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IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE,

Petitioner,

vs.

MICHAEL D. CREWS,
Secretary, Florida
Department of Corrections, etc.,

Respondents.
_____/

CASE NO. SC12-2465
L.T. No. 91-12952
Death Penalty Case

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

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INTRODUCTION

Petitioner will be referred to as Defendant. The prosecution and Respondent will be referred to as the State. The symbol "DR" followed by the appropriate volume and page numbers will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal. (DR V#/page #)

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. *Bogle v. State*, Case No. SC11-2403. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. THE CLAIMS REGARDING THE GIVING OF A FELONY MURDER INSTRUCTION SHOULD BE DENIED.

Defendant first asserts that the trial court erred in instructing the jury on felony murder with sexual battery as the underlying felony. He further contends that his trial counsel was ineffective for failing to object to the instruction, claiming that the indictment was insufficient to put him on notice of the charge and that the evidence was insufficient to support the sexual battery theory. Additionally, he contends that his appellate counsel was ineffective for failing to raise this issue on appeal. However, this claim should be denied because the claims of trial court error and ineffective assistance of trial counsel are not properly raised in this proceeding and appellate counsel was not ineffective for failing to raise this unpreserved and meritless issue.

To the extent that Defendant is attempting to raise claims of trial court error or ineffective assistance of trial counsel, these claims are not cognizable in this proceeding. As this Court has held, a habeas petition cannot be used to raise claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt v. State*, 71 So. 3d 86, 112 n.20 (Fla. 2011); *Wright v. State*, 857 So. 2d 861, 874 (Fla. 2003); *Hardwick v. Dugger*, 648 So. 2d 100, 105 (Fla. 1994); *Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989). Issues regarding the propriety of jury instructions are issues that should have been raised on direct appeal.

Griffin v. State, 866 So. 2d 1, 14-15 (Fla. 2003). Moreover, this Court has held that claims of ineffective assistance of trial counsel must be raised in a motion for post conviction relief; not a state habeas petition. *Thompson v. State*, 759 So. 2d 650, 668 n.13 (Fla. 2000); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). Since these claims are not cognizable, any attempt Defendant is attempting to make to raise these claims here should be rejected.

To the extent Defendant is claiming ineffective assistance of appellate counsel, the claim should still be denied. As this Court had held, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved at trial. *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Breedlove*, 595 So. 2d at 11. Moreover, appellate counsel also cannot be deemed ineffective for failing to raise a meritless claim. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove*, 595 So. 2d at 11.

Here, as Defendant candidly admits, his trial counsel did not object to the jury being instructed on felony murder. (T. 499-519, 523-35, 617-21) As such, this issue was not preserved for appeal. *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991). Since the issue was not preserved, appellate counsel cannot be ineffective for failing to raise it. *Groover*, 656 So. 2d at 425; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, the issue was also meritless. While Defendant boldly states that he was only charged with premeditated murder in the indictment, this statement is false. The indictment in this case expressly charged the first degree murder under alternative theories of premeditated and felony murder:

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that BRETT A. BOGLE, on the 13th day of September, 1991, in the County and State aforesaid, from a premeditated design, **and/or while the said BRETT A. BOGLE was engaged in the perpetration of or an attempt to perpetrate the felony of Sexual Battery**, did murder the said MARGARET TORRES by beating her, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 782.04(1)[.]

(DR 1/24)(emphasis added). Since felony murder based on sexual battery was charged in the indictment, Defendant's argument that it was improper to instruct the jury because it was not is specious. As such, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, even if the indictment had only charged premeditated murder, this claim is meritless. This Court has repeatedly held that it is proper for a trial court to instruct the jury on felony murder where the indictment only charged premeditated murder. *Hannon v. State*, 941 So. 2d 1109, 1148-49 (Fla. 2006); *Anderson v. State*, 841 So. 2d 390, 404 (Fla. 2003); *Kearse v. State*, 662 So. 2d 677, 682 (Fla. 1995); *Knight v. State*, 338 So. 2d 201, 204 (Fla. 1976). Since the issue would have been meritless

even if Defendant was not relying on a misstatement of the record in raising the claim, appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Defendant's suggestion that the giving of the instruction was improper because there was insufficient evidence to show that Ms. Torres was sexually battered is also meritless. As this Court has held, a trial court is required to give an instruction when there is any evidence to support it. See, *Parker v. State*, 458 So. 2d 750, 752 (Fla. 1984); *Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990). While Defendant contends that the evidence was insufficient to meet this standard, this Court found on direct appeal that the evidence was sufficient to prove that the murder occurred during the course of a sexual battery, beyond a reasonable doubt:

> Bogle next argues that the aggravating factor of committed while engaged in the commission of a sexual battery is inapplicable. In support of this argument, Bogle notes that he was neither charged with nor convicted of sexual battery or attempt to commit sexual battery and he contends that no evidence was produced to show that the sexual activity was nonconsensual. In fact, according to Bogle, the evidence supports the opposite conclusion. Because the facts are susceptible to more than one conclusion, he argues that this factor should not be upheld. We disagree. In finding this aggravating circumstance, the trial judge stated:
>
> > Although the defendant was not charged with or convicted of sexual battery by the jury, the evidence at trial and penalty phase was that the victim, Margaret Torres, was found nude. She had semen in her vagina and trauma to her anus consistent with sexual

> activity. Dr. Vernard Adams, the medical examiner, testified the injuries to the anus were consistent with intercourse and the most reasonable possibility was that they were inflicted before death. The DNA extracted from the semen found in the victim was consistent, although proof was not positive, with the defendant's DNA (12.5% of caucasian males could have contributed the semen). Further, a pubic hair found on the defendant's pants, in the crotch area, was consistent with the pubic hair of the victim. Defendant was at the scene, exiting the bar immediately after the victim and later that evening was seen by a witness in the immediate area of the murder, his pants covered with dirt and mud, the crotch of his pants wet, and scratches on his forehead. This aggravating circumstance was proven beyond a reasonable doubt.
>
> Additionally, the medical examiner testified that the sexual activity occurred within three hours of the victim's death, and witnesses testified that the victim was at a club named Starky's and then Club 41 alone during the hours preceding her death. It is not necessary that there be a conviction of sexual battery to find this factor in aggravation. Given the facts, we find this aggravating circumstance to have been proven beyond a reasonable doubt.

Bogle v. State, 655 So. 2d 1103, 1108 (Fla. 1995). Since the evidence was sufficient to prove beyond a reasonable doubt that the murder was committed during the course of a sexual battery, it was more than sufficient to justify a jury instruction on the issue. As such, any claim that the trial court abused its discretion in instructing the jury on felony murder would have been meritless, and appellate counsel cannot be deemed ineffective for failing to raise this issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Additionally, this Court has held that appellate counsel cannot be deemed ineffective for failing to raise an issue even if the issue was meritorious if the error would have been found harmless. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). Here, even if the issue was preserved and the issue was meritorious, any error would be harmless.

