IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2289

LABRANT DENNIS,

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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TABLE OF CONTENTS

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. *Dennis v. State*, FSC Case No. SC09-1089. The State will therefore rely on its statements of the case and facts contained in its brief in that matter, with the following addition. In affirming the conviction and sentence in this matter, this Court found the following historical facts:

> On the morning of April 13, 1996, University of Miami football player Earl Little arrived at his on-campus apartment to pick up the keys to his truck, a black Ford Explorer, he had loaned to his roommate and teammate, Marlin Barnes. Little loaned Barnes the truck the previous evening to attend a party at Club Salvation in Miami Beach and advised him that he would return to the apartment early the next morning to retrieve his vehicle. Little, who spent the night at another on-campus apartment, arrived at the apartment complex between 7 and 7:30 a.m. As he approached his third-floor apartment he noticed that his truck, which was parked outside the apartment, was tilting towards its right side. Little examined his truck and observed a puncture mark in his right rear tire. He then went upstairs to his apartment.
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> When Little attempted to open the door to his apartment he discovered that it was unlocked, but when he tried to push the door open he experienced resistance. Finally, after several attempts the door gave way enough for him to peer inside the apartment where he discovered

Barnes' body lying against the front door. Little called Barnes' name and Barnes drew only a heavy breath in response. Upon calling his name a second time, Barnes turned his head and Little saw for the first time that Barne' face was badly beaten and bloodied. Little raced to a nearby apartment and called police.

Dan Oppert of the Coral Gables Police Department arrived on the scene at 7:34 a.m. Upon entering the apartment Oppert observed Barnes lying on the floor with his head leaning against the front door. As Oppert proceeded through the apartment to secure the premises he discovered the body of Timwanika Lumpkins in a bedroom. Lumpkins was lying face down and had severe trauma to the back of her head. As he continued his search of the apartment he observed that the back door was dead-bolted. When Oppert returned to the living room he watched Barnes make an attempt to get up and then collapse.

Wayne Sibley of the Coral Gables Fire Rescue arrived at the scene at 7:39 a.m. and Barnes was no longer breathing. Sibley and other emergency personnel quickly attended to Lumpkins who was still breathing. Barnes was pronounced dead at the scene and Lumpkins was pronounced dead after being airlifted to a nearby hospital.

When Miami-Dade Police officer Thomas Charles arrived at the scene, he first investigated the apartment's exterior. Charles examined Little's Explorer, observing that both tires on the right side had puncture marks. The only blood Charles noted on the exterior of the apartment was immediately outside the front door. Upon entering the apartment through the rear door, he observed no blood in the hallway meeting the rear door and no blood in one of the bedrooms. When he entered the bedroom in which Lumpkins' body was found, he observed a pool of blood in the middle of the room, with broken fingernails, strands of hair, and an earring belonging to Lumpkins. [FN1]

Charles next entered the living room where Barnes' body lay. Therein he found wooden splinters strewn about the floor which did not match any of the furniture found in the room. Additionally, he discovered a small metal fragment consistent with a shotgun trigger guard. Charles also observed a similar piece of metal along with bone fragments and teeth adjacent to Barnes' boot. Other items found near Barnes included a live 12-gauge shotgun shell, two gold colored bracelets and a football championship ring. The police surmised that robbery was not a motive for the crime as homicide detective Clarence Poitier also found $59 in Barnes' pocket, a gold chain with a

medallion around his neck, $103 in Lumpkins' purse, and $550 in a bedroom dresser drawer.

That morning Edward Hudak, who served as liaison between the University of Miami and the Miami Police Department, organized a meeting of the football team on campus to break the news and uncover any leads. At that meeting some of the players indicated that Lumpkins had an ex-boyfriend who was a member of rap group by the name of "The Dawgs."

At 4 p.m. that afternoon, the lead detective at the crime scene, Thomas Romagni, was advised to head back to the station to interview members of "The Dawgs" who wanted to talk about the murders.

When Romagni arrived at the station, Lumpkins' ex-boyfriend, [Defendant], was waiting with friend, Keith Bell. After Romagni advised [Defendant] that Lumpkins had been murdered, [Defendant] informed Romagni that he was romantically involved with Lumpkins for five years and that they had a child together.

When asked about his relationship with Lumpkins, [Defendant] told Romagni that the two had arguments and that he might have slapped her on occasion. As to Barnes, [Defendant] indicated that he knew him and he believed that he lived on campus. [Defendant], however, told Romagni that he had never been to Barnes' apartment.

[Defendant] told Romagni that he and Lumpkins had an argument the previous week after she came home late after an evening out with Barnes. Lumpkins was staying with [Defendant] at the house of his cousin, Carolyn Williams, and her boyfriend, Jesse Pitts. After the argument Lumpkins moved out on April 6. According to [Defendant], Pitts informed him that the person who helped her move out was driving a black Explorer. [Defendant] believed that person to be Barnes.

As to his whereabouts the previous evening, [Defendant] told Romagni that he went to a bachelor party after 11 p.m., remaining there until 1:30 a.m. [Defendant] then went home, changed clothes, and went to the party at Club Salvation, leaving his cousin's house at 2 a.m. According to [Defendant], his cousin Carolyn saw him when he came home after the bachelor party. [Defendant] denied seeing either Barnes or Lumpkins at the club. He remained at the club for about an hour and returned to his cousin's apartment and slept until the next morning.

[Defendant] consented to having his fingerprints taken and his car searched. Police also took pictures of him and observed no injuries on his body. [Defendant]

then volunteered to have the clothes he wore the previous evening inspected, accompanying Romagni to his cousin's apartment for that purpose. Romagni examined the clothing and did not observe blood or other trace evidence. Thereafter, Romagni returned to the station with [Defendant] and Bell and told them that they were free to leave.

Several Miami-Dade detectives canvassed the Miami Beach area for information and encountered Nidia El-Djeije, an attendant at a Amoco gas station located within blocks of Club Salvation. El-Djeije told police that on the morning of April 13 at around 3 a.m. she observed a gray Nissan parked at the gas station. Between 3:30 and 4 a.m., El-Djeije became suspicious after observing a black man matching [Defendant's] general physical description, dressed entirely in black with a hooded sweatshirt covering his face, standing and walking around the car. El-Djeije called police. According to El-Djeije, the man walked towards her glass booth and turned towards Club Salvation. He returned no more than five minutes later, got in the car, and left before the police arrived. As soon as the police left, he returned and remained in the car. El-Djeije observed that the car had tinted windows and did not have a license plate. El-Djeije called Jose Rodriguez from Miami Beach Towing to advise the individual that the car would be towed if he did not leave. Rodriguez arrived at the gas station about fifteen to twenty minutes later, pulling up next to the driver's side of the Nissan. Rodriguez described the vehicle as a two-door light silver Nissan. The driver's side window was cracked open slightly and Rodriguez advised the person that he had to move the car. According to Rodriguez, the Nissan was pointed in the direction of a Chevron station across the street where a black Explorer with a flat tire or tires on its right side was being loaded onto a flat-bed truck. The driver of the Nissan drove off without responding to Rodriguez.

Detectives showed El-Djeije a picture of [Defendant's] car, a Mazda Protege, but she could not recognize it. Instead, El-Djeije definitively told police that the car she saw the previous evening was a Nissan. Several days later detectives interviewed Watisha Wallace, [Defendant's] ex-girlfriend. Wallace owned a gray two-door Nissan Sentra which [Defendant] drove occasionally. On the weekend of the murders Wallace traveled to Daytona with several friends in a rental car, leaving her car behind. Wallace's car did not have a license plate displayed in the usual place. It was

positioned in the rear window. The police took photographs of Wallace's car and showed them to El-Djeije. Upon seeing the photographs, Djeije identified Wallace's Nissan as the car she saw in the early morning hours of April 13.

