IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-605

VICTOR TONY JONES,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary,
Department of Corrections, State of Florida,

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

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TABLE OF CONTENTS

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. *Jones v. State*, No. SC01-734. The State will therefore rely on its statements of the case and facts contained in its brief in that matter.

ARGUMENT

I. THE CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL SHOULD BE DENIED.

Defendant asserts that his appellate counsel is ineffective for the manner in which he conducted the direct appeal and for failing to raise a variety of issues. 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), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

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.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Additionally, appellate counsel is not ineffective for failing to raise a nonmeritorious issue. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107, 111 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Appellate counsel is also not ineffective for failing to

raise unpreserved issues. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

A. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE TRIAL COURT'S DENIAL OF THE MOTION TO WITHDRAW.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the trial court improperly refused to permit Defendant's trial counsel to withdraw. Defendant appears to assert that the trial court improperly considered whether Mr. Koch was providing effective representation to Defendant, that the fact that Defendant and his counsel took different positions during the inquiry into the motion to withdraw required that the trial court grant the motion to withdraw, that the trial court was required to appoint a different attorney to represent Defendant at the hearing on the motion to withdraw and that a different standard should apply to this case because Defendant was incompetent. However, this claim should be denied as the underlying issue was without merit.

This alleged conflict of interest centered around a motion to withdraw that Mr. Koch filed after the guilt phase had concluded. (DAR. 346-47) The motion alleged that Defendant had threatened to harm Mr. Koch and refused to speak to him. *Id.*

At a status conference before the penalty phase began, Defendant indicated that Mr. Koch was not speaking to him and

the trial court considered the motion to withdraw. (DAT. 2202) At that hearing, Mr. Koch indicated that he had accompanied Dr. Eisenstein to a meeting with Defendant. (DAT. 2202-03) Mr. Koch indicated that Defendant had been verbally abusive to him and had threatened to physically attack Mr. Koch. (DAT. 2202-04) Mr. Koch stated that he did not wish to represent Defendant and asked that Defendant be shackled. (DAT. 2204-05) Defendant responded that he was angry with Mr. Koch because he thought that Mr. Koch thought he was guilty and deserved the death penalty. (DAT. 2206) The State responded that the filing of the motion to withdraw and the manner in which Mr. Koch chose to present it were based on a desire to have Defendant act out in court and to delay the proceedings. (DAT. 2206-11) The State also observed that the motion to withdraw was one of a number of pleadings that had been filed at the last minute to delay the proceedings. *Id.* The State indicated that the trial court should inquire of Defendant if he wanted to discharge Mr. Koch. (DAT. 2211-12) Mr. Koch denied that he was attempted to initiate a response from Defendant and stated that the State should have responded differently to his last minute pleadings rather than claim they were delaying tactics in response to the motion to withdraw. (DAT. 2212-15)

The trial court inquired regarding Dr. Eisenstein's

description of what had occurred and was told that Defendant had been verbally abusive to Mr. Koch over the trial strategy and that Mr. Koch and Dr. Eisenstein had left because Dr. Eisenstein thought Defendant might become violent. (DAT. 2215-17) The trial court then inquired whether Mr. Koch had met with Defendant pretrial and had discussed the trial strategy with him and was informed that numerous meetings had been held and trial strategy had been throughly discussed. (DAT. 2217-18) Defendant asserted that the reason he was upset was because there had been a change in trial strategy about whether he was going to testify or not. (DAT. 2218-20) The trial court explained that the trial strategy had to change at the time because the State had not presented the evidence that the defense had expected would be presented. *Id.* Defendant acknowledged that he had been given an opportunity to discuss the change in strategy, that he had agreed to not testify and that he did not believe that Mr. Koch was a bad lawyer. *Id.* The trial court then indicated to Defendant that simply being upset because he had been found guilty was not a sufficient reason to discharge Mr. Koch. (DAT. 2220-21) Defendant responded that he was unhappy because he had been asked to make a decision about testifying. (DAT. 2221-23) The trial court explained to Defendant that he had to make that decision. (DAT. 2223-24) Defendant also stated that he was

unhappy with the composition of the jury but admitted that he had discussed the issue with Mr. Koch. (DAT. 2224-25) Defendant asserted that he had never planned to harm Mr. Koch and was merely venting his frustrations. (DAT. 2225-26) After considering case law, the trial court denied the motion to withdraw, finding that Defendant did not wish to discharge Mr. Koch and that his expression of frustration over the guilty verdicts was understandable and did not destroy the relationship between Defendant and Mr. Koch. (DAT. 2228-37)

At the beginning of the penalty phase, Mr. Koch renewed his motion to withdraw. (DAT. 2446) The trial court again denied the motion. *Id.* Mr. Koch then asked that Defendant be shackled and removed from the defense table, claiming that he feared that Defendant might attack him. (DAT. 2446-47) The trial court responded that it would not do so because Defendant always displayed appropriate courtroom demeanor. (DAT. 2447-50)

In *Wike v. State*, 698 So. 2d 817 (Fla. 1997), this Court rejected a claim that a trial court improperly denied a motion to withdraw. There, the defendant had sought between the guilt and penalty phases to have his appointed counsel discharged and new counsel appointed based on alleged incompetency of counsel. After listening to the defendant's complaints, the trial court had concluded that there was no basis to remove counsel. The

defendant then struck his attorney in front of the jury. This Court held that the trial court had properly denied the motion because a defendant could not create a mistrial by striking his attorney. This Court reasoned that allowing a defendant to profit from his own misbehavior would create a mockery of justice.

Here, the basis for the motion to withdraw was Defendant's verbal abuse of his attorney that caused the attorney to fear that his client might become violent. The motion was made between the guilt and penalty phases. As such, the trial court properly denied the motion to dismiss under *Wike*. Since the trial court properly denied the motion to withdraw, 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 asserts that the trial court's denial of the motion was improperly focused on whether Mr. Koch was providing competent representation. However, this is not true. The trial court was confronted with Defendant's assertions that Mr. Koch was refusing to speak to him, that Mr. Koch had changed trial strategy, that Mr. Koch made Defendant choose whether to testify and that Defendant was unhappy with the composition of the jury

chosen and Mr. Koch's assertion that Defendant had been abusive toward him. It inquired into each of these issues and determined that Mr. Koch had been adequately communicating with Defendant, that Defendant understood that the trial strategy had to change because the State had not presented evidence as had been expected, that Defendant understood that he had to make the decision whether he would testify and that Defendant understood why the jury had been selected in the manner it was. It also inquired and determined that Defendant had not been, and would not be, physically violent toward Mr. Koch and that Defendant was merely venting his frustrations at Mr. Koch. Pursuant to *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), the trial court conducted an appropriate inquiry into each of the bases for the motion to withdraw.