II. THE CLAIMS REGARDING THE SPECIAL JURY INSTRUCTIONS ON HAIR EVIDENCE SHOULD BE DENIED.

Defendant next asserts that the trial court erred in denying his requests for special jury instructions regarding hair comparison evidence. He further contends that his appellate counsel was ineffective for not raising this issue on appeal. However, the claims should be denied because the claim of trial court error is not properly presented in this proceeding and appellate counsel was not ineffective for failing to raise this meritless issue.

To the extent that Defendant is attempting to raise a claim of trial court error, the claim is not cognizable in this proceeding. As this Court has held, a habeas petition cannot be used to raise claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. Issues regarding the propriety of jury instructions are issues that should have been raised on

direct appeal. *Griffin*, 866 So. 2d at 14-15. As such, any claim of trial court error is not cognizable in this proceeding and should be rejected as such.

To the extent that Defendant is claiming ineffective assistance of appellate counsel, the claim should still be denied. As noted above, appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Since any issue about the denial of these instructions would have been meritless, the claim of ineffective assistance of appellate counsel should be denied.

A defendant must show that a trial court abused its discretion to obtain appellate relief based on a trial court's refusal to give a special jury instruction. *Stephens v. State*, 787 So. 2d 747, 755-56 (Fla. 2001). Moreover, "[i]n order to be entitled to a special jury instruction, [a defendant] must prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing." *Id.* at 756. However, it is improper for a trial court to give a jury instruction that comments on the "weight, character or credibility of any evidence" even where the comment accurately states the law. *Whitfield v. State*, 452 So. 2d 548, 549 (Fla. 1984); see also, *In re Instructions in Criminal Cases*, 652 So. 2d 814, 814 (Fla. 1995); *Fenelon v. State*, 594 So. 2d 292, 294 (Fla. 1992); *Fecske v. State*, 757 So.

2d 548, 549-50 (Fla. 4th DCA 2000). This Court has applied this principle to disallow requested jury instructions even where they were based on language from court opinions, where the language was used in the opinion to discuss the sufficiency of the evidence and not a jury instruction. *Marr v. State*, 494 So. 2d 1139, 1141-42 (Fla. 1986). Here, the trial court did not abuse its discretion in denying the requested instructions.

During the charge conference, Defendant submitted a request for special jury instructions on hair and fiber evidence, which stated:

> Hair evidence must meet the following requirement:
> The circumstances must be such that the hair could have been transferred between the victim and defendant only at the time that the crime was committed.

(DR 1/169; DR 7/518) In doing so, Defendant argued that the giving of such an instruction was discretionary. (DR 7/517) The State objected to the instruction and asserted that the instruction was unclear on whether Defendant was contending that the hair evidence could not be considered at all or whether the hair evidence would be insufficient to sustain a conviction on its own. (DR 7/518) The trial court deferred consideration of the instruction while it read the cases Defendant had supplied. (DR 7/518)

Defendant later requested a second special instruction on the hair evidence, which provided:

> "Hair analysis and comparison are not absolutely certain and reliable. Although hair comparison analysis may be persuasive, it does not result in identifications of absolute certainty."

(DR 1/140; DR 8/523) The State objected to both instructions. (DR 8/531) Regarding the first instruction, it asserted that the instruction was unclear regarding whether Defendant was suggesting that the hair evidence needed to meet the alleged requirement to be admissible or to be considered. (DR 8/531) It averred that the cases Defendant had cited did not support the instruction because they merely held that a single fingerprint was insufficient to sustain a conviction if the fingerprint could have been innocently explained and in this case the hair was not the only evidence. (DR 8/531-32) The State objected to the second instruction because it was a comment on the evidence. (DR 8/532)

Defendant responded that he believed the first instruction was necessary because he did not believe the hair evidence was relevant unless the State proved that the hair was transferred at the time of the crime. (DR 8/533) He averred that the second instruction was needed because the State had presented evidence that the hair was similar to the victim's hair. (DR 8/533)

The trial court agreed with the State that the second instruction was an improper comment on the evidence and refused to give it. (DR 8/533-34) Regarding the first instruction, the trial court noted that the testimony was that the victim's pubic hair was

found on Defendant's pants and stated that Defendant was free to argue his hypothesis regarding how the transfer occurred at a time other than during the crime. (DR 8/534) However, it refused to give the instruction. (DR 8/534) It did agree to give a jury instruction on circumstantial evidence even though this Court had deleted that instruction from the standard instructions and the State objected that the reasonable doubt instruction was sufficient. (DR 8/529-30)

As a result, when the trial court instructed the jury, it informed the jury that:

> Circumstantial evidence is legal evidence and a crime or any fact to be proven may be proven by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. Its value is dependent upon its conclusive nature and tendency.
>
> Circumstantial evidence is governed by the following rules: One, the circumstances themselves must be proven beyond a reasonable doubt; two, the circumstances must be consistent with guilt and inconsistent with innocent [sic]; three, the circumstances must be of such conclusive nature and tendency that you are convinced beyond a reasonable doubt of the defendant's guilt or the fact to be proven. If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence. Circumstances which, standing alone, are sufficient to proof or disprove any fact may be considered by you in weighing direct and positive evidence.

(DR 8/610-11)

Given these circumstances, the trial court did not abuse its discretion in denying the requested instructions. *Stephens*, 787 So. 2d at 755-56. Regarding the first requested instruction, the instruction as written was not a correct statement of the law,

was likely to confuse the jury and was covered by the other instructions given.

The instruction asserted that hair evidence had to meet an alleged requirement but did not include the purpose for which the requirement had to be met. (DR 1/169; DR 7/518) While Defendant suggested that the hair evidence had to be shown to have only been transferred at the time of the crime to be relevant, this is not the holding of the cases on which he relied. Instead, in each of those cases, the courts held that hair or fingerprint evidence was insufficient to sustain a conviction where the conviction was based on circumstantial evidence and the State did not rebut the reasonable hypothesis that the evidence might have been placed there at a time other than the commission of the crime. *Scott v. State*, 581 So. 2d 887, 893 (Fla. 1991); *Horstman v. State*, 530 So. 2d 368, 369-70 (Fla. 2d DCA 1988); *Jackson v. State*, 511 So. 2d 1047, 1048-50 (Fla. 2d DCA 1987); *Ivey v. State*, 176 So. 2d 611, 612 (Fla. 3d DCA 1965). In fact, the courts acknowledged that the hair evidence was admissible in *Horstman* and *Jackson*. *Horstman*, 530 So. 2d at 370; *Jackson*, 511 So. 2d at 1049; see also, *Bundy v. State*, 455 So. 2d 330, 349 (Fla. 1984). Under Florida law, only relevant evidence is admissible. See, §90.402, Fla. Stat. As such, by recognizing the evidence was admissible, *Horstman* and *Jackson* implicitly held that the hair evidence was relevant. Since Defendant's proposed instruction was intended to, and did, suggest the contrary, it was not a correct statement of the law and had a tendency to confuse the jury. As