After learning that Joseph Stewart, an acquaintance of [Defendant], might have some information about the murders the police interviewed him on April 29. Stewart told police that on April 7, only a day after Lumpkins moved out, [Defendant] came to the apartment of Stewart's girlfriend, Zemoria Wilson. At that time, [Defendant] asked Stewart if he had any guns [Defendant] could borrow. Stewart told [Defendant] about an old sawed-off shotgun he had at his mother's house. The shotgun was missing the shoulder stock and had a long screw sticking out of that end of the gun. Otherwise the shotgun, which had a wood-type grill underneath the barrel, was intact. The two of them then rode in [Defendant's] car to Stewart's mother's house to retrieve the shotgun. Once there, Stewart advised [Defendant] that he was uncertain of whether the shotgun worked. Nonetheless, [Defendant] requested the shotgun. Stewart initially put the shotgun in a pillow case, but [Defendant] asked that he place it in something that would better conceal its appearance. Stewart then placed the shotgun in a blue duffel bag and [Defendant] asked him to carry it out to his car and place it in the trunk. According to Stewart, he did not give [Defendant] any ammunition, nor did he ask what [Defendant] wanted the shotgun for.

While Stewart was at work on the morning of April 13, he received a call from [Defendant]. [Defendant] told Stewart that he returned the shotgun and left it behind some bushes at his mother's house. When Stewart arrived home from work that afternoon he found the bag behind some bushes and immediately noticed that the duffel bag was much fuller than when he gave it to [Defendant]. Stewart took the bag inside his mother's house and upon opening it discovered a pair of black pants, a black sweatshirt, a pair of black boots, the shotgun, and a knife. The shotgun was considerably damaged: the trigger guard was missing, the handgrip was broken and pieces of the wood-like grill had been broken off. Stewart, who was familiar with guns, took the gun apart. When he unscrewed the ammunition chamber several shotgun shells fell out. Stewart became nervous and took the shotgun and the knife and threw them down a sewer drain. At the time, Stewart did not notice any blood on any of the items in the duffel bag. Stewart took the black clothing out of the

duffel bag and kept both the clothing and the bag in his room.

The following morning Stewart received another call from [Defendant]. [Defendant] asked Stewart if he had found the duffel bag. Stewart told him that he had and asked [Defendant] if he wanted his clothes back. [Defendant] told Stewart the he could throw the clothes away. Stewart then threw the clothes and boots in a dumpster behind a grocery store. Later that Sunday Stewart paged [Defendant], asking to meet with him. [Defendant] eventually came to Stewart's mother's house at which time Stewart advised him that he threw everything he left in the duffel bag away and that he wanted to be kept out of whatever was going on. [Defendant] responded, "Don't worry about it. Nobody would think to come here. I just had to do what I had to do and I didn't even go in my car." [FN2]

During his interview with police, Stewart led them to the drain where he threw the shotgun and knife. The police were able to recover both items. The clothing, however, could not be recovered as the dumpster where Stewart had deposited [Defendant's] clothing had since been cleaned. Stewart also gave the police the blue duffel bag he retained.

[Defendant] was arrested on April 30, 1996, and charged with the murders of Marlin Barnes and Timwanika Lumpkins. He was subsequently indicted on May 8, 1996, on two counts of first-degree murder, one count of burglary with assault or battery while armed, and one count of criminal mischief (tire slashing).

At trial, Shabaka Abdul-Majid, a former teammate and friend of Barnes, testified that he and Barnes attended a party at Club Salvation on the night of April 12, 1996. Barnes drove Earl Little's Explorer to the party. According to Abdul-Majid, the two arrived at the club at midnight. About an hour after arriving, the two parted ways. The next time Abdul-Majid saw Barnes he was upstairs in the VIP section with Lumpkins. Barnes and Lumpkins were in an open area of the club which was visible from the first floor. Selma Wade, a friend of Barnes who was to meet Lumpkins at the party, testified that Barnes and Lumpkins could be seen from the first floor of the club hugging and kissing. At some point in the evening, Barnes exited to park the Explorer closer to the club. Abdul-Majid, Barnes, and Lumpkins eventually left the club at around 4:30 a.m. When they reached the Explorer they discovered that the tires had been slashed. They then pushed the Explorer to a nearby Chevron gas

station. Majid and some other friends left Barnes and Lumpkins at the station while the two awaited a tow truck.

Tow truck driver Robin Lorenzo testified that he towed the Explorer back to the University of Miami campus while both Barnes and Lumpkins rode in the truck with him. Lorenzo dropped the two off at Barnes' apartment between 5:30 and 6:30 a.m.

To establish [Defendant's] motive, the State introduced evidence of prior incidents in which [Defendant] had stalked Lumpkins and one incident in which [Defendant] threatened to kill her with a gun.

In support of a finding of premeditation, the State presented the testimony of University of Miami basketball player Jennifer Jordan, a friend of Barnes and [Defendant]. Jordan testified that on several occasions in which [Defendant] drove her to campus, he asked her to "look out and see if I ever see Marlin with a girl that drove a red car." Lumpkins drove a red Honda Civic. On one of those occasions [Defendant] again asked Jordan to look out for a girl in a red car because "he believed Marlin was messing with his baby's mother." Only a month prior to the murders, [Defendant] visited Jordan on campus and asked her where Barnes lived and who lived with him. Jordan responded accordingly and [Defendant] explained that he wanted the information because he wanted to find out if Marlin was "f--- ing around with his baby's mother."

More damaging testimony was obtained from Bernadette Hardy. Hardy lived with Joseph Stewart's girlfriend, Zemoria Wilson, in April of 1996. Hardy, who knew [Defendant], testified that sometime after 6 a.m. on the morning of the murders she was awakened by a knock at her window. When she looked out she saw [Defendant] outside wearing a black sweater. [Defendant] asked about Stewart's whereabouts and Hardy informed him that he was at his mother's house. Hardy's next-door neighbor, Deborah Scales, also testified that she was awakened that morning by banging on the window next door at around 7 a.m. Scales opened the door and observed a black male dressed entirely in black. [FN3]

As to the physical evidence recovered in the case the State produced the testimony of George Borghi, an expert in the area of trace evidence and fracture patterns. Borghi testified that the metal fragments recovered from Barnes' apartment conclusively matched the trigger guard of the recovered shotgun. To amplify Borghi's testimony, the State introduced several

compelling photographs of the reconstructed trigger guard. Additionally, Thomas Quirk, an expert in tool marks, testified that the wooden fragments found at the apartment were consistent with the forearm of the shotgun. Quirk also testified that the knife obtained from the sewer drain was consistent with the puncture marks on the tires of the Explorer.

The shotgun was examined and while it tested positive for the presumptive presence of blood there was not enough blood to do more tests to confirm the presence of blood. [FN4] Further, the duffel bag Stewart loaned [Defendant] was tested and blood matching the victims' was found on the bag. No blood or any trace evidence of the defendant was identified at the scene, nor was any blood or trace evidence found in Wallace's Nissan.

The State also presented the testimony of Toby Wolson, a forensic biologist with an expertise in blood stain pattern analysis. Wolson's testimony explained the lack of any footprints from the assailant at the bloody crime scene. In particular, Wolson opined that the pooling and smearing of blood near the front door of the apartment and other nearby patterns were consistent with Barnes struggling and flailing about after the assailant had already exited the apartment. Moreover, Wolson testified that the pooling of blood in the bedroom where Lumpkins was found was consistent with the gradual bleeding from her wounds. Wolson further indicated that the traces of blood found immediately outside the front door of the apartment was likely the result of blood being pushed out from underneath the door as Barnes' wounds bled. Accordingly, Wolson opined that it was not unlikely that the assailant accumulated little blood from the scene despite the vast amount of blood present at the scene when the bodies were discovered.

