IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1615

MICHAEL SEIBERT,

Petitioner,

vs.

WALTER A. MCNEIL, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbols "R." and "T." will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal.

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. *Seibert v. State*, SC08-708. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE UNPRESERVED AND MERITLESS CLAIMS.

Defendant asserts that he was denied the effective assistance of appellate counsel on his direct appeal. Specifically, Defendant complains that his appellate counsel did not raise issues about the alleged denial of his right to be present, the constitutionality of the rule regarding contacting jurors, an incidence of alleged juror misconduct, the admission of a photograph of the victim's body as found at the crime scene, the rejection of a special jury instruction on the heinous, atrocious or cruel aggravator (HAC) and an issue regarding the constitutionality of the death penalty.

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. 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).

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN UNPRESERVED AND MERITLESS ISSUE ABOUT THE RIGHT TO BE PRESENT.

Defendant first asserts that his counsel was ineffective for failing to claim on appeal that there was error because he was not present at pretrial hearings. He asserts that the error arises because of the number of hearings at which his presence was waived. He further contends that the fairness of the proceedings was impeded because he was not present for a hearing regarding an *ex parte* motion for the appointment of a mitigation specialist, hearings regarding disclosure of letters that he had written and a hearing at which both the letters and the perpetuation of Ace Green's testimony were discussed. However, appellate counsel was not ineffective for failing to raise this unpreserved and meritless issue.

This Court has required that an objection be made regarding a defendant's absence for a claim regarding the alleged denial of the right to be present to be preserved for review. *See Carmichael v. State*, 715 So. 2d 247, 248-49 (Fla. 1998); *see also Cole v. State*, 701 So. 2d 845, 850 (Fla. 1997); *Gibson v. State*, 661 So. 2d 288, 290-91 (Fla. 1995). This in accordance with United States Supreme Court precedent. *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985). Here, the record reflects that there was no objection to

Defendant's absence regarding most of the hearing dates that Defendant lists as occasions when he was not present. (T. 20-24, 28-29, 98-112, 116-32, 185-88, 193-95, 199-201, 205-13, 283-87, 292-99, 303-07, 335-42, 619-21, 733-38, 742-65) Instead, the record reflects that his presence was affirmatively waived at several of these hearings. (R. 28, 98, 116, 185, 193, 307, 335, 619, 733, 734, 742) In fact, on one of these dates, corrections offers to get Defendant and bring him to the courtroom ,and counsel declined the offer. (T. 285) On two of the three remaining dates that Defendant lists, counsel indicated that he wanted Defendant present to hear the trial court rule that certain letters he had written to a witness had to be disclosed to the State but raised no object to discussing the scheduling matters considered at the hearings in Defendant's absence. (T. 243-46, 250-62) Since there were no objections, this issue was not preserved for appeal. *Carmichael*, 715 So. 2d at 248-49; *see also Cole*, 701 So. 2d at 850; *Gibson,* 661 So. 2d at 290-91. As such, appellate counsel cannot be deemed ineffective for failing to raise it. *Groover*, 656 So. 2d at 425. The claim should be denied.

Moreover, with regard to the one remaining hearing (December 18, 2000), the record reflects that after defense counsel stated that he needed Defendant present, a recess of this proceeding occurred while other matters were heard. (T. 232) The docket sheet reflects that Defendant was present. (R. 17) Thus, the

record reflects that Defendant was present for this hearing. Since Defendant was present, any claim that he was denied his right to be present is without merit. *Griffin v. State*, 866 So. 2d 1, 19 (Fla. 2003)(when defendant was present, claim of denial of right to be present without merit); *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000). As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Even if the issue regarding the other hearings had been preserved, Defendant would still be entitled to no relief because the issue is meritless. In *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934), the Court recognized that a defendant had a due process right to be present when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." The Court further opined that "when presence would be useless, or the benefit but a shadow," no violation of the right to be present is shown. *Id.* at 106-07. This Court has recognized that a defendant does not have a right to be present when purely legal issues are discussed. *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105. In fact, this Court has stated, "the right 'does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed.'" *Orme v.*

State, 896 So. 2d 725, 738 (Fla. 2005)(quoting *United States v. Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984)). Thus, this Court has required a defendant to show that he was prejudiced by his absence from a proceeding in order to obtain relief. *Orme*, 896 So. 2d at 738.