such, the trial court did not abuse its discretion in refusing to give the instruction. *Stephens*, 787 So. 2d at 755-56. Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to claim it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, the instructions the trial court gave adequately explained that the hair evidence alone would not be sufficient circumstantial evidence to sustain a conviction. The need for hair and fingerprint evidence to be shown to be connected to the crime, is that otherwise it does not rebut a reasonable hypothesis of innocence. *Jaramillo v. State*, 417 So. 2d 257, 257 (Fla. 1982); *Horstman*, 530 So. 2d at 370; *Jackson*, 511 So. 2d at 1049-50. The trial court here instructed the jury on circumstantial evidence and, in doing so, informed the jury that it had to accept an innocent explanation for such evidence if a reasonable one existed. (DR 8/610-11) Through this instruction, the jury was already informed that the hair evidence was insufficient to convict if it could be innocently explained. Since the circumstantial evidence instruction already correctly informed the jury of the law, the trial court did not abuse its discretion in denying the first requested instruction. *Stephens*, 787 So. 2d at 755-56. Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to claim it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at

111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Appellate counsel also cannot be deemed ineffective for failing to raise an issue about the second requested instruction. The second instruction did nothing more than comment on the weight, character and credibility of hair evidence. (DR 1/140; DR 8/523) However, it is improper for a trial court to give an instruction that does so. *Whitfield*, 452 So. 2d at 549; see also, *In re Instructions in Criminal Cases*, 652 So. 2d at 814; *Fenelon*, 594 So. 2d at 294; *Fecske*, 757 So. 2d at 549-50. As such, the trial court did not abuse its discretion in refusing to give this instruction.

In fact, the basis on which Defendant requested this instruction is similar to the manner in which this Court found the request improperly made in *Marr*. There, the defendant requested an instruction that a rape victim's testimony "should be rigidly scrutinized" if there was no other witness to a sexual battery. *Marr*, 494 So. 2d at 1140. The cases relied upon to propose the instruction had included such language in the context of analyzing the sufficiency of the evidence to support a conviction. *Id.* at 1141. This Court determined that the requested instruction was an improper comment on the evidence, noting that such a statement "is a proper *argument* from counsel," but that "it would not be proper had the same statements come from the bench clothed as principles of law." *Id.* at 1142. Similarly here, Defendant's second requested instruction was drawn from comments made in the course of analyzing the sufficiency

of evidence and did nothing more than comment on the weight of character of hair evidence. Given these circumstances, the trial court did not abuse its discretion in refusing to give the instruction. Since the trial court did not abuse its discretion, appellate counsel cannot be deemed ineffective for failing to claim it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Additionally, this Court has held that appellate counsel cannot be deemed ineffective for failing to raise an issue even if the issue was meritorious if the error would have been found harmless. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). Here, even if the issue was preserved and the issue was meritorious, any error would be harmless.

III. THE CLAIM REGARDING THE PRIOR VIOLENT FELONY AND AVOID ARREST AGGRAVATORS IS BARRED.

Defendant next asserts that the trial court erred in instructing the jury on, and finding, the prior violent felony and avoid arrest aggravators. He further contends that his appellate counsel was ineffective for not raising this issue on appeal. However, Defendant is entitled to no relief.

First, to the extent that Defendant is seeking to raise a claim of trial court error, the claim is barred. As this Court has held, a habeas petition cannot be used to raise

claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. Issues regarding the propriety of jury instructions and findings of aggravating circumstances are issues that should have been raised on direct appeal. *Bell v. State*, 965 So. 2d 48, 55 n.7 (Fla. 2007); *Griffin v. State*, 866 So. 2d 1, 14-15 (Fla. 2003); *Blanco v. Wainwright*, 507 So. 2d 1377, 1380 (Fla. 1987). As such, any substantive claim of trial court error regarding the jury instructions or finding of aggravators is not properly presented in this petition and should be rejected as such.

To the extent that Defendant is claiming ineffective assistance of appellate counsel, the claim is barred and meritless. As this Court has held, a claim of ineffective assistance of appellate counsel is barred where counsel raised the issue on direct appeal and the defendant is simply seeking to relitigate the issue. *Bryan v. Dugger*, 641 So. 2d 61, 65 (Fla. 1994); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992). Moreover, as this Court has recognized, appellate counsel cannot be deemed ineffective for failing to raise an issue on direct appeal when appellate counsel did raise the issue. *State v. Riechmann*, 777 So. 2d 342, 365 (Fla. 2000).

Here, Defendant argued on direct appeal that the trial court had erred in instructing the jury on, and finding, the prior violent felony and avoid arrest

aggravators. Initial Brief of Appellant, Florida Supreme Court Case No. SC81345, at 58-61, 65-68. This Court rejected these arguments:

> Bogle's fourth issue concerns the aggravating circumstances. Bogle alleges that the aggravating circumstances of prior violent felony, committed while engaged in the commission of a sexual battery, committed to avoid arrest, and HAC are not supported by the facts in this case. We address each of these circumstances in turn.
>
> Bogle first claims that the aggravating circumstance of prior violent felony is inapplicable because the prior violent felony at issue is an additional felony perpetrated against the victim. The prior violent felony in this case is Bogle's conviction of burglary of a dwelling with an assault or battery. That felony was committed twelve days before the murder in this case and was perpetrated against both the victim and the victim's sister, Katie Alfonso. In *Wasko v. State*, 505 So. 2d 1314 (Fla. 1987), we did state that, when the felony at issue is a contemporaneous felony perpetrated against the victim, the aggravating circumstance of prior violent felony does not apply. The rationale set forth in *Wasko*, however, does not apply in a situation where, as here, the felony was not contemporaneous and also involved another victim. As such, the trial judge properly found this aggravating circumstance to apply in this case.
>
> * * * *
>
> Bogle also claims that the aggravating factor of committed to avoid arrest is not supported by the evidence in this case. As Bogle correctly noted, to establish this aggravating circumstance when the victim is not a law enforcement officer, the requisite intent must be proven beyond a reasonable doubt. *Bates v. State*, 465 So. 2d 490 (Fla. 1985). In this case, we find that the requisite intent was established. Bogle was convicted of retaliation against a witness after breaking into Katie Alfonso's home and after warning the victim, on several occasions, that she would "not live to tell about it" if she pursued criminal charges against Bogle regarding that incident.

Bogle v. State, 655 So. 2d 1103, 1108, 1109 (Fla. 1995). Since counsel did challenge

these aggravators on direct appeal, Defendant's attempt to relitigate this issue in this proceeding is both barred and meritless. The claim should be denied.

