IN THE SUPREME COURT OF FLORIDA

MANUEL ANTONIO RODRIGUEZ

Petitioner,

v. **CASE NO. SC07-1314**
L.T. No. F93-25817B

JAMES R. McDONOUGH,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, James R. McDonough, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

On September 15, 1993, Defendant and Luis Rodriguez were charged by indictment with committing, on December 4, 1984: (1) first degree murder of Bea Joseph, (2) first degree murder of Sam Joseph, (3) first degree murder of Genevieve Abraham, and (4) armed burglary of the Josephs' apartment with an assault. (R. 5-8). In exchange for his testimony against Defendant, Luis Rodriguez was allowed on April 25, 1996, to plead guilty to second degree murder and to be sentenced to life imprisonment.

(T. 2854-2856). Defendant's case proceeded to trial on October 7, 1996. (R. 12). Following a jury trial, Defendant was found guilty as charged on all counts. (R. 867-70). The jury unanimously recommended that Defendant be sentenced to death for each of the first degree murder counts. (R. 1291-92). The trial court followed the jury's recommendations and sentenced Defendant to death for each of the murders.[1] (R. 1795-98, 1738-92).

In sentencing Defendant to death, the trial court found six aggravators: (1) under a sentence of imprisonment - great weight; (2) prior violent felony, based on Defendant's 71 prior convictions and the contemporaneous murders of the other victims in this case - very great weight; (3) during the course of a burglary - great weight; (4) avoid arrest - great weight; (5) pecuniary gain - great weight; and (6) cold, calculated and premeditated (CCP) - great weight. (R. 1738-60). In mitigation, the trial court found: Defendant had suffered from some mental deficit - some weight; Defendant abused drugs - substantial weight; Petitioner was a loving family member - minimal weight; Petitioner showed compassion for others - minimal weight; Defendant was under financial pressure - minimal weight; and

[1] The trial court sentenced Defendant to a life sentence with a three year minimum mandatory provision for the armed burglary. (R. 1795-98, 1738-92).

Defendant had worked well in a family business - minimal weight. (R. 1760-89).

The trial court also considered and *rejected* Defendant's claims that: he committed the murders while under the influence of extreme mental or emotional disturbance; he was a minor accomplice in the crimes; his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; he was affected by his mother's mental condition; and Luis Rodriguez's life sentence demonstrates disparate treatment of an equally culpable codefendant. (R. 1769-89).

This Court affirmed Defendant's convictions and sentences on direct appeal. *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000). The facts, as found by this Court, are:

> [Defendant] and Luis Rodriguez were both charged with armed burglary and three counts of first-degree murder. In exchange for his testimony at [Defendant's] trial, Luis was allowed to plead guilty to second-degree murder, for which he received a life sentence. Although they both have the same last name, [Defendant] and Luis are not related by blood. At the time of the crimes, [Defendant] lived with Luis's sister, Maria Malakoff, who was also known as "Cookie."
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> [Defendant] was convicted based on the following facts presented at trial. In December 1984, Bea Joseph, Sam Joseph, and Genevieve Abraham were found murdered in a Miami apartment building. The Josephs lived in the apartment in which they were found, and Sam Joseph was the apartment complex landlord. Abraham was visiting the Josephs at the time of the crimes. When Abraham was found, her wedding band, diamond

watch, and diamond earrings were missing. There was no sign of forced entry into the apartment, but the apartment was in disarray. Apparently, each victim died quickly from gunshot wounds to the head, which were inflicted from shots fired at close range.

Law enforcement officers were unable to obtain enough evidence to solve these crimes until 1993. However, [Defendant] was suspected of involvement in the crimes soon after they occurred because of several calls he made to the police. In July 1985, police were contacted by a "tipster," who identified himself as Antonio Chait. The informant told them that on the night of the murders, he was living in the apartment complex where the murders occurred and he saw two males, one of whom he knew, running from the area near the Josephs' apartment. The tip was found to be without merit, and police determined that the informant was actually [Defendant]. Again, in November 1985, [Defendant] contacted police, identifying himself as Antonio Traves. He told police that on the night of the murders, he saw a man named Geraldo leaving the Josephs' apartment. That story could not be confirmed. Police were suspicious of [Defendant] but received no further leads until 1992.

In 1992, Rafael Lopez, Luis Rodriguez's brother-in-law, contacted police, hoping to get the reward that had been posted for information about the murders. Lopez told police that Luis had confided to him that Luis and [Defendant] committed the murders. He stated that Luis told him that he and [Defendant] went to the Josephs' apartment to rob them and that they killed two old ladies and an old man. Thereafter, police contacted Luis, who eventually gave a formal confession, in which he implicated both himself and [Defendant]. The next day [Defendant] was questioned and arrested. [Defendant] gave numerous conflicting accounts of his activities at the time of the murders. In all but his final statement to police, he denied any involvement in the murders. Finally, he admitted involvement but contended that the robbery and murders were committed by Luis and Luis's brother Isidoro, and that he had simply acted as a lookout.

Luis Rodriguez testified against [Defendant] at trial. His trial testimony was somewhat different from his original confession. [FN1] At trial, Luis testified that in 1984 he was living in Orlando. He

stated that [Defendant] called him and asked if he was interested in making money by assisting [Defendant] in committing a robbery. [Defendant] told Luis that Luis would be the lookout and that [Defendant] would do all of the work. Luis flew to Miami and met [Defendant]. They went to the Josephs' apartment; [Defendant] knocked on the door and told Sam Joseph that Malakoff and the children were being held hostage and that they would be released only if the Josephs gave him money. [Defendant] then forced himself into the apartment. Luis followed and shut the door.

Once inside the apartment, [Defendant], who had brought two pairs of rubber gloves with him, put on one pair and told Luis to wear the other pair and not to touch anything in the apartment without the gloves. Sam Joseph offered to get money from the bedroom, but [Defendant] instructed Luis to look there instead. Luis found a gun in the Josephs' bedroom, and [Defendant] became angry with Sam Joseph because he thought the offer to get money from the bedroom was actually a ruse to get the gun. Eventually, during the course of the crime, [Defendant] shot both Sam and Bea Joseph with a gun he had brought with him and then he ordered Luis to shoot Abraham with the gun Luis had found in the Josephs' bedroom. Because Luis was scared, he did as he was told and then he fled. He stated that he did not receive any of the proceeds from the crime and flew back to Orlando the next day.

Luis's brother, Isidoro, also testified at trial. He provided documentation that he was working in another city at the time of the crimes. He also stated that, soon after the murders, his mother contacted him to tell him that she had found coins and jewelry in a bag under her trailer and that [Defendant] and Malakoff had shown up looking for it. Isidoro stated that he was aware of the murders in the building and that he took the bag back to Orlando, where he threw it into a field. Isidoro's mother also testified and confirmed Isidoro's story.