As to the injuries suffered by the victims, the State's medical examiner testified that both victims died from massive head trauma. According to Dr. Gulino, Lumpkins suffered lacerations and a compound fracture to the back of her skull. Dr. Gulino opined that the skull fractures suffered by Lumpkins were the type typically seen in high-speed car accidents. Lumpkins also had a fracture to the base of her skull. Dr. Gulino indicated that many of the injuries to the back of Lumpkins' head were consistent with being inflicted with the blunt portion of the shotgun. Moreover, several lacerations corresponded with the coils or spring of the ammunition tube of the shotgun. Lumpkins also had a fracture to her left hand and numerous other injuries to her hand which

Dr. Gulino testified were consistent with an attempt to protect herself from injury.

Similarly brutal injuries were described by Dr. Gulino with regards to Barnes. Barnes suffered numerous lacerations over his face and head, many of which had a crescent character consistent with the broken trigger guard recovered at the scene. Indeed, the State introduced several composite pictures comparing the victims' wounds with the shotgun that made it readily apparent that the victims were struck with such force that their skin retained what amounted to the shotgun's "fingerprints." Barnes suffered numerous facial fractures. Like Lumpkins, Barnes had several defensive wounds to his forearms and hands.

In defense, [Defendant] presented the testimony of his cousin, Carolyn Williams, to substantiate his alibi defense. Williams testified that she saw [Defendant] in his bedroom with his daughter sometime after 2 a.m. She further testified that she next saw [Defendant] when she awoke at 5 a.m. According to Williams, he remained at the house for the rest of the morning.

The jury found [Defendant] guilty on all counts. At the penalty phase he offered the testimony of his mother and grandmother. They testified generally to his positive relationship with his family and loving relationship with his children. The defense offered no evidence of mental mitigation. Following the penalty phase, the jury recommended death sentences for both murders by a vote of eleven to one. The trial judge followed the jury's recommendation, finding four aggravating circumstances: (1) that the defendant had been convicted of a prior capital felony (the contemporaneous murder); (2) that the murder was committed in the course of a felony (burglary); (3) that the murder was especially heinous, atrocious, or cruel (HAC); and (4) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP). The court considered the following statutory and nonstatutory mitigation: (1) that the defendant did not have a significant history of prior criminal activity (not found and therefore given no weight); (2) that the defendant was under the influence of extreme mental or emotional disturbance (given little weight); (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (given no weight); (4) a catchall category of mitigation--the defendant's kindness to others and love and affection

> towards his family (given some weight); (5) that defendant's demeanor at trial was good (given some weight); (6) the length of sentence defendant could receive if not sentenced to death (found not to be mitigating and therefore given no weight); and (7) lingering or residual doubt as to defendant's guilt (found not to be mitigating and therefore given no weight).
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> [FN1] The other earring was found under the bed Lumpkins' body lay next to.
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> [FN2] At trial, the State introduced [Defendant's] cellular phone records. Those records corroborated Stewart's recall of the times and places where [Defendant] phoned him following the murders. Moreover, the State introduced Stewart's time card from work which indicated, consistent with his testimony, that he clocked into work on the morning of April 13, 1996, at 6:32 a.m.
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> [FN3] Although Scales testified that she could not recognize the individual, she was certain that it was not Joseph Stewart.
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> [FN4] The expert testified that this was not surprising given that the shotgun was submerged in the sewer drain for some time before it was recovered.

Dennis v. State, 817 So. 2d 741, 744-50 (Fla. 2002).

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A SERIES OF UNPRESERVED AND MERITLESS ISSUES ABOUT THE ADMISSION OF EVIDENCE.

Defendant first asserts that his counsel was ineffective during his direct appeal for failing to raise issues related to the admission of evidence. However, Defendant is entitled to no relief.

The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994). 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, 425 (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). Similarly, counsel cannot be deemed ineffective for failing to raise an issue that would have been harmless error. *Valle v. Moore*, 837 So. 2d 905, 910 (Fla. 2002).

Moreover, Defendant's reliance on the ABA guidelines to assert appellate counsel should be deemed ineffective unless he raised every potential meritorious issue should be rejected. As the United States Supreme Court has recently held, it is improper to treat the ABA guidelines as rules that a counsel must follow. *Bobby v. Van Hook*, 130 S. Ct. 13, 16-17 (2009). Instead, they only provide guides to what the prevailing professional norms are and only to the extent they are applicable to the time at which counsel acted. *Id.* Here, the ABA guidelines do not comport with the prevailing professional norms. Instead, this Court has stated that counsel has a professional duty to "winnow out weaker arguments in order to concentrate on key issues."[1] *Thompson v. State*, 759 So. 2d 650, 656 n.5 (Fla. 2000)(quoting *Cave v. State*, 476 So. 2d 180, 183 n.1 (Fla. 1985); *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

Applying this proper standard, Defendant is entitled to no relief. Defendant first contends that appellate counsel should have claimed that the trial court abused its discretion in allowing Det. Hudak to testify regarding Earl Little's appearance at the crime scene and the reaction of other football players as irrelevant and unduly prejudicial. However, Defendant did not object to Det. Hudak's testimony about Mr. Little. (T. 3402) As such, counsel

[1] The State would note that the brief appellate counsel did file complete filled the 100 page limit. Initial Brief of Appellant, Case No. SC95211. Thus, counsel would have had to abandon issues that he did raise in order to raise the issues that Defendant now

cannot be deemed ineffective for failing to raise this unpreserved issue. *Groover*, 656 So. 2d at 425.

With regard to Det. Hudak's testimony about the other players, part of the State's case was that Defendant had called Joseph Brinson on the morning of the murders and related information that was not publically available about the murders. (T. 3927-52) Further, Defendant repeatedly asserted that the police conducted a sloppy investigation and failed to consider other suspects or motives. Given these circumstances, Det. Hudak's testimony that the players were isolated from the community and crime scene, not provided with information about the murders, interviewed and in no emotional state to be communicating with the community at large was relevant to show that Defendant had no source other than having committed the crimes for knowing the information he gave Mr. Brinson and to showing that the police did conduct a thorough investigation. §90.401, Fla. Stat. Moreover, this Court has held that brief comments about relationships with the victim are harmless if they are error at all. *Franqui v. State*, 699 So. 2d 1332, 1334 n.4 (Fla. 1997). Given these circumstances, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Valle*, 837 So. 2d at 910; *Kokal*, 718 So. 2d at 143.

Defendant next asserts that appellate counsel was ineffective for failing to claim that the trial court abused its discretion in

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asserts he should have raised.

allow Robin Gore to testimony to an excited utterance by Ms. Lumpkins. However, appellate counsel was not ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. Ms. Gore stated that Ms. Lumpkins had just run back into Ms. Gore's apartment and locked the door, that Ms. Lumpkins appeared scared and was speaking quickly at the time, that the statement was that Defendant had a gun, which Ms. Gore stated was the source of Ms. Lumpkins fear, and that the statement was made within a period less than 10 minutes after Ms. Lumpkins fled and before the encounter with Defendant ended that evening. (T. 4266, 4268, 4272-73) Given these circumstances, the trial court did not abuse its discretion in finding that the statement qualified as an excited utterance. *Hudson v. State*, 992 So. 2d 96, 106-09 (Fla. 2008). As such, the claim is meritless and should be denied.

Defendant next asserts that appellate counsel was ineffective for failing to claim that Dr. Gulino's testimony about blood smears exceeded the scope of his expertise. However, appellate counsel was not ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. Initially, the State would note that Defendant invited any error in the admission of this testimony. During the testimony of Off. Oppert, Defendant repeatedly questioned him about his opinion regarding blood spatter evidence and the State repeatedly objected that Off. Oppert had no expertise to allow him to offer such an opinion. (T. 3221-22, 3225-26, 3227-

29) However, Defendant convinced the trial court to overrule these objections by asserting that Off. Oppert's experience as a patrol officer going to crime scenes and his ability to see permitted him to provide this testimony. *Id*.