This is all the more true as Defendant misstates the law in arguing this issue. In arguing against the prior violent felony aggravator, Defendant cites to *Craig v. State*, 510 So. 2d 857 (Fla. 1987), *Craig v. State*, 685 So. 2d 1224 (Fla. 1996), and *Scull v. State*, 533 So. 2d 1137 (Fla. 1988), and claims that the cases hold that contemporaneous criminal activity and criminal activity connected to the murder cannot be used to support the prior violent felony aggravator. However, this is untrue. In the first *Craig* case, this Court actually held that considering a contemporaneous and connected murder of another as a basis for the prior violent felony aggravator was proper. *Craig*, 510 So. 2d at 868. In the other *Craig* case and *Scull*, the propriety of considering contemporaneous and connected criminal activity in support of the prior violent felony aggravator was not discussed at all. Instead, in both cases, this Court determined that evidence of contemporaneous and connected criminal activity did not negate the no significant criminal history statutory mitigator. *Craig*, 685 So. 2d at 1231; *Scull*, 533 So. 2d at 1143. Thus, these cases do not show that counsel was ineffective.

Additionally, this Court has held that appellate counsel cannot be deemed ineffective for failing to raise an issue even if the issue was meritorious if the error

would have been found harmless. *Valle v. Moore*, 837 So. 2d 905, 910-11 (Fla. 2002). Here, even if the issue was preserved and the issue was meritorious, any error would be harmless. The claim should be denied.

IV. THE CLAIMS REGARDING THE ADMISSION OF THE AUTOPSY PHOTOS SHOULD BE DENIED.

Defendant next asserts that the trial court abused its discretion in admitting photographs of the victim's injuries because they were allegedly more prejudicial than probative. He further contends that his appellate counsel was ineffective for failing to raise this issue on direct appeal. However, Defendant is entitled to no relief.

Once again, to the extent that Defendant is attempting to raise a claim of trial court error, the claim is not cognizable in this proceeding. A habeas petition cannot be used to raise claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. Issues regarding the admission of photographs are issues that should have been raised on direct appeal. *Griffin*, 866 So. 2d at 22. As such, any claim of trial court error is not cognizable in this proceeding and should be rejected as such.

To the extent that Defendant is claiming ineffective assistance of appellate counsel, he is still entitled to no relief. While Defendant mentions four photographs

(Exhibits 21B, 21D, 21E and 21F) and acts as if he preserved issues regarding all of them by repeatedly alluding to objections, any issue regarding the admission of Exhibit 21B was not preserved for review. When the State originally presented eight autopsy photos to Dr. Vernon Adams, the medical examiner, Defendant did lodge an objection to all of the photos.[1] (DR 5/227) However, Defendant withdrew his objection to Exhibit 21B after the State explained what was depicted in that photo. (DR 5/228) He confirmed that he had done so immediately before the trial court issued its rulings on the other photos. (DR 5/ 231) As a result, the trial court did not issue a ruling on the withdrawn objection. (DR 5/231) As this Court has held, appellate counsel cannot be deemed ineffective for failing to raise an issue where the defendant withdrew the issue from the trial court's consideration before obtaining a ruling because the issue was abandoned at trial. *Doorbal v. State,* 983 So. 2d 464, 491-92, 495-96 (Fla. 2008). Since Defendant abandoned any issue regarding the admissibility of 21B here by withdrawing his objection to it, any claim of ineffective assistance of appellate counsel regarding the admission of that photo is meritless. The claim should be denied.

[1] The State withdrew one of the photos. The trial court sustained Defendant's objection to three of the photos because they were duplicative and unduly prejudicial. (DR 5/227, 231, 232-33) As such, the trial court did engage in the proper balancing of the probative value and undue prejudice required by this Court.

Moreover, Defendant is not entitled to any relief regarding any of the photos 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). "Autopsy photographs that are relevant to show the manner of death, location of wounds, and the identity of the victim or to assist the medical examiner in explaining the victim's injuries are generally admissible evidence." *Patrick v. State*, 104 So. 3d 1046, 1062 (Fla. 2012). In fact, this Court has 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).

Applying this standard here, the trial court did not abuse its discretion in admitting the four photos. Each of the photos were autopsy photos that were used by the medical examiner to explain Ms. Torres' injuries and demonstrate the patterns in

those injuries that the medical examiner used to determine that the splash stone found at the crime scene caused the injuries and the number of blows inflicted. (DR 5/214-20, 228-30, 233-27) Since the photos were used by Dr. Adams to explain the victim's injuries, showed the location of her wounds and corroborated his opinion regarding the murder weapon and number of blows, the trial court did not abuse its discretion in admitting them. *Patrick*, 104 So. 3d at 1062; *Looney*, 803 So. 2d at 668. Since the trial court did not abuse its discretion in admitting the photos, appellate counsel cannot be deemed ineffective for failing to make the meritless claim that it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

In arguing that the trial court did abuse its discretion, Defendant contends that the photos were not necessary to prove any point. However, as noted above, the issue is not whether the photos were necessary. *Pope*, 679 So. 2d at 713; *Jones*, 648 So. 2d at 679; *Straight*, 397 So. 2d at 906. As such, this assertion does not show that the trial court abused its discretion.

Defendant also notes that he argued below that the photos were not relevant to an issue in dispute. However, the trial court also did not abuse its discretion in rejecting this assertion. Defendant's argument below that the photos were not relevant was based on the assertion that he was not contesting that Ms. Torres' head was bashed in and

that the medical examiner had already described the injuries. (DR 5/229) However, the fact that the photos corroborated Dr. Adams' testimony about the injuries is a basis for finding the photos admissible and not a basis for finding them inadmissible. *Looney*, 803 So. 2d at 668. Moreover, this Court has recognized that photos can still be relevant to issues such as identity and premeditation even where a defendant is not contesting the cause of death. *Seibert v. State*, 64 So. 3d 67, 88-89 (Fla. 2010). As such, the mere fact that Defendant was not contesting the cause of death did not show that the photos were inadmissible.

This is all the more true as Defendant did contest strenuously that he committed the murder, the circumstances under which the murder occurred and HAC. (DR 2/199-201; DR 8/537-42, 572-84) Moreover, he never conceded that the murder was premeditated. Instead, he suggested that Ms. Torres may have been killed by someone else and had a consensual sexual encounter because she was intoxicated. (DR 8/572-75) As this Court has held, the nature of the weapon used to kill a victim and the nature and manner of the wounds inflicted are relevant to a finding that a murder was premeditated. *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001). Thus, the photos that allowed the jury to see that Ms. Torres was struck several times in several different areas with a heavy piece of cement supported the State's argument that the murder was premeditated. (DR 8/545) Moreover, these facts also suggested that the murderer bore

personal animosity toward Ms. Torres. (DR 8/542-43) Since there was ample evidence that Defendant bore such animosity toward Ms. Torres, the photos were also relevant to identity. (DR 8/542) Finally, this Court has considered evidence suggesting that a beating victim moved after the first blow to be relevant to HAC. See, *Dennis v. State*, 817 So. 2d 741, 766 (Fla. 2002). Since the photos illustrated that Ms. Torres sustained injuries from separate blows to the top and both sides of her head and to both the front and back of her torso, they suggested such movement and were relevant to HAC as well.