Here, Defendant concedes, and the record confirms, that the hearings of May 7, 1998, July 20, 1998,[1] January 16, 2001, February 28, 2001, October 12, 2001, March 26, 2002, and October 10, 2002, concerned nothing more than legal issues and scheduling matters. The October 3, 2002 hearing consisted of the trial court granting an *ex parte* motion for Defendant without hearing any argument, the trial court hearing legal argument on a motion for continuance and the trial court discussing scheduling matters. (T. 731-39) As such, Defendant's claim concerning his absence from these proceedings is meritless, and appellate counsel is not ineffective for failing to raise this meritless issue. *Orme*, 896 So. 2d at 738; *Rutherford*, 774 So. 2d at 647. The claim should be denied.

While Defendant insists that he could have provided input and that his presence was essential at the June 4, 1999 hearing, the record belies these assertions. At the June 4, 1999 hearing, the

[1] Defendant states that the hearing occurred on May 20, 1998, and cites to page 28 of the trial transcript. Petition at 8. However, page 28 of the trial transcript involves a hearing held on July 20, 1998. (T. 26-30) The docket sheet does not reflect a hearing having been held on May 20, 1998, but does reflect a hearing on July 20, 1998. (R. 3-24) As such, the State assumes the reference to May instead of July is a typographical error.

trial court heard legal argument on whether a defendant was entitled to present motions *ex parte* regarding cost issues. (T. 96-112) As such, the record reflects that purely legal issues were discussed. Because the hearing concerned purely legal issues, any claim about Defendant's absence would be meritless, and appellate counsel could not be deemed ineffective for failing to raise an issue about it. *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105. The claim should be denied.

While Defendant insists that his presence at the June 14, 1999 hearing was essential and thwarted the fundamental fairness of the proceeding, the record reflects that the hearing was held for the purposes of determining why Defendant needed to have a mitigation specialist appointed in addition to the two mental health experts and two investigators that had already been appointed. (T. 114-33) Since Defendant would not have any information about what a mitigation specialist would do, Defendant has not shown that he was prejudiced by his absence from the hearing. This lack of prejudice is particularly acute, as the hearing was held *ex parte*, and the trial court appointed the mitigation specialist that Defendant had requested. As there was no prejudice from Defendant's absence from this hearing, the issue is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it. *Orme*, 896 So. 2d at 738. The claim should be denied.

The claim regarding the series of hearings (October 27, 2000,

November 6, 2000, November 16, 2000, November 22, 2000, and January 19, 2001)[2] about Defendant's correspondence is equally without merit. At the first hearing, the trial court merely considered legal argument on whether a special master should be appointed to conduct an *in camera* review to which the parties had agreed. (T. 183-89) At the next hearing, Defendant acknowledged that there was no legal basis for the appointment of a special master, and the trial court and parties discussed the manner in which the letters would be submitted for the *in camera* review. (T. 190-96) At the next hearing, Defendant merely submitted the materials for the *in camera* review in the manner that the trial court had directed. (T. 197-202) At the next hearing, the trial court announced that it had reviewed the letters, listened to legal argument about whether they were subject to disclosure, discussed the filing of written pleadings on the issue, heard a motion for continuance of trial and discussed scheduling issues. (T. 206-14) At the January 19, 2001 hearing, the trial court indicated that it would announce its ruling that the letters had to be disclosed to Defendant personally. (T. 248-51) The trial court then addressed the issue of scheduling of a deposition in Ecuador and the mechanism through which the letters would be disclosed. (T. 251-63) Since all of these matters concerned legal arguments, the claim about

[2] Defendant also mentions the hearing of January 16, 2001. However, as noted above, Defendant conceded and the record reflects that this hearing merely concerned a scheduling matter.

Defendant's right to be present at these hearing is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it.[3] *Rutherford*, 774 So. 2d at 647. The claim should be denied.

