue on appellate, Lugo, Defendant's codefendant, did. This Court found the claim to be without merit:

> Lugo contends that two violations of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), occurred, each of which warrants a new trial or entitles Lugo to conduct further discovery on the matter. We determine that each assertion is without merit.
>
> Lugo first contends that a *Brady* violation occurred due to the State's failure to disclose its knowledge of the federal investigation of Marc Schiller for Medicare fraud. Schiller was presented as a witness by the State during the guilt-innocence phase regarding the events surrounding his abduction and his loss of assets. The record reflects that Lugo was aware Schiller would testify during trial. Moreover, the record establishes that through a pretrial deposition of Jorge Delgado, Lugo knew not only that Delgado may have been involved in Medicare fraud, but also that Delgado had alleged Schiller was also involved in the fraud. At a post-trial *Richardson* hearing on the

> matter, the State indicated that it turned over knowledge of Delgado's possible involvement to federal authorities. The State denied having knowledge that Schiller was the specific target of a federal investigation, and stated that Schiller had denied involvement in Medicare fraud when questioned. The State further denied having made any deals with Schiller to speak with federal authorities on his behalf in exchange for favorable testimony at Lugo's trial. Most important, Lugo failed to present any evidence at the hearing that the State either withheld any document or other knowledge of the possibility of a federal investigation into Schiller's Medicare activities, or that the State had made a deal with Schiller to speak with federal authorities in exchange for favorable testimony. The trial judge denied Lugo's motion for a new trial or, in the alternative, a new round of discovery concerning the State's knowledge of Schiller's indictment on Medicare fraud charges. This decision was not erroneous.
>
> The three elements of a *Brady* claim are: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice to the defendant must have ensued. *See Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). Even if Lugo could establish the first element, he cannot satisfy either the second or third elements, because he was fully aware of Schiller's possible involvement in Medicare fraud and therefore cannot establish how he was prejudiced by the State's alleged failure to disclose its knowledge of Schiller's activities with regard to Medicare. That Schiller was subsequently indicted on federal Medicare fraud charges is of little import in the wake of Lugo's failure to establish that the State knew of Schiller's pending indictment or had any involvement with it whatsoever.

Lugo v. State, 845 So. 2d 74, 104-05 (Fla. 2003)(footnotes omitted). Thus, this Court has already determined on the facts of this case that the claim is without merit. Because the claim

is without merit, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143.

II. THE CONTINUANCE CLAIM.

Defendant next asserts that appellate counsel was ineffective for failing to raise an issue regarding the alleged denial of a motion to continue trial. However, Defendant is entitled to no relief.

While the heading of the claim asserts that appellate counsel should have raised an issue regarding an alleged denial of a motion to continue the trial based on illnesses in counsel's family, Defendant proceeds to argue that counsel had a conflict of interest, which he raises again in Claim III.[2] Counsel then makes passing references to the standard of review for the denial of a continuance and asserts that the trial court's denial of a continuance was not supported by competent, substantial evidence. However, because Defendant does not actual present an argument regarding how the trial court abused its discretion in denying a continuance or even cite to anywhere in the record were the alleged denial occurred, this claim is facially insufficient and should be denied. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004).

[2] To the extent Defendant is raising an issue regarding the denial of a motion to withdraw, it is addressed in Claim III.

Even if the issue had been properly pled, it does not appear that Defendant is entitled to relief. While the record includes an "emergency" motion for continuance Defendant filed, it does not appear to include a transcript of any hearing on that motion or any actual ruling on the motion.[3] When the record does not include a transcript, the trial court's ruling is presumed correct. *Hall v. Bass*, 309 So. 2d 250 (Fla. 4th DCA 1975). Moreover, the record reflects that trial was supposed to begin at the time that motion was filed. (R. 231) However, after that motion, jury selection for Defendant's jury did not begin until February 2, 1998. (R. 1756) Thus, it appears that the motion was granted. As such, appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143.

Even if the motion had been denied, Defendant still would not have been entitled to relief. The record reflects that the trial court granted Defendant numerous pretrial continuances. (R. 337-38, 357-59, 697-700, 2152) In fact, the record reflects that the lower court set a firm trial date of November 8, 1997, the trial court continued to grant numerous continuances to Defendant after doing so, and jury selection did not commence

[3] In the post conviction record, Defendant included a transcript from the codefendant's case in which the trial court stated that

until February 2, 1998, which was 25 days after counsel requested a 30 day continuance and more than 3 years after the crimes and Defendant's arrest. (T. 1557-59, 1862-63, 1962-62, 2152) Moreover, after receiving this last continuance, Defendant did not complain about needing more time. (T. 2200) Further, Defendant does not point to anything in the record from direct appeal that shows that he was prejudiced. Instead, he suggests that such evidence would be presented at an evidentiary hearing. However, appellate counsel cannot rely on matters outside the record on appeal to support an issue. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983)("That an appellate court may not consider matter outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."). Given that Defendant was given numerous continuances and the lack of evidence of prejudice, the trial court would not have abused its discretion in denying a continuance had it done so. *Kearse v. State*, 770 So. 2d 119, 1127 (Fla. 2000). Appellate counsel cannot be deemed ineffective for failing to raise this meritless claim. *Kokal*, 718 So. 2d at 143. It should be denied.

III. THE WITHDRAW OF GUILT PHASE COUNSEL CLAIM.

Defendant next asserts that his appellate counsel was

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the new trial date had been set by agreement. (PCR. 441)

ineffective for failing to raise an issue regarding the trial court's "refusal to allow defense counsel to withdraw numerous times." However, Defendant is entitled to no relief.

While Defendant asserts that appellate counsel was ineffective for failing to raise an issue regarding the trial court's refusal to allow counsel to withdraw, he does not cite to a single motion to withdraw in the record or a single adverse ruling on such a motion. He does not argue why the trial court would have abused its discretion in making any of the non-referenced ruling and cites to no case law regarding rulings on motion to withdraw. Instead, he cites to case law regarding conflicts of interest and the entitlement to post conviction relief based on such conflicts. Even in doing this, he makes only vague references to adverse effects and refers to other pleadings. However, it is improper to brief a claim by reference to other pleadings. *Griffin v. State*, 866 So. 2d 1, 7 (Fla. 2003). Moreover, given the deficits in the allegations, the claim is facially insufficient and should be denied. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004).

Even if the claim had been sufficiently pled, Defendant would still be entitled to no relief. The record reflects that counsel only made one motion to withdraw. (T. 389-93) This one motion was based on counsel's alleged inability to continue to

represent Defendant after the indictment was filed and the trial court's initial refusal to declare Defendant indigent. (T. 360-89) The trial court did not rule on the motion at that time but did indicate that a hearing would be necessary on whether Natale could withdraw and how much of the fee he had collected would need to be returned to Defendant if he was allowed to do so. (T. 390-403)

At the time of arraignment, however, the State stipulated that Defendant could be declared indigent and that Natale could be appointed as a special assistant public defender so that the matter could proceed in a timely fashion. (T. 420-22) Natale indicated that he would accept the appointment and withdraw his motion to withdraw. The trial court declared Defendant indigent and appointed Natale. (T. 425)

As can be seen from the foregoing, Natale withdrew his motion to withdraw. As such, any issue regarding the alleged denial of the motion is not preserved for appeal. *Bolin v. State*, 869 So. 2d 1196, 1200-01; *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Because the issue was not preserved for appeal, appellate counsel cannot be deemed ineffective for failing to raise the issue. *Groover*, 656 So. 2d at 425.