Given all the contested issues to which the photos were relevant, the trial court did not abuse its discretion in rejecting Defendant's assertion that the photos were not relevant because he was not contesting the cause of death. *Seibert*, 64 So. 3d at 88-89. As such, the issue was meritless, and appellate counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied. Additionally, this Court has held that appellate counsel cannot be deemed ineffective for failing to raise an issue even if the issue was meritorious if the error would have been found harmless. *Valle*, 837 So. 2d at 910-11. Here, even if the issue was preserved and the issue was meritorious, any error would be harmless.

V. THE CLAIMS BASED ON THE FACT THAT THE TRIAL COURT SUSTAINED ONE OBJECTION DURING DR. GONZALEZ'S TESTIMONY SHOULD BE DENIED.

Defendant next asserts that the trial court violated his right to present mitigation because it refused to allow Defendant's mental health expert to answer one question. He contends that the refusal to allow this one question caused the trial court to reject or weigh the capacity to conform statutory mitigator and evidence of drug and alcohol abuse as nonstatutory mitigation. He further contends that his appellate counsel was ineffective for failing to raise this issue on appeal. However, these assertions provide no basis for relief.

Once again, to the extent that Defendant is attempting to raise a claim of trial court error, the claim is not cognizable in this proceeding. A habeas petition cannot be used to raise claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. Issues regarding the admission of evidence are issues that should have been raised on direct appeal. See, *Griffin*, 866 So. 2d at 22. As such, any claim of trial court error is not cognizable in this proceeding and should be rejected as such.

To the extent that Defendant is claiming ineffective assistance of appellate counsel, he is still entitled to no relief. Appellate counsel cannot be deemed ineffective

for failing to raise an issue that has not been preserved for review. *Groover*, 656 So. 2d at 425; *Breedlove*, 595 So. 2d at 11. Since the issue here is unpreserved, the claim that appellate counsel was ineffective for failing to raise the issue is meritless.

As this Court had held, a defendant must proffer the evidence that the trial court ruled inadmissible to preserve an issue regarding the exclusion of evidence. *Baker v. State*, 71 So. 3d 802, 816-17 (Fla. 2011). Defendant did not offer a proffer of Dr. Gonzalez's answer to the question to which the trial court sustained the objection. In fact, he did not even offer an argument responsive to the State's objection. (DR 14/1428) As such, this issue was unpreserved. Since the issue was unpreserved, appellate counsel cannot be deemed ineffective for failing to raise it. *Groover*, 656 So. 2d at 425; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, what information might have been revealed had Dr. Gonzalez been permitted to answer the question is not apparent from the record. Dr. Gonzalez never discussed the details of Defendant's drug use during his testimony. (DR 14/1391-1431) In fact, while Dr. Gonzalez testified regarding the number of beers Defendant drank in a period of around six hours before the murder, he did not even testify about the amount of alcohol Defendant generally drank or the frequency with which Defendant did so. *Id.* Instead, he merely testified that Defendant's father introduced him to drug use during his childhood and that Defendant became addicted to marijuana, cocaine

and alcohol as a result. (DR 14/1397-98, 1400-01) Given the lack of testimony regarding the nature and extent of Defendant's drug use before the murder, what information might have been revealed if Dr. Gonzalez had been permitted to answer whether Defendant's family corroborated the undisclosed information is not apparent from the face of the record. Thus, Defendant's failure to proffer the evidence that he hoped to elicit results in the claim being unpreserved. *Baker*, 71 So. 3d at 816-17. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, the claim of ineffective assistance of appellate counsel is meritless and should be denied.

This is all the more true, as Defendant's present assertions regarding how the answer would have been relevant are refuted by the record. In his petition, Defendant contends that Dr. Gonzalez relied on evidence about his prior drug use to support his opinion regarding the capacity to conform mitigator and that the answer to the question would have prevented the trial court from finding that statutory mitigator was unproven and assigning little weight to a non-substantial impairment in his capacity and his abuse of drugs and alcohol as nonstatutory mitigation. However, the record refutes these assertions.

Dr. Gonzalez repeatedly testified that his opinion about the statutory mitigators was based on Defendant's use of alcohol in the hours leading up to the murder. (DR

14/1403-04, 1427) In fact, he admitted that he had no information that Defendant was using any other drugs around the time of the crime. (DR 14/1420) When he was directly asked if Defendant's history of drug use contributed to his opinion regarding the capacity to conform mitigator, Dr. Gonzalez responded:

> No, I don't believe that that per se had anything to do at this moment with him. It continued for a longer period of time perhaps we know of alcoholic dementias and all of this. He has things, but he's too -- I don't think for that, if he could continue on that course. Eventually, his brain would be affected, but to this point, I don't think so.

(DR 14/1429) Since Dr. Gonzalez expressly disavowed that he was relying on Defendant's history of drug use for his opinion, Defendant's claim that permitting him to answer the question regarding Defendant's unspecified, past drug use would not have supported his opinions.

Moreover, the trial court's reason for finding that Dr. Gonzalez's testimony did not show substantial impairment and assigning only some weight to the impairment mitigator was that Dr. Gonzalez's opinion was based on Defendant being drunk, and other witnesses testified Defendant was not drunk that night. (DR 2/264-65) The trial court assigned only little weight to Defendant's history of substance abuse because there was little evidence about drug and alcohol dependency around the time of the murder. (DR 2/265-66)

Here, the question to which the trial court sustained an objection concerned whether Defendant's family members had confirmed Defendant's drug use before the night of the crime. (DR 14/1428) In describing the information he received from family members, Dr. Gonzalez stated only that he had read statements from Defendant's sister, two brothers and mother. (DR 14/1395-96) There was no evidence that any of Defendant's family members were with Defendant on the night of the murder and could have observed his state of intoxication at that time. Even though Defendant's sister, brother Charles Robert and mother testified, and his mother read a letter from his brother Brian, none of these witnesses provided any testimony regarding Defendant's drug or alcohol use after his childhood. (DR 15/1504-44) In fact, Defendant's sister Cheryl testified that she had not been in contact with Defendant or the rest of the family after she was kicked out of the house when Defendant was 14, approximately eight years before the murder. (DR 15/1512-13) Defendant's brother Charles Robert stated that he was almost finished serving a seven-year prison sentence. (DR 15/1523) Given this testimony, none of Defendant's family members could have provided information to confirm that Defendant was drunk on the night of the murder or had been dependent on drugs in the time period leading up to the murder.