Malakoff testified that she and [Defendant] had two children, one of whom died in 1984. She stated that members of her family did not like her or [Defendant]. She also said that [Defendant] was not angry with Sam Joseph at the time of the murders and that she did not believe that [Defendant] was involved in the murders. The State impeached her testimony

> through her sworn statement to the police in 1993, in which she said that [Defendant] had been angry with Sam Joseph and on the day of the murders had called him a son-of-a-bitch. Additionally, in her pretrial statement, she said that [Defendant] told her he killed Sam Joseph when Joseph reached for a gun; that he had made sure that Luis killed Abraham; and that [Defendant] made sure they were all dead.
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> The following evidence was presented during the penalty phase. The State presented evidence that [Defendant] had seventy-one prior violent felony convictions (the contemporaneous murders in this case, twenty-three convictions of armed robbery, seventeen for armed kidnapping, eight for aggravated assault with a firearm, and numerous convictions for carrying a concealed weapon and possession of a firearm by a convicted felon) and that he was on probation and parole at the time of the murders.
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> Both the State and [Defendant] presented the testimony of numerous psychologists and psychiatrists who had evaluated [Defendant] over the preceding twenty years. Apparently, whenever [Defendant] was charged with a crime, a question of competency was raised and he was evaluated. Most of those who examined him agreed that he suffered from some sort of mental illness, but the testimony varied greatly in that some had previously found him to be incompetent and in need of hospitalization; others had found him to be malingering. None could testify to his state of mind at the time of the murders. The testimony did establish that [Defendant] had a long history of drug abuse. Several of his family members testified regarding his childhood and his mother's mental problems.
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> [FN1] In his initial confession, Luis Rodriguez stated that he shot Abraham through a pillow; that he shot at two people; that he had ingested cocaine and marijuana before the homicides; and that [Defendant] shot the Josephs after he shot Abraham.

Rodriguez v. State, 753 So. 2d 29, 33-35 (Fla. 2000). On direct appeal to this Court (*Rodriguez v. State*, Florida Supreme Court Case No. 90,153), Defendant raised the following issues:

ISSUE I: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL WHEN BOTH A STATE WITNESS AND THE PROSECUTOR COMMENTED UPON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION

ISSUE II: THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE DEFENSE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST A HISPANIC JUROR, WHERE THE DEFENSE GAVE AN ETHNICALLY NEUTRAL AND NONPRETEXTUAL REASON FOR THE CHALLENGE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION

ISSUE III: THE TRIAL COURT ERRED IN ALLOWING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST AN AFRICAN-AMERICAN JUROR, WHERE THE STATE FAILED TO GIVE A RACIALLY NEUTRAL AND NONPRETEXTUAL REASON FOR THE CHALLENGE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION

ISSUE IV: THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN COLLATERAL CRIMINAL ACTIVITY, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

ISSUE V: THE TRIAL COURT ERRED IN PERMITTING DETECTIVE CRAWFORD TO TESTIFY TO HIGHLY PREJUDICIAL DOUBLE HEARSAY DURING THE PENALTY PHASE, WHEN THE DEFENDANT DID NOT HAVE THE OPPORTUNITY TO EFFECTIVELY REBUT THE HEARSAY TESTIMONY, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 6 AND 9, OF THE FLORIDA CONSTITUTION

ISSUE VI: THE TRIAL COURT ERRED WHEN IT LIMITED THE DEFENDANT'S PRESENTATION OF MITIGATION EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION

ISSUE VII: THE TRIAL COURT ERRED WHEN IT SEPARATELY CONSIDERED AND WEIGHED THE FELONY MURDER AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES, SINCE BOTH AGGRAVATING CIRCUMSTANCES REFERRED TO THE SAME ASPECT OF THE OFFENSE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

ISSUE VIII: THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD ESTABLISHED THAT THE HOMICIDE HAD BEEN COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE

ISSUE IX: THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE HAD BEEN COMMITTED TO AVOID OR PREVENT A LAWFUL ARREST, WHERE THE EVIDENCE INTRODUCED WAS LEGALLY INSUFFICIENT TO SUSTAIN THAT AGGRAVATING CIRCUMSTANCE

Defendant's convictions and sentences became final on October 2, 2000, when the United States Supreme Court denied certiorari from direct appeal. *Rodriguez v. Florida*, 531 U.S. 859 (2000). Defendant pursued post conviction relief, which was denied May 3, 2005. The appeal from the denial of post conviction relief is currently pending before this Court. *Rodriguez v. State*, SC05-859. Defendant's petition for writ of habeas corpus was timely filed with his initial post conviction brief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

CLAIM I

WHETHER MR. RODRIGUEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT ON DIRECT APPEAL.

Defendant's first claim does not present a substantive issue for consideration, but simply introduces the concept of ineffective assistance of appellate counsel and relates the particular standards involved. The State acknowledges that this Court may properly consider a claim of ineffective assistance of appellate counsel in a petition for writ of habeas corpus, and that the relevant standards for determining whether Defendant was deprived of his constitutional right to appellate counsel are the same as applied to claims of ineffective assistance of trial counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000).

In *Rutherford*, this Court repeated that habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. However, claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a post conviction motion. *Id*. at 643. If a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. This is generally true as to issues that would have been found to be procedurally barred had

they been raised on direct appeal. *Id*. at 643; *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995). Additionally, since habeas corpus is not to be used as a vehicle for a second appeal, appellate counsel is not ineffective for failing to raise additional arguments in support of a claim raised on direct appeal or to make arguments "more convincingly." *Id*. at 645. The Court reasserted that appellate counsel cannot be considered ineffective for failing to raise issues which were procedurally barred because they were not properly raised at trial. *Id*. at 646; *Williamson v. Dugger*, 651 So. 2d 84, 86-87 (Fla. 1994). Where an issue has not been preserved for review, if it had been raised on appeal it would have warranted reversal only if it constituted fundamental error defined as an error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Id*. at 646. Finally, habeas cannot be used to raise substantive claims that trial counsel was ineffective and a petitioner is procedurally barred if he attempts to do so. *Id*. at 647-48.

Appellate counsel is not required to raise every conceivable claim. *See Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). Habeas corpus may not serve as a second or successive appeal and a claim of ineffective assistance of

appellate counsel may not be used as a variant to an issue already raised nor added as an issue raised in the 3.850 motion and appeal. *Fotopoulos v. State*, 838 So. 2d 1122 (Fla. 2002).

With these general principles in mind, Defendant's specific allegations will be addressed in the remaining issues.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE ALLEGED PENALTY PHASE ERRORS.

Defendant asserts that his appellate attorney should have raised several issues challenging the penalty phase proceeding that was conducted after his conviction. Specifically, Defendant identifies four claims which he submits should have been presented on direct appeal: the exclusion of proffered defense mitigation; the trial court's rejection of proffered mitigation relating to Defendant's mother's depression; prosecutorial misconduct in allegedly arguing mitigation as non-statutory aggravation; and the State's use of Defendant's prior convictions. (Petition, pp. 7-19). Each of these claims will be addressed in turn; as will be seen, no basis for a finding of ineffective assistance of appellate counsel can be discerned in this issue.

a) Exclusion of mitigating evidence: Defendant identifies the trial court's rulings excluding evidence offered by his two

sisters as reversible error which he claims should have been raised on appeal. The record reflects that the following evidence was excluded: 1) during the testimony of Ana Fernandez, defense counsel wanted to ask the ages of Fernandez's children that were present in the house one of the times Defendant's mother tried to commit suicide (T. 3866-72); and during the testimony of Mayra Molinet, defense counsel wanted to ask what Molinet had been doing between 1976 and 1986, and also about the fact that Molinet's nine-year-old daughter was going to be prescribed Prozac for depression. (T. 3901, 3904-16). A review of the record confirms that appellate counsel acted reasonably in omitting any issue challenging these rulings on appeal.