While Defendant again asserts that the fundamental fairness of the proceeding was thwarted by his absence at the May 29, 2001 hearing, the record reflects that the trial court merely set a trial date and listened to concerns about the attorneys having to travel to Atlanta to conduct a deposition because the County was refusing to pay a witness's fee for coming to Miami. (T. 301-08) Again, Defendant could not have provided any useful input, and the claim is without merit. *Orme*, 896 So. 2d at 738. As such, appellate counsel was not ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

While Defendant notes that Ms. Adrianza's father spoke to the trial court at the April 26, 2001 hearing, he fails to note that Mr. Adrianza merely expressed his frustration about the length of time that this matter had been pending. (T. 290-92) The trial court then explained to Mr. Adrianza the reasons for the delays and listened to the attorneys complaints about the delays in the proceeding. (T. 292-300) Again, Defendant could not have provided

[3] Further, Defendant ignores that he was present for the hearing on December 7, 2000. (T. 218) At that hearing, the trial court considered Defendant's written motion to quash the subpoena for the letters and heard oral argument on the motion. (T. 216-28) Thus, if he actually had any input to provide, he had the opportunity to

any useful input in this discussion. Thus, the claim is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it. *Orme*, 896 So. 2d at 738. The claim should be denied.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN UNPRESERVED AND MERITLESS ISSUE ABOUT R. REGULATING FLA. BAR 4-3.5.

Defendant next asserts that his counsel was ineffective for failing to raise an issue regarding the constitutionality of the ethical rule prohibiting attorneys from contacting jurors. However, Defendant is entitled to no relief because the underlying issue is unpreserved and without merit.

The record does not reflect that counsel presented any challenge to the rule regarding juror contact to the trial court. This Court has held that issues that were not presented to the trial court are not preserved for review. *See Castor v. State*, 365 So. 2d 701 (Fla. 1978). As such, this issue was not preserved for review, and appellate counsel cannot be deemed ineffective for failing to raise this issue on appeal. *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. This Court has also repeatedly rejected claims that the rule is unconstitutional. *Power v. State*, 886 So. 2d 952, 957 (Fla. 2004); *Sweet v. Moore*, 804 So. 2d 1269, 1274

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do so.

(Fla. 2002); *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla. 2001). As such, the issue is meritless, and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant's mention of the situation with Jurors Glinton and Lennen and alternate juror Lavine does not assist his claim. When the incident occurred, the lower court conducted interviews with all of the jurors and alternates about it. (T. 4578-4655) As the trial court actually conducted juror interviews about this incident, reliance on it does not show that the rule is unconstitutional. The claim should be denied.

To the extent that Defendant intends these comments to suggest that counsel should have raised an issue concerning the scope of the interviews allowed, Defendant is entitled to no relief. This Court has held that when juror interviews are allowed, the interview must be strictly limited to the objective facts regarding the alleged misconduct and cannot include the jurors' thoughts, beliefs, emotions or mental processes of the jurors. *Jones v. State*, 928 So. 2d 1178, 1191-92 (Fla. 2006); *Marshall v. State*, 854 So. 2d 1235, 1240-41, 1253 (Fla. 2003); *Lazelere v. State*, 676 So. 2d 394, 404 (Fla. 1996); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356-57 (Fla. 1995); *Keen v. State*, 639 So. 2d 597, 599-600 (Fla. 1994). This is so because "[a] juror is not competent to testify about matters inhering in the verdict, such as jurors'

emotions, mental processes, or mistaken beliefs. *See Baptist Hosp. v. Maler*, 579 So. 2d 97, 99 (Fla. 1991); *State v. Hamilton*, 574 So. 2d 124, 128 (Fla. 1991); see also § 90.607(2)(b), Fla. Stat. (1999)." *Marshall*, 854 So. 2d at 1240.

Here, Defendant's apparent claim regarding the scope of the interviews is that they did not include the extent to which "the homophobic and anti-gay attitudes of the jury impacted his conviction and death sentence." Petition at 16. However, this Court has made it abundantly clear that while expressions of bias are subject to questioning about whether they occurred, jurors' attitudes of bias are not. *Powell*, 652 So. 2d at 357-58; *see also Marshall*, 854 So. 2d at 1253. As such, this issue about the scope of the interviews would be without merit. Since appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, this claim should be denied. *Kokal*, 718 So. 2d at 143

C. THE CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING JUROR MISCONDUCT IS INSUFFICIENTLY PLEAD AND MERITLESS.

Defendant next asserts that counsel was ineffective for failing to raise an issue regarding an incidence of alleged juror misconduct. However, this claim should be denied because it is insufficiently plead and without merit.