Moreover, because the motion to withdraw was withdrawn, Defendant does not explain how the trial court abused its

discretion. A trial court's ability to remove counsel where the removal is not based on a request from the defendant or counsel is limited. *Weaver v. State*, 894 So. 2d 178, 188 (Fla. 2004). The trial court may only do so in the interest of justice. *Id.* at 188-89. Here, no such need based on the interest of justice was presented. As such, the trial court did not abuse its discretion in not forcing the withdraw. Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Moreover, for a trial court to have abused its discretion by denying a motion for withdraw, a defendant must have shown that he would suffer substantial prejudice by the denial of the motion. *Schwab v. State*, 636 So. 2d 3, 5-6 (Fla. 1994). Here, there was no showing before the trial court of substantial prejudice from denial of any motion to withdraw. As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.[4]

[4] Moreover, any issue regarding an alleged conflict of interest as a result of alleged conflicts between Natale's self interest and Defendant would not entitle Defendant to relief. The United States Supreme Court has recently made it clear that it has never applied its conflict of interest case law outside the area of conflicts based on concurrent dual representation and had stated that rule does not logically apply to other situations. *Mickens v. Taylor*, 535 U.S. 162 (2002). Since Defendant's claim

IV. THE SEVERANCE OF DEFENDANTS CLAIMS.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of his motion for severance of defendants. However, Defendant is again entitled to no relief because appellate counsel cannot be deemed ineffective for failing to raise an unpreserved and nonmeritorious issue.

Prior to trial, Defendant moved from severance from his codefendants. (R. 514-20) Defendant asserted that the only evidence against him came from two cooperating accomplices while the evidence against Delgado, Lugo and Mese was far more extensive. *Id.* He also asserted that he and the codefendants would be presenting antagonistic defenses, that other codefendants had made statements implicating him that would not be admissible against him and that evidence of Lugo and Delgado prior criminal activities would prejudice him. *Id.* However, Defendant did not assert that he was entitled to severance because of any limited role in the crimes. *Id.* The State took the position that antagonistic defenses was not a basis for severance and that all of the evidence, except the statements

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of a conflict is not based on dual representation, it had no merit under *Mickens*. Appellate counsel cannot be deemed ineffective for failing to make this nonmeritorious claim. **Error! Main Document Only.***Kokal*, 718 So. 2d at 143.

implicating one another, would be admissible against each of the defendants, given the RICO charges. (T. 1973-75) The motion was denied. (R. 520)

Defendant later filed a second motion for severance, claiming that there were issues regarding the statements of the codefendants and that his defense was antagonistic, as he would be claiming duress and seeking to admit evidence concerning the codefendants' prior criminal histories. (R. 852-61) The trial court granted this motion, only to the extent that Defendant and Mese would have a separate jury from Lugo at a joint trial. (T. 1961)

Defendant subsequently filed a motion to preclude the use of dual juries, in which he renewed his request for complete severance. (R. 1596-1605) He asserted that the case law authorizing the use of dual juries involved cases in which the defendant had not objected, that there was a potential for prejudice if evidence that would only be admissible against one defendant was heard by the other jury and that he objected to the use of dual juries. *Id.* He also asserted that he and the codefendants planned to present antagonistic defenses, which merited severance. *Id.* Again, he did not suggest that his role in the crimes had any bearing on the issue of severance.

At the hearing on the motion, Defendant asserted that dual

juries should not be used because there were numerous statements of the codefendants that would not be admissible before both juries and the allegedly antagonistic defenses would also require that only one jury heard cross examination. (T. 2081-84) When the trial court inquired about specifics, the only things to which Defendant could point were co-conspirators' statements and his attempts to show specific incidents where Lugo lied. (T. 2084-95) Again, he did not assert that severance was appropriate based on his role in the crimes. The State pointed out that the co-conspirators' statements were admissible against Defendant, that the alleged specific acts of lying by Lugo were not and that Defendant was claiming that he would be blaming Lugo such that the motion should be made by Lugo not Defendant. (T. 2084-98) After considering these argument, the trial court denied the motion. (T. 2103)

Defendant now asserts that his appellate counsel was ineffective for failing to claim that the trial court abused its discretion in denying the motion for severance. He asserts that severance was required because his role in the commission of these crimes was "peripheral" and he was prejudiced by his association with the codefendants. However, Defendant never asserted this argument as a basis for severance in the trial court. As such, any issue regarding the denial of severance on

this basis is not preserved for review. *See Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005); *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 not preserved, appellate counsel cannot be deemed ineffective for failing to raise it. *Groover*, 656 So. 2d at 425. The claim should be denied.

Even if the issue had been preserved, Defendant would still be entitled to no relief. Defendant only assertion of why severance should have been granted is that he allegedly play only a peripheral role in the crimes and "his association in the mind of the jurors with the remaining characters was extremely prejudicial." However, Defendant does not assert how granting severance would have affected presentation of evidence of his association with the codefendants even if his assertion about his role in the crime were true. Defendant was charged with RICO and several conspiracy counts, as well as being charged as a principal in the other counts. (R. 61-111) Because of the RICO and conspiracy charges, Defendant's association with the codefendants was a material element of the charges against him. *Lugo*, 845 So. 2d at 97; §777.04(3), Fla. Stat. Thus, evidence of that association was relevant and admissible. Moreover, as a principal, Defendant was guilt of the criminal act committed by

the codefendants even if he had only a peripheral role. §777.011, Fla. Stat.; *Foxworth v. State*, 276 So. 2d 647, 650 (Fla. 1972). Thus, evidence regarding the codefendants' criminal acts was relevant and admissible and severing Defendant would not have prevented the jury from learning of Defendant's association with the codefendants. Thus, the trial court would not have abused its discretion in denying a motion to sever based on Defendant's alleged role in the crime even if the issue had been presented and the allegations were true. *See Lugo*, 845 So. 2d at 97 n.41, 101-02; *McCray v. State*, 416 So. 2d 804 (Fla. 1982). Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, the claim should be denied. *Kokal*, 718 So. 2d at 143.

Moreover, the record belies Defendant's assertion that he only had a peripheral role in the crimes. Defendant was described as the second in charge of the RICO enterprise. He actively participated in the planning of all of the criminal activity of the group. He personally participated in the kidnapping of Schiller, personally tortured Schiller, personally urged the codefendants to kill Schiller, personally participated in the attempt to do so, personally selected Griga as a target of the group, personally participated in the kidnapping of Griga and Furton and the failed attempts to do so, personally killed

both Griga and Furton and personally dismembered their bodies. In fact, it was Defendant who threatened Pierre when he did not carry out an attempt to kidnap Schiller, and it was Defendant who became angry at Lugo when he did not carry out an attempt to kidnap Griga. (T. 5598-5600, 5670-71, 5679-81, 5704-22, 5733-34, 5786-90, 7325-38, 7394, 8370-81, 8495-99, 8543-49, 8848-50, 8852-94, 8898, 8918, 8921-23, 8927, 11655-66, 11670-74, 10365-76, 10233-50, 10409-31, 11686-88, 11690, 11731-56, 11795-11805) Since the record shows that Defendant was not a peripheral character, his false assertion that he was does not provide a basis for severance. The issue is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

V. THE SEVERANCE OF COUNTS CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of his motion to sever the counts of the indictment. However, Defendant is entitled to no relief because appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue.

While it is true that Defendant’s appellate counsel did not raise this issue on appeal, Lugo, Defendant’s codefendant, did. This Court rejected the claim:

Lugo asserted before trial that he was entitled to have separate trials on the Racketeer Influenced and Corrupt Organization (RICO) counts, [FN32] the Schiller counts, and the Griga-Furton counts. He contended that a single trial on all the counts would result in spillover prejudice to the extent that jurors would not be able to make individual determinations of guilt or innocence regarding each criminal charge. [FN33] The trial judge denied Lugo's motion to sever the sets of counts from each other and to have separate trials. The only relief granted by the trial judge after a hearing on the motion was that Lugo would have a separate jury from codefendants [Defendant] and Mese. [FN34]

Denial of a motion for severance of criminal charges is reviewed for abuse of discretion. *See Crossley v. State*, 596 So. 2d 447 (Fla. 1992). We have previously stated:

> "[T]he rules [of criminal procedure] do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are connected only by similar circumstances and the accused's alleged guilt in both or all instances." Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence.

Wright v. State, 586 So. 2d 1024, 1029-30 (Fla. 1991) (citations omitted) (quoting *Garcia v. State*, 568 So. 2d 896, 899 (Fla. 1990)). Florida Rule of Criminal Procedure 3.150 [FN35] requires that the criminal charges joined for trial "be considered in an episodic sense." *Garcia v. State*, 568 So. 2d 896, 899 (Fla. 1990). Moreover, there must be a "meaningful relationship" between or among the charges before they can be tried together. *Ellis v. State*, 622 So. 2d 991, 999 (Fla. 1993). That is to say, "the crimes in question must be linked in some significant way." *Id.*

at 1000.