Regarding Dr. Gulino, the State established that he frequently went to crime scenes to assist him in his work as a medical examiner and that he did so in this case. (T. 4383-84) Moreover, when the State first attempted to ask questions in this area, the trial court sustained objection, stating that it would not allow Dr. Gulino to testify regarding the position of blood stains but that he could offer an opinion regarding the relationship of the blood to Mr. Barnes' vision. (T. 4448-49) As this was entirely consistent with the ruling Defendant convinced the trial court to make regarding Off. Oppert, Defendant should be deemed to have invited any error. *See Terry v. State*, 668 So. 2d 954, 962 & n.10 (Fla. 1996). Having invited the error at trial, the issue would not have been successful on appeal. *Id.* As such, appellate counsel cannot be deemed ineffective for failing to raise the issue. *Valle*, 837 So. 2d at 910. The claim should be denied.

Moreover, Dr. Gulino's testimony on this issue was directed at showing that Mr. Barnes moved for the place where he was first attacked to the door of the apartment where he was found dying, while blinded by his injuries. (T. 4447-48, 4450) In *Terry*, this Court found that the trial court had not abused its discretion in

determining that a medical examiner was qualified to give such an opinion over a defense objection the doctor was not an expert in blood spatter evidence. *Terry*, 668 So. 2d at 960-61. As such, the trial court did not abuse its discretion in permitting Dr. Gulino's testimony here. Appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next contends that it was fundamental error for paramedic Sibley to testify about the bloody condition of the crime scene. However, appellate counsel was not ineffective for failing to raise this issue either. This Court has defined fundamental error as "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.'" *Brooks v. State*, 762 So. 2d 879, 899 (Fla. 2000)(quoting *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999). Here, that standard was not met. Immediately before Mr. Sibley's testimony, Defendant elicited a graphic description of the bloodiness of the crime scene during his cross examination of Off. Oppert. (T. 3220-21) He then used the bloodiness of the crime scene to argue that Defendant could not be guilty because the police found no blood on him or in the cars he used. (T. 4902, 4937-38) Given these circumstances, Mr. Sibley's brief testimony about the bloodiness of the area cannot be said to be such that the verdict could not have been

reached without it. *Brooks*, 762 So. 2d at 899. As such, appellate counsel cannot be deemed ineffective for failing to argue that the verdict depended on this testimony. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next asserts that appellate counsel was ineffective for failing to claim the admission of Randy Shannon's testimony was fundamental error. However, again, the standard of fundamental error was not met with the admission of this relevant evidence. As noted above, a large part of Defendant's defense was claiming that the police investigation was sloppy and missed evidence of other suspects. (T. 4883-4942) Pretrial, Defendant convinced the trial court that he should be allowed to present evidence that Ms. Lumpkins had romantic involvements with other men to suggest that these men were suspects. (T. 930-35, 1031) Defendant has identified Ray Lewis as one of these men. (PCR. 60) Given these circumstances, Mr. Shannon's testimony that he called Mr. Lewis around 9 a.m., that he reached him in Lakeland and that Mr. Lewis' response to the call was indicative of not knowing anything about the crimes was relevant to rebut Defendant's defense. §90.401, Fla. Stat. Thus, it was not even error for this relevant testimony to be admitted, much less fundamental error. As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next asserts that appellate counsel should have claimed that the admission of the medical examiner's testimony concerning the amount of force necessary to cause the victims' deaths was fundamental error. However, this Court has recognized that the manner in which a murder is committed and the nature of the victims' injuries and manner in which they were inflicted is relevant to premeditation. *Preston v. State*, 444 So. 2d 939, 944 (Fla. 1984)(quoting *Larry v. State*, 104 So. 2d 352, 354 (Fla. 1958)). As such, the medical examiners' testimony about the amount of force necessary to cause the victims' injuries was directly relevant. Moreover, this Court has recognized that testimony about the victims' injuries may be more graphic during the penalty phase because of the need to address aggravation. *Cummings-el v. State*, 863 So. 2d 246, 254 (Fla. 2003). Thus, Appellate counsel cannot be deemed ineffective for failing to claim that the proper admission of this evidence was fundamental error. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next asserts that appellate counsel was ineffective for failing to claim fundamental error in the admission of Det. Charles' testimony about blood evidence because it exceeded the scope of his qualifications. However, as noted above, Defendant invited any error by convincing the trial court during the testimony of Off. Oppert that the type of testimony at issue did not require any expertise beyond having been at crime scenes and

having eyes. Having invited the error at trial, the issue would not have been successful on appeal. *Terry*, 668 So. 2d at 962 & n.10. As such, appellate counsel cannot be deemed ineffective for failing to raise the issue. *Valle*, 837 So. 2d at 910. The claim should be denied.

Moreover, Det. Charles testified he had been trained in blood spatter analysis and that he had been a police officer for 26 years, during which he had worked in crime analysis for 3 years and been a crime scene technician for 6 to 7 years. (T. 3248-49) When the State objected to Defendant cross examining him about blood spatter analysis, the trial court found that Det. Charles was qualified to testify about blood spatter. (T. 3315-17) In *Anderson v. State*, 863 So. 2d 169, 179-80 (Fla. 2003), this Court held that a trial court did not abuse its discretion in finding a person with similar training qualified to testify as a blood spatter expert. Thus, the admission of Det. Charles' testimony was not even error, and appellate counsel cannot be deemed ineffective for failing to make the meritless argument that it was fundamental error. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next asserts that appellate counsel should have argued that the admission of Det. Charles' testimony about the puncture in the car tires was fundamental error. He again seems to suggest that the testimony was improper expert testimony. However, Det. Charles was not even offering an expert opinion about the

punctures. Instead, he was describing evidence he had seen. (T. 3262) A witness is properly permitted to describe things he had seen. As such, appellate counsel cannot be deemed ineffective for failing to claim that such evidence was not admissible. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Finally, Defendant asserts that appellate counsel should have claimed that the admission of Dr. Gulino's testimony that the pattern injuries on the victims were consistent with the shotgun was fundamental error. Again, he seems to suggest that testimony exceeded the scope of Dr. Gulino's expertise. However, this Court has recognized that medical examiners are qualified to testify about the consistency between wounds and weapons. *Cox v. State*, 966 So. 2d 337, 352-54 (Fla. 2007); *see also Terry*, 668 So. 2d at 960-61. Thus, appellate counsel cannot be deemed ineffective for failing to claim that the admission of such testimony was fundamental error. *Kokal*, 718 So. 2d at 143. The claim should be denied.

II. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE MERITLESS ISSUE OF JURY MISCONDUCT AND JUDICAL BIAS FOR THE FIRST TIME ON APPEAL.

Defendant next his appellate counsel was ineffective for failing to argue fundamental error occurred because the trial court and the State allegedly had improper contact with the jury, because the trial court allegedly demonstrated bias by making rulings, because the trial court allegedly engaged in ex parte communications with the jury and because the trial court was friendly with the medical examiner. However, Defendant is entitled to no relief.

As Defendant freely admits these issues were never raised at trial. As Defendant also admits, appellate counsel counsel cannot generally be found ineffective for failing to raise issues that were not preserved for review. *Groover*, 656 So. 2d at 425. As such, he asserts that appellate counsel should have sought review of these issues for fundamental error. As noted above, fundamental error is "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.'" *Brooks*, 762 So. 2d at 899. This Court has refused to consider issues where the record is insufficient to determine the issue. *Robertson v. State*, 829 So. 2d 901, 906-09 (Fla. 2002). This Court has applied this principal particularly where the failure to present the issue in the trial court prevented the opponent from

developing it position. *Robertson*, 829 So. 2d at 908-09. Here, the record is insufficient to allow the issue of improper contact with Jurors Reid and Thomas to have been raised on appeal. As such, this issue could not have been presented on appeal, and appellate counsel cannot be deemed ineffective for failing to raise them.