The cases relied upon by Defendant are inapplicable. In each of these cases, the trial court had held an inadequate inquiry into the alleged basis for the need for new counsel. *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001)(trial court never asked counsel or defendant what the defendant did not understand about charges or plea or whether counsel had threatened defendant if plea was not accepted); *United States v. Musa*, 220 F.3d 1096 (9th Cir. 2000)(no inquiry at all); *United States v. D'Amore*, 56 F.2d 1202 (9th Cir.

1995)(trial court listened to defendant's complaint but did not inquire of counsel or determine if complaints were justified). Instead, the trial courts simply denied the motions because they believed that the attorneys were good attorneys, capable of providing effective assistance. Here, the trial court listened to each of the complaints about the attorney/client relationship. It inquired into the reason for the complaint and determined whether the complaints were justified. As the trial court did conduct an appropriate inquiry focused on the nature of the dispute, these cases do not apply. The claim should be denied.

Defendant next contends that a conflict of interest existed because of the conduct of counsel during the hearing on the motion to withdraw. He appears to assert that Mr. Koch revealed confidential information by stating that Defendant was guilty and portrayed Defendant negatively. However, it must be remembered that this issue arose after Defendant had been found guilty by the jury and the trial court had adjudicated Defendant guilty. The evidence at trial had shown that Defendant had confessed and had the victim's wallets in his pants' pockets when the police arrived. In this context, Mr. Koch's commented:

> I didn't vote him guilty. I didn't kill anyone. I didn't confess. I didn't put wallets in may pockets. I didn't do those sorts of things. He did. The jury found him guilty and is so often the case

> Defense Counsel is being blamed for the acts that the jury found beyond a reasonable doubt that Victor Jones committed.

(DAT. 2205) He later stated that Mr. Jones was "not telling the truth" with regard to level of his outburst to Mr. Koch. (DAT. 2232) As can be seen, these comments did not reveal any confidential information to the trial court. Moreover, Defendant was presenting a claim that Defendant was incompetent because he was unable to demonstrate appropriate courtroom behavior and a claim of mental mitigating because Defendant had a low frustration tolerance and poor impulse control. In fact, Defendant used the incident between Defendant and counsel as support for his claims of mental mitigation and incompetency. (DAT. 2372-73, 2798, 2808-09) As such, counsel's description of the incident between himself and Defendant actually assisted Defendant rather than portraying him as a bad person. Under these circumstances, the trial court properly found that these comments did not prejudice Defendant. *See Bruno v. State*, 807 So. 2d 55 (Fla. 2001)(revelation of confidential information did not create a conflict of interest where matters were revealed in an attempt to assist defendant). As this issue was meritless, appellate counsel cannot be deemed ineffective for failing to raise it. *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.

Again, the cases relied upon by Defendant are inapplicable. In *Adelzo-Gonzalez*, the defendant had alleged that his attorney had used bad language and threatened to "sink" him if the defendant did not take a plea. 268 F.3d at 774. In *Frazier v. United States*, 18 F.3d 778 (9th Cir. 1994), the defendant had alleged that his counsel had referred to him by a racial slur and threatened to provide ineffective assistance if the defendant did not accept a plea. In *United States v. Shorter*, 54 F.3d 1248 (7th Cir. 1995), revealed confidently information to the trial court without any benefit to the defendant. In *Clark v. State*, 690 So. 2d 1280 (Fla. 1997), counsel had told the jury in closing that the defendant was a bad person who should be stopped from committing senseless crimes. Here, counsel did not use racial slurs, did not threaten to be ineffective and did not reveal confidential information. Moreover, counsel used the alleged threatening behavior to Defendant's benefit. As such, none of these cases show that the trial court abused its discretion in denying the motion to withdraw. The claim should be denied.

Moreover, requiring discharge of counsel every time a defendant and counsel disagreed during a hearing on the discharge of counsel would be in conflict with *Nelson* and its

progeny. Under *Nelson* and its progeny, this Court has required that the trial court inquire of the defendant and his counsel regarding the source of the alleged dispute between them. If the claim is not meritorious, the answers of the attorney and the client will be contradictory. At the present time, the trial court is permitted to resolve this conflict by accepting the attorney's answers and finding that counsel was not ineffective. If, as Defendant asserts, the mere contradiction between counsel and his client was sufficient to require the removal of the attorney, there would be no point to the inquiry. Moreover, this inquiry must occur even when the dispute arises midtrial, as it did here. Under these circumstances, a defendant could bring the trial to a screeching halt anytime he wanted to do so by claiming some alleged instance of misconduct on the part of counsel. If counsel disputed the claim, the defendant would be entitled to new counsel and if counsel did not dispute the claim, the defendant would be entitled to new counsel. Such occasions for manipulation would also occur if the trial court was required to find and appoint new counsel for the defendant each time he made a complaint about counsel. As such, Defendant's assertions would be entirely inconsistent with *Nelson* and its progeny and should be rejected.

Defendant finally alleges that a special standard should be

applied in this case because he was not competent. However, the trial court found that Defendant was competent at the time this issue first occurred.[1] (DAT. 2432) As Defendant was not incompetent, there is no reason to apply a special standard to this claim. As such, the claim should be denied.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING THE SUPPRESSION OF THE EVIDENCE.

Defendant next asserts that his appellate counsel was ineffective for failing to raise a claim regarding the denial of his motions to suppress physical evidence and statements. Defendant contends that his statements were made without the benefit of counsel after the right to counsel had attached. He also asserts, without explanation, that the physical evidence should have been suppressed. However, this claim should be denied as the issues were unpreserved and meritless.