Lugo primarily addresses the trial court's failure to grant his pretrial motion to sever the Schiller counts, the Griga-Furton counts, and the racketeering counts [FN36] from each other so that separate trials could be conducted on each set of charges. However, he generally fails to address the important part that the racketeering charges had in the trial judge's decision to deny the motion for severance. [FN37] The trial judge noted that the State had properly pled the racketeering-related charges in the indictment, with events involving the Schiller counts and the Griga-Furton counts serving as two of the required predicate acts. He also noted that he was being asked "in advance of hearing one shred of evidence [during the trial]" to sever the Schiller counts, the Griga-Furton counts, and the racketeering counts, when one of the crucial points that the State intended to assert was that the Schiller counts and the Griga-Furton counts were integral parts of the very racketeering enterprise in which Lugo and others had engaged. At the pretrial hearing, the trial judge indicated that Lugo was free to file a formal motion to dismiss the racketeering charges if the State failed during trial to present evidence of the link between the Schiller and Griga-Furton counts and their relationship to Lugo's alleged racketeering activities. On the facts before us, we are not prepared to determine that the trial judge erred in his conclusion that the RICO charges provided a "relevant relationship" between the Schiller and Griga-Furton counts, thereby justifying a single trial on all charges filed against Lugo. This conclusion reflects the requirement that there be a "meaningful relationship" among charges that are tried together, as we discussed in *Ellis*. *See Ellis*, 622 So. 2d at 999. Moreover, unlike *Ellis*, the instant case involves charges of racketeering that link criminal incidents which might appear upon initial inspection to be temporally unrelated because they occurred within a six-month span. [FN38] The racketeering charges provide the "significant way" in which the Schiller counts, the Griga- Furton counts, and Lugo's alleged racketeering activity were linked. *See generally Ellis*, 622 So. 2d at 1000.

Florida law fully supports the trial judge's

conclusion. In *Shimek v. State*, 610 So. 2d 632 (Fla. 1st DCA 1992), the appellant, an attorney, sought before trial to have one count of grand theft severed both from other counts of grand theft and from a count of racketeering. The appellant contended that severance was necessary because one grand theft count (the "Skipper" count) involved investing settlement funds of a client of his legal practice in a bank that engaged in questionable practices, whereas the other grand theft counts (the "Pierce-LaCoste" counts) involved investors sought by the appellant or the principals of that same bank. The appellant argued that the count involving his client was not related in an episodic sense to the other grand theft counts or to the racketeering count, but the trial court denied the motion to sever. In concluding that the trial court did not abuse its discretion in denying the motion to sever, the district court noted several relationships between the Skipper and Pierce-LaCoste counts: the appellant and several principals of the subject bank were involved in each set of counts; each set of counts centered on an investment scheme involving the subject bank; and in each set of counts the appellant used his attorney trust account to channel funds to the subject bank. *See id.* at 636-37. The district court concluded not only that the Skipper and Pierce-LaCoste grand theft counts were related to each other and constituted predicate acts for the racketeering count, but also that the grand theft counts were linked to the racketeering count in such a way that a unified trial on all of the grand theft counts and the racketeering count was justified. *See id.* at 640.

We note that the district court in *Shimek* had the benefit of reviewing the entire record of the trial in determining the link between the grand theft counts and the racketeering counts. In the instant case, Lugo sought before trial to sever the Schiller, Griga-Furton, and racketeering counts from each other before any evidence of the relationship of the Schiller and Griga-Furton counts to the alleged racketeering activity had been subjected to adversarial testing during the trial. The trial judge reviewed the indictment against Lugo and determined that the State conformed to the pleading requirements of Florida's

substantive RICO statute. The trial court did not abuse its discretion by declining Lugo's pretrial motion to sever, especially when it indicated that it would entertain a formal motion to dismiss the racketeering charges if the State did not present sufficient evidence during trial to support them. Moreover, as in *Shimek*, the existence of several relationships between the Schiller counts and the Griga-Furton counts, and their links to the racketeering counts, justified the trial judge's decision to conduct a unified trial.

We also disagree with Lugo's contention that the racketeering activities were not related in an episodic sense. The unfortunate racketeering activity in which Lugo and others participated began with the abduction, extortion, and attempted murder of Marc Schiller, continued with the incident involving the planned abduction and extortion of Winston Lee, and reached its tragic pinnacle in the events related to the abduction and terror-filled murders of Frank Griga and Krisztina Furton. The careful planning that surrounded each of these incidents, along with the manner of execution, obviates the conclusion that they were entirely random, disconnected events.

With regard to the abduction and subsequent crimes against Schiller, as well as the abduction and subsequent crimes against Griga and Furton, the record indicates that at least one plot was aborted before an actual abduction took place. Each plot involved intricate planning and the assignment of specific duties to each participant, including Lugo. Indeed, in the Schiller abduction, testimony adduced at trial described Lugo's role as equivalent to that of a military general. Stun guns, handguns, and tape, among other items, were employed to subdue or restrain Schiller. Lugo and [Defendant] also visited Griga's Golden Beach home before the abduction of Griga and Furton occurred. During the last visit before the abduction occurred, Lugo and [Defendant] each had a concealed firearm. Testimony from Sabina Petrescu, Lugo's girlfriend, indicated that [Defendant] was very upset when Lugo did not follow through on the plan to kidnap Griga and Furton during this particular visit, but was later placated by Lugo with the knowledge that they would execute the abduction later that evening.

While Griga and Furton were held hostage, both were subdued with Rompun, which Lugo and [Defendant] had procured for that specific purpose. Furton was also subdued with handcuffs and tape, as was Schiller. Furthermore, it is important to note that in the intervening months between the Schiller and Griga-Furton abductions, Lugo directed the surveillance of Winston Lee's townhome, with the goal of abducting Lee and obtaining his assets. This type of activity over a six-month period does not have the characteristics of impulsive, sporadic behavior. The nature of these crimes removes them from the category of being merely similar to each other, and requires that they be placed in the category of "connected acts or transactions." Fla. R. Crim. P. 3.150(a). [FN39]

We further note that if separate trials on the Schiller and Griga-Furton counts had been held, evidence of the abduction, extortion, and attempted murder of Schiller would have been admissible in Lugo's trial for the abduction, attempted extortion, and murders of Griga and Furton, and vice versa. This evidence would have been admissible in separate trials to establish the existence of an ongoing, common scheme to target wealthy victims, as well as to establish the entire context within which Lugo's criminal activity occurred. *See, e.g., Fotopoulos v. State*, 608 So. 2d 784, 790 (Fla. 1992)(determining that severance of murder charges was not required, in part because evidence of commission of one murder would have been admissible in a separate trial of the other to show a common scheme and context in which criminal activity occurred); *Bundy v. State*, 455 So. 2d 330, 345 (Fla. 1984)(determining that severance of murder charges was not required, in part because evidence of murder at one location would have been admissible in separate trial for murder at other location due to common scheme involved in both), *abrogated on other grounds*, *Fenelon v. State*, 594 So. 2d 292 (Fla. 1992). [FN40] Therefore, due to the common scheme that is related to both the Schiller and Griga-Furton counts, Lugo "has failed to demonstrate that a severance was necessary for a fair determination of his guilt or innocence." *Bundy*, 455 So. 2d at 345.

Based on the reasons above, we determine that the

trial judge did not abuse his discretion when he denied Lugo's pretrial motion to sever charges.

* * * *

[FN32] See § 895.03, Fla. Stat. (1995).

[FN33] The State obtained an indictment against Lugo that included (1) charges previously made in an information concerning the abduction, extortion, and attempted murder of Schiller; (2) new charges concerning the Griga-Furton murders and related crimes; (3) a new charge of committing a RICO violation; and (4) a charge of conspiring to commit a RICO violation.

The trial judge also denied Lugo's renewed motions to sever which were made at subsequent points during the trial.