Initially it must be noted that much of this claim, as pled, was not preserved for appellate review. The defense attempt to admit the evidence discussed in the petition began during the testimony of Defendant's sister, Ana Fernandez. After Ms. Fernandez had testified for several transcript pages, describing a bloody suicide attempt by Defendant's and Fernandez's mother, the State objected when defense counsel asked the ages of the children that were home at the time of the suicide attempt, noting the testimony was getting "far afield." (T. 3866-67). At the ensuing bench conference, defense counsel indicated his intent to elicit information "to show the degree

of depression suffered by the mother," and that it went "literally on from her to her children to the grandchildren, who are now taking antipsychotic drugs." (T. 3867-68). Defense counsel ultimately acknowledged that he was not prepared to offer medical testimony showing a medical link to some hereditary mental illness, but he intended to use lay witnesses to show the existence of mental health problems among several generations: "the one mother is going to testify that one child is presently on Prozac." (T. 3868-69).

The trial court, noting the lack of any testimony that the mother suffered from schizophrenia, "or anything in any way related to" the defendant's mental illness as described by the testimony to that point, sustained the objection, at least as to getting such information from witness Ana Fernandez. (T. 3870). Defense counsel commented that the child's mother would be able to provide testimony linking her daughter's illness to the Defendant's illness, and the court determined that it would rule further on the issue after hearing this testimony. Defense counsel did not object but stated, "Okay." (T. 3872). Defense counsel did not attempt to proffer the answer to the only question asked which Ms. Fernandez was not permitted to answer - the ages of the children in the home at the time of the attempted suicide. Counsel's acquiescence to the ruling and

failure to proffer the answer to the question propounded demonstrates that there was nothing on this issue preserved for appellate review from Ms. Fernandez's testimony.

The next witness called, and the final defense witness, was Defendant's younger sister, Mayra Molinet. (T. 3890). Molinet described her mother's nervous breakdown in 1966, upon learning that another sister, Frances, was using heroin. (T. 3895). She discussed how her mother's psychological problems had affected her as well as the Defendant. (T. 3896-97). Ms. Molinet testified that after Defendant came to California to get her in late 1975 or early 1976, she and Defendant and their sister Frances lived in the same house, doing drugs. (T. 3900). Molinet was using heroin and cocaine until 1986, when she went to detox for eight weeks. (T. 3901). Defense counsel asked, "Between 1976 and 1986 tell us about your life," to which Molinet responded "I was a mess." (T. 3901). The prosecutor objected, noting "it is not her life that is at issue here," and the court sustained the objection. (T. 3901). The defense continued questioning; Ms. Molinet testified that Defendant lived with her in 1976, when Frances turned them both on to heroin and cocaine. (T. 3901). After that, Molinet said she met a drug dealer and went her own way. (T. 3902). She next saw Defendant in the early 1980s, at South Florida Hospital. (T. 3902).

When defense counsel asked whether Molinet had any contact with Defendant between 1982 and three or four years ago, Molinet responded: “Well, I have always known, you know, through my sister, but I have tried to make my life. I am struggling now to try to get over depression. I have a daughter who is depressed. She is only nine and I am trying to help her because --,” when defense counsel interrupted to ask if the daughter had received -- then the prosecutor objected. (T. 3904). The jury was excused and defense counsel proffered more information from Molinet. Molinet stated that her nine-year-old daughter had just been found to be clinically depressed, and doctors at Children’s Hospital had advised her that they were going to conduct additional testing and intended to put the daughter on Prozac. (T. 3904-06). The judge also inquired and Molinet indicated that the only diagnosis had been for clinical depression. (T. 3906-07).

After excusing the witness and entertaining legal argument, the court sustained the State’s objection finding no link between the depression of the mother, the depression of the daughter and the depression of the niece to the Defendant’s diagnosed mental illness. (T. 3915-16). Defense counsel did not object to the ruling. The jury heard a wealth of information relating to Defendant’s mother’s depression, and that the

sisters and a niece also suffered from depression. (T. 3862-66, 3877, 3882, 3894-99, 3904, 3923, 3935-36). The only tidbit of information developed in this record that the jury did not hear is that Molinet's daughter's doctors have indicated they may prescribe Prozac for the daughter's depression. This is the only fact which the court excluded, and the exclusion of this one fact is the only possible issue preserved for appellate review in this record.

Notwithstanding the procedural bar applicable to much of the issue as now offered, Defendant's petition suggests that appellate counsel should have presented an argument that the trial court improperly denied the defense attempt to present relevant mitigating evidence. However, even if such an argument had been presented, no relief would have been granted. Neither deficient performance nor prejudice can be found, since the claim now offered is without merit.

Contrary to Defendant's claim that significant mitigating evidence demonstrating the intergenerational nature of Defendant's mental illness was not available, much of the testimony which Defendant implies was excluded was in fact heard by the jury. Both Ana Fernandez and Mayra Molinet were permitted to describe Defendant's mother's mental problems for the jury, including that she suffered from depression, was prescribed

medications for her mental condition, and had attempted suicide several times. (T. 3862-66, 3883, 3894-99, 3935). Fernandez was permitted to describe how her daughter found the mother, first finding the bathroom full of blood and then finding that the mother had cut her wrists. (T. 3866).

Defendant does not cite any comparable cases suggesting error was committed in the instant case. As this Court has repeatedly recognized, there are reasonable limits which can be placed on the admission of testimony offered to prove a mitigating circumstance. ***Hill v. State***, 515 So. 2d 176, 178-79 (Fla. 1987), establishes that the trial court ruled correctly on this issue. In ***Hill***, this Court upheld the exclusion of the testimony relating to Hill's father's medical history, finding that it pertained more to the father's character than defendant Hill's, and therefore admissibility was properly denied. As the trial court in this case ruled properly, there is no merit to the issue which Defendant now claims should have been raised on appeal, and therefore appellate counsel cannot be deemed to have performed deficiently by failing to present the issue.

Even if some error could be shown in the trial court's ruling to exclude this evidence, any such error would clearly be harmless beyond a reasonable doubt. The only proffered evidence actually excluded was the fact that Defendant's nine-year-old

niece was going to be prescribed Prozac for depression. While Defendant speculates that hearing this evidence would have caused the jury to reject the State's position that Defendant was malingering, this speculation has no support in the record. The jury heard testimony from eight different mental health experts. (T. 3628, 3664, 3733, 3758, 3817, 3995, 4024, 4096). As the trial court noted, "nearly every doctor who testified found the Defendant to be exaggerating his symptoms, faking his amnesia, and for the most part malingering," although most believed that some underlying mental illness existed. (R. 1784). Given the wealth of testimony from different experts on the subject, there is no reason to suggest that the jury would reach a different conclusion on this question simply because a niece takes medication for a different and unrelated mental condition.