Prior to trial, Defendant moved to suppress a small black coin purse, keys, cigarette lighters and money seized from Defendant, his clothing and the items in his clothing, the results of gunshot residue tests on his hands and his blood. (DAR. 197-99) He claimed that these items had been illegally

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[1] Defendant was also found competent to proceeding with his post conviction proceedings after an evidentiary hearing and the lower court rejected Defendant's claim that his counsel was ineffective for failing to raise the competency issue earlier after an evidentiary hearing.

seized. *Id.* Defendant also moved to suppress his statement to Officer Jorge Garcia made at the time of his arrest, his statement to Officer George Cadavid made in the emergency room on the day of his arrest and his statement to Det. John Buhrmaster and Oscar Tejeda two days later in the hospital. (DAR. 213-14) He claimed that these statements were the product of an illegal arrest and were obtained in violation of his right to counsel and to remain silent. *Id.*

At the suppression hearing, Off. Vernon Hetherington testified that he was called to the crime scene as commanding officer because the door was lock. (DAT. 86-87) He ordered that the door be forced open. (DAT. 87-89) He then had the building checked to make sure that it was safe before allowing the rescue personnel to enter. (DAT. 89-93) The police found Defendant on the sofa with a gun. (DAT. 93) Defendant was handcuffed and removed from the building. (DAT. 94-97) The police also found the dead bodies of the Nestors, blood and bullet casings. (DAT. 95-98) No one else was in the building. (DAT. 98)

Off. Jorge Garcia testified that he saw Defendant on the sofa when he entered the building and observed that Defendant's clothing were bloody and he had a gun. (DAT. 105-10) Defendant was removed from the building and handcuffed. (DAT. 109-10) Off. Garcia believed that Defendant might have killed Mr.

Nestor, as he had seen his body and the blood around the office. (DAT. 110-11) Off. Garcia walked Defendant downstairs to his police car, where Off. John Vance noticed a bulge in Defendant's pockets. (DAT. 112-13) At that point, Off. Vance reached into the pocket and pulled out several items. (DAT. 113-14) Off. Garcia asked Defendant what had happened, and Defendant responded, "the old man shot me." (DAT. 114) Defendant was then placed in the care of the rescue personnel on the scene. (DAT. 114)

Off. Garcia accompanied Defendant to the hospital. (DAT. 116) On the way, the rescue personnel were asking Defendant medical questions, and Defendant was responding by shouting obscenities. (DAT. 116-17) When the rescue personnel told Off. Garcia that Defendant had been shot, he asked Defendant what had happened and Defendant responded, "go fuck yourself." (DAT. 117) In the emergency room at the hospital, Off. Garcia saw Defendant's clothes removed and taken by a clerk. (DAT. 118) The clerk then showed Off. Garcia that Defendant had two wallets in his pocket and gave him the wallets and the pants. (DAT. 118-20) In searching the pants, Off. Garcia also found 2 sets of keys. (DAT. 121-24) Off. Garcia also bagged Defendant's hands for gunshot residue testing. (DAT. 124)

Off. John Vance testified that he remained at the other

locked door to the building while other officers entered the first locked door. (DAT. 158-62) When he saw Defendant being escorted from the building, he went to help with Defendant. (DAT. 163-64) He noticed a bulge in Defendant's pocket and patted it down. (DAT. 165) In the pocket, he found keys, two lighters, money and a change purse. (DAT. 166-68)

Sgt. George Cadavid testified that he arrived at the scene as Defendant was being escorted from the building. (DAT. 175-77) Sgt. Cadavid was then instructed to go to the hospital to see that Defendant's hands were bagged for gunshot residue tests and that his blood was drawn for a toxicology screening. (DAT. 177) He radioed Off. Garcia to have the hands bagged and went to the hospital. (DAT. 177) He asked the hospital personnel to draw Defendant's blood, which was already being done for medical reasons. (DAT. 179-80) Sgt. Cadavid asked Defendant for his name and address, and Defendant again responded with obscenities. (DAT. 180) Sgt. Cadavid asked Defendant who shot him, and Defendant claimed that the police had done so. (DAT. 180) Sgt. Cadavid stated that he was not asking questions to interrogate Defendant but was merely attempting to determine his mental state. (DAT. 185)

Det. John Buhrmaster testified that he was the lead investigator in the case and was going to arrest Defendant based

on what he had seen at the scene and what was found at the hospital. (DAT. 186-94) However, he was waiting for Defendant to complete surgery and be conscious before he was arrested. (DAT. 194-95) Two days after the crimes, Det. Buhrmaster and his partner Det. Tejeda went to the hospital because Defendant was finally in a condition to see the police. (DAT. 195-99) Before allowing the police to question Defendant, Defendant's doctor performed a series of tests on Defendant to check his condition. (DAT. 199-200) Included in the doctor's tests was asking Defendant how he was shot, to which Defendant responded with obscenities. (DAT. 200-02)

The doctor informed Defendant that the police were there to see him and he refused to speak to the police. (DAT. 203) He was then placed under arrest. (DAT. 203-04) Det. Buhrmaster informed Defendant that if he changed his mind, Det. Buhrmaster would speak to him and that he was going to be completing paperwork to have Defendant transferred to the jail ward. (DAT. 205-06) As Det. Buhrmaster was completing his paperwork at the nurse's station, Defendant called out and stated that he had changed his mind. (DAT. 206-08) As Det. Buhrmaster was asking background questions before completing a *Miranda* waiver, Defendant blurted out that he had killed Mr. Nestor because he owed him money. (DAT. 208-11) Det. Buhrmaster immediately

informed Defendant of his rights. (DAT. 211-16) Shortly thereafter Det. Tejeda entered the room with Mr. Lobo, a nurse. (DAT. 216) Det. Buhrmaster then questioned Defendant in the presence of the witnesses with Det. Tejeda taking notes of the statement. (DAT. 216-17) Det. Tejeda then wrote the contents of the statement in long hand, and the statement was signed by Det. Buhrmaster, Det. Tejeda and Mr. Lobo. (DAT. 218-19)

On cross, Det. Buhrmaster stated that Defendant had been arrested by a uniformed officer at the scene but that no arrest affidavit was prepared until two days later. (DAT. 230-31) Det. Buhrmaster did not feel that it was necessary to complete an arrest affidavit earlier because of Defendant's condition. *Id.* During the time between when Defendant was taken to surgery on the day of the crime and when Det. Buhrmaster spoke to him two days later, Defendant was not under police guard. (DAT. 231-23)

Salvador Landa testified that he was the emergency medical technician who took Defendant to the hospital. (DAT. 248-51) As part of his treatment of Defendant, he asked Defendant medical questions, and Defendant was perfectly alert and responsive. (DAT. 251-54)

Shirley Ricks testified that she was the trauma room clerk when Defendant was brought into the hospital. (DAT. 263-64) As part of her job, she collected the clothing cut off of Defendant

and inventoried it and its contents. (DAT. 264-65) In doing so, she found two wallets that did not belong to Defendant, commented out that fact and turned them over to the police. (DAT. 265-68)