[FN34] Lugo had also filed a motion to be tried separately from [Defendant] and Mese. This motion was denied.

[FN35] Florida Rule of Criminal Procedure 3.150 states in pertinent part:

> (a) Joinder of offenses. Two or more offenses that are triable in the same court may be charged in the same indictment or information in a separate count for each offense, when the offenses, whether felonies or misdemeanors, or both, are based on the same act or transaction or on 2 or more connected acts or transactions.

Moreover, Florida Rule of Criminal Procedure 3.152 states in pertinent part:

> (a) Severance of Offenses.
> (1) In case 2 or more offenses are improperly charged in a single indictment or information, the defendant shall have a right to a severance of the charges on timely motion.
> (2) In case 2 or more charges of related offenses are joined in a single indictment or information, the court nevertheless shall grant a severance of charges on motion of the state or of a defendant:
> (A) before trial on a showing that the severance is appropriate to promote a fair determination of the defendant's guilt or

> innocence of each offense; or
> (B) during trial, only with defendant's consent, on a showing that the severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

[FN36] As predicate acts for the racketeering charges, the State alleged the following: the events surrounding the abduction and extortion of Marc Schiller; the events surrounding the abduction and attempted extortion of Frank Griga and Krisztina Furton; and the events surrounding the planned, but never executed, abduction and extortion of a man named Winston Lee. Lugo knew Lee because he exercised at Sun Gym. In March or April of 1995, Lugo told [Defendant] that he had found another candidate for kidnaping and extortion. That candidate was Winston Lee. Lugo, [Defendant], Delgado, and others surveilled Lee's townhome over a period of time. However, Lee was frequently out of the country and the plan to abduct him was ultimately abandoned. When police executed a search warrant at [Defendant's] apartment, they found pictures of Lee's townhome.

[FN37] In the one case involving racketeering on which Lugo relies, *State v. Fudge*, 645 So. 2d 23, 24 (Fla. 2d DCA 1994), the district court affirmed the trial court's decision to sever multiple counts and to grant a judgment of acquittal on a racketeering charge. However, the trial court's decision to sever in *Fudge* was made after a trial on all the joined counts, in which the jury was deadlocked on twenty-six charges. Moreover, the district court noted the dissimilar nature of many of the charges that had been joined for trial, including vehicle ramming and grand theft at a closed business establishment. The district court further stated that similar fact evidence with regard to the remaining criminal charges would not have been admissible if separate trials had been held. Conversely, in the instant case, Lugo asked the trial judge to sever the charges in a pretrial motion, before the trial judge had heard any evidence of the relationship to Lugo's racketeering activity of the Schiller counts, the Griga-Furton counts, and the planned (but never executed) abduction and extortion of Winston Lee. Moreover, as discussed *infra*, we

determine that similar fact evidence of the Schiller counts would have been admissible in a separate trial on the Griga-Furton counts, and vice versa. Therefore, *Fudge* is distinguishable.

[FN38] In *Harvey v. State*, 617 So. 2d 1144 (Fla. 1st DCA 1993), racketeering activity extending over a period of at least four months did not constitute a temporal separation such that severance of criminal charges was required. The pertinent Florida RICO statutes require that the defendant engage in at least two incidents of racketeering conduct within five years of each other. *See* §§ 895.02- 895.03, Fla. Stat. (1995). Lugo's racketeering activity, which occurred within a six-month time frame, falls well within this requirement.

[FN39] The substantive Florida RICO statute, section 895.03, Florida Statutes (1993), is patterned after its federal counterpart. Therefore, Florida courts may look to federal RICO decisions as persuasive authority. *See Gross v. State*, 765 So. 2d 39, 42 (Fla. 2000); *State v. Whiddon*, 384 So. 2d 1269, 1271 (Fla. 1980).

In *United States v. Baltas*, 236 F.3d 27 (1st Cir. 2001), the pertinent indictment listed kidnaping and conspiracy to possess with intent to distribute heroin as predicate RICO acts in which the defendant had participated. The "conspiracy to possess" activity was also listed in the indictment as a separate criminal charge. In determining that the trial court did not err in denying the defendant's motion to sever the RICO counts from the charge of conspiracy to possess and distribute heroin, the *Baltas* court stated that "offenses committed pursuant to the same (charged) racketeering enterprise and conspiracy may be joined in a single indictment." *Id.* at 33 (quoting *United States v. Zannino*, 895 F.2d 1, 16 (1st. Cir 1990)). The court also noted:

> "There is always some prejudice in any trial where more than one offense or offender are tried together--but such 'garden variety' prejudice, in and of itself, will not suffice [to justify severance of charges joined in one indictment]."

Baltas, 236 F.3d at 34 (quoting *United States v. Boylan*, 898 F.2d 230, 246 (1st Cir. 1990)).

> Furthermore, the *Baltas* court noted that the trial judge had adopted appropriate measures to prevent spillover prejudice by instructing the jury to consider the evidence separately as to each criminal charge. The trial judge in *Baltas* thus took pains to ensure that jurors made individualized determinations of guilt. The record indicates that the trial judge in Lugo's case also instructed the jury to consider the evidence separately as to each criminal charge. We are not convinced that the jury failed to make individualized determinations of guilt, as Lugo asserts. *Baltas* provides further support for the conclusion that the trial court did not err in denying Lugo's motion to sever the criminal charges filed against him.
>
> [FN40] We are aware that in *Bundy* the multiple murders occurred in a more compact time frame than in the instant case. However, we also noted in *Bundy* the existence of evidence of a common scheme that would have been admissible if separate trials on the multiple murders had been held. *See Bundy*, 455 So. 2d at 345. The same logic of the common scheme in *Bundy* applies to the attempted murder of Schiller and to the murders of Griga and Furton.

Lugo, 845 So. 2d at 92-97. As can be seen from the foregoing, this Court has already determined that the RICO counts provided the necessary connection such that severance was properly denied on the facts of this case and that the crimes were sufficiently similar so that the evidence would have been properly admissible as similar crimes evidence. As is true of Lugo, Defendant was charged with the Schiller crimes, the Griga/Furton crimes and the RICO crimes.[5] (R. 61-111) On direct appeal, this Court

[5] In fact, Defendant and Lugo were jointly charged in each of these crimes. The only difference in charging between them was that Lugo was charged with additional counts related to the

determined that the evidence was sufficient to conviction Defendant of each of the crimes charged. *Doorbal*, 837 So. 2d at 963. Under these circumstances, the determination that Lugo was properly denied severance of counts applies with equal force to Defendant. Thus, the issue is without merit. Because the issue is without merit, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

In an attempt to distinguish this matter from Lugo, Defendant asserts that he was a "follower who did not participate in a common scheme of targeting wealthy people for kidnapping, extortion and attempted murder" and claims that he was merely "associated" with the group that committed the Schiller crimes. Petition at 30. However, Defendant does not explain how these assertions would alter the facts of the crime or this Court's analysis even if the assertions were true. As seen above, this Court found that the RICO and RICO conspiracy charges provided the linkage necessary to make the crimes properly joined. This Court found that there was sufficient evidence to convict Defendant of these crimes on direct appeal. *Doorbal*, 837 So. 2d at 963. Further, the United States Supreme

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theft of one of Schiller's cars and the laundering of Schiller's assets. (R. 61-111)

Court has made it clear that a defendant may be guilty of a RICO conspiracy even if he did not personally commit any of the predicate acts so long as he agreed to pursuit the objective of the conspiracy. *Salinas v. United States*, 522 U.S. 52, 61-66 (1997). Thus, assertions that Defendant was merely a follower and associated with the other members of the RICO organization do not affect his guilt of the RICO conspiracy. As the RICO offenses provided the required link for the denial of severance, Defendant's assertions would not show that severance was required even if they were true. As such, the issue is without merit, and appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Moreover, the record belies Defendant's assertion that he was merely "associated" with the group that kidnapped Schiller and killed Griga and Furton and did not participate in the common scheme. As asserted in Claim IV, Defendant was an active and instrumental participant in all of the groups criminal activity. As such, Defendant's incorrect assertions regarding the extent of his participation do not distinguish this matter from *Lugo*. The issue is as meritless here as it was in *Lugo*. Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143.