The trial court's ruling on this evidence was proper. Therefore, appellate counsel did not perform deficiently in failing to offer this particular argument on appeal.

b) Trial court's rejection of mitigation: Defendant also asserts that counsel should have challenged the trial court's assessment of the mitigating evidence, claiming that the rejection of Defendant's mother's "mental illness" as mitigation would have been found to be reversible error, resulting in a new sentencing order. In this claim, Defendant asserts that the

trial court made “a faulty assumption” in commenting that depression had not been identified as a major mental illness. (Petition, p. 13). It must be noted that the court’s comment about whether depression was a major mental illness was not made as part of the decision to reject the mother’s depression as mitigation, it was made during a bench conference with regard to whether Defendant’s mental problems were hereditary in determining the admissibility of the testimony about the niece being clinically depressed. (T. 3904, 3911). The trial court’s stated reason for denying the mother’s mental problems as mitigation is based on the testimony that the mother’s problems were exacerbated by Defendant’s legal problems. (R. 1784-85).

The trial court’s finding that Defendant’s illegal activities contributed to his mother’s mental problems is well supported by the testimony of Defendant’s sisters. (T. 3883, 3896, 3935-36). Indeed, Defendant makes no claim these findings are not supported; he does not even acknowledge the findings, choosing instead to focus on the red herring comment about depression.

Defendant submits that the defense “presented evidence which established his mother’s longstanding battle with mental illness and specifically depression, including separate suicide attempts,” citing T. 3862-66, 3897, 3899. (Petition, p. 13). The

only testimony was from Fernandez and Molinet, who testified their mother suffered from depression most of her life, and attempted suicide on several occasions. Lay testimony that an individual was depressed does not necessarily establish mitigation for another individual, and the trial court was not constitutionally compelled to so find. The record is clear that this evidence was considered and rejected by the court. Contrary to Defendant's argument, the trial court was not required to accept, but only consider, this evidence. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). This Court has recognized that a trial court may conclude that nonstatutory mitigation is not entitled to any weight. *Ford v. State*, 802 So. 2d 1121, 1134-35 (Fla. 2001). In *Ford*, this Court acknowledged that a trial court may find non-statutory mitigation to exist, yet to be entitled to no weight because it was not truly "mitigating" of the defendant's behavior. This is precisely what occurred at Defendant's sentencing. Because no error has been shown, appellate counsel performed reasonably. No relief is warranted on this issue.

c) Prosecutorial misconduct: Defendant claims an issue also should have been presented with regard to alleged prosecutorial misconduct in the penalty phase. Specifically, Defendant asserts that the prosecutor improperly argued some of

the mitigating evidence should be used to aggravate the crime. However, the record reflects that the prosecutor's comments now challenged were not objected to at trial, and were in fact proper, and therefore appellate counsel could reasonably decide against presenting this issue on appeal.

Defendant maintains that error occurred when the prosecutor argued to the jury that Defendant was not really mentally ill, but was malingering. Because there was no objection to these statements, they were not preserved for appellate review and counsel cannot be deemed for failing to challenge them. Defendant makes no claim that this issue should have been urged as fundamental error.

As this Court has repeatedly recognized, attorneys are permitted wide latitude in their closing arguments. *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999); *Breedlove v. State*, 413 So. 2d 1, 8 (Fla.), *cert. denied*, 459 U.S. 882 (1982). Counsel may advance any legitimate argument. The prosecutor's explaining why the jury should reject the mental mitigation offered in this case was not presented in a derogatory manner or with inflammatory labels; it was a proper argument as to why the jury should not be swayed by the defense's expert testimony, in light of the evidence that Defendant faked or exaggerated his symptoms. A prosecutor is clearly entitled to offer the jury his

view of the evidence presented. *Shellito v. State*, 701 So. 2d 837, 841 (Fla. 1997), *cert. denied*, 523 U.S. 1084 (1998).

The comments challenged in the petition did not suggest to the jury that Defendant's malingering should be considered or weighed as an aggravating circumstance. The evidence of malingering was properly admitted as rebuttal to the defense case for mental mitigation, and therefore was properly subject to comment by the State. *See Zack v. State*, 911 So. 2d 1190, 1208-09 (Fla. 2005)(denying habeas claim that appellate counsel should have raised this same issue, where comments alleged as nonstatutory aggravation were based on testimony properly admitted to rebut defense mitigation). The prosecutor in this case had not even broached the subject of aggravating circumstances at that point in the closing argument, but was addressing the weight of the mitigation. (T. 4216, 4223-25, 4242, 4249, 4257). As this Court has recognized, an argument that jurors should reject mitigation based on the evidence should not be equated with an argument that nonstatutory aggravating factors existed. *See Perez v. State*, 919 So. 2d 347, 375 (Fla. 2005)(no error in using testimony of defendant's mental condition to evaluate weight to be afforded mitigation).

The record presented herein does not support any claim that the prosecutors engaged in improper argument. While the

prosecutor's comments may not have been complimentary, they were supported by the evidence and were not unfairly inflammatory. They clearly did not, as Defendant suggests, urge any evidence should be considered as nonstatutory aggravation. Presentation of this issue would not have resulted in any relief, and therefore no ineffectiveness is shown in the failure to raise this issue on direct appeal.

d) Use of Defendant's prior convictions: Finally, Defendant asserts that his appellate attorney performed deficiently in failing to present an issue on appeal relating to the use of Defendant's prior convictions. Once again, although Defendant accuses the prosecutor of misconduct, he has not identified any impropriety. Defendant claims that the prosecutor made the prior convictions a feature of the penalty phase because he used large pieces of cardboard to aid the jury in understanding the extent of Defendant's relevant prior legal history.

The first impediment to finding that Defendant's counsel should have raised this claim is that it was not preserved for appellate review. There was no objection offered at trial to the prosecutor's use of the posters as demonstrative aides. (T. 4184, 4198). Counsel cannot be deemed ineffective for failing to present an argument which is procedurally barred.

In addition, there is no merit to the claim. Despite Defendant's attempt to characterize the prosecutor's actions as inflammatory, the record reflects that the prosecutor was merely invoking the facts of this case. Notably, Defendant does not dispute the accuracy of the comments; he indeed had over seventy prior convictions of violence, spanning a history of over forty years. While this is a staggering number, there is no showing that this aggravating factor was the primary focus of the penalty phase. To the contrary, most of the penalty phase testimony focused exclusively on Defendant's mental condition and history of psychological problems. There were eight experts, providing volumes of testimony and a number of different opinions.

When this Court has criticized prosecutors for making prior crimes a feature of the penalty phase, the concern is often directed to inflammatory and unfairly prejudicial evidence relating to the prior crime. In this case, very few details were offered, and those details were factual in nature and would not engender any unnecessary emotional appeal.

Once again, appellate counsel was not ineffective in failing to present a claim which was both procedurally barred and easily refuted by the record. Defendant's petition fails to identify any meritorious penalty phase claim which should have

been presented on direct appeal. As counsel performed reasonably in Defendant's direct appeal, the habeas petition must be denied as to this issue.

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE DENIAL OF THE MOTION TO SUPPRESS PETITIONER'S STATEMENTS.