Dr. Bradley Ruben testified that the hospital records indicated that Defendant was alert when he was brought there. (DAT. 283-91) Dr. Ruben met with the police when they came to see Defendant two days later. (DAT. 296-300) Dr. Ruben conducted tests on Defendant to see if he was in condition to speak to the police. (DAT. 300-04) He then informed Defendant the police were there to speak to him, and Defendant responded that he did not wish to speak to the police. (DAT. 304)

After presenting this evidence, the State argued with regard to the search at the scene that there was probably cause to arrest Defendant at the scene and that the search was a proper search incident to arrest. (DAT. 311-13) The State also asserted that this search was a proper *Terry* frisk. (DAT. 313-14) Finally, the State asserted that the evidence would have been inevitably discovered in the seizure of the pants. (DAT. 314-15) With regard to the search at the hospital, the State asserted that it was not a police search and that the search was a proper inventory search. (DAT. 315-17) With regard to the hand swabs and the blood, the State asserted that no warrant was

needed because of the volatile nature of the evidence sought and the likelihood that it would be unable if the search was delayed. (DAT. 317-18) The State also asserted that the blood test results would have been inevitably discovered because the blood would have been drawn by the hospital anyway. (DAT. 318-19)

With regard to the statements to Off. Garcia and Sgt. Cadavid, the State asserted that they were not elicited through interrogation. (DAT. 319-27) With regard to the statement to Buhrmaster, the State asserted that Defendant reinitiated contact with the police after they had honored his assertion of his right to remain silent. (DAT. 327-29)

With regard to the physical evidence, Defendant argued the police had no probable cause to arrest him at the scene and that the search exceeded the scope of a *Terry* stop. (DAT. 329-31) He asserted that Defendant was still not arrested at the hospital until two days later. (DAT. 331-32) He claimed that the seizure of the clothes at the hospital was improper because the hospital was the bailee of his clothes. (DAT. 332-35) He asserted that the blood was properly drawn by the hospital but should not have been given to the police. (DAT. 335)

With regard to the statements, he asserted they were the product of custodial interrogation because Defendant had been

arrested at the scene. (DAT. 335-36) He claimed that Det. Buhrmaster's testimony that Defendant reinitiated contact should not be believed. (DAT. 336-37)

The State responded that the evidentiary value of Defendant's clothing was immediately recognized by the police. (DAT. 337-39) As such, they could seize them. *Id.*

The trial court ruled that the items seized at the scene were properly taken as part of a search incident to arrest. (DAT. 436) It found that the clothing was taken during a private search not at the direction of the police. (DAT. 436-38) It also agreed with the State's arguments regarding the blood and hand swabs. (DAT. 438-39) It found that the statements to Off. Garcia and Sgt. Cadavid were not the product of interrogation. (DAT. 439-41) It found that Defendant had reinitiated contact with Det. Buhrmaster and knowingly and intelligently waived his rights prior to giving the statement to him. (DAT. 441-45) As such, the lower court denied the motion to suppress.

Two months after the trial court had denied the motions, Defendant filed a motion asking the trial court to reconsider its rulings on the motion to suppress statements. (DAR. 275-76, 286) He then asserted that the statements should have suppressed because he was not promptly brought to a first appearance. *Id.*

On the morning of trial, Defendant claimed that he had been unaware until the suppression hearing that Defendant was placed in custody on the day of the crime. (DAT. 893-94) He then argued that this meant that Defendant should have been brought to a first appearance and had his Sixth Amendment Right to counsel attach. (DAT. 894-98) He asked to place on the record evidence of whether Defendant could have been arraigned earlier but did not want to reargue the motion to suppress. (DAT. 898-905)

At trial, the State admitted the evidence seized from Defendant at the scene and the clothing and contents taken at the hospital without objection on the suppression grounds. (DAT. 1342-46, 1347-52, 1354-59, 1491-93, 1506-13, 1717, 1721-27) The hand swabs and blood were not admitted. The State also did not admit the statement to Det. Buhrmaster. It did admit the statement to Off. Garcia and the statement to Sgt. Cadavid without objection. (DAT. 1543, 1717, 1720)

In order to preserve an issue regarding the suppression of evidence, it is necessary to object to the admission of that evidence at the time of trial, as well as move to suppress the evidence pretrial. *Terry v. State*, 668 So. 2d 954, 959 (Fla. 1996); *Kokal v. State*, 492 So. 2d 1317, 1320 (Fla. 1986). As Defendant did not object to the admission of the physical

evidence or the statements at the time of trial, this issue is unpreserved. Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, this claim should be denied.

Even if the issue of the admissibility of the statements had been preserved, appellate counsel would still not have been ineffective for failing to raise this claim, as it is meritless. Defendant asserts that these statements were made without the benefit of counsel after the right to counsel had attached. Defendant then cites a series of cases that hold that the Sixth Amendment right to counsel attaches when adversarial proceedings are instituted against Defendant. *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Maine v. Moulton*, 474 U.S. 159 (1985); *Brewer v. Williams*, 430 U.S. 387 (1977); *Phillips v. State*, 612 So. 2d 557 (Fla. 1992); *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).[2]

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[2] Defendant also cites to two cases from the Third District Court of Appeal as supportive of his claim that his right to counsel had attached. *State v. Ruiz*, 526 So. 2d 170 (Fla. 3d DCA 1988); *State v. Lewis*, 518 So. 2d 406 (Fla. 3d DCA 1988). However, these cases concern whether the police were required to give *Miranda* warning during a *Terry* stop and make do mention of attachment of the right to counsel. As such, they do not support Defendant's claim. To the extent that Defendant is attempting to raise a different claim by referencing these case, the claim is facially insufficient and should be rejected. *See Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990).

These citations appear to be a reference to the claim that Defendant made in his motions for reconsideration that he should have been brought to a first appearance within 24 hours of December 19, 1990.[3] However, the statements that were elicited at trial were made at the scene of the crime and in the hospital immediately thereafter. At that time, no formal proceedings had been initiated against Defendant. As such, his right to counsel had not attached. Therefore, Defendant's statements would not have been suppressible on the grounds that they were made after his right to counsel attached without the benefit of counsel. Since this issue has no merit, appellate counsel was not ineffective for failing to raise it. *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.