Additionally, Mary Shrader, who was in regular contact with Defendant before the murder, testified that Defendant stopped spending his money on cocaine merely

because her husband asked him to do so more than a year before the murder. (DR 14/1461-62) She claimed never to have seen Defendant drink during their two year friendship. (DR 14/1459-60, 1481) She averred that Defendant was living a responsible life around the time of the murder. (DR 14/1461-62) Similarly, Defendant's brother Brian stated that Defendant had his life together at that time. (DR 15/1542)

Given the actual reasons why the trial court ruled as it did and the actual evidence presented through the family members and others, Defendant's present suggestions regarding what would have been presented had Dr. Gonzalez been permitted to answer the question are refuted by the record. As such, Defendant's need to have proffered what evidence would have been presented is more acute. Since Defendant did not do so, the issue is unpreserved. *Baker*, 71 So. 3d at 816-17. Since appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, the claim of ineffective assistance of appellate counsel is meritless and should be denied.

Even if the issue could be said to have been preserved, appellate counsel would still not have been ineffective because the issue was meritless. The only argument that Defendant suggests that his appellate counsel should have made regarding why the trial court's sustaining of the objection was improper is an argument that the Eighth

Amendment precludes a trial court from ruling any mitigation evidence inadmissible. However, the United States Supreme Court has held that "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006). As such, merely arguing that it was improper to exclude under the Eighth Amendment without discussing how the evidence was admissible under Florida law would not be meritorious. Since appellate counsel cannot be deemed ineffective for failing to raise a meritless issue, the claim is without merit and should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

This is all the more true as the evidence here was not admissible under the evidence code. As this Court has made clear, the mere fact that an expert may rely on hearsay does not make the hearsay admissible through the expert. *Mendoza v. State*, 87 So. 3d 644, 666 (Fla. 2011); *Linn v. Fossum*, 946 So. 2d 1032, 1036-39 (Fla. 2006). Instead, the expert is expected to testify to the opinion based on the hearsay without revealing the hearsay. *Linn*, 946 So. 2d at 1038-39. Here, the question to which the trial court sustained an objection called for little more than hearsay regarding what the family statements disclosed about Defendant's drug use. As such, the trial court did not abuse its discretion in finding this question improper.

The absence of any merit to this claim is further established by the fact that the State had not challenged Dr. Gonzalez's testimony about childhood drug use on cross. (DR 14/1405-25) Its only attempt to challenge Dr. Gonzalez's opinion about drugs other than alcohol was to inquire if Dr. Gonzalez had based his opinion that Defendant was addicted to cocaine on Defendant's own statements about his cocaine use. (DR 14/1417) When the State attempted to follow up by questioning Dr. Gonzalez about his awareness that Defendant had previously stated that he only used cocaine occasionally on the weekends, Defendant objected, and the trial court sustained the objection. (DR 14/1417-20) As such, Defendant effectively prevented the State from the only impeachment it attempted regarding other drugs. Yet, Defendant then sought to bolster Dr. Gonzalez's opinion on this issue by having him testify that the family members' statements corroborated his opinion. Given these circumstances, the trial court did not abuse its discretion in precluding him from doing so. See, *Johnson v. Singletary*, 647 So. 2d 106, 111 n.3 (Fla. 1994) (error to preclude defense from presenting evidence but allowing State to present rebuttal); *Provenzano v. State*, 750 So. 2d 597, 601 (Fla. 1999)(same).

Given all of these circumstances, the trial court did not abuse its discretion in sustaining the State's objection. As such, appellate counsel cannot be deemed ineffective for failing to claim it did. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at

425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Additionally, this Court has held that appellate counsel cannot be deemed ineffective for failing to raise an issue even if the issue was meritorious if the error would have been found harmless. *Valle*, 837 So. 2d at 910-11. Here, even if the issue was preserved and the issue was meritorious, any error would be harmless.

While the trial court may have precluded Dr. Gonzalez from testifying he believed the family members' statements were consistent with his opinion, Defendant's sister, mother and brother Charles Robert were permitted to testify regarding their knowledge of Defendant's drug use and Defendant's mother was permitted to read a letter from his brother Brian. (DR 15/1504-44) Katie Alfonso testified that Defendant drank during the time she knew him. (DR 12/1191, 1193) Jeff Trapp testified that he was aware that Defendant was a big drinker and had seen him drunk in the past. (DR 13/1223, 1227) Mary Shrader testified about Defendant using all of his pay and pawning his personal property to buy cocaine before her husband convinced Defendant to stop. (DR 14/1460-62) As such, the jury had ample evidence before it regarding Defendant's substance abuse.

Moreover, Dr. Gonzalez's opinion regarding the consistency of this evidence with his opinion would have added little. On questioning about evidence consistent

with his opinion that Defendant was intoxicated at the time of the murder, Dr. Gonzalez repeatedly insisted that the one piece of evidence that was consistent with his opinion was the deposition testimony of Tammy Alfonso. (DR 14/1410-15) However, when questioned about what in the content of that deposition was consistent, Dr. Gonzalez pointed to Ms. Alfonso's statements indicating that Defendant did not appear drunk to her although she lacked sufficient familiarity with Defendant to say for sure. (DR 14/1415-17) As such, Dr. Gonzalez testified that evidence inconsistent with his opinion supported his opinion. Given these circumstances, the jury would have had little reason to credit Dr. Gonzalez's opinion about what evidence supported his opinion.

Further, as noted above, the actual testimony of the witnesses showed that the family did not have knowledge of any drug dependency near the time of the murder and could not testify about his intoxication at the time of the murder. The people who did testify regarding Defendant's drug use at the time were inconsistent with the assertion that Defendant was dependent on drugs or was intoxicated.

Given the cumulative nature of responses from Dr. Gonzalez, the questionable nature of his beliefs regarding what testimony supported his testimony and the failure of any answer to the question to address the basis of the trial court's finding regarding the mitigation, the refusal to allow the answer did not contribute to the jury's

recommendation or the sentencing decision beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As such, any error in failing to raise this issue would be harmless, and the claim of ineffective assistance of appellate counsel should be denied.

VI. THE *RING* CLAIM SHOULD BE DENIED.

Defendant next asserts that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). Specifically, Defendant complains that the jury was not required to return a specific, unanimous verdict that death was the proper sentence beyond a reasonable doubt, that it was told that its recommendation was a recommendation, that hearsay was admitted and that the aggravators were not charged in the indictment. However, Defendant is entitled to no relief because this claim is not cognizable in this proceeding, *Ring* does not apply retroactively to this matter and this Court has already rejected Defendant's claims.

As this Court has repeatedly held, claims that could have been, should have been or were raised on direct appeal or in a motion for post conviction relief are not cognizable in state habeas petitions. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. This Court has also held that claims that Florida's capital sentencing scheme is unconstitutional are claims that could have and should have been raised on direct appeal. *Knight v. State*, 923 So.

2d 387, 391 n.6, 414 (Fla. 2005); *Byrd v. State*, 597 So. 2d 252 (Fla. 1992). Moreover, Defendant raised this same claim in his motion for post conviction relief. As such, this claim should have been raised on direct appeal or on post conviction appeal and is not cognizable in this petition. It should be denied.