In his post conviction motion and companion post conviction appeal, Defendant argued that trial counsel was ineffective in litigating the suppression of Defendant's statements. Now, in a variation on this same theme, Defendant alleges that appellate counsel was ineffective in failing to challenge the trial court's denial of his motion to suppress the Defendant's post-arrest statements.

It is improper for Defendant to re-argue the IAC/suppression claim rejected in post conviction under the guise of a habeas petition. *Blackwood v. State*, 946 So. 2d 960, 976 (Fla. 2006), citing *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992)("Habeas corpus is not a second appeal and cannot be used to litigate or relitigate issues . . .")

Moreover, Defendant has not demonstrated any deficiency of counsel and resulting prejudice under *Strickland*. On direct appeal, Defendant's appellate counsel demonstrated his obvious familiarity with the suppression claim and the Defendant's

statements. Specifically, Defendant's Initial Brief set forth the comprehensive recitation of facts relating to Defendant's August 13th statements.[2] Despite appellate counsel's obvious familiarity with the suppression claim rejected by the trial court, Defendant asserts that appellate counsel was "obligated"

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[2] "Throughout his conversations with the officers, Defendant consistently maintained that he did not shoot anyone in the Josephs' apartment. (T. 219, 438). At the conclusion of Defendant's oral statement at 8:30 PM, Defendant declined the officers' request to give a formal, stenographically recorded statement. (T. 222, 332, 444).

At the conclusion of Detective Crawford's testimony, the defense argued that the State had failed to establish that Defendant had freely and voluntarily waived his rights before speaking to the Metro-Dade officers. Specifically, the defense claimed that by ignoring Defendant's mental deficits, the officers were able to obtain a statement from Defendant by overcoming Defendant's will through persistent questioning. The result, the defense claimed, was an involuntarily given statement. (T. 466-70).

The trial court granted Defendant's suppression motion in part and denied the motion in part. (R. 349-364). The court suppressed the statements made by Defendant at Tomoka. Although Defendant was a suspect and in custody, the officers failed to read Defendant his *Miranda* rights before speaking with Defendant. (T. 509-510). The court also found that the police had not used coercion to obtain the Tomoka statements. (T. 510). The court denied suppression of Defendant's statements made to the officers during the ride from Starke to Miami, since those statements were volunteered. (T. 512). The court also denied suppression of the statements made by Defendant to the police at police headquarters. The court found that the previous *Miranda* violation did not affect the voluntariness of Defendant's subsequent statement, since the police had not utilized coercion to obtain the earlier statements. (T. 517-519). The court also found that the State had established that Defendant was alert at the time of his statement and that the medication that he had been taking had not impaired him so as to render his statement involuntary. (T. 513, 514)." (e.s.)(Initial Brief, Case 90,153, pp. 5-6)

to appeal the denial of the motion to suppress. Contrary to Defendant's assertion, appellate counsel is not "obligated" to raise any particular claim. *See Jones v. Barnes*, 463 U.S. 745, 751-54 (1983)(recognizing that appellate counsel needs latitude in selecting issues to raise on appeal). Even if Defendant's suppression claim had any arguable merit, which Respondents emphatically dispute, appellate counsel was not unreasonable under prevailing professional norms because (1) the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue, and (2) effective advocates may "winnow out" weaker arguments.

The trial court correctly denied Defendant's motion to suppress his August 13th statements. Upon arrival at the police station, Defendant executed a *Miranda* rights/waiver form. When confronted with various documents and pieces of evidence, Defendant periodically changed his stories in order to accommodate his self-serving version of events. After being confronted with Luis's statements, Defendant admitted certain aspects of the triple homicide. In sum, Defendant voluntarily waived his *Miranda* rights and there was no evidence presented to the trial court of any police coercion in obtaining those statements. The trial court excluded Defendant's initial statements because *Miranda* warnings were not given to him.

Defendant now argues that his first statements were "not voluntary" and that his second set of statements, which were given nine days later and after his valid waiver of *Miranda*, were tainted by his earlier unwarned confession and should have been excluded.

Contrary to Defendant's self-serving claim, his first statements were excluded solely because of a violation of *Miranda*, not because his statements were "not voluntary." Moreover, the Supreme Court has limited the remedy for a *Miranda* violation to the exclusion of statements taken *in violation of Miranda*. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), (the failure to administer *Miranda*, without more, did not "taint" subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights.)

Defendant also faults the trial court's reliance on *Colorado v. Connelly*, 479 U.S. 157 (1986). Defendant argues that *Connelly* is inapplicable because Defendant was arrested. This argument was not raised before the trial court and, therefore, was not preserved for appeal. *Hendrix v. State*, 908 So. 2d 412, 426 (Fla. 2005). Moreover, Defendant's current attempt to distinguish *Connelly* is meritless. "The sole concern of the Fifth Amendment, on which *M*iranda was based, is governmental **coercion.**" *Connelly*, 479 U.S. 157. Because "[c]oercive police

activity is a necessary predicate to the finding that a confession is not 'voluntary,'" *Connelly*, 479 U.S. at 167, the dispositive inquiry is one of alleged police coercion, not the timing of the defendant's arrest.

Finally, even a legitimate claim of a purportedly coerced confession, which does not exist in this case, may be rejected as harmless error. *See Arizona v. Fulminante*, 499 U.S. 279 (1991). The jury heard Defendant's admission to being involved in the murders and the five other versions of the events he had provided to the police. (T. 3130-35, 3139-45); *Rodriguez*, 753 So. 2d at 34. They heard evidence that the proceeds of the crimes were found under Luis's mother's trailer and that Defendant and Ms. Malakoff had come looking for them. *Rodriguez*, 753 So. 2d at 35. They heard Ms. Malakoff's testimony about the false alibi and her impeachment with her prior statement that Defendant had admitted to committing the crimes. (T. 2723-25); *Rodriguez*, 753 So. 2d at 35. Under these circumstances, any error would be harmless.

ISSUE IV

WHETHER APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CHALLENGE PROSECUTORIAL MISCONDUCT.

Defendant next contends that appellate counsel failed to challenge improper comments made by the prosecutor throughout

the trial. Specifically, he complains about: (1) guilt phase closing arguments referring to the novel *"Heart of Darkness"* and to the movie "*Silence of the Lambs*;"[3] (2) alleged improper victim impact testimony introduced at guilt phase through witnesses Virginia Nimer and Tama Zaydon;[4] (3) the prosecutor's remarks about the Josephs' health problems and about victim Genevieve Abraham's family; (4) alleged prosecutorial remarks impermissibly shifting the burden of proof and that people involved in this crime have to be punished; (5) the prosecutor's alleged attack on defense counsel that the defense was attempting to trick the jury.[5]

The record on this case reflects that appellate counsel acted as an able advocate. Appellate counsel raised as one of his primary issues that a State witness was improperly allowed

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[3] The record reflects that trial defense counsel did not object to the prosecutor's *Heart of Darkness* allusion (T. 3392-93) but did object and was overruled on the reference to the *Silence of the Lambs* movie (T. 3330-32).