With regard to the motion to suppress the physical evidence, it too is meritless. Initially, the State would note that Defendant does not attempt to explain why the physical evidence should have been suppressed. Instead, he merely states, "Additionally, the physical evidence should have been

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[3] Moreover, the Sixth Amendment right to counsel must be invoked even after it has attached, which would not have been possible earlier as Defendant was not in any condition to participate in any proceedings until December 21, 1990. *See Smith v. State*, 699 So. 2d 629 (Fla. 1997).

suppressed. See People v. Jordan, 468 N.W.2d 294 (Ct. App. Mich. 1991)." As such, this claim is insufficiently plead and should be denied. *See Anderson v. State*, 27 Fla. L. Weekly S580 (Fla. Jun. 13, 2002); *Duest v. Dugger*, 555 So. 2d 849, 952 (Fla. 1990).

Assuming the citation to *Jordan* alone is sufficient to raise a claim, it appears that Defendant is attempting to assert that the seizure of his clothing from the hospital was improper because the hospital was the bailee of his clothing and should not have surrendered them to law enforcement. However, the holding in *Jordan* rested upon the fact that the police could not avail themselves of the plain view except to the warrant requirement. *Id.; see also Jones v. State*, 648 So. 2d 669 (Fla. 1994). Here, that cannot be said. Defendant had just been found with a gun, locked in a room with two dead bodies. No one else was on the premises. Defendant had a bulge in his pants pocket and the pants were covered in blood. At the hospital, the clerk who was inventorying Defendant's belongings stated aloud that she had found two wallets that did not belong to Defendant and Off. Garcia had overheard that comment. Given the bloody condition of the clothing, Defendant's presence at the murder scene and the knowledge that Defendant was in possession of property that did not belong to him, the fact that the clothes

were evidence of a crime was readily apparent to the police. As such, the plain view exception applies, and the clothing was properly seized. *See Chavis v. State*, 274 So. 2d 544 (Fla. 3d DCA 1973). Since the issue was meritless, appellate counsel cannot be deemed ineffective for failing to raise it. *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.

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING THE SUBSTITUTION OF THE MEDICAL EXAMINER.

Defendant next asserts that his appellate counsel was ineffective for failing to raise a claim regarding the granting of the State's motion to substitute the medical examiner. He asserts that counsel should have argued that allowing the substitution violated his right to confrontation. However, this claim should be denied as the underlying issue is meritless.

Prior to trial, the State moved to be permitted to have a medical examiner other than the one who conducted the autopsies testify at trial. (DAR. 200-01) In its motion, the State asserted that Dr. Copeland, who had conducted the autopsies, had left the State, that the autopsy files were business records that were made under a legal duty and that therefore another medical examiner should be able to testify from their review of the file. *Id.* Defendant filed a response to this motion

asserting that while parts of the medical examiner's file might be admissible with Dr. Copeland, there was no authority to allow an different medical examiner to testify to Dr. Copeland's results. (DAR. 203-04) He also contended that since Dr. Copeland had been to the scene of the crime, he would be testifying to more than just the autopsy results.

At the hearing on the motion, the State pointed out that Dr. Copeland had moved out of state, that §§90.704 & 90.705, Fla. Stat. permit one expert to rely upon another expert's data and that the underlying data was inherently reliable because it was from an medical examiner's file, which was both a business record and a statutorily required document. (DAT. 354-57) The State noted that if Defendant wished to call Dr. Copeland as his own witness to testify to matters beyond the autopsy, he should be required to do so. *Id.* Defendant argued that while an expert in a more limited field would be able to testify from another expert's data, a medical examiner should not be because his report is based on his observations. (DAT. 357-58) He stated that allowing the substitution would violate his right to confrontation. *Id.* The trial court granted the State's motion.

At trial, Dr. Joseph Davis, the chief medical examiner for Dade County, testified that he had reviewed the autopsy files for the victims, which were business records of the medical

examiner's office, and was prepared to testify to the manner and cause of death based on his review. (DAT. 1783-88) He then testified that based on the autopsy reports, both victims had died of stab wounds. (DAT. 1789-) Ms. Nestor had been stabbed in the back at the base of her neck, severing her aorta and causing her to bleed to death internally. (DAT. 1789-95, 1799-1804) He stated that Ms. Nestor did not have any defensive wounds but did have abrasion to her face that were consistent with having struck something hard as she fell at the time of her death. (DAT. 1795-99) Dr. Davis stated that the cause and manner of death was his opinion based on his review of the autopsy file. (DAT. 1803-04) Mr. Nestor was stabbed in the chest, injuring his heart and causing him to bleed to death. (DAT. 1805-14) Again he stated that the cause and manner of death was his opinion based on his review of the autopsy file. (DAT. 1817-18)

In *Geralds v. State*, 674 So. 2d 96 (Fla. 1996), and *Brennan v. State*, 754 So. 2d 1 (Fla. 1999), this Court held that the trial courts had not abused their discretion in permitting medical examiners who had not conducted the autopsies to testify at trial based on their review of the autopsy files. Here, that is precisely what happened. Dr. Davis testified to his opinions on the cause and manner of death based on the autopsy file. As

such, the trial court did not abuse its discretion in granting the State's motion to substitute the medical examiner. Since the issue is without merit, appellate counsel cannot be deemed ineffective for failing to raise it. *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.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING DEFENDANT'S PRIOR CONVICTIONS.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the trial court's denial of his motions for post conviction relief in his prior cases. However, the claim should be denied as Defendant was not entitled to post conviction relief.

On November 25, 1992, Defendant moved for post conviction relief regarding four of his prior convictions. (DAR. 129-82) In each motion, Defendant asserted that his convictions should be set aside because the trial court had accepted his plea without being given a factual basis for the plea after Defendant stipulated that there was a factual basis. *Id.* He also claimed that the pleas should be set aside because the colloquies were insufficient to show a knowing and voluntary relinquishment of his constitutional rights. *Id.* Attached to each motion was a transcript of the plea colloquy, during which the trial court

informed Defendant of his constitutional rights and Defendant waived them. (DAR. 156-57, 167-68, 179-80) None of the motions were sworn to by Defendant. (DAR. 129-82) Three of the four prior convictions (F87-9733A, F87-12591, and F87-23843) had become final in 1987. *Id.* The fourth conviction had become final on February 8, 1990.