Even if the claim was cognizable in a habeas petition, the claim should still be denied. Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases that were final when *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v. State*, 104 So. 3d 1010, 1028 (Fla. 2012). Here, Defendant's convictions and sentences became final on November 13, 1995, when the United States Supreme Court denied certiorari from direct appeal. *Bogle v. Florida*, 516 U.S. 978 (1995). As this was before *Ring* was decided in 2002, *Ring* does not apply, and the claim should be denied.

Further, even if the claim was cognizable and *Ring* applied retroactively, Defendant would still be entitled to no relief. This Court has previously rejected Defendant's claims, particularly in cases such as this one in which the prior violent felony aggravator was found. *Kocaker v. State*, 2013 WL 28243, *15 (Fla. Jan. 3, 2013); *Hampton v. State*, 103 So. 3d 98, 116 (Fla. 2012). Thus, the claim is meritless and should be denied.

VII. THE CLAIMS REGARDING THE COMMENTS SHOULD BE DENIED.

Defendant finally asserts that the prosecutor made improper comments during closing argument at the guilt phase. He further contends that his appellate counsel was ineffective for failing to raise an issue about the comments on direct appeal even though trial counsel did not object to the allegedly improper comments. However, Defendant is again entitled to no relief.

Once again, to the extent that Defendant is attempting to raise a claim of trial court error, the claim is not cognizable in this proceeding. A habeas petition cannot be used to raise claims that could have been, should have been or were raised on direct appeal or in a post conviction motion. *Wyatt*, 71 So. 3d at 112 n.20; *Wright*, 857 So. 2d at 874; *Hardwick*, 648 So. 2d at 105; *Parker*, 550 So. 2d at 460. Issues regarding the propriety of comments in closing are issues that should have been raised on direct appeal. See, *Griffin*, 866 So. 2d at 15. As such, any claim of trial court error is not cognizable in this proceeding and should be rejected as such.

It is all the more inappropriate to raise this claim in this proceeding because Defendant raised a claim of prosecutorial misconduct and included a conclusory assertion of ineffective assistance of trial in his motion for post conviction relief and is complaining about its denial in his post conviction appeal based on the same comments. As this Court has held, raising a claim in both a post conviction motion and

a state habeas petition results in the claim being barred. *Valentine v. State*, 98 So. 3d 44, 58 (Fla. 2012). Given that this is precisely what Defendant is doing here, the claim is barred and should be denied as such.

To the extent that Defendant is claiming ineffective assistance of appellate counsel and the claim is not barred, the claim should still be denied. Defendant never objected to any of the comments about which he now complains during trial. (DR 8/556-60) As such, any issue about these comments was not preserved for appeal. *Gonzalez v. State*, 786 So. 2d 559, 568 (Fla. 2001). Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved for review. *Groover*, 656 So. 2d at 425 (Fla. 1995); *Breedlove*, 595 So. 2d at 11. Thus, the claim of ineffective assistance of appellate counsel is meritless and should be denied.

Moreover, any suggestion that appellate counsel should have raised the issue as fundamental error is insufficiently pled. In *Patton v. State*, 878 So. 2d 368, 379-80 (Fla. 2004), a defendant asserted that his appellate counsel was ineffective for failing to raise an issue regarding the admission of his statements to the police even though the issue had not been preserved at trial. In an attempt to avoid a finding that appellate counsel could not be deemed ineffective for failing to raise an unpreserved issue, the defendant made a conclusory assertion that the error was fundamental without explaining how this was true. *Id.* at 380. This Court determined that such a conclusory

assertion regarding fundamental error was insufficient to raise the claim that appellate counsel should have argued fundamental error. *Id.*

Similarly, here, Defendant's only mention of fundamental error is a conclusory assertion that "appellate counsel failed to raise this issue on direct appeal resulting in fundamental error." Petition at 45. He makes no attempt to explain how the comments about which he complains were sufficient to deprive him of a fair trial. As such, any assertion regarding fundamental error is insufficiently pled and should be denied as such.

Additionally, Defendant would be entitled to no relief even if he had sufficiently alleged a claim of fundamental error. As this Court has held, a comment in closing must not only be improper but also must be of such a nature as to deprive the defendant of a fair trial for the comment to be considered fundamental error. *Braddy v. State*, 37 Fla. L. Weekly S703, S710-13 (Fla. Nov. 15, 2012); *Chandler v. State*, 702 So. 2d 191 n.5 (Fla. 1997). Here, the State's comments were largely proper and any impropriety did not deprive Defendant of a fair trial. As such, any claim of fundamental error is meritless. Appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

First, Defendant suggests that the State's comments about the palm print and the

submission of evidence for forensic testing invoked the prestige of the government and improperly bolstered the State's case. However, this Court had held that comments that are responsive to a defense theory are proper comments. *Braddy*, 37 Fla. L. Weekly at S712; *Valentine*, 98 So. 3d at 56 ("Indicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented.")

Here, Defendant's theory of the case was that the State conducted an incomplete investigation and charged him because he was a convenient suspect. To support this theory, Defendant repeatedly elicited testimony on cross-examination regarding the impounding of a piece of the Beverage Barn siding that appeared to have a faint palm print on it even though there was no evidence showing that the print had been placed on the siding at the time of the crime and the crime scene was a distance from the siding. (DR 5/200-02, 249, 251-53; DR 6/342-43, 368) He also elicited testimony about additional evidence that had been sent to the FBI lab for testing even though most of the other testing did not produce results and the results that were produced were never shown to have any connection with the crimes. (DR 5/247-48; DR 6/320-28, 369-70, 402-03) During his closing, Defendant used this evidence to argue that the police had conducted a sloppy investigation because it did not thoroughly test all of the

evidence. (DR 8/575, 578-87)

Given these circumstances, the State's comments about conducting a thorough investigation were responsive to Defendant's theory. As such, they were not improper and did not constitute fundamental error. *Braddy*, 37 Fla. L. Weekly at S712. This is all the more true as the State actually phrased its comment regarding the print on the Beverage Barn siding as a response to Defendant's theory:

> Mr. Roberts may argue to you that there is some doubt about because there was a palm print on the side of the Beverage Barn. Well, you heard that that palm print, the Hillsborough County Sheriff's Office did everything they could in this case. They did a very thorough investigation and followed every lead. We can't tell you how long what they thought was a palm print, although it was smudged and Detective -- or Racey Wilson said that he was concerned because it was so faint that he didn't think he could lift it or even develop it by taking photographs...

(DR 8/559) Thus, appellate counsel was not ineffective for failing to make the meritless argument that they were improper and constituted fundamental error. *Valentine*, 98 So. 3d at 58. The claim should be denied.