[4] The defense did not object to the substance of the testimony of witnesses Virginia Nimer and Tama Zaydon or to the prosecutor's opening statement (T. 1713-40; 1751-1804; 1810-32) except as to two relevance objections at T. 1813-14 regarding the mother's health condition in December 1984 which was overruled and a question as to the closeness of the family which was sustained.

[5] The defense did not object to the comment at T. 3356 that Defendant claimed to be sick when asked about his participation in the murders, nor did defense counsel object to anything at T. 3300 or T. 3400-08, or to comments about tricking or misleading at T. 3301, 3314, 3342, 3349. The defense objection at T. 3313 was properly denied since it was an appropriate response to the defense argument that the State's evidence had been scripted. (T. 3290-94; 3296-98).

to comment on Defendant's right to remain silent and that the prosecutor improperly commented on his right not to testify at trial. This Court found that the witness's statement, even if found to be an impermissible comment on the right to remain silent, in light of Defendant's subsequent admission that he was present at the time of the crimes, helped Luis Rodriguez gain entrance to the Josephs' apartment and acted as a lookout, the trial court did not abuse its discretion in refusing to grant a mistrial. *Rodriguez*, 753 So. 2d at 36-37.

As to the prosecutor's remarks during closing argument concerning Defendant exercising his right to remain silent, this Court agreed that the prosecutor had made improper comments but the error was harmless under *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). *Id*. at 37-39. This Court's thorough analysis of the issue demonstrates that appellate counsel provided exemplary advocacy.

With respect to the challenge to victim impact evidence and comments in paragraph (2), *supra*, this appears to be merely an effort to repeat impermissibly an identical claim asserted in the post conviction motion which the trial court considered and denied (as an aspect of trial counsel ineffectiveness). (PCR 5/606-07). With regard to the victim impact evidence, Respondent

will rely on its argument (Argument I) in its Answer Brief in *Rodriguez v. State*, SC05-859.

With respect to the complaint in paragraph (4), *supra*, regarding prosecutorial comments that allegedly impermissibly shifted the burden of proof, as well as the *Silence of the Lambs* reference and the complaint about the defense trying to trick the jury, again the trial court in its post conviction order found the challenge to trial counsel's performance meritless and procedurally barred. (PCR 5/606-07) The lower court's conclusion was amply supported by the record.

The State's comments asking the jury to return a truthful verdict and about justice did not shift the burden of proof and were not improper. The State began its closing by asserting that the State had the burden of proof and then stated that the jury should consider only the evidence presented and the jury instructions in determining its verdict. (T. 3299-3301). The State then pointed out that what the attorneys said was not evidence or jury instruction and should not be considered as such in returning a verdict. (T. 3300-01). The State continued by pointing out that justice was served when an innocent man goes free and when a guilty man is convicted if the evidence shows that the man is guilty. (T. 3303). Near the end of its closing argument, the State asserted that Defendant's own

confession showed that Defendant was guilty as a principal even if the jury did not believe Luis. (T. 3400-04). The State then argued that sympathy for anyone involved in the case was an improper consideration during deliberations. (T. 3404-06). The State then asserted that the jury had to apply the law of principal and could not ignore that law because it disliked it. (T. 3406-07). The State argued that the evidence showed that Defendant had committed these crimes beyond a reasonable doubt and that the jury should return a verdict in accordance with the verdict. (T. 3407-11). During this discussion, the State reiterated that justice was served both when an innocent man was acquitted and when a guilty man was convicted. (T. 3410).

When considered in context, the State's comments about justice and a truthful verdict did not shift the burden of proof. Instead, they urged the jury to consider only those matters that a jury should properly consider and to ignore those matters that they should ignore and that the State had proven Defendant guilty beyond a reasonable doubt based on the evidence. As such, the comments were not improper, and counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that they were. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998). The claim should be denied.

The claim regarding comments about the State tricking the jury and speaking to the witnesses were also proper. (T. 3301, 3308, 3313, 3314). The State's comments were a fair response to Defendant's initial closing argument. *See Ferguson v. State*, 417 So. 2d 639, 641-42 (Fla. 1982). During his initial closing argument, Defendant accused the State of trying to hide the truth. (T. 3290). He also asserted that the State had scripted the witnesses' testimony. (T. 3289-98). In response to Defendant's claim that the State had scripted the testimony, the State asserted that there was nothing wrong with attorneys discussing the witnesses' testimony with them prior to trial and that the State had not presented perjured testimony. (T. 3307-09, 3313-14). The State asserted that Defendant was making his arguments about the scripting of the testimony to distract the jury from the evidence. (T. 3313-14). As such the State's comments that it was not trying to trick the jury, that it was proper for the State to speak to its witnesses before they testified and about presenting scripted testimony were proper as a fair response to Defendant's closing. *Ferguson*. Counsel cannot be deemed ineffective for failing to make a nonmeritorious argument that they were not. *Kokal*, 718 So. 2d at 143. The claim should be denied.

The same is true regarding the other trick comments and the comment about the *Heart of Darkness*. (T. 3347, 3349). Defendant has stressed that the State did not recover the guns used in this crime and did not present DNA evidence. (T. 1957, 2206, 2404-07). During his initial closing argument, Defendant called Luis the devil. (T. 3286-87). The State argued that these claims were nonmeritorious because the guns had been thrown into the water and Defendant would claim that the State could not show that he had used the gun even if it had been recovered. (T. 3345-47). The State asserted the issue about DNA was not meritorious because DNA evidence would not have been present in the manner Defendant suggested. (T. 3349). The State briefly asserted that while Defendant called Luis evil it was Defendant who was "capable of every wickedness." (T. 3392-93). Given the evidence Defendant presented on these issues and his argument, the State's comments about them were not improper. *Ferguson*.

Moreover, there is no reasonable probability that Defendant would not have been convicted had counsel objected to the comment about Ms. Malakoff's impeachment. (T. 3351-52). The State pointed out that Luis's testimony about where the guns were thrown was corroborated by Defendant's own statement to the police. (T. 3351). When the State referred to Ms. Malakoff's statement as additional corroboration, it referred to it as

impeachment. (T. 3351-52). The trial court instructed the jury that it could not consider Ms. Malakoff's statement to the police as substantive evidence. (R. 849). Moreover, the statement itself was brief. Thus, there is no reasonable probability that the jury would not have convicted Defendant even if counsel had objected to this statement. *Strickland*. The claim should be denied.

This conclusion is bolstered by considering the evidence against Defendant. The evidence also supports the same conclusion regarding the other comments that Defendant claims were improper. Defendant interjected himself into this investigation by twice contacting the police and providing false information. After he was arrested, Defendant gave even more false exculpatory statements before confessing to having been involved in this crime. Defendant was implicated by Luis, including in a statement Luis made near the time of the crime and long before he needed to exculpate himself. Defendant was connected to a bag containing items similar to those taken during the crime. Under these circumstances, there is no reasonable probability that Defendant would not have been convicted had counsel objected to all of the comments about which Defendant complains. *Strickland*. The claim should be denied.

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE ALLEGED ERRONEOUS RULINGS BY THE TRIAL COURT.