This Court has held that when a defendant raises an issue of juror misconduct, he bears the burden of showing that potentially prejudicial conduct occurred. *Amazon v. State*, 487 So. 2d 8, 11-12 (Fla. 1986). If a defendant alleges sufficient facts that would meet this standard, if true, a trial court is then required to interview the jurors in question. *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. *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). Moreover, 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 is in accordance with United States Supreme Court precedent. As the United States Supreme Court recognized in *Rushen v. Spain*, 464 U.S. 114, 118 (1983), "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." Moreover, in *Smith v. Phillips*, 455 U.S. 209, 217 (1982), recognized that a defendant did not demonstrate a denial of due process merely because a juror "had been placed in a compromising situation." Instead, the Court held that when such a situation occurred, the defendant was required to the juror in question was actually biased. *Id*. at 215. The Court reached this conclusion even though the misconduct in question involved a juror applying for a job at the prosecutors' office while serving on the jury and the prosecutors not disclosing the application to the defense when they

learned of it during trial. *Id.* at 212-13.

Here, Defendant does not point to anything in the record to show that any potential prejudicial conduct even actually occurred. Instead, he relies entirely on speculation that such conduct occurred. Petition at 19-20. Moreover, because Defendant did not raise this issue at the trial, the record does not contain an interview with either of the jurors to show that either juror was actually biased. Moreover, the State was not given the opportunity to rebut any presumption of prejudice that might have arisen. As such, the record was not sufficient to show that any error occurred at all, much less fundamental error. *Robertson*, 829 So. 2d at 906-09. Thus, appellate counsel could not be deemed ineffective for failing to raise this unpreserved issue. *Groover*, 656 So. 2d at 425.

In an attempt to avoid the fact that the record is incomplete, Defendant speculates that he was not aware the alleged contact was occurring and that alleged contact must have been prejudicial to him. However, the record refutes this speculation.

With regard to Ms. Reid, the record reflects that the trial court announced that Ms. Reid had a notice regarding a meeting and that it would work with her about scheduling in the presence of Defendant and his counsel when the proceedings began that day. (T. 3444-45) The record reflects that Defendant and his counsel were present when the trial court directed Ms. Reid to stay in the

courtroom after it excused the remainder of the jurors and when the trial court began to address Ms. Reid's scheduling issue. (T. 3557) There is nothing in the record to indicate that either Defendant or his counsel left the room after this conversation began. (T. 3557-59) Thus, Defendant's assertion that he did not know what happened regarding Ms. Reid boils down to a contention that this Court should presume that neither Defendant nor his counsel went back into chambers during the time that phone calls needed to reschedule Ms. Reid's appointment were made because the record does not reflect that either did so. However, this Court has held that such speculation is insufficient to establish that individuals were not present during proceedings. *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007). Given these circumstances, Defendant's claimed lack of aware of the discussion with Ms. Reid is meritless.

Moreover, the record does not even show that Ms. Reid was aware that there was a connection between the office with which she had a meeting and the prosecution and suggests that any prejudice resulting from such knowledge would have been toward the State. Ms. Reid stated that she had never been to the office at which the meeting was to occur. (T. 3558) Moreover, the trial court, who had a copy of the notice sent to Ms. Reid, stated that it was with the "Dade Child Support Enforcement Office" and had to ask the prosecutors if there was a connection to their office. (T. 3557-

58, 3559) Thus, it does not appear from the record that Ms. Reid would have even known that the offices were connected. Moreover, in discussing the conduct of that office, Ms. Reid expressed frustration over the inability to contact anyone in the office directly by phone and the response she received from when she attempted to resolve the scheduling issue herself. (T. 3558-39) As such, it would appear that any prejudice that might have occurred based on Ms. Reid's contact with the child support office would not have been against Defendant but against the State. Given these circumstances, Defendant's due process claim regarding Ms. Reid is meritless based on what is in the record. *Smith*, 455 U.S. at 212-17. Thus, appellate counsel cannot be deemed ineffective for failing to raise an issue that would have been meritless on the record. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425. The claim should be denied.

The record also refutes the claim regarding Mr. Thomas. The record does not reflect that the State knew Mr. Thomas had been fired before the trial court conducted its colloquy with him in the presence of Defendant's counsel. (T. 5208-14) Instead, it reflects that the State asked, "Did he lose his job?," indicating a lack of knowledge. (T. 5208) Moreover, the record reflects ample basis for the question, as it reflects a continual history of difficulty Mr. Thomas was experiencing with his employer.

During voir dire, Mr. Thomas approached the court and

expressed a concern that serving would have an adverse impact on him financially because of his employment. (T. 2069) The trial court then explained that his employer was required to pay him while on jury duty and that if a problem arose, he should notify the court so it could deal with his employer. (T. 2069-70) Still later during voir dire, Mr. Thomas asked the trial court for a letter to his employer "because they are trying not to pay me." (T. 2099) After the jury was selected, Mr. Thomas wrote to the court to indicate that his employer was still refusing to pay him even after receiving this letter. (T. 2879) As a result, the trial court wrote a second letter to Mr. Thomas' employer. (T. 2880, 2885, 2893) Moreover, after consulting with Mr. Thomas and the parties, the trial court also agreed to call Mr. Thomas' employer to get him paid. (T. 2897-99) During the guilt phase of trial, the trial court provided Mr. Thomas with another letter for his employer so that he could be paid. (T. 3445) Still later during the guilt phase, the trial court had to enter an order requiring Mr. Thomas' employer to comply with a local ordinance regarding paying Mr. Thomas, an issue about which Mr. Thomas was sufficiently concerned to address with the court at the time the order was signed. (R. 2325-26, T. 3866)

Given this repeated history of problems with Mr. Thomas' employer, the State had ample reason to suspect that Mr. Thomas' employer might have taken adverse employment action against him as

a result of his jury serve and to ask about it. Given the basis for the question and the fact it was a question, the record refutes that the asking of this question indicated any improper contact with Mr. Thomas.

The same is true of the State's comment that it had lined up another job for Mr. Thomas. During voir dire, Mr. Thomas indicated that he was a security guard at the Port of Miami and had been employed there for 18 months. (T. 1719, 2484) Moreover, after the trial court and parties spoke to Mr. Thomas about his job loss and Mr. Thomas left the room (T. 5208-14), the following colloquy occurred.

> [The State:] Judge, when the trial is over, do you have any objection if we could get him a job at a security company?
> THE COURT: Can you?
> [The State:] Yes, Detective Hudak can.
> THE COURT: Okay. I have no objection.
> [The State:] I didn't want to say anything at this time. Once trial is over, perhaps he can give him a card and have him call him.
> THE COURT: Absolutely, because he looks like a good man.

(T. 5314-15) Thus, the record reflect that knowing Mr. Thomas' occupation and having a detective who could assist Mr. Thomas, the State arranged for new employment to be offered to Mr. Thomas after trial without communicating with Mr. Thomas ex parte. Thus, appellate counsel cannot be deemed ineffective for failing to raise an issue that would have been meritless on the record. *Kokal*, 718 So. 2d at 143; *Groover,* 656 So. 2d at 425. The claim should be

denied.

Moreover, appellant counsel cannot be deemed ineffective for failing to raise an issue concerning the arrest of his mother because such a claim would also have been meritless. *Kokal*, 718 So. 2d at 143. The trial court did not abuse its discretion in its handling of this issue. *England*, 940 So. 2d at 402; *Boyd*, 901 So. 2d at 197; *Doyle*, 460 So. 2d at 357.