This Court has held that when a trial court is informed of possible juror misconduct, it must first determine whether the allegations are sufficient to merit juror interviews. *Boyd v.*

State, 910 So. 2d 167, 178 (Fla. 2005). If the trial court determines that interviews are necessary, it then holds the interviews limited to the extrinsic facts of the alleged misconduct without inquiring into the thought processes of the jurors. *Jones v. State*, 928 So. 2d 1178, 1191-92 (Fla. 2006); *Marshall v. State*, 854 So. 2d 1235, 1240-41, 1253 (Fla. 2003); *Lazelere v. State*, 676 So. 2d 394, 404 (Fla. 1996); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356-57 (Fla. 1995); *Keen v. State*, 639 So. 2d 597, 599-600 (Fla. 1994). Based on this inquiry, the trial court must then determine whether the alleged misconduct occurred and the prejudice resulting from the misconduct. *Johnson v. State*, 696 So. 2d 317, 320-24 (Fla. 1997). If there is prejudice, the trial court must then provide a remedy that eliminates the prejudice, which may be limited to removing the jurors involved in the misconduct. *Johnson*, 696 So. 2d at 320-24; *Scull v. State*, 533 So. 2d 1137, 1141 (Fla. 1988). This Court has refused to grant relief regarding the guilt phase, where the alleged misconduct did not occur until the penalty phase. *Larzelere*, 676 So. 2d at 403-04.

This Court has held that the manner in which a trial court handled an issue of alleged juror misconduct is reviewed for an abuse of discretion. *England v. State*, 940 So. 2d 389, 402 (Fla. 2006); *Boyd*, 901 So. 2d at 197; *Doyle v. State*, 460 So. 2d 353, 357 (Fla. 1984). This Court also reviews a trial court's ruling on a motion for mistrial for an abuse of discretion. *England*, 940 So.

2d at 402; *Perez v. State*, 919 So. 2d 347, 363 (Fla. 2005). This Court has held that a trial court does not abuse its discretion in denying a motion for mistrial unless it appears that granting such a motion was an absolute necessity to preserve the defendant's right to a fair trial. *England*, 940 So. 2d at 401-02; *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999)(quoting *Salvatore v. State*, 366 So. 2d 745, 750 (Fla. 1978)).

Given this law, the State would initially note that the claim is not sufficiently plead. This Court has held that to plead a claim of ineffective assistance of appellate counsel sufficiently, a defendant must present more than a conclusory allegation regarding what counsel should have raised and how the failure to raise the issue would have resulted in a reasonable probability of a different result on appeal. *Franqui v. State*, 965 So. 2d 22, 37 (Fla. 2007); *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004). Here, Defendant present no argument regarding how the trial court abused its discretion in finding that any prejudice from the incident was remedied by the removal of the effected jurors and that there was not absolute necessity for the granting of a mistrial. Petition at 16-19. As such, the claim is insufficiently plead and should be denied as such.

Even if the issue could be considered sufficiently plead, Defendant would still be entitled to no relief. The trial court did not abuse its discretion in the manner in which it resolved the

incident, as the trial court followed the procedure this Court had set and provided an appropriate remedy.

On the third day of the penalty phase, alternate juror Lavine approached the trial court during a recess, informed the court that some of the other jurors had made homophobic comments about the clerk and asked to be excused. (T. 4578-80) The trial court reported the incident to the parties and solicited their input on the questions to be asked during the interviews. (T. 4580-87) During his juror interview, Lavine stated that he was standing between Juror Glinton and Juror Lennen waiting to enter the courtroom that morning when Glinton started to speak about homosexuals. (T. 4589-90) According to Lavine, Glinton asked Lennen if he had noticed the manner in which the clerk asked witnesses to raise their hands: "You ever notice the way Dave says raise your hand, would you please raise your hand da, da, da, da." (T. 4590) Lavine stated that Glinton also said that "a lot of people play both sides." (T. 4591) Lavine did not recall any specific response from Lennen but perceived him to be agreeing with Glinton. (T. 4591) He also thought that other jurors might have been agreeing as well but could provide no specifics. (T. 4591) Lavine heard no reference to any testimony, Defendant or attorney. (T. 4591) He stated that the entire conversation lasted 30 seconds to less than a minute. (T. 4592) He had not heard any other remarks but had always perceived the other jurors as macho

and homophobic. (T. 4592) He acknowledged that other than the conversation that he had reported, none of the other jurors had ever acted overly homophobic but that he had felt they were and that the same had been true of jurors during his previous service on a federal grand jury. (T. 4596) He admitted that he, Glinton and Lennen had been standing across the hall from the other jurors during the conversation. (T. 4597)