The State filed a response, asserting that the motion was time barred because all of the motions had been filed more than 2 years after the conviction had become final. (DAR. 119-28) It also asserted that a factual basis did exist for each plea, as evidenced by the arrest affidavits from those cases. (DAR. 119)

At the hearing on these motions, Defendant asserted that he was primarily contending that there was no factual basis for the pleas. (DAT. 420-22) Defendant asserted that the timeliness of his motions was irrelevant. (DAT. 422-25) Defendant then claimed that he was asserting that the pleas were not knowing, intelligent and voluntary and that Defendant did not understand the nature of the charges against him or the consequences of the plea. (DAT. 425) The State pointed out that the plea colloquies refuted Defendant's claim of lack of understanding. (DAT. 425-26) After an extended discussion, the trial court found that the plea colloquies and arrest affidavits refuted Defendant's claims and denied them. (DAT. 426-34)

As seen above, the motions were filed more than 2 years after the convictions had become final. As such, the motions were properly denied. Fla. R. Crim. P. 3.850(b). Moreover, the plea colloquies and arrest affidavit do show that Defendant was informed of the rights he was waiving and the nature and consequences of his plea and that a factual basis did exist. As such, the motions were properly denied. *See State v. Perry*, 786 So. 2d 554, 557 (Fla. 2001). Because the issue was meritless, appellate counsel cannot be deemed ineffective for failing to raise it. *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 appears to assert that appellate counsel should have argued that it was improper for the trial court to have considered the arrest affidavits that were part of the court files regarding this prior convictions. However, there is nothing improper about a court considering documents from the court file in ruling on a motion for post conviction relief. *See* Fla. R. Crim. P. 3.850(d)("On filing of a rule 3.850 motion, the clerk shall forward the motion and **file** to the court. If the motion, **files**, and **records** in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is

not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the **files** and **records** that conclusively shows that the prisoner is entitled to no relief shall be attached to the order.")(emphasis added). As such, this issue is meritless, and counsel cannot be deemed ineffective for failing to raise it. *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.

E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE DISCLOSURE OF MEDICAL RECORDS OF A WITNESS WHO WAS NOT CALLED.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of his motion to compel production of a mental status report of Roberto Lobo or to compel Mr. Lobo to undergo a psychiatric evaluation. Defendant does not explain why counsel should have been given access to this report or why Mr. Lobo should have been compelled to undergo a psychiatric evaluation other than a vague reference to §90.603, Fla. Stat. However, the trial court properly denied the motions and Mr. Lobo never testified. As such, this claim should be denied.

Twice prior to trial, Defendant moved to compel the production of a mental status report regarding Mr. Lobo. (DAR.

81-83, 211-12) In the motions, Defendant asserted that Mr. Lobo had been a witness to Defendant's confession to the police, that Mr. Lobo had since been arrested for stalking and that Mr. Lobo had been placed in a pretrial intervention program. *Id.* He asserted that as part of that program, Mr. Lobo had undergone a mental status evaluation. *Id.* He claimed that the report of this evaluation might disclose information that would impeach Mr. Lobo's testimony, show that he had been promised leniency for his testimony or reveal Mr. Lobo's "motives, prejudices, hostilities, power of memory, way of life and associations" that might be relevant. (DAR. 81-83) He also claimed that the report might show that Mr. Lobo was not competent to testify. (DAR. 212)

At the hearing on the motion, the State argued that the trial court had no authority to order the evaluation of a witness. (DAt. 416-17) It also stated that it had obtained a copy of a report from a psychologist who had spoked to Mr. Lobo, reviewed the report and found no *Brady* information. (DAT. 416-19) However, the State did make the report available for the trial court to conduct an in camera inspection for *Brady* material, which the trial court agreed to conduct. (DAT. 417-19) The trial court refused to order a new evaluation of Mr. Lobo. (DAT. 420) After conducting the in camera inspection,

the trial court indicated that the report contained no *Brady* material and denied the motion to disclose the report. (DAT. 877-79) At trial, the State did not call Mr. Lobo as a witness and did not attempt to introduce the statement to which he was a witness.

Defendant appears to contend that there was something in the report that would have disqualified Mr. Lobo as a witness. However, Mr. Lobo never testified. As such, whether he would have been qualified as a witness or not would not have been relevant. *See Shuler v. Wainwright*, 491 F.2d 1213, 1223 (5th Cir. 1974)(issue of whether a mentally ill witness is competent to testify is to be determined by the court when the witness is called and state is not required to prove witness competent to testify until it calls witness). Since this issue has no merit, appellate counsel cannot be deemed ineffective for failing to raise it. *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.

F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING A COMMENT IN CLOSING.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that the State impermissible commented on his right to remain silent. However, the claim

should be denied as the underlying issue was unpreserved and meritless.

During his opening statement, Defendant asserted that he had been a victim in this crime and that an unknown assailant had committed the crimes. (DAT. 1261-77) He claimed that the police framed him by planting evidence on his person and lying about the confessions Defendant made. *Id.* He made detailed asserts regarding what had allegedly occurred during the crimes. *Id.* During the question of witnesses, Defendant attempted to show that another person could have entered the building and left without being detected.

Immediately before closing argument began, Defendant asked the trial court to preclude the State from commenting on issues that he had raised in opening statement that were not shown in the evidence. (DAT. 2022-26) After a discussion, the trial court warned the State to avoid commenting on the fact that Defendant had not testified but agreed that the State could comment that the scenario that Defendant had proposed in opening was not supported by the evidence. *Id.* Defendant next claimed that the State should not be able to comment that Defendant did not claim that another person had committed the crime when speaking to the police. (DAT. 2035-47) After a lengthy discussion, the trial court ruled that the State could not

comment on this issue unless Defendant raised the issue in closing first. *Id.*

In closing argument, the State reviewed the evidence that showed no one else could have been in the building when the murders occurred or have left without being seen or left any trace. (DAT. 2068-73) The State then commented regarding the theory Defendant had presented of the crime:

> The evidence is overwhelming. It points in one direction (indicating the Defendant) and Mr. Koch tries, as he may, has to jump aside and try to blame it on somebody else. Well, as you listen to his argument, which he is going to make to you concerning the evidence in this case, ask yourself, ask him, hey where's the evidence to support what you are saying? Is this just like your opening statement? Are you going to tell all these things and nothing be in here to support what you say? Ask yourself that when he is talking to you.
>
> Ask yourself also how when he's talking to you does that fourth killer leave without putting any blood outside, that Ernesto Sorondo never saw, must have tunneled out the next day. Everyone must have missed him. How did he get inside? How did he buzz his way out? How did he unlock the door and how did he lock it again?

(DAT. 2073) Defendant did not object to these comments. *Id.* After the State finished its closing argument, Defendant moved for a mistrial based on a different comment the prosecutor had made, claiming that the State had commented on his right to remain silent. (DAT. 2075) The trial court denied the motion for mistrial, finding the comment proper to rebut Defendant's

version of how the crime was committed and a fair comment on the evidence. (DAT. 2074-75)

In order to preserve an issue regarding a comment in closing, it is necessary to make a contemporaneous objection to that comment. *See McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999); *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). As Defendant did not make a contemporaneous objection to this comment, the issue was not preserved. Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, this claim should be denied.