Moreover, while the trial court would not have abused its discretion in sustaining an objection to the State's brief reference to the FBI lab as the "greatest crime laboratory in the world" had one been made, it cannot be said that the brief reference deprived Defendant of a fair trial. One of the themes Defendant presented in support of his theory about the sloppy investigation was that additional testing of the evidence was possible but that such testing was either not conducted or the results were

not presented to the jury. (DR 8/575, 578-82, 585) Since the FBI lab was the lab that did the testing in this case, commenting that it was the world's best crime lab also supported Defendant's assertion that additional testing was possible. Since the comment could be viewed as supporting Defendant's argument, it cannot be said that the comment deprived Defendant of a fair trial.

Next, Defendant asserts that the State's comment regarding why he would have asked the Alfonsos for a ride after killing Ms. Torres was improper. However, again, the comment was merely a response to a defense theory. During the testimony of Phillip Alfonso, evidence was presented that Defendant asked Mr. Alfonso for a ride when Mr. Alfonso observed Defendant coming from the scene of the murder and Mr. Alfonso rejected Defendant's request. (DR 6/415, 418) Defendant also elicited testimony that Mr. Alfonso had previously had to caution Defendant about the impropriety of arguing at Mr. Alfonso's mother's home. (DR 6/417) Defendant used this evidence to argue that he could not have possibly have committed the murder because he asked the Alfonsos for a ride immediately after they saw him leaving the murder scene. (DR8/583-84)

In response to this defense theory, the State commented:

> Mr. Roberts may get up to you and argue well, it doesn't make sense, why would [Defendant], if he did this, approach her relatives and ask for a ride. Well, by asking that question, he's acting on a faulty assumption. You can't judge this man or expect this man to behave

> within the confines of the ordinary person. You can't expect a person who is capable of doing what he did to Margaret Torres to act as you would expect an ordinary human being to act.
>
> Maybe he was governed by his judgment, was governed, was overcome by a sense of euphoria and glee as he looked down and saw the destruction that he had caused a woman he despised. More likely, it was just a feeling of invincibility, invincibility, arrogance and total indifference for the evil and vileness of his actions.

(DR 8/558) Since the comment was responsive to Defendant's theory and was actually phrased as a response to Defendant's theory, it was not improper and did not amount to fundamental error. *Braddy*, 37 Fla. L. Weekly at S712; *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992).

This is all the more true as the State's comment that Defendant did not behave normally regarding interactions with the victim and her family on the night of the murder was supported by the evidence. Katie Alfonso testified that Defendant and her sister Ms. Torres disliked each other intensely almost from the moment they met. (DR 5/264-67, 270-72) She described how Defendant had threatened to kill Ms. Torres on two separate occasions in the two weeks before her murder. (DR 5/275, 277) Yet, Jeff Trapp testified that Defendant approached Ms. Torres to speak to her when he saw her at Club 41. (DR 6/376)

Both Tammy and Phillip Alfonso testified they were barely acquainted with Defendant, having only met him briefly on three occasions. (DR 6/407, 431) As noted

above, Defendant elicited that his interaction with Mr. Alfonso on one of those occasions was not positive. (DR 6/417) Yet, both of the Alfonsos testified that Defendant approached them to chat at Club 41 the night of the murder. (DR 6/410-11; DR 7/433-34)

Since ordinary people do not approach people they hate or barely know to engage in chit chat, the evidence supports the State's comment that Defendant did not interact with people in a normal fashion. This is all the more true as the evidence showed that the environment in the bar where the interactions occurred was not conducive to chit chat because the music was too loud. (DR 6/377, 410)

Since the State's comment was responsive to Defendant's theory and was supported by the evidence, it was not improper and did not constitute fundamental error. *Braddy*, 37 Fla. L. Weekly at S712; *Mann*, 603 So. 2d at 1143. As such, appellate counsel cannot be deemed ineffective for failing to make the meritless argument that it did. *Valentine*, 98 So. 3d at 58. The claim should be denied.

Finally, while Defendant asserts that the comment regarding the finding of Ms. Torres' pubic hair on his pants was improper, this is not true. As this Court has held:

> "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment. *Mann v. State*, 603 So. 2d 1141, 1143 (Fla. 1992) (rejecting claim that prosecutor's closing argument turned defendant's

> pedophilia into improper nonstatutory aggravator and denigrated psychologist's opinion that statutory mental health mitigators applied).

Griffin, 866 So. 2d at 16. Here, the State's comment about the hair on the pants was merely a proper argument about a conclusion to be drawn from the totality of the evidence.

Crime Scene Technician Ron Cashwell testified that he found and impounded the pants in question in the bathtub in which Defendant was hiding at the time of his arrest and that pubic hair was visible on the pants when he did so. (DR 6/346-47) Det. Larry Lingo testified that he retrieved these pants from the property room, opened the zipper area of the pants and retrieved what he believed to be hairs from the areas of the pants accessible from that area. (DR 6/356-67) Contrary to Defendant's assertion that Det. Lingo did not collect those hairs, Det. Lingo testified that he did collect the hairs and place them in a envelope that he sealed and sent to the FBI, which was admitted as State's Exhibit 13. (DR 6/366) Agt. Michael Malone, a hair and fiber expert, testified that he received State's Exhibit 13, opened the envelope, took the hairs out and mounted them on slides. (DR 6/302-16) He averred that most of the hair fragments from the envelope were so small that no analysis of them was possible. (DR 6/317-18) However, he was able to match the one full hair from the envelope to Ms. Torres' pubic hair. (DR 6/317-18)

Given the totality of this evidence, it was reasonable for the State to conclude that the hair that Tech. Cashwell was able to determine was a pubic hair based on a cursory view, that Det. Lingo collected in a search that involved only opening the zipper area of the pants, and that Agt. Malone stated was the only hair that was more than a small fragment was found in the crotch area of the pants and was the same hair that Agt. Malone identified as belonging to Ms. Torres. Thus, it was a proper comment on the evidence. *Griffin*, 866 So. 2d at 16; see also, *Braddy*, 37 Fla. L. Weekly at S712 (comment not supported by direct testimony of a single witness not improper where cumulative evidence supported the inference the State drew). Defendant's suggestion that it misstates the record because a single witness did not testify to all the facts in the comment is meritless, particularly as Defendant misstates the record by falsely claiming that Det. Lingo did not collect the hair. Since the comment was not improper, appellate counsel cannot be deemed ineffective for failing to make the meritless claim. *Valentine*, 98 So. 3d at 58. The claim should be denied.

Finally, as previously noted, Defendant never objected to any of the comments about which he now complains during trial. Accordingly, this claim should be denied in its entirety, as appellate counsel cannot be deemed ineffective for failing to raise meritless unpreserved claims that do not constitute fundamental error. *Valentine*, 98 So. 3d at 58.

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 has been furnished by email to Linda McDermott, Esquire, McClain & McDermott P.A., 20301 Grande Oak Blvd., Suite 118-61, Estero, Florida 33928, lindammcdermott@msn.com, this 8th day of April, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

s/ Candance M. Sabella
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