The trial court then interviewed all of the other jurors. (T. 4606-55) Alternate Juror Brookins stated that she had heard Glinton say the clerk was queer to Lennen in front of herself, Lavine, Juror Rocawich and Juror Pimienta, that she and another juror had stated that the comment was unfair as the clerk might be married and that Glinton had said "married people sometimes are hiding it." (T. 4607-11) There were no other comments made and no comments about Defendant or the attorneys. (T. 4611) Juror Rocawich testified that she heard Glinton use the word gay in a manner that made her uncomfortable but that she did not necessarily consider derogatory. (T. 4630-31) She asked Lennen to tell Glinton that the comment was inappropriate because she believed they were friendly, and Lennen agreed to do so. (T. 4630-31) She had heard no other inappropriate comments, and the comment she did hear was not related to Defendant or any attorney. (T. 4632)

Lennen stated that he and Glinton had been speaking about some people being married and homosexual before coming into the

courtroom that morning. (T. 4638-39) The conversation ended because Rocawich pulled him aside and told him the comments were inappropriate because Lavine was present. (T. 4639) There had been no discussion of Defendant, the attorneys or any person in particular. (T. 4640) He believed that the only people who heard the conversation were himself, Glinton, Rocawich, Lavine and possibly Juror Rexach. (T. 4641)

Glinton admitted that he and Lennen had been speaking about homosexuals and the fact that some marry that morning. (T. 4650-51) No other comments had been made, and the comments that were made were not directed at anyone. (T. 4651) Rocawich had pulled Lennen aside after the comment, and Lennen had then cautioned Glinton about making such comments. (T. 4651)

Juror Pimienta had heard Glinton make a joking comment to Lennen about the clerk and homosexuality. (T. 4652-54) Rocawich stated that it was inappropriate, and the conversation stopped. (T. 4653-54) He had heard no other comments and nothing about Defendant or the attorneys. (T. 4655-56)

Alternate Juror Singh had vaguely heard someone use the word queer flippantly but did not know who used the word. (T. 4614-15) He had not heard any other comments and did not perceive the comment he heard to be about the case. (T. 4616-17) Juror Rexach similarly heard the one vague reference to homosexuality only. (T. 4635-37) Jurors Isaza, Gonzalez, Friedli, Pina, Shaw, Jones and

Henry did not hear the comment and had never heard any biased comment. (T. 4617-19, 4621-22, 4623-25, 4627-29, 4643, 4644-45, 4646-47)

After the interviews were completed, Defendant moved for a mistrial, claiming that the entire jury was tainted because of the nature of the comment, the content of the interviews and the fact that the lower court had sustained objections to questions about Defendant's lifestyle. (T. 4656-57) The State responded that there was no reason to grant a mistrial but that the dismissal of individual jurors might be appropriate. (T. 4657-58) The trial court stated that it was excusing Jurors Glinton and Lennen. (T. 4658) However, it also stated that it did not believe that a mistrial was necessary because the comment, while inappropriate, concerned the clerk and not Defendant or the lawyers. (T. 4661, 4668) When Defendant suggested that the jurors had lied because they all did not report the same thing, the trial court rejected the assertion, indicating different people observe things differently and that there was no evidence that any of the other jurors were not candid. (T. 4661-65, 4667) As such, the trial court denied Defendant's motion for mistrial but excused Glinton and Lennen. (T. 4665-66) The trial court then inquired if anyone wanted Lavine excused because of his expression of discomfort. (T. 4666) Defendant indicated that he wanted Lavine excuse, which the trial court granted. (T. 4666)

Given these facts, the trial court did not abuse its discretion in its handling of this matter. It learned of Glinton's inappropriate statement and determined that it was sufficient to require juror interviews. That determination was consistent with *Powell* and *Marshall*.

During those interviews, all of the jurors and alternates testified no inappropriate comment was made that referred to Defendant, the attorneys or the merits of the case. (T. 4591, 4611, 4616-17, 4617-19, 4621-22, 4623-25, 4627-29, 4632, 4635-37, 4640, 4643, 4644-45, 4646-47, 4655-56) In fact, of the 15 jurors and alternates, seven had not heard any comments and two more only heard a vague reference to homosexuality without more. (T. 4614-15, 4617-19, 4621-22, 4623-25, 4627-29, 4635-37, 4643, 4644-45, 4646-47) The testimony of the six remaining jurors and alternates supported this Court's determination that the comment concerned the clerk. (T. 4590-91, 4607-11, 4630-31, 4638-39, 4650-51, 4652-54, 4661) Further, two of these six people indicated that they had immediately responded that the remark was inappropriate. (T. 4607-11, 4630-31) Another juror testified in a manner that suggested he agreed. (T. 4652-54) Lavine found the comment so inappropriate that he admitted he was distracted from his task as a juror. (T. 4579) Glinton and Lennen were the two jurors exchanging the inappropriate comment. Under these circumstances, the trial court properly determined that the prejudice was limited to Glinton,

Lennen and Lavine and appropriately limited the remedy to the excusal of these individuals. *Scull*, 533 So. 2d at 1141.