VI. THE MOTION FOR NEW TRIAL CLAIM.

Defendant next asserts that appellate counsel was ineffective for failing to raise an issue regarding the denial of his motion for mistrial based on the alleged violation of *Brady*. This claim basically reiterates the claim raised Claim I. For the reasons asserted there, the underlying issue is without merit, and appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. *Kokal*, 718 So. 2d at 143.

VII. THE MERGER CLAIM.

Defendant next asserts appellate counsel was ineffective for failing to raise a variety of issues regarding the during the course of a felony and pecuniary gain aggravators. He appears to claim that counsel should have argued that finding that both pecuniary gain and the during the course of a robbery aggravator constitutes improper doubling, that the pecuniary gain aggravator is unconstitutional because it can double with other aggravators and that the jury instruction on the pecuniary gain aggravator does not include a proper language about its narrowing construction.

Defendant bases his arguments under this claim on the assertion that the trial court found the during the course of a felony aggravator based on a robbery. However, this is simply

untrue. The trial court instructed the jury and found the during the course of a felony aggravator based on kidnapping.[6] (R. 3464-65, T. 14287) Since there was no during the course of a robbery aggravator, counsel cannot be deemed ineffective for failing to raise an issue concerning it. *Strickland*.

Moreover, Defendant's appellate counsel did raise an issue regarding the improper doubling of the during the course of a kidnapping and pecuniary gain aggravators. Amended Initial Brief of Appellant, FSC Case No. 93,988, at 83-86. This Court rejected this claim, finding that both aggravators were properly separately found and weighed. *Doorbal*, 837 So. 2d at 960. Since appellate counsel did raise an issue regarding the aggravators that were actually found, he cannot be deemed ineffective for failing to do so. *State v.* Riechmann, 777 So. 2d 342, 365 (Fla. 2000).

To the extent that Defendant is asserting that appellate counsel was ineffective for failing to raise additional arguments in support of this issue, the claim is procedurally barred. A claim of ineffective assistance of counsel may not be used to relitigate an issue that was raised on direct appeal by asserting other grounds for that claim. *Harvey v. Dugger*, 656

[6] Defendant was not even charged with robbery of Griga and Furton. (R. 61-111)

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). Thus, the claim is procedurally barred. It should be denied.

Even if the additional arguments were not procedurally barred, Defendant would still be entitled to no relief. The issue is unpreserved. Prior to trial, Defendant filed motions asking that the pecuniary gain and during the course of a felony aggravator be declared unconstitutional. (R. 1371-86) However, the record does not reflect that Defendant ever had these motions heard or obtained a ruling on them. During the charge conference, Defendant did not request an instruction on the merger of aggravators. (T. 14109-24, 14134-35, 14160-61, 14209-28) He also did not object to the standard jury instructions on the pecuniary gain or during the course aggravators or request any other instructions about these aggravators. (T. 14111, 14114, 14115-16) However, in order to preserve an issue on the ruling on the motion, it is necessary to have the motion heard and obtain a ruling. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). In order to raise an issue concerning the jury instructions, it is necessary to object to the instruction given or propose a different instruction. *Sochor v. State*, 619 So. 2d 285, 290 (Fla. 1993). Since Defendant did none of these things,

these issues were not preserved. Thus, appellate counsel cannot be deemed ineffective for failing to raise the issues. *Groover*, 656 So. 2d at 425. The claim should be denied.

Moreover, the underlying issues are also without merit. This Court has repeatedly rejected challenges to the constitutionality of these aggravators and the jury instructions concerning them and has determined that the merger doctrine does render informing the jury about applicable aggravators improper. *Griffin v. State*, 866 So. 2d 1, 14 (Fla. 2003); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001); *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985). Because the issues are without merit, appellate counsel cannot be deemed ineffective for failing present them. *Kokal*, 718 So. 2d at 143.

VIII. THE WITHDRAW OF PENALTY PHASE COUNSEL CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of his penalty phase counsel's motion to withdraw. However, Defendant is entitled to no relief.

On November 14, 1997, Penny Burke, Defendant's penalty phase counsel,[7] filed a motion to withdraw, asserting that Defendant had begun a romantic relationship with Lievano, her secretary,

[7] While Defendant now suggests that Burke was not qualified to represent him, Defendant asserted that Burke was qualified at

and that she believed this relationship created a conflict of interest. (R. 1165-69) The alleged conflict of interest purported arose because Lievano may have conveyed information about counsel's preliminary strategic discussions incorrectly to Defendant, may have convinced Defendant not to permit counsel to seek a plea bargain, may have provided Defendant was incorrect advice about Defendant's divorce proceedings, assisted Defendant in speaking to others without counsel's input and may have damaged counsel's relationship with Defendant. *Id.* Burke was also concerned that Lievano might have had herself a penalty phase witness but that the circumstances of their relationship and concerns about issues of attorney-client privilege might limit her effectiveness as such a witness. *Id.*

At the hearing on the motion, Burke asserted that the issues regarding Lievano, including Burke firing Lievano, had caused her relationship with Defendant to deteriorate and that Defendant wanted her to withdraw. (T. 1805-06) The trial court indicated that when he had first been approached about this matter ex parte, he had suggested that Natale attempt to find a new second chair. (T. 1806) Natale indicated that he had begun to look and believed that he could find someone and doing so would not interfere with the trial schedule but that he had not

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the time he sought her appointment. (R. 499-501, T. 885-89)

found anyone yet. (T. 1806-07) The trial court indicated that it did not believe there were legally sufficient grounds for withdraw but that it would allow a substitution if other counsel was available. (T. 1807-08) Burke then added that Defendant wanted her to withdraw because he was not comfortable with her, that she believed her credibility with the jury would be compromised by calling Lievano as a witness, that Lievano's credibility as a witness would be compromised and that calling Lievano would be vital. (T. 1808-09) The trial court indicated that Defendant was not entitled to new counsel where he created the difficulties and they did not concern counsel's competency. (T. 1810) It caution that Defendant's refusal to communicate with counsel would be Defendant's problem. (T. 1810)

The trial court then addressed Defendant personally and informed him that Lievano was not a lawyer or acting as a representative of his lawyer in giving him advice, that non-lawyers frequently misinterpret the law and that any reliance Defendant placed on Lievano's advice over the lawyers was misplaced. (T. 1811-12) Defendant personally stated that he understood. (T. 1812)

The trial court then stated that it would reserve ruling on the motion to withdraw for a week. (T. 1812-13) If at that point a new second chair had been located, Burke would be allowed to

withdraw. (T. 1813) The State then noted that a plea bargain would not have been possible. (T. 1814)

At Burke's request, the trial court took testimony from Lievano, who stated that she and Defendant never discussed his case or decisions regarding it. (T. 1815-28) The trial court also questioned Defendant who denied ever having any discussions with Lievano about his case. (T. 1833) Defendant stated that the reason he had lost trust in Burke was that Burke did not trust Lievano and fired her. (T. 1834) The trial court explained that Burke had every reason to fire Lievano, and Defendant stated he understood. (T. 1833-35) The trial court also explained to Defendant that he would only hurt himself if he chose not to cooperate with counsel, and Defendant stated that he understood and could cooperate. (T. 1836-40)

At a hearing on November 24, 1997, Burke announced that she, Natale and Defendant had resolved their issues regarding a potential conflict of interest and that she would be remaining as counsel. (T. 1932-33) Defendant personally agreed. (T. 1933)

As can be seen from the foregoing, Burke withdrew her motion to withdraw. As such, any issue regarding the alleged denial of the motion is not preserved for appeal. *Bolin v. State*, 869 So. 2d 1196, 1200-01; *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Because the issue was not preserved for appeal,

appellate counsel cannot be deemed ineffective for failing to raise the issue. *Groover*, 656 So. 2d at 425.