(1)(a) Limitation on the Cross-Examination of Anastasia Rodriguez

Defendant complains here that appellate counsel rendered ineffective assistance by failing to urge on direct appeal that the trial court impermissibly limited the cross-examination of Anastasia Rodriguez. The record reflects that trial counsel voiced no complaint that his cross-examination was impermissibly limited. (T. 2117-29). Consequently, no adverse ruling was preserved by contemporaneous objection, a prerequisite for a competent appellate attorney to assert an error.

Defendant points to an exchange regarding her visits to Luis Rodriquez at the police station:

> Q. And how do you know when to go, would Luis call you? Will a police man call you?
> A. The police man would call me.
> Q. And they would tell you what?
> MR.LASER: Your honor, I must object. This is
> THE COURT: Sustained as to what was told.

(emphasis supplied)(T. 2125)

Since the question called for a response which was clearly inadmissible hearsay, it is understandable that trial defense counsel did not object to the ruling to preserve it for appellate review and equally understandable that competent

appellate counsel would choose not to waste his time urging an unpreserved, meritless issue.

Later in the questioning this exchange appears:

> Q. Now, did you ever? Who was police man? Did he give you a name when he would call you?
> A. No.
> Q. Was it a man, a male voice, female voice?
> A. A male.
> Q. Would your son always just called [sic] the homicide office during this matter?
> MR. LASER: Objection, your honor.
> THE COURT: Sustained.

(T. 2126)

Clearly, the question called for a speculative response and the objection was properly sustained.

(1)(b) Limitations on the Cross-Examination of Officer Nyberg

During the cross-examination of Officer Nyberg, the prosecutor objected to a defense question as outside the scope of direct examination. The defense rather than attempting to urge the question as appropriate deferred to whatever the court would do ("Whatever you say, judge."). The court then ruled that "If this is going where I believe it is going, I sustain." (T. 2390). This was after the witness responded in the colloquy:

> Q. You ever seen him in a party in homicide?
> A. No.
> Q. Were you ever present for a Christmas party, birthday anything like that?
> A. No. No. I have not.

(T. 2390).

Since the witness answered the questions and defense did not proffer anything more that he desired, no judicial error was preserved for review. *See Lucas v. State*, 376 So. 2d 1149, 1152 (Fla. 1979).

(1)(c) Limitation on the Cross-Examination of Detective Smith

Defendant claims that the court sustained the State's objection during cross-examination of Detective Smith and precluded defense counsel from eliciting testimony about what his knowledge was of Luis Rodriguez's visits with his family and his wife. He cites pages T. 3183-84 of the record.

The direct appeal record reflects that Detective Smith was cross-examined at T. 3156-98. There was no objection or preclusion of testimony at T. 3183-84. While there had been an objection at T. 3157, the prosecutor withdrew the objection a page later. Thereafter, a prosecutorial objection was overruled. (T. 3172). The prosecutor did object to a question asking for a conclusion about what Luis Rodriguez's attorneys knew and the objection was sustained. (T. 3185; *see also* T. 3186). The defense did not inform the court of any basis to challenge the ruling. Since there was no preserved erroneous ruling to challenge, appellate counsel was not deficient. This claim is meritless.

(1)(d) Limitations on the Cross-Examination of Isidoro Rodriguez

Defendant next complains that the trial court sustained the State's objection at T. 2506 to the question: "Did your brother Luis, to your knowledge, kill anybody in this case, he himself?". The witness answered the question: "I don't know" and the jury was not instructed to disregard the answer. Consequently, whether the lower court erred in the ruling, no harm can be shown since the witness answered the question and appellate counsel need not waste time on an issue for which there is no resulting harm.

As to the defense questions about Ralph Lopez who was related to the family through marriage, the prosecutor objected on the basis of relevance and the inquiry being outside the scope of direct examination. (T. 2508-09). The court opined that the testimony was not relevant and sustained the objection. (T. 2510-12). The defense proffered that Ralph Lopez tried to commit suicide and his pregnant wife had to convince him not to do it. (T. 2510). The prosecutor objected. (T. 2510).

The trial court sustained the objection on relevancy grounds. (T. 2511). Defendant does not now explain why the trial court's ruling was erroneous and thus appellate counsel cannot be deemed deficient nor ineffective in failing to raise an argument on appeal that had no merit.

(1)(e) Limitations on the Cross-Examination of Detective Loveland

Loveland testified on direct examination that he assisted in the investigation, attended the autopsy of Genevieve Abraham and impounded two projectiles from the autopsy. (T. 1838-42). On cross, the defense inquired about the witness's contacting U.S. Customs regarding the Josephs' exporting arms. The prosecutor objected that this exceeded the scope of direct and the defense could pursue the matter by calling the witness in the defense case. The trial court correctly sustained the objection and ruled that it was clearly outside the scope of direct examination. (T. 1845-46). *See Christopher v. State*, 583 So. 2d 642 (Fla. 1991).

(1)(f) Limitations on the Cross-Examination of Officer Casey

Officer Casey was extensively cross-examined at trial. (T. 1941-77). The trial court sustained a prosecutorial objection to an incomplete question. (T. 1948) Trial defense counsel did not preserve anything for appellate review either by completing the question or informing the trial court why the question should be allowed. The trial court also overruled the prosecutor's objection at T. 1950, so there was no adverse ruling to appeal. The trial court further sustained the prosecutor's objection as beyond the scope of direct to a question about Casey's visiting the apartment the next day. The defense did not explain to the

court why the testimony should be admissible. (T. 1976-77). Appellate counsel thus had no basis for arguing that the ruling was erroneous and the testimony should be admitted. *See Lucas v. State*, *supra*.

(1)(g) Limitation on the Cross-Examination of Detective Venturi

Defendant next asserts that appellate counsel was ineffective in raising the issue of limitations placed on the cross-examination of Detective Venturi, citing T. 2197 and T. 2194. (Petition, p. 40). The record reflects that the prosecutor was conducting direct examination on those two pages. When the defense announced an intention to ask the witness about the Josephs having purchased 102 firearms and whether they were to be transported to Lebanon, the court sustained an objection, ruling that it was hearsay and had no relevance except to inflame or prejudice the jury. Apparently, this matter referred to a federal conviction some fifteen years earlier and had nothing to do with a claim whether certain types of guns were found or not found in the apartment. (T. 2197-98). Since the matter was irrelevant, appellate counsel was not ineffective in failing to argue it. The trial defense cross-examination of Venturi found at T. 2202-14 was uneventful.

(1)(h) Limitation on the Cross-Examination of Maria Malakoff

Defendant contends that appellate counsel was ineffective in failing to raise the issue on direct appeal. The record demonstrates that the claim is meritless. After the State's direct examination of Malakoff regarding her prior inconsistent statement to police that Manuel Rodriguez stated that he "made sure they were dead" (T. 2688-2713), trial defense counsel on cross-examination indicated that he would attempt to show a prior consistent statement (T. 2714-18). The court ruled that if Defendant could lay the proper predicate he could show "she has given a statement consistent with testimony she has given in court today" (T. 2719). Defense counsel continued questioning but still did not establish predicate. (T. 2722-23). Appellate counsel cannot be deemed to be ineffective for failing to assert this unpreserved issue as trial counsel had abandoned it by telling the judge to strike the testimony he attempted to elicit. When a defendant fails to pursue an issue during proceedings before the trial court and then attempts to present that issue on appeal, this Court deems the claim to have been abandoned or waived. *Mungin v. State*, 932 So. 2d 986, 995 (Fla. 2006).