Because the trial court did not abuse its discretion in the manner in which it handled the incident and the remedy it provided, the claim is meritless. As such, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE ABOUT THE ADMISSION OF PHOTOGRAPHS.

Defendant next asserts that appellate counsel was ineffective for failing to raise an issue regarding the admission of a photograph of the victim, as she was found at the crime scene. However, appellate counsel was not ineffective for failing to raise this nonmeritorious issue.

In his petition, Defendant repeatedly refers to the admission of gruesome photographs. However, he only identifies one photograph that was admitted at trial in his argument. Petition at 19-22) Moreover, he only presents arguments regarding why the depiction of the dismemberment was an abuse of discretion. At the pretrial hearing regarding the motion to exclude the photographs, the State agreed to present only one photograph showing the dismemberment, and the trial court ruled that only one could be used. (T. 789, 1040) As such, to the extent that Defendant is attempting to raise an issue concerning some other unidentified

photograph, the issue is not sufficiently plead. *Franqui v. State*, 965 So. 2d 22, 37 (Fla. 2007); *see also Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). As such, any claim that Defendant is attempting to make about any other photograph should be denied.

With regard to Exhibit 37, Defendant is entitled to no relief because the claim is without merit. 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, 906 (Fla. 1981). 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).

Defendant asserts that appellate counsel should have argued that a photograph of Ms. Adrianza's body as it was found at the crime scene should not have been admitted because the cause of

death was not in dispute. As such, Defendant avers that appellate counsel should have argued that it was an abuse of discretion to admit the photograph because it was not relevant to any issue in dispute. However, the record reflects that trial court did not abuse its discretion because the photograph was, in fact, relevant to an issue in dispute.

At trial, Defendant claimed as his defense in both opening and closing that he had consensual sex with Ms. Adrianza and that Danny Mavarres or someone else who knew Ms. Adrianza then entered the apartment and killed her out of rage. (T. 2335, 2342-43, 3708-18, 3724-28) To support this defense, Defendant elicited testimony that Mavarres and his parents had kept their address and phone number from their relatives, the Korkours, after Mavarres returned to Venezuela a week after the murder and that all efforts to locate Mavarres had been unsuccessful. (T. 2767-68, 2949-53) He had Ms. Korkour testify that she had not actually seen Mavarres at home on the night of the murder. (T. 2769-72) He brought out that Mavarres' father was helping to support the Korkours. (T. 2774-78, 2952) He brought out the fingernail scrapings had never been taken from Mavarres. (T. 2916) He elicited that Mavaress' alibi was based largely on the testimony of the Korkours. (T. 2945-46)

As part of its rebuttal to this defense, the State asserted that the fact that Ms. Adrianza's body was being dismembered in a manner in which it left no evidence except in the bathtub indicated

that someone who lived in the apartment was responsible. (T. 3742-43, 3761-62, 3773-74) It pointed out that Ms. Adrianza's panties showed that they had been cut by stabbing into them but that it was not possible to confirm whether she was alive at the time because the flesh around that area had been removed. (T. 3758) It noted that blood consistent with having been placed there during the dismemberment was present on Defendant's jeans. (T. 3768)

Thus, by presenting this defense, Defendant made evidence of the dismemberment and its effects on the remaining evidence directly relevant to an issue in dispute. In fact, it was on the basis that evidence of the dismemberment being relevant to the issue of premeditation based on the possibility that some of the injuries were premortem, the issue of consciousness of guilt, the issue of blood spatter and the issue of corroborate the testimony about seeing the severed foot that the trial court ruled the State could admit the photograph that became Exhibit 37. (T. 1046-47) In fact, at the time that the trial court made this ruling, Defendant conceded that consciousness of guilt was a proper basis for admission of the photograph. (T. 1052) As such, the lower court did not abuse its discretion in admitting Exhibit 37. *Pope*, 679 So. 2d at 713; *Jones*, 648 So. 2d at 679; *Straight*, 397 So. 2d at 906. Because the lower court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to make the nonmeritorious claim that it did. *Kokal*, 718 So. 2d at 143.