The record reflects that when the trial court was first informed of Defendant's mother's threat to Katia Lynn (T. 5340-41), it had the jury removed from the courtroom. (T. 5327) Moreover, the threat was made in such a manner that none of the parties even heard it and only learned of it when spectators informed them of it. (T. 5326-27, 5335-36) Further, after discussing how to proceed, the trial court agreed to recess the proceedings for the day, send the jury home, give them a strong admonishment to avoid contact with extrajudicial sources of information about the case and not to discuss the case among themselves and specifically ask the jurors to report any contact the following morning. (T. 5327-32) It then brought the jury back to the courtroom, gave them the admonishment it had promised and had the juror leave. (T. 5332-33) It was only after the jury was gone that the State even announced its plan to arrest Defendant's mother, and there was further delay before she was actually arrested. (T. 5333-39) As such, the record reflects that the jury had no way of knowing directly that

Defendant's mother had been arrested.

The following morning, Defendant indicated that his mother's arrest had been publicized in the media and asked that the trial court to inquire about extrajudicial exposure and conduct individual interviews with anyone who indicated exposure. (T. 5353) The State agreed to this procedure. (T. 5353) When the jury entered the courtroom, the trial court asked:

> Now you recall yesterday that I asked you, as I always do, to please refrain from speaking to anyone about this case or having anyone speak to you about this case, or refrain from seeing news reports or reading any reports either in the print media or any other type of media. There's always a chance that by happenstance you could have seen something that may have been in the media between yesterday and today.
>
> Let me see a show of hands, if any, if anyone by chance happened to see something in the media.

(T. 5355) None of the jurors indicated any exposure. (T. 5353)

After the jury retired to deliberate, the trial court permitted the alternates to leave. (T. 5416-22) While the jury was deliberating, that the bailiff indicated that the jury had requested to be escorted to their cars. (T. 5418) Defendant then asked that the trial court question the jurors about exposure again, indicating that he was concerned that the jury might have been exposed to his mother's arrest. (T. 5418-20) However, the trial court refused, indicating that it had already conducted the colloquy. (T. 5420)

Given that the jurors were not present during Defendant's mother's arrest, that they were questioned about exposure to

extrajudicial information and that they all denied exposure, the trial court did not abuse its discretion in determining that there was no juror misconduct and no need for further inquiry into the escort request. *England*, 940 So. 2d at 401-02. Thus, appellant counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant's claims regarding issues about judicial bias similarly provide no basis for relief. As Defendant acknowledges, his trial counsel never made a motion to recuse Judge Crespo. While Defendant suggests that appellate counsel should have attempted to raise this issue as fundamental error, he does not point to a single case in which this Court has held that assertions of bias can be raised on appeal as fundamental error. In fact, this Court has rejected the assertion that a defendant may raise a claim regarding disqualification for the first time on appeal as fundamental error. *Mungin v. State*, 932 So. 2d 986, 993-94 (Fla. 2006). Instead, what this Court has held is that any grounds for disqualification not raised within 10 days of when the facts giving rise to the request for disqualification are "forever waived." *Rivera v. State*, 717 So. 2d 477, 481 n.3 (Fla. 1998); *see also Asay v. State*, 769 So. 2d 974, 980 (Fla. 2000). As this Court has recognized, appellate counsel cannot be deemed ineffective for failing to raise an issue that has been waived. *See Doorbal v.*

State, 983 So. 2d 464, 491-92 (Fla. 2008). Thus, the claim is meritless and should be denied.

Even the issue had not been waived, appellate counsel would still not have been ineffective for failing to raise this issue. Defendant first asserts that appellate counsel should have asserted that the trial court evidenced bias by ruling against him on several issues and commented about recognizing the victims' parents during one of these ruling. However, this Court has repeatedly held that trial court rulings do not provide a facially sufficient basis for disqualification. *Waterhouse v. State*, 792 So. 2d 1176, 1194 (Fla. 2001); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998); *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998); *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994)(stating that trial court rulings "are proper grounds for appeal, not for recusal."). Thus, any issue asserting that the trial court was biased because it ruled against Defendant would have been meritless. Appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant next asserts that appellate counsel should have claimed the trial court evidenced bias because it allegedly engaged in ex parte communication with the jury. However, as Defendant admits, there is nothing in the record that shows that the trial court spoke privately to the jury. Petition at 28. Instead,

Defendant bases this claim entirely on speculation that such communications must have occurred based on an ambiguous statement the trial court made during the penalty phase charge conference. (T. 5203) This Court has held that a motion for disqualification based on speculation is facially insufficient. *Moore v. State*, 820 So. 2d 199, 206 (Fla. 2002); *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000); *Barwick v. State*, 660 So. 2d 685, 693 (Fla. 1995). Thus, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

This is particularly true, as the record as a whole refutes Defendant's speculation. The statement from the penalty phase charge conference upon which Defendant bases this claim was:

> I will read this to them and show them these verdict forms, like I do during the regular instructions. I am going to go down and speak to them like I did the last time.

(T. 5203) During the guilt phase charge conference, the trial court informed the parties regarding its practice in reading jury instructions:

> This is the first case, in fact, that I had the honor of presiding with any of you so you have not had an opportunity to see or hear the way that I read jury instructions.
>
> Well let's just say at the least it's very different from what you have heard or seen before. I'm a firm believer that instructions are not and should not and if I ever have anything to do with it, I would prohibit judges giving jury instructions, sitting up here and throwing them and blasting down at the jury things they have never heard before.

> I go to the podium and address them from the podium. I give them a very direct eye to eye instruction and I've been told by responses that I had from people that it's the time that they have understood the jury instructions the most, when I have taken the time to speak to them as they would like to be spoken to and not preached to.

(T. 4802-03) Given this context, the trial court's statement during the penalty phase charge conference did not indicate that any private conversations had occurred. Instead, the trial court was explaining that it, once again, planned to deliver the instructions from the well of the court instead of the bench. As such, the record also refutes Defendant's speculation about ex parte communications and shows that the claim is meritless in the context of the record. *Asay*, 769 So. 2d at 980. Appellant counsel cannot be deemed ineffective for failing to raise this claim. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Defendant finally asserts that appellate counsel should have claimed that trial court evidenced biased because it had a friendly relationship with Dr. Rao. However, in making this claim, Defendant relies on the record from the first post conviction appeal. Petition at 28-29. Obviously, the first post conviction appeal did not exist at the time of the direct appeal and could not have been part of the record on direct appeal. Thus, Defendant is suggesting that appellate counsel should have raised an issue based on extra record evidence. However, claims based on matters that are not a part of the record cannot be raised on appeal. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla.

1st DCA 1983)("That an appellate court may not consider matter outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."). Thus, appellate counsel cannot be deemed ineffective for failing to make a nonmeritorious attempt to have raised this issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

Even if appellate counsel could rely on extra record evidence to raise an issue on appeal, Defendant would still be entitled to no relief. The only basis that Defendant asserts that actually existed at the time of direct appeal is that Judge Crespo had a friendly relationship with Dr. Rao.[2] However, merely having a friendly relationship with a witness is not a facially sufficient ground for a motion to recuse. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990). Thus, any attempt to recuse Judge Crespo because he had a friendly relationship with Dr. Rao would have been meritless. Appellant counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143. The claim should be denied.

[2] Dr. Rao was still employed at the Miami-Dade County Medical Examiner's office at the time of trial. (T. 5222) She did not leave the office until 2000. (PCR. 1123) Thus, the letter of recommendation would have been written after trial.

III. THE SUFFICIENCY OF THE EVIDENCE CLAIM IS PROCEDURALLY BARRED AND MERITLESS.

Defendant next asserts that the evidence was insufficient to sustain his convictions. However, Defendant is entitled to no relief, as this claim is barred and meritless.