Even if the comment had been preserved, the claim should be denied as the comment was not a comment on Defendant's right to remain silent and was harmless. In *Barwick v. State*, 660 So. 2d 685 (Fla. 1995), this Court held that it was proper for the State to comment that no evidence supported the defendant's claim that there had been some impropriety in the taking of his confession. Similarly, in *Dufour v. State*, 495 So. 2d 154 (Fla. 1986), this Court found that it was proper for the State to comment that there was no evidence to support the defendant's claim that a witness had based his documents in the defendant's

possession. In *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), this Court continued to hold that it was proper for the State to point out that there was no evidence to support a claim that the defendant had made, as an invited response.

Here, Defendant had consistently asserted throughout trial that the crime had been committed by another person. After reviewing the evidence that rebutted this claim, the State commented that there was no evidence to support it. As such, the comment was not improper under *Rodriguez*, *Barwick* and *Dufour*. Since the issue is meritless, appellate counsel cannot be deemed ineffective for failing to raise it. *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, any error in the comment was harmless. Defendant was found trapped at the murder scene with the two dead bodies. The building in which the murders occurred was securely locked, and no one else was found there. Additionally, no other person was seen entering or leaving the building. Despite the fact that the crime scene was very bloody, there was no blood evidence found outside the building. The victim's property was found on Defendant's person. Defendant admitted to a nurse in the hospital that he had killed the victims to get their money. Given the ambiguous nature of the comment and the overwhelming

nature of the evidence, the brief comment did not contribute to the jury's verdict. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). As such, there is no reasonable probability that the result of the appeal would have been different had counsel raised this issue. As such, counsel cannot be deemed ineffective, and the claim should be denied. *Strickland*.

G. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A *CALDWELL* CLAIM.

Defendant next asserts that his appellate counsel was ineffective for failing to claim that comments to the jury that their role was advisory violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). However, this claim should be denied.

Under *Caldwell*, error is committed when a jury is mislead regarding its responsibility for a sentencing decision so as to diminish its sense of responsibility for that decision. However, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). This Court has recognized that the jury's penalty phase decision is merely advisory and that the judge does make the final sentencing decision. *Combs v. State*, 525 So. 2d 853, 855-58 (Fla. 1988). As such, any claim that telling the jury that they were to return an advisory recommendation violated *Caldwell* is without merit. Since appellate counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue, this claim 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.

II. DEFENDANT'S CLAIM UNDER *APPRENDI* AND *RING* SHOULD BE DENIED.

Defendant finally alleges that he is entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 2002 WL 1357257 (2002). He asserts that these cases require that an aggravator be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt. However, this claim should be denied as it is procedurally barred, neither *Ring* nor *Apprendi* apply retroactively, and neither invalidates Florida's capital sentencing law. Moreover, the death sentences in this case are supported by an aggravating factor that was found by the jury and one that even under *Ring* and *Apprendi* did not need to be.

Defendant's claims that an aggravator needs to be charged in the indictment, that the jury must find an aggravator and that that aggravator must be proven beyond a reasonable doubt have been available since before Defendant was tried. As such, these issues could have been raised earlier and are now procedurally barred.

Moreover, neither *Ring* nor *Apprendi* apply retroactively under the principles of *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980). Pursuant to *Witt*, *Ring* and *Apprendi* are only entitled to retroactive application if it is a decision of

fundamental significance, which so drastically alters the underpinnings of King's death sentence that "obvious injustice" exists. *New v. State*, 807 So. 2d 52 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. *Ferguson v. State*, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to *Ring*, which did not directly or indirectly address Florida law, provides no basis for consideration of *Ring* in this case.[4] Moreover, Defendant has not even attempted to

[4] The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). If an error is not plain error cognizable on direct appeal, it is not of sufficient magnitude to be a candidate for retroactive application in collateral proceedings. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir 2002) (emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively and therefore, concluding that *Apprendi* is not retroactive). Every federal circuit that has addressed the issue had found that *Apprendi* is not retroactive. *See, e.g., McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001). The one state supreme court that has addressed the retroactivity of *Apprendi* has, likewise, determine that the decision is not retroactive. *Whisler v. State*, 36 P.3d 290 (Kan. 2001). Moreover, the United States Supreme Court has held that a violation of the right to a jury trial is not retroactive. *DeStefano v. Woods*, 392 U.S. 631 (1968) (refusing to apply the

assert how *Ring* and *Apprendi* does satisfy these requirements. As such, the claim should be denied.

Moreover, Defendant has not demonstrated that he is entitled to any relief. It is important to recognize that, contrary to Defendant's assertions, *Ring* does not require jury sentencing in capital cases. The case does not involve the jury's role in imposing sentence, but only the requirement that the jury find a defendant death-eligible. *See Ring*, at *18 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed") (Scalia, J., concurring). This is a critical distinction. The Court studied Arizona law and concluded that, because additional findings by a judge alone are required in order for the death penalty to be imposed, the "statutory maximum" for practical purposes is life, until such time as a judge has found an aggravating circumstance to be present. In other words, under the Arizona law examined in *Ring*, the jury plays no role in "narrowing" the class of defendants eligible for the death penalty upon conviction of first degree murder. This conclusion is consistent with the Arizona Supreme Court's description of state law, which

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right to a jury trial retroactively because there were no serious doubts about the fairness or the reliability of the factfinding process being done by the judge rather than the jury).

recognized the statutory maximum permitted by the jury's conviction alone to be life. See *Ring*, at *8; *Ring v. State*, 25 P.3d 1139, 1150 (Ariz. 2001).

To the extent that Defendant may assert that *Ring* proves this Court "erred" in previously stating that *Apprendi* did not apply to capital sentencing procedures, *see Mills v. Moore*, 786 So. 2d 532 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001), he is incorrect. To the contrary, *Ring* proves only that this Court was correct -- in fact, *Apprendi* is not a case about sentencing, and more importantly, neither is *Ring*. *Apprendi* and *Ring* both involve the jury's role in convicting a defendant of a qualifying offense, subject to the death penalty.