The claim should be denied.

To the extent that any claim about the other photographs of injuries to Ms. Adrianza could be considered to have been sufficiently plead, Defendant would still be entitled to no relief. At the time of trial, Defendant agreed that all but four of these photographs were admissible. (T. 3517-18) As such, any issue regarding the other photographs would not be preserved for review. *Rodriguez v. State*, 919 So. 2d 1252, 1286 (Fla. 2005). Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, any claim regarding the other photographs should be denied. *Groover*, 656 So. 2d at 425.

With regard to the other four picture, these photographs were used to show injuries Ms. Adrianza sustained before her death from being hit and from struggling with her killer and to explain how the medical examiner could tell the difference between premortem injuries and postmortem injuries when a body part was intact. (T. 3518-25) During her testimony, Dr. Lew used these photographs to explain her testimony concerning how the injuries reflects that Ms. Adrianza struggled with her killer while he was strangling and beating her and how the evidence concerning a ligature found around the victim's neck indicated that the killer had made sure that Ms. Adrianza was dead. (T. 3563-82, 3601-08, 3610-13) As such, these photographs were relevant and admissible. *Douglas v. State*, 878 So. 2d 1246, 1255 (Fla. 2004).

Further, the struggle and injuries were relevant to facts in dispute. While Defendant admitted that Ms. Adrianza was strangled, he contested both that he was the killer and that the killing was premeditated. (T. 3708-18, 3724-28, 3725) Further, Defendant presented Dr. Wright during the penalty phase to contest HAC by claiming that injuries did not show consciousness. (T. 4235-50) Part of the State's evidence regarding these issues was the testimony of Marsha Hill, Defendant's downstairs neighbor, who heard six to seven minutes of banging coming from Defendant's apartment at 6:30 a.m., a time when Defendant was locked in the apartment only with Ms. Adrianza, followed by screams for help. (T. 2725-39) Evidence that Ms. Adrianza sustained injuries consistent with having been banged into a wall or floor and suggesting a struggle corroborated this testimony. Moreover, it showed that she was conscious when she was killed. Additionally, evidence showing that Defendant made sure Ms. Adrianza was dead demonstrated it was his intent that she die. As such, the trial court did not abuse its discretion in admitting these photographs either. *Pope*, 679 So. 2d at 713; *Jones*, 648 So. 2d at 679; *Straight*, 397 So. 2d at 906. Appellate counsel was not ineffective for failing to raise the nonmeritorious issue that it did. *Kokal*, 718 So. 2d at 143. The claim should be denied.

E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A MERITLESS ISSUE REGARDING THE HAC INSTRUCTION.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the rejection of a special jury instruction regarding the heinous, atrocious or cruel aggravator (HAC). Specifically, Defendant asserts that the jury instruction given was deficient because it did not instruct the jury that intent to torture is an element of HAC. However, appellate counsel was not ineffective for failing to raise this meritless issue.

This Court has held that to be entitled to a special jury instruction on an aggravator, "'[the defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of the defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing.' *Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001)(footnotes omitted)." Based on these requirements, this Court has held that a trial court does not abuse its discretion in refusing to give a special jury instruction that intent to torture is an element of HAC because intent to torture is not an element of HAC and such an instruction, therefore, misstates the law. *Hoskins v. State*, 965 So. 2d 1, 15-16 (Fla. 2007); *Bowles v. State*, 804 So. 2d 1173, 1177 (Fla. 2001). As such, any claim that appellate counsel might have made that the trial court abused

its discretion in rejecting his special jury instruction on HAC would have been meritless. Since appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, this claim should be denied. *Kokal*, 718 So. 2d at 143.

F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A LARGELY UNPRESERVED AND ENTIRELY MERITLESS ISSUE ABOUT THE CONSTITUTIONALITY OF THE DEATH PENALTY.