Moreover, because the motion to withdraw was withdrawn, Defendant does not explain how the trial court abused its discretion. A trial court's ability to remove counsel where the removal is not based on a request from the defendant or counsel is limited. *Weaver v. State*, 894 So. 2d 178, 188 (Fla. 2004). The lower court may only do so in the interest of justice. *Id.* at 188-89. Here, no such need based on the interest of justice was presented. As such, the trial court did not abuse its discretion in not forcing the withdrawal. Appellate counsel cannot be deemed ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Moreover, the trial court indication that there were not grounds presented for withdraw is in accordance with the law. This Court had held that for a trial court to have abused its discretion by denying a motion for withdraw, a defendant must have shown that he would suffer substantial prejudice by the denial of the motion. *Schwab v. State*, 636 So. 2d 3, 5-6 (Fla. 1994). Moreover, a defendant may not cause a withdrawal by his own conduct. *Wike v. State*, 698 So. 2d 817, 819-20 (Fla. 1997). Here, the facts stated above showed that Defendant did not show

that he would have been substantially prejudiced by the denial of the motion to withdraw, as most of the damage that counsel asserted happened did not and that Defendant caused the alleged conflict. As such, had counsel not withdrawn the motion and the trial court had denied it, no abuse of discretion would have been shown. Appellate counsel was not ineffective for failing to raise this nonmeritorious issue. *Kokal*, 718 So. 2d at 143.

IX. THE *AKE* CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the trial court's denial of a request for additional funds for his expert. However, Defendant is entitled to no relief as the claim is insufficiently plead and without merit.

Under *Ake v. Oklahoma*, 470 U.S. 68, 82-83, 84 (1985), the State is required to provide a defendant access to a mental health expert if he makes a showing that his sanity is likely to be a significant factor in his defense or his mental state is likely to be a significant factor at sentencing. However, *Ake* does not require that the State allow a defendant to have an expert of his choosing or that State provide a defendant funds to hire his own expert. *Id.* at 83. Moreover, *Ake* does not require the State to provide a defendant with "all the assistance that his wealthier counterpart might buy." *Id.* at

77. As a result, this Court has determined that to show a trial court abused its discretion in its rulings regarding the appointment of an expert or additional analysis by an expert, a defendant must show that he demonstrated a particularized need for the expert to the trial court and the record must show that the defendant was prejudiced by the trial court's ruling. *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997); *see also Marshall v. Crosby*, 911 So. 2d 1129, 1133 (Fla. 2005).

Here, Defendant has not met, and cannot meet, either prong. In his petition, Defendant does not explain how he made a particularized showing of need for the additional funds. Instead, he merely asserts that a trial court is required to appoint a mental health expert if he had shown that his mental state was at issue. Moreover, he does not assert how was prejudiced by the denial of additional funds in this case. Instead, he merely claims that undercompensation was "likely to sour the defense's relationship with its expert." Because Defendant has not shown how he meets either of the prongs of the applicable test, the claim is insufficient and should be denied. *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004).

Moreover, the record reflects no showing of particularized need or prejudice. Prior to trial, Defendant sought, and received approval, for the appointment of two mental health

experts and a mitigation specialist. (R. 748-49, 1634-38, 1721-24, 1766, 3185-86, 3693-94) In fact, Defendant sought, and received approval, for the mitigation specialists to charge twice the authorized rate and for Dr. Berland to receive additional fees to complete his work. (R. 1634-38, 1721-24, 1766) In total, the trial court authorized Dr. Berland to be paid up to $4000. (R. 3693-94)

When Defendant again sought additional funds for Dr. Berland, he admitted that Dr. Berland had completed his testing but refused to explain what tests were done or why $4000 had not been sufficient to complete testing. (T. 5575-78) Instead, he claimed that he had spent the money already authorized having Defendant's competency determined and consulting with Dr. Berland. (T. 5576-77) When the lower court inquired what still needed to be done, Defendant stated that Dr. Berland needed to review discovery. (T. 5577) When the lower court indicated that Dr. Berland had claimed to have familiarized himself with the facts of the case already and that experts did not need to read all the discovery, Defendant merely claimed that he was not and that trial preparation was ongoing. (T. 5578) Based on this lack of showing, the lower court denied the additional funds. (T. 5578) However, such a denial was not an abuse of discretion, as there was no showing a particularized need and *Ake* itself does

not require a State to provide Defendant with everything he wants. *Ake*, 470 U.S. at 71; *San Martin*, 705 So. 2d 1337 at 1347

Moreover, nothing in the record shows that Defendant was prejudiced. Despite having the authorization for additional fees denied, the record reflects that Defendant moved again for additional funds for Dr. Berland to pay him in full after Defendant had been sentenced. (R. 3691-99) In this motion, Defendant asserted that Dr. Berland was billing not only for the $4000 that had been authorized but also for an additional $2450.46 for work he had completed without obtaining prior authorization. *Id.* At the hearing on this motion, the trial court noticed the additional $2450 for Dr. Berland, inquired when it had been authorized and pointed out that advanced authorization was required. (T. 14440-41) When Defendant eventually acknowledged that there had been no advanced authorization, the trial court responded that this was improper as advanced authorization based on a showing of the reasonableness of the request was required. (T. 14441-42) Defendant then asserted that he had believed the work was justified without explaining why. (T. 14442) The trial court then inquired why the $6,450 charged was necessary when complete evaluations were usually conducted for $2000 or less. *Id.* Defendant asserted that the additional expenses were the result

of Dr. Berland providing consulting and consultation services to help counsel deal with Defendant. (T. 14442-43) After listen to this argument, the trial court agreed to order payment of the $4000 that it had authorized and not the additional $2450 that it had not. (T. 14443)

As can be seen from the foregoing, Defendant never alleged any need for the additional funds that related to his defense or mitigation. Under these circumstances, the trial court did not abuse its discretion in denying the additional funding. *See Overton v. State*, 801 So. 2d 877, 896-97 (Fla. 2001). Since the issue is without merit, appellate counsel was not ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

X. THE ADMISSION OF PHOTOGRAPH CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the admission of photographs of his victims' bodies. However, Defendant is entitled to no relief.

At trial, the State's theory was that Defendant, Lugo, Delgado and others engaged in a protracted scheme to kidnap wealthy people, torture the victims to obtain all of their assets and then kill the victims and dispose of their bodies to prevent detection of their crimes. The final victims of this

scheme were Griga and Furton. The State also argued that the manner in which both of these victims were killed was heinous, atrocious and cruel.

To support these assertions, the State presented the testimony of Delgado regarding Lugo's description of the murder of Griga, Delgado's personal observations of the murder of Furton and his personal observations of the dismemberment of their bodies. (T. 11739-63, 11793-11808) It also presented the testimony of Mario Gray regarding the disposal of the barrels containing the dismembered torsos of the victims. (T. 11121-52) It further presented evidence regarding the recovery of the barrels and of the buckets containing the dismembered heads, hands and feet of the victims. (T. 11305-19, 11330-31) To corroborate the testimony of Delgado, the State presented the testimony of Tony Falsetti, a forensic anthropologist, to confirm that some of the dismemberment had been accomplished with a chain saw and the rest with a hatchet and that Griga had suffered blunt head trauma. (T. 12231-66) The State also presented the testimony of the medical examiner regarding the manner in which the victims died. (T. 12314-52)

Further, because the bodies had been dismembered and identifying characteristics, such a prints and teeth, had been removed, the State was forced to seek alternative methods of

identifying the remains. As such, Dr. Falsetti also testified concerning how he examined the remains to determine the approximate age of the victims at the time of death. (T. 12238-41) Dr. Mittleman testified regarding the various manner in which he identified portions of the remains. (T. 12314-52)

During the testimony of Dr. Falsetti, the State sought to introduce four photographs of Furton's bones: 48I, 48J, 48K and 48H. (T. 12242) Dr. Falsetti testified that these photographs would assist him in explaining his testimony. *Id.* Defendant objected to the photograph marked as 48H only, claiming that it was prejudicial and that Dr. Falsetti's opinion was based upon the bones themselves. (T. 12242-43) The trial court then held at hearing outside the presence of the jury on the admissibility of this photograph. (T. 12243-54)