A clear understanding of what *Ring* does and does not say is essential to analyze any possible *Ring* implications to Florida's capital sentencing procedures. Notably, the *Ring* decision left intact all prior opinions upholding the constitutionality of Florida's death penalty scheme, including *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). It quotes *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), acknowledging that ("[i]t has never [been] suggested that jury sentencing is constitutionally required."). *Ring*, at *9 n.4. In Florida, any death sentence that was imposed

following a jury recommendation of death necessarily satisfies the Sixth Amendment as construed in *Ring*, because the jury necessarily found beyond a reasonable doubt that at least one aggravating factor existed. Since the finding of an aggravating factor authorizes the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense has been fulfilled in any case in which the jury recommended a death sentence.

Even in the wake of *Ring*, a jury only has to make a finding of one aggravator and then the judge may make the remaining findings. *Ring* is limited to the finding of an aggravator, not any additional aggravators, nor mitigation, nor any weighing. *Ring*, at *18 (Scalia, J., concurring) (explaining that the factfinding necessary for the jury to make in a capital case is limited to "an aggravating factor" and does not extend to mitigation); *Ring*, at *19 (Kennedy, J., concurring) (noting that it is the finding of "an aggravating circumstance" that exposes the defendant to a greater punishment than that authorized by the jury's verdict). Constitutionally, to be eligible for the death penalty, all the sentencer must find is one narrower, i.e., one aggravator, at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (observing "[t]o render a defendant eligible for the death penalty in a

homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Once a jury has found one aggravator, the Constitution is satisfied, the judge may do the rest.[5]

Ring does not directly or indirectly preclude a judge from serving in the role of sentencer. There is no language in *Ring* that suggests that, once a defendant has been convicted of a capital offense, a judge may not hear evidence or make findings in addition to any findings a jury may have made. Justice Scalia commented that, "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so." *Ring*, at *18 (Scalia, J., concurring). The fact that Florida provides an additional level of judicial consideration to enhance the reliability of the sentence before a death sentence is imposed does not render our capital sentencing statute unconstitutional. To the extent that Defendant criticizes state law for requiring judicial participation in capital sentencing, he does not identify how judicial findings after a jury

[5] We know this is true because the Court in *Apprendi* held, and reaffirmed in *Ring*, that a prior violent felony aggravator satisfied the Sixth Amendment; therefore, no further jury consideration is necessary once a qualifying aggravator is found.

recommendation can interfere with the right to a jury trial. Any suggestion that *Ring* has removed the judge from the sentencing process is not well taken. The judicial role in Florida alleviates Eighth Amendment concerns as well, and in fact provides defendants with another "bite at the apple" in securing a life sentence; it also enhances appellate review and provides a reasoned basis for a proportionality analysis.

The jury's role in Florida's sentencing process is also significant. Section 921.141, Florida Statutes, states:

> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. ...
>
> **(2) Advisory sentence by the jury.**--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the

following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

This statute clearly secures and preserves significant jury participation in narrowing the class of individuals eligible to be sentenced to death. The jury's role is so vital to the sentencing process that the jury has been characterized as a "co-sentencer" in Florida. *Espinosa v. Florida*, 509 U.S. 1079 (1992).

In the instant case, Defendant's sentence for the murder of Mr. Nestor was recommended by a unanimous jury and his sentence for the murder of Ms. Nestor was recommended by a 10 to 2 vote; a jury that had been instructed that aggravating factors had to be proven beyond a reasonable doubt. However, to the extent that he claims the death penalty statute is unconstitutional for failing to require juror unanimity, or the charging of the aggravating factors in the indictment, or special jury verdicts, *Ring* provides no support for his claims. These issues are

expressly not addressed in *Ring*, and in the absence of any United States Supreme Court ruling to the contrary, there is no need to reconsider this Court's well established rejection of these claims. *Sweet v. Moore*, 27 Fla. L. Weekly S585 (Fla. June 13, 2002); *Cox v. State*, 27 Fla. L. Weekly S505, n.17 (Fla. May 23, 2002) (noting that prior decisions on these issues need not be revisited "unless and until" the United States Supreme Court recedes from *Proffitt v. Florida*, 428 U.S. 242 (1976)).

As this Court has recognized, "[t]he Supreme Court has specifically directed lower courts to 'leav[e] to this Court the prerogative of overruling its own decisions.' *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989))." *Mills*, 786 So. 2d at 537. The United States Supreme Court has declined to disturb its prior decisions upholding the constitutionality of Florida's capital sentencing process, and that result is dispositive of these claims.

In addition, *Ring* affirms the distinction between "sentencing factors" and "elements" of an offense recognized in prior case law. *See Ring* at *14; *Harris v. United States*, 2002 WL 1357277 (U.S. June 24, 2002). Defendant's argument,

suggesting that the jury role in Florida's capital sentencing process is insufficient, improperly assumes the jury recommendation itself to be a jury vote as to the existence of aggravating factors. However, the jury vote only represents the final jury determination as to appropriateness of the death sentence in the case, and does not dictate what the jury found with regard to particular aggravating factors. When the jury recommends death, it necessarily finds an aggravating factor to exist beyond a reasonable doubt and satisfies the Sixth Amendment as construed in *Ring*. To the extent that *Ring* suggests that capital murder may have an additional "element" that must be found by a jury to authorize the imposition of the death penalty, that "element" would be the existence of any aggravating factor, and would not be the determination that the aggravating factors outweighed any mitigating factors established. Defendant appears to assert that the jury must determine death to the appropriate sentence, but nothing in *Ring* supports Defendant's speculation that the ultimate sentencing determination is an additional "element" which must be proven beyond a reasonable doubt.

Moreover, to the extent that Defendant's claims that *Ring* requires that the aggravating circumstances be charged in the indictment and presented to a grand jury, that argument is based

upon an invalid comparison of federal cases, which have wholly different procedural requirements, to Florida's capital sentencing scheme.[6] For example, in *United States v. Allen*, 247 F.3d 741, 764 (8th Cir. 2001), the Court of Appeals based its decision that the statutory aggravating factors under the Federal Death Penalty Act do not have to be contained in the indictment exclusively on *Walton v. Arizona*, which, of course, *Ring* overruled. It is hardly surprising that the United States Supreme Court remanded *Allen* for reconsideration in light of *Ring.*

The United States Supreme Court elaborated on *Apprendi* in *Harris v. United States*, which was released on the same day as *Ring.* In *Harris*, the Court described the holding in *Apprendi* in the following way:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.

Harris v. United States, 2002 WL 1357277 (U.S. June 24, 2002).

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[6] Of course, the Fifth Amendment's grand jury clause has not been extended to the States under the Fourteenth