As this Court has repeatedly recognized, claims that are cognizable on direct appeal or in a motion for post conviction relief are procedurally barred in state habeas petition. *Pagan v. State*, 34 Fla. L. Weekly S561, S567 (Fla. Oct. 1, 2009); *Blackwood v. State*, 946 So. 2d 960, 976 (Fla. 2006); *Smith v. State*, 931 So. 2d 790, 805 (Fla. 2006); *Orme v. State*, 896 So. 2d 725, 740 (Fla. 2005); *Baker v. State*, 878 So. 2d 1236, 1241 (Fla. 2004); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). Moreover, this Court has held that a challenge to the sufficiency of the evidence is a claim that could and should have been raised on direct appeal. *Howell v. State*, 877 So. 2d 697, 704 (Fla. 2004); *Burr v. State*, 518 So. 2d 903, 905 (Fla. 1987). As such, this claim is barred and should be denied as such.

Further, this Court has held that claims are also barred when the claim was considered and rejected in a prior proceeding. *See Denson v. State*, 288, 290 (Fla. 2000). Here, this Court reviewed the sufficiency of the evidence during direct appeal and found the evidence was sufficient to support his conviction. *Dennis*, 817 So. 2d at 767. As this Court has already determined that the evidence

was sufficient, this claim is again barred and should be denied as such.

Even if the claim was not barred, Defendant would still be entitled to no relief. In challenging the sufficiency of the evidence, Defendant makes no attempt to explain how no rational jury, considering the totality of the evidence in the light most favorable to the State, would have determined that the State did not prove that he committed the crime. Instead, he notes that the State did not present physical evidence directly linking him to the crime or eyewitness testimony, complains that the State was allowed to present evidence that he believes should not have been present and argues that Joseph Stewart should not have been deemed credible. However, none of these arguments show that the evidence was insufficient.

First, the evidence is not insufficient merely because the State did not present physical evidence that directly linked a defendant to the crime scene or eyewitness testimony. *See Twilegar v. State*, 35 Fla. L. Weekly S13, S14-16 (Fla. Jan. 7, 2010). Moreover, as the United States Supreme Court has just reaffirmed, an appellate court considering the sufficiency of the evidence is required to consider the totality of the evidence the State presented at trial, even where the defendant challenges the admissibility of that evidence. *McDaniel v. Brown*, 2010 WL 58631, *6 (U.S. Jan. 11, 2010); *see also Lockhart v. Nelson*, 488 U.S. 33,

40-42 (1998). Further, this Court has recognized that the evidence is not insufficient simply because a defendant challenges a witness's credibility, as credibility determinations are made by the jury. *Jackson v. State*, 34 Fla. L. Weekly S541, S545 (Fla. Sept. 24, 2009). Thus, none of Defendant's arguments show the evidence was insufficient.

Further, while Defendant insists that the State's case was based entirely on circumstantial evidence, this is not true. Joseph Stewart testified that when he informed Defendant that he had thrown the clothes that Defendant had left with the shotgun in the gym bag stained with the victims' blood[3] and asked to be left out of whatever Defendant had done, Defendant responded, "Don't worry about it. Nobody will think to come here. I just had to do what I had to do and I didn't even go in my car." (T. 3659) As this Court recognized in *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006), such a statement in respond to questions about evidence amounts to a confession, which is direct evidence of guilt. Thus, Defendant's claim is also meritless. It should be denied.

[3] Mr. Stewart also testified that Defendant told him to throw the clothes away. (T. 3656) As such, Defendant's assertion that "[t]here is no indication in the record that [Defendant] asked him to destroy or hide evidence" Petition at 34, is incorrect.

IV. DEFENDANT'S *CRAWFORD* CHALLENGE TO DR. RAO'S TESTIMONY SHOULD BE DENIED.

Defendant next asserts that the admission of Dr. Rao's testimony violated the Confrontation Clause, as it has been construed in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). However, Defendant is entitled to no relief. The claim is barred, the cases do not apply retroactively to this matter, they are factually inapplicable to Dr. Rao's testimony and the Confrontation clause is not implicated because Dr. Gulino testified.

Once again, claims that are cognizable on direct appeal or in post conviction motions are procedurally barred in state habeas petitions. *Pagan*, 34 Fla. L. Weekly at S567; *Blackwood*, 946 So. 2d at 976; *Smith*, 931 So. 2d at 805; *Orme*, 896 So. 2d at 740; *Baker*, 878 So. 2d at 1241; *Breedlove*, 595 So. 2d at 10. Claims regarding the admissibility of evidence are claims that could and should have been raised on direct appeal. *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000). Moreover, claims predicated on fundamental changes in law are cognizable in motions for post conviction relief. *See Thompson v. State*, 887 So. 2d 1260, 1263 (Fla. 2004); *Witt v. State*, 387 So 2d 922 (Fla. 1980). As such, this claim is barred.

Further, Defendant's claim seeks the application of *Crawford* and its extension in *Melendez-Diaz* to his case. However, both this Court and the United States Supreme Court have held that *Crawford*

does not apply to cases that were final at the time it was decided. *Whorton v. Bockting*, 549 U.S. 406 (2007); *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005). Since *Crawford* does not apply retroactively, it is axiomatic that *Melendez-Diaz*, which applied *Crawford* is also not retroactive. *See Hughes v. State*, 901 So. 2d 837, 843 (Fla. 2005).

Here, Defendant's convictions and sentences became final on December 2, 2002, when the United States Supreme Court denied certiorari from direct appeal. *Dennis v. Florida*, 537 U.S. 1051 (2002). *Crawford* was not decided until March 8, 2004. *Crawford*, 541 U.S. at 36. *Melendez-Diaz* was not decided until November 25, 2009. *Melendez-Diaz*, 129 S. Ct. at 2527. As Defendant's case was final before either of these dates, neither of these cases apply retroactively here. The claim should be denied.

Even if the claim was not barred and *Crawford* and *Melendez-Diaz* did apply retroactively, Defendant would still be entitled to no relief. While this Court held in *Rodgers v. State*, 948 So. 2d 655, 662-65 (Fla. 2006), that the Confrontation Clause and *Crawford*'s interpretation of the clause applies to the penalty phase, the United States Supreme Court has never held that the Confrontation Clause applies to the penalty phase. Instead, in *Williams v. New York*, 337 U.S. 241 (1949), the United States Supreme Court held that trial courts were permitted to consider evidence in making a sentencing decision that was "obtained outside

the courtroom from persons whom a defendant has not been permitted to confront or cross-examine." *Id.* at 245; *see also United States v. Grayson*, 438 U.S. 41, 45-50 (1978); *United States v. Tucker*, 404 U.S. 443, 446-47 (1972); *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959). As late as 1999, Justice Scalia, the author of *Crawford*, noted that the Sixth Amendment right to confront witnesses did not apply at penalty phase proceedings. *Mitchell v. United States*, 526 U.S. 314, 337 (1999)(Scalia, J., dissenting). Here, Defendant is complaining about the admission of Dr. Rao's testimony at the penalty phase. As such, under United States Supreme Court precedent, the claim is meritless and should be denied.

Further, neither *Crawford* nor *Melendez-Diaz* addresses the issue in this case. In *Crawford*, the evidence at issue was a tape statement by the defendant's wife who had facilitated the crime and was an eyewitness to it. *Crawford*, 541 U.S. at 40-41. In *Melendez-Diaz*, the State admitted affidavits from forensic scientists without calling the scientists themselves. *Melendez-Diaz*, 129 S. Ct. at 2531. Here, Defendant is complaining about the admission of Dr. Rao's testimony regarding the opinions she reached based on the review of data generated by Dr. Gulino. (T. 5222-44) Further, Dr. Rao testified that she was the staff doctor with the medical examiner's office at the time Dr. Gulino, the resident, conducted the autopsies in this case and that she actually matched the pattern injuries on the bodies to the shotgun herself. (T.