At the hearing, Dr. Falsetti explained that 48H was a photograph of Furton's left ankle. (T. 12244) The trial court then questioned whether Dr. Falsetti had any other picture of Furton's left ankle, which he did, and inquired if Dr. Falsetti could explain his testimony without 48H. (T. 12244-46) When Dr. Falsetti confirmed that he could explain his testimony concerning whether the foot was severed with a hatchet or a chain saw based on the other photograph of Furton's left ankle and the bone, the trial court sustained Defendant's objection

and excluded photograph 48H. *Id.*

At the trial court's direction, Defendant then reviewed the remainder of the photos that Dr. Falsetti had planned to use and objected to photos 48A, 48B, 48C, 48D and 47Z. (T. 12245) Dr. Falsetti then testified that 48B was his only picture of Griga's right ankle and was necessary to explain his testimony. (T. 12247-48) The trial court then had Dr. Falsetti look at the remaining photos to which Defendant had objected and explained that it wanted to know whether Dr. Falsetti needed any of these picture to explain his testimony. (T. 12248-49) Dr. Falsetti then testified that while photos 48B and 48C were necessary to explain his testimony, the subject of the remaining objectionable photographs could be explained through other evidence. (T. 12249-52) As such, the trial court sustained Defendant's objections to the other photos and admitted 48B, 48C and other photographs to which Defendant had not objected.[8] (T. 12252)

Dr. Falsetti then used State's Exhibit 1162 to explain what evidence showed that one of Griga's feet had been severed with a chain saw. (T. 12264-65) He used State's Exhibit 1161 to explained what evidence showed that this was true of his other

[8] Photo 48B became State's exhibit 1161, and photo 48C became State's exhibit 1162. (T. 12253)

foot as well. (T. 12265-66)

Before Dr. Mittleman began to testify, Defendant objected to the admission of photos 48R and 48S on the grounds that they were duplicative of photos already in evidence. (T. 12281-82) The trial court then questioned Dr. Mittleman about whether these photos were necessary for him to explain his testimony and whether he could do so based on the picture that were already in evidence. (T. 12285-87) Dr. Mittleman answered that he did need such photos to explain his testimony and that he could use the previously admitted photos but they he believed his photos were better as they showed exactly how the torsos were presented to him. *Id.* The trial court then had Dr. Mittleman sort the pictures so that all of the pictures of the same body part from the same victim were together. (T. 12287-92) While Dr. Mittleman was doing so, Defendant objected to photos 49G, 49H and 49B. (T. 12292-93) Dr. Mittleman explained that 49G and 49H depicted a scar that was used to identify the torso and that 49B depicted the manner in which the breast implants were identified. (T. 12293-94) Moreover, 49G showed the rapid decomposition of the bodies once they were removed from the barrels that complicated the identification process. (T. 12295-96) After considering these argument, the trial court excluded photos 49B and 49R. (T. 12295, 12298) The trial court also excluded 50S, 50R and 50L as

duplicative. (T. 12300) The trial court subsequently admitted 49G, 49H, 48S and a number of other photographs to which Defendant had not objected.[9] (T. 12318)

During his testimony, Dr. Mittleman used 48S and 49G to explain how when the torsos were removed from the barrels, they appeared to be in good condition but by the next morning, they had decomposed to such an extent the identification was complicated. (T. 12319) He used 49H to match a surgical scar on the torso to Ms. Furton's medical records. (T. 12324)

To the extent that Defendant is asserting that appellate counsel should have claimed that any of the photographs other than 48B and 48C was improper because the photographs were gruesome, Defendant is entitled to no relief because the issue was not preserved. In order to preserve an issue regarding the admission of evidence, it is necessary to object to that evidence at the time the evidence is admitted. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, it is also necessary for the objection to be made on the same grounds at trial for the issue to be preserved. *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). Here, the only photographs

[9] Photo 49G became State's exhibit 1185, 49H became State's exhibit 1186 and 48S became State's exhibit 1172.

that were admitted over Defendant's objection were 48B, 48C, 49G, 49H and 48S. Moreover, Defendant's objection to 49G, 49H and 48S was based on the assertion that they were duplicates and not on the basis that they were gruesome. As such, any issue regarding the gruesome nature of any photos other than 48B and 48C is not preserved for review. Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for review. *Groover*, 656 So. 2d at 425. As such, the claim regarding these other photos should be denied.

Moreover, Defendant is not entitled to any relief with regard to the admission of any of the photographs to which he objected. The trial court did not abuse its discretion in its ruling on the photographs, and appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim. *Kokal*, 718 So. 2d at 143.

This Court has held that gruesome photographs are admissible so long as they are relevant and "not so shocking in nature as to defeat the value of their relevance." *Looney v. State*, 803 So. 2d 656, 668 (Fla. 2001)(quoting *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990)). As such, gruesome photographs that are "independently relevant or corroborative of other evidence" are properly admitted. *Id.* Moreover, the test for admissibility is relevance, not necessity. *Pope v. State*, 679 So. 2d 710, 713

(Fla. 1996); *Jones v. State*, 648 So. 2d 669, 679 (Fla. 1994); *Straight v. State*, 397 So. 2d 903 (Fla. 1981).

While Defendant suggests that this Court held that this Court has held in *Henry v.* State, 574 So. 2d 73 (Fla. 1991), that it is "unfairly prejudicial to show a murder victim's body where doing so is unduly inflammatory," Petition at 44, this is not true. In *Henry*, the issue did not concern the presentation of photographs of the victim of the murder being tried. Instead, the issue concerned the presentation of the autopsy photograph of the victim of a collateral crime. Thus, *Henry* does not support the assertion that all photographs of the dead victim may be excluded simply because they are gruesome.

In fact, this Court had held that "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Arbelaez v. State*, 898 So. 2d 25, 44 (Fla. 2005)(quoting *Henderson v. State*, 463 So. 2d 196, 200 (Fla. 1986)); *Chavez v. State*, 832 So. 2d 730, 763 (Fla. 2002)(same). Thus, it is not true that relevant photograph evidence may be excluded simply because they are gruesome.

Here, the photographs were relevant and corroborated the State's case. The photographs were admitted and used to corroborate Delgado's testimony regarding the manner of death

and dismemberment of the victims. They were further used to explain how the various portions of the remains were identified, as Defendant had elected to destroy the victims' prints, teeth and faces such that alternative methods of identification were necessary. As such, the trial court did not abuse its discretion in overruling Defendant's objections to them. *Looney*. Appellate counsel cannot be deemed ineffective for failing to raise an issue regarding their admission. *Kokal*, 718 So. 2d at 143. The claim should be denied.

XI. THE SUPPRESSION OF STATEMENTS CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the trial court's denial of his motion to suppress statements. However, Defendant is entitled to no relief because the underlying issue is unpreserved and without merit.

Prior to trial, Defendant filed a boilerplate motion to suppress his statements to the police (R. 1116-17) As grounds, the motion asserted that the statements were the result of an illegal search and seizure, made without a valid waiver of his *Miranda* rights and were coerced. *Id.*

Immediately before hearing Defendant's motion to suppress statements, the trial court considered Defendant's motion to suppress the physical evidence. (T. 2260-85) In doing so, the

trial court reviewed the search warrant affidavits and heard argument on whether the warrants sufficiently connected Defendant, his apartment and his car to these crimes. *Id.*

At the hearing on the motion to suppress statements, Defendant withdrew his assertion that the statements were the result of an illegal search and seizure. (T. 2286-88) As such, the hearing proceeded solely on Defendant's assertion that *Miranda* warnings were not properly administered or voluntarily waived. (T. 2288)

Det. Nicholas Fabregas testified that he was assisting in the investigation of this case, was aware of the issuance of the search warrants and was assigned, with Det. William Hellman, to attempt to obtain Defendant cooperation and interview him during the execution of the search warrants. (T. 2290-93) When the police arrived to execute the search warrant for Defendant's apartment on June 3, 1995, Det. Fabregas entered Defendant's apartment as the search warrant was being executed and met Defendant as Defendant was walking downstairs. (T. 2293-94) Det. Fabregas asked Defendant if he would accompany him to police headquarters voluntarily and Defendant agreed. (T. 2294) Defendant, who appeared to have just awoken and was still in pajamas or sweatpants, asked if he could change first, which he did. (T. 2294) After Defendant got dressed, Det. Fabregas and