Defendant next asserts that appellate counsel was ineffective for failing to raise an issue asserting that the imposition of the death penalty is cruel and unusual punishment. He asserts that appellate counsel should have argued that the death penalty is unconstitutional because it is applied in an arbitrary and capricious manner. He contends that counsel should have based this argument on the number of executions that have been carried out, the number of people who had allegedly been exonerated, the fact that a defendant must show that he has been diligent in presenting a newly discovered evidence claim, the alleged failure to provide Defendant with competent counsel at trial and during post conviction proceedings, alleged problems with the penalty phase jury instructions, the fact that a death recommendation does not need to be unanimous, the ability to override a jury's life recommendation, alleged racial and geographic discrimination in imposing the death penalty, the assertion that prosecutorial misconduct sometimes occurs, the alleged failure of this Court to

conduct proportionality reviews, the fact that certain decisions do not apply retroactively, the fact that this Court applies procedural bars, the alleged failure to have meaningful clemency proceedings, the alleged influence of politics in sentencing, the alleged failure to consider mental health evidence properly and the alleged errors in processing evidence. However, this claim should be denied because appellate counsel was not ineffective for failing to raise unpreserved and meritless claims.

In his motion to declare the death penalty unconstitutional, Defendant argued only that the death penalty was unconstitutional because of the delay between imposition of sentence and execution, the alleged "paradox" in the United States Supreme Court's death penalty case law, racial disparities and the alleged cost of the system. (R. 348-58) He did not raise any of the other arguments that Defendant now presents. However, this Court has held that an issue is only preserved for appeal if it presents the same grounds as was presented in the trial court. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). As such, all of these other grounds are not preserved for review. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied. *Groover*, 656 So. 2d at 425.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise the grounds that were preserved. This Court has consistently rejected the claim that the death penalty is cruel and

unusual punishment. . *See, e.g., Hodges v. State*, 885 So. 2d 338, 359 & n.9 (Fla. 2004); *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003). Since appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, this claim should be denied. *Kokal*, 718 So. 2d at 143.

Further, in support of this claim, Defendant argues that a report from the ABA issued on September 17, 2006, shows that the death penalty is unconstitutional. However, Defendant does not even begin to explain how appellate counsel could have possibly presented an argument based on this report in an appeal in which this Court issued mandate in May 2006. In fact, this Court has routinely held that counsel cannot be deemed ineffective for failing to anticipate a change in the law. *Peede v. State*, 955 So. 2d 480, 502-03 (Fla. 2007); *Johnson v. State*, 903 So. 2d 888, 899 (Fla. 2005); *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992); *Stevens v. State*, 552 So. 2d 1082, 1085 (Fla. 1989). Thus, a claim that counsel should have presented a claim based on a source that does not exist should also be denied.

Further, even if counsel could somehow be required to have anticipated the report, Defendant would still be entitled to no relief. This Court has held that "nothing [in the ABA report] would cause this Court to recede from its decisions upholding the facial constitutionality of the death penalty." *Rutherford v. State*, 940 So. 2d 1112, 1118 (Fla. 2006). Thus, the issue is again

meritless. As such, appellate counsel could not be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143. The claim should be denied.

G. THE ASSERTIONS REGARDING PREJUDICE SHOULD BE REJECTED.

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

To the extent that Defendant means to assert that he is entitled to relief based on the alleged cumulative effect of the unspecified errors, Defendant is still entitled to no relief. Where the individual errors alleged are either procedurally barred or without merit, the claim of cumulative error also fails. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999). As seen above, Defendant's individual claims are all procedurally barred or without merit. As such, this claim should be denied.

Additionally, in pleading this claim, Defendant asserts that the burden of showing that he was not prejudiced by any alleged error is on the State and that the State must carry that burden by showing that the alleged errors were not harmless beyond a

reasonable doubt. He cites to *Chapman v. California*, 386 U.S. 18 (1967), in support of this assertion. However, this is untrue. Defendant is raising claims of ineffective assistance of appellate counsel. As such, he bears the burden of showing that the alleged deficiencies of counsel created a reasonable probability that there would have been a different result on appeal had counsel not been deficient. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *see also Strickland v. Washington*, 466 U.S. 668, 694 (1984). This requirement is particularly appropriate as the United States Supreme Court has rejected the application of *Chapman* in collateral proceedings. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Instead, the Court has required a showing that the alleged error "'had substantial and injurious effect or influence'" on the process to be entitled to relief. *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). As such, Defendant's assertions about the State bears the burden of showing that Defendant was not prejudiced beyond a reasonable doubt should be rejected.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Leor Veleanu, Assistant CCRC-South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ___ day of October, 2008.

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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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