5228, 5245) As this Court held in *Smith v. State*, 34 Fla. L. Weekly S681, S684-85 (Fla. Dec. 17, 2009), testimony from a expert who draws his own conclusion based on the work of others, particularly people the expert is supervising, does not violate *Crawford* and *Melendez-Diaz*. As this was the nature of Dr. Rao's testimony, Defendant's claim is meritless and should be denied.

Even if the claim was not barred, the cases were retroactive and they did apply to this situation, Defendant would still be entitled to no relief. In *Crawford*, the Court directly stated that "when the declarant appears for cross-examination, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9. Here, it is indisputable that Dr. Gulino appeared and was subject to cross examination in this case. His testimony, and cross examination, are in the record. (T. 4380-4466) As such, the Confrontation Clause was not implicated by Dr. Rao's testimony at all under *Crawford*. Defendant's claim to the contrary is meritless and should be denied.

V. THE BARRED AND MERITLESS CLAIM ABOUT THE ALLEGED DENIAL OF THE RIGHT TO BE PRESENT SHOULD BE DENIED.

Defendant finally asserts that his right to be present was violated because he was allegedly not present at a number of pretrial hearings. However, Defendant is entitled to no relief as the claim is procedurally barred and meritless.

Once again, claims that are cognizable on direct appeal or in post conviction motions are procedurally barred in state habeas petitions. *Pagan*, 34 Fla. L. Weekly at S567; *Blackwood*, 946 So. 2d at 976; *Smith*, 931 So. 2d at 805; *Orme*, 896 So. 2d at 740; *Baker*, 878 So. 2d at 1241; *Breedlove*, 595 So. 2d at 10. This Court has repeatedly held that claims concerning the right to be present are claims that could have and should have been raised on direct appeal. *Morris v. State*, 931 So. 2d 821, 832 n.12 (Fla. 2006); *Phillips v. State*, 894 So. 2d 28, 35 & n.6 (Fla. 2004); *Vining v. State*, 827 So. 2d 201, 217 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d 637, 647 (Fla. 2000); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994). As such, this claim is barred and should be denied as such.

Even if the claim was not barred, Defendant would still be entitled to no relief. 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. The Court also held that the right to be present could be lost "by consent or at times even by misconduct." *Id.* at 106. 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)); *see also Ferrell v. State*, 2010 WL 114481, (Fla. Jan. 14, 2010). Thus, this Court has required that a defendant show that he was prejudiced by his absence from a proceeding in order to obtain relief. *Orme*, 896 So. 2d at 738.

In raising this claim, Defendant makes no attempt to show how he was prejudiced from his alleged absence from proceedings. Instead, he merely states that he was allegedly absent from "at least 24 hearings."[4] Petition at 44-45. He then concedes that 15

[4] However, Defendant then proceeds to list only 23 dates of hearings from which Defendant was allegedly absent. Petition at 45

hearings concerned mere scheduling matters. *Id.* at 45 n.10. Defendant only provides specific allegations regarding two hearings: the hearings of May 28, 1996 and September 4, 1998. *Id.* at 46-47. Moreover, he merely asserts that the record does not reflect that he was present at the May 28, 1996, and only makes conclusory allegations regarding his need to be present at either of these hearings without any explanation of how he was prejudiced as a result of his alleged absence. As such, his allegations are insufficient to state a claim for relief. *Franqui v. State*, 965 So. 2d 22, 37-38 (Fla. 2007); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007); *Patton v. State*, 878 So. 2d 368, 380 (Fla. 2004); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998). The claim should be denied.

Even if the claim was not barred and was sufficiently plead, Defendant would still be entitled to no relief. As noted above, this Court has held that a defendant does not have a right to be present at hearings that only concern legal issues and scheduling. *Orme*, 896 So. 2d at 738; *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105. As Defendant properly concedes, the hearings of July 1, 1996, July 3, 1996, September 12, 1996, October 23, 1996, December 5, 1996, January 7, 1997, February 14, 1997, May 2, 1997, June 3, 1997, June 27, 1997, July 28, 1997, August 13, 1997, December 9, 1996, February 17, 1998, and May 13, 1998, all

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n.9.

concerned legal argument and scheduling issues. (T. 376-79, 381-400, 414-18, 420-25, 434-38, 444-48, 454-58, 474-76, 478-82, 500-11, 513-20, 522-26, 528-35, 542-48, 558-69) Moreover, the record also shows that the hearings of June 12, 1996, June 18, 1996, June 21, 1996, November 13, 1996 and May 20, 1998 also all concerned legal arguments and scheduling.[5] (T. 341-46, 348-55, 357-74, 427-32, 579-84) At the hearing on August 18, 1998, the trial court merely announced its ruling on motions that had been heard in Defendant's presence. (T. 685, 690-705, 711-16, 756-818, 853-59) Since all of these hearings concerned legal issues and scheduling, Defendant's claim concerning his right to be present at these hearings is meritless. *Orme*, 896 So. 2d at 738; *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105. It should be denied.

Moreover, while Defendant insists that his presence was necessary at the hearing of May 28, 1998, the record refutes this assertion. Judge Platzer entered an order recusing herself from the proceedings on May 14, 1998. (R. 1136) As a result, Judge Platzer did not have jurisdiction to make an substantive rulings in the case after that date. *Fischer v. Knuck*, 497 So. 2d 240, 243 (Fla. 1986). Thus, at the hearing on May 28, 1996, Judge Platzer merely recounted her reasons for recusing herself. (T. 608-19)

[5] In fact, the hearings on June 18, 1996 and June 21, 1996 concerned the same legal arguments as were heard on July 3, 1996. (T. 348-55, 357-74, 381-400) The hearing on November 13, 1996 concerned the same legal issue addressed at the October 23, 1996 and December 5, 1996 hearings. (T. 420-25, 427-32, 434-38)

However, she did not, and could not have, taken any substantive action on the case. *Id.* Thus, Defendant could not have had any input at this hearing. Further, the record reflects that Defendant was present at the hearings on the motion to dismiss based on the contact with Judge Platzer. (T. 641-72, 756, 818-36) He was present when the trial court denied an evidentiary hearing on that motion and when the trial court denied the motion to dismiss. (T. 676, 842-48) As such, Defendant had the opportunity to provide input on the issue that arose as a result of the recusal. Thus, the record refutes any notion that Defendant was prejudice by not being present for Judge Platzer's statement. His claim is meritless and should be denied. *Orme*, 896 So. 2d at 738; *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105.

The same would be true of the hearing on September 4, 1998. Defendant filed three motions in limine, seeking to exclude the *Williams* rule evidence. (R. 232-36, 1278-79, 1932-34) He also filed an extensive written response to the State's *Williams* Rule. (R. 1912-19) Defendant was present when these motions were first called for hearing. (T. 686, 705-10, 725-26) He was also present during the hearing where the trial court heard the arguments on the *Williams* rule notice. (T. 861-900) As such, Defendant had ample opportunity to provide any input he had on this issue. Additionally, it should be remembered that counsel waived Defendant's presence at this hearing in his presence and without

objection. (T. 914) Moreover, at the hearing on September 4, 1998, the lower court merely announced its ruling on the *Williams* rule, heard legal argument regarding motions in limine, heard legal arguments about the procedure for jury selection and discussed scheduling. (T. 917-1027) Thus, Defendant's claim about this hearing is also meritless and should be denied. *Orme*, 896 So. 2d at 738; *Rutherford*, 774 So. 2d at 647; *Harwick*, 648 So. 2d at 105.

CONCLUSION

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

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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 Suzanne Keffer, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 25th day of January, 2010.

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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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