Det. Hellman drove Defendant to the police station in Det. Fabregas' unmarked police car without handcuffing him or forcing Defendant. (T. 2294-96)

When they arrived at the station, they went into an interview room. (T. 2296-97) Det. Fabregas asked Defendant biographical information, including his place of birth, level of education, ability to communicate in English, and whether Defendant was under the influence of any intoxicants. (T. 2297) Det. Fabregas then produced a *Miranda* waiver form and read Defendant his rights. (T. 2297) Defendant indicated that he understood each of his rights verbally and by initialing the waiver form. (T. 2297-2301) When Det. Fabregas got to the last paragraph of the waiver form which indicated that Defendant was signing the form voluntarily, Det. Fabregas had Defendant read the paragraph aloud to ensure that Defendant did understand English. *Id.* After Defendant indicated verbally that he understood his rights and was willing to waive those rights and speak to the police voluntarily, Det. Fabregas had Defendant sign the form to that effect. (T. 2302-03) Defendant was not threatened or touched and no promises were made to him. (T. 2303) At that point, Det. Fabregas still considered Defendant free to leave and would have driven Defendant back to his apartment had be so requested. (T. 2299)

After the waiver of rights, Det. Fabregas questioned Defendant about his employment, his living situation and his ability to meet his monthly expenses on his income. (T. 2303-05) Det. Fabregas then questioned Defendant about his knowledge of Delgado, Griga, Furton and Schiller. (T. 2305-09) During these discussions, Defendant did not indicate a desire to terminate the interview and instead spoke freely. *Id.* However, when Det. Fabregas stated that he believed Defendant knew the whereabouts of Griga and Furton, Defendant responded that he knew he was going to spend the rest of his life in prison and did not wish to continue the interview. At that point, the interview was terminated. *Id.*

On cross, Defendant elicited that while Det. Fabregas considered Defendant free to leave during the interview, he did not offer to take Defendant home after the interview. (T. 2311) Instead, Defendant was left alone in the interview room while Det. Fabregas consulted with the State Attorney's office about arresting Defendant and was then arrested and taken for processing. (T. 32312-13)

Defendant then questioned Det. Fabregas about the fact that he knew Defendant's apartment and what car Defendant drove at the time he first spoke to Defendant because Det. Fabregas had reviewed the search warrants and affidavits. (T. 2313-14)

Defendant then began questioning Det. Fabregas about the content of the warrants and affidavits and the sources of the information therein. (T. 2314-15) When Defendant asked Det. Fabregas how he knew that Defendant lived at his apartment, the State objected on relevance grounds. (T. 2318) Defendant argued that he was attempting to impeach Det. Fabregas' credibility. (T. 2315) The trial court indicated that he did not need to hear collateral impeachment. (T. 2315) Defendant then shifted to questioning Det. Fabregas directly about the fact that he knew that Defendant was implicated in serious criminal activity at the time he spoke to Defendant but that he had asked Defendant to go to the station voluntarily and had not handcuffed Defendant. (T. 2315-17)

He elicited that while Det. Fabregas had inquired about Defendant's use of intoxicants, he had not independently verified Defendant's denial. (T. 2317-18) He elicited that Det. Fabregas had not recorded his interview in any manner but his report and had not asked Defendant to confirm the account in the report. (T. 2318-21) Defendant elicited that Defendant never indicated any concern for his or his wife's safety and that the only people present during the interview were Det. Fabregas, Det. Hellman and Defendant. (T. 2321)

At the conclusion of testimony, Defendant presented no

argument. (T. 2323) The trial court then denied the motion, finding that Defendant had freely, intelligently and voluntarily spoke to the police after being fully advised of his rights and freely, intelligently and voluntarily waiving his rights. (T. 2324-25) The trial court found that Defendant was not coerced as there was no evidence of coercion of any form. *Id.*

At trial, the State did not introduce any statements Defendant made when he was arrested to the police. The only statements by Defendant that were introduced were statements Defendant made to others that were overheard by inmate Franklin Higgs. (T. 11453-88) Defendant did not object to the introduction of these statements. *Id.*

Because the State did not introduce any statements that were the subject of the motion to suppress at trial, any issue regarding the denial of the motion to suppress would not be meritorious. *Griffin v. State*, 639 So. 2d 966, 972 & n.4 (Fla. 1994). Since the issue is meritless, counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143.

Even if the State had introduced the statements, Defendant would still be entitled to no relief. While Defendant suggests that the asking of background questions constituted interrogation before *Miranda* warnings were given, both this Court and the United States Supreme Court have rejected the

concept that such background questioning constitutes impermissible interrogation without *Miranda*. *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02, 606-08 (1990); *Allred v. State*, 622 So. 2d 984, 987 & n.9&10 (Fla. 1993). Moreover, the unrebutted testimony of Det. Fabregas that Defendant was read his rights, indicated that he understood them both orally and in writing and waived them both orally and in writing was sufficient to carry the State's burden of establishing a waiver. *Thomas v. State*, 894 So. 2d 126, 136 (Fla. 2004); *see also State v. Fernandez*, 526 So. 2d 192, 193 (Fla. 3d DCA 1988)(testimony that is not "impeached, discredited, controverted, contradictory within itself, or physically impossible"). As such, the issue is without merit and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143.

To the extent that Defendant is also asserting that appellate counsel was ineffective for failing to raise an issue concerning the alleged refusal to allow Defendant to engage in collateral impeachment, he is entitled to no relief. The issue is not preserved for review. When the State objected that questions concerning how Det. Fabregas knew where Defendant lived were irrelevant, Defendant merely stated that he was going to tie the questions into a credibility issue. (T. 2315) When the trial court indicated that "collateral impeachment [was] not

really something I care to get into here," Defendant simply proceed to ask another question without asserting how the issue was not collateral impeachment or obtain an actual ruling of the trial court on the issue or attempting to proffer the answer to the question. *Id.* However, it is necessary to obtain a ruling on an issue to preserve an issue for appeal. *Richardson v. State*, 437 So. 2d 1091, 1094 (Fla. 1983). Moreover, it is necessary to proffer the answer and how the question is relevant in order to preserve an issue regarding the exclusion of evidence. *Morrison v. State*, 818 So. 2d 432, 447-48 & n.8 (Fla. 2002). Since Defendant did none of these, the issue is not preserved. Because the issue was not preserved, appellate counsel cannot be deemed ineffective for failing to raise it. *Groover*, 656 So. 2d at 425. The claim should be denied.

Further, while Defendant now suggests that an explanation of the circumstances of how Defendant was "pinpointed for apprehension" or how Defendant came to accompany the officers to the police station could not be collateral, he did not make these arguments below. As such, they are not preserved. *Morrison*, 818 So. 2d at 447-48. Appellate counsel cannot be deemed ineffective for failing to present these issues. *Groover*, 656 So. 2d at 425.

To the extent that Defendant may assert that his motion to

suppress was sufficiently broad to cover his statements that were overheard by Higgs, Defendant is still entitled to no relief. Defendant did not object to the admission of this testimony at the time of trial. (T. 11453-88) As such, any issue regarding the admission of these statements was not preserved for review.[10] *Terry v. State*, 668 So. 2d 954, 959 (Fla. 1996); *Kokal v. State*, 492 So. 2d 1317, 1320 (Fla. 1986). Appellate counsel cannot be deemed ineffective for failing to present an issue that was not preserved for review. *Groover*, 656 So. 2d at 425. The claim should be denied.

CONCLUSION

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

Respectfully submitted,

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[10] While this requirement was changed with the 2003 amendment of §90.104, Fla. Stat. (2003), this provision was not effective until July 1, 2003, after this trial and direct appeal had concluded. Ch. 2003-259, §4, Laws of Fla. Counsel cannot be deemed ineffective for failing to anticipate a change in the law. *Foster v. State*, 929 So. 2d 524, 529 (Fla. 2006).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Melodee Smith, 101 N.E. 3rd Avenue, Suite 1500, Ft. Lauderdale, Florida 33301, this 27th day of October, 2006.

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CERTIFICATE OF COMPLIANCE

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

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