Defendant notes that many of the objections were sustained on the ground that the cross-examination went beyond the scope of direct, citing T. 1948, 1976-97, 1950, 2125-26, 2197, 2194,

2387, 2391, 2506, 2507-12, 3183-84. To the extent that Defendant's complaint acknowledges the awareness that his impermissible attempts to exceed the scope of direct examination of several witnesses at trial - because to do the appropriate thing of calling the witnesses as part of the defense case would entail losing the right to both opening and closing in final argument - Respondent answers that there is no constitutional infirmity resulting therein. *McGautha v. California*, 402 U.S. 183, 213 (1971); *McMann v. Richardson*, 397 U.S. 759, 769 (1970).

Defendant is not aided by his reliance on *Holmes v. South Carolina*, 547 U.S. 319 (2006). In that case Justice Alito opined for that a state evidentiary rule under which the defendant may not introduce proof of third party guilt was arbitrary and violated a criminal defendant's right to have a meaningful opportunity to present a complete defense. Nothing therein implied or suggested that criminal evidentiary rules limiting the proper scope of cross-examination or demanding that questions be relevant to the issues at trial were nullified. The trial court did not preclude the defense from calling witnesses of its own to provide relevant evidence related to the defense of the case. Accordingly, *Holmes* is inapposite and cannot form the basis for the grant of relief here.

Defendant's contention that the trial court improperly precluded defense counsel from arguing during closing arguments that defense counsel was restricted from bringing out information through witnesses on cross-examination at T. 3268-70, is meritless. Defense counsel seems to agree with the proposition that it is improper for counsel to make comments about the court's rulings. (T. 3270). When defense counsel Houlihan was advised on this, he acquiesced and did not preserve any issue for appellate review by contending the lower court's ruling was erroneous. Since the issue was both procedurally barred and meritless, it was not incumbent on appellate counsel to raise the issue on direct appeal.

(2) Whether Appellate Counsel Failed to Challenge the Trial Court's Ruling Permitting the Impeachment of Witness Malakoff.

This Court on direct appeal addressed the issue of Malakoff's testimony. *Rodriguez*, 753 So. 2d at 47. Defendant now argues that appellate counsel should have argued impermissible use as substantive evidence in the guilt phase. However, the trial court's jury instructions clearly informed the jury that "The testimony concerning a statement made to the police by Maria Malikoff (Cookie) was admitted for the sole purpose of impeaching that witness's testimony in court," and "must not be considered as substantive evidence." (emphasis supplied)(R.

849). Since jurors are presumed to follow the court's instructions, appellate counsel was not required to make a meritless challenge.

CLAIM VI

WHETHER THIS COURT CONDUCTED A PROPER HARMLESS ERROR ANALYSIS ON DIRECT APPEAL.

Defendant's final issue challenges the harmless error analysis conducted by this Court on direct appeal. This issue is procedurally barred. Defendant did not assert that this Court's harmless error analysis was insufficient in his rehearing motion, nor did he present the claim in his petition for review to the United States Supreme Court.

Defendant's petition cites *Shere v. State*, 742 So. 2d 215, 218 n.7 (Fla. 1999), as authority to present this claim in a petition for writ of habeas corpus. *Shere* was not a habeas decision, but an appeal from the denial of post conviction relief. The footnote cited merely states that "Shere's claim challenging the sufficiency of this Court's harmless error analysis on direct appeal cannot be raised in this motion for postconviction relief." The reason that the issue was barred from the post conviction motion is the same reason it is barred in the instant petition -- it should be asserted at the time that the direct appeal is decided, when this Court has an

opportunity to consider and, if necessary, correct any purported deficiency. Waiting until 2007 to challenge an error allegedly committed in 2000 does not satisfy the objectives of the contemporaneous objection rule, and any possible problem with this Court's analysis on direct appeal has clearly been waived. *See Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978).

Moreover, even if this claim is considered at this juncture, no relief is warranted. According to Defendant, this Court improperly relied upon the overwhelming evidence of guilt in it's determination that the guilt phase errors were harmless. Defendant also attacks this Court's reliance on conflicting testimony that he was a malingerer in finding that the admission of hearsay in the penalty phase was harmless, given the trial court's finding in mitigation that Defendant was mentally ill. Defendant submits that these improprieties resulted in an arbitrary and capricious imposition of the death penalty in violation of *Parker v. Dugger*, 498 U.S. 308 (1991).

Defendant's suggestion that this Court must ignore the strength of the evidence in assessing the harm of any trial error is not supported by relevant case law. Certainly this Court has recognized that harmless error is not determined solely by the sufficiency of the evidence. *Goodwin v. State*, 751 So. 2d 537, 540 (Fla. 1999). As noted in *Chapman v. California*,

386 U.S. 18 (1967), the pivotal question is what affect the impropriety may have had on obtaining the conviction. *Id.*, at 24. While the overwhelming nature of the evidence may not necessarily resolve the question, clearly the strength of the State's case is a relevant and proper consideration for any court engaging in an analysis to determine the impact of any trial error. In fact, the strength of the State's case is a factor frequently noted by appellate courts in determining a particular error to be harmless. *See Lugo v. State*, 845 So. 2d 74, 107 (Fla. 2003); *Chavez v. State*, 832 So. 2d 730, 754 (Fla. 2002).

In *Parker*, the United States Supreme Court found that the Florida Supreme Court committed a factual error in finding a penalty phase error to be harmless. In affirming Parker's death sentence despite striking two of the aggravating factors upon which the trial judge had relied, the Florida Supreme Court determined that reliance on the stricken aggravators was harmless because there had been no mitigation found by the trial court. In reversing, the United States Supreme Court concluded that the trial court had indeed found and weighed nonstatutory mitigating circumstances before imposing the death sentence. Thus, the Florida Supreme Court made a factual misstatement in noting that no mitigation existed. Parker v. Dugger, 498 U.S.

308, 320 (1991). Finding that the appellate court, on review, had ignored the nonstatutory mitigation evidence presented by the defense and found by the trial court, the United States Supreme Court remanded the case for further consideration.

Defendant has not identified a factual mistake in this Court's analysis. Although he contests this Court's reference to the testimony of his malingering in light of the trial court's finding of mental illness, this Court's comments are clearly supported by the sentencing order, when read in its entirety. The sentencing order devotes fourteen pages to just addressing the statutory mitigating factor of extreme mental disturbance, which was ultimately rejected (R. 1761-74). The difficulty identified in *Parker*, which was decided prior to *Campbell v. State*, 571 So. 2d 415 (1990), and involved a sentencing order which was ambiguous with regard to nonstatutory mitigation, simply does not exist in this case.

As this issue is both procedurally barred and meritless, relief must be denied.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Roseanne Eckert, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel – Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301-1162; the Honorable Victoria Sigler, Circuit Judge, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130; and Christine Zahralban, Assistant State Attorney, E.R. Graham Building, 5th Floor, South Wing, 1350 Northwest 12th Avenue, Miami, Florida 33136-2111, on this 15th day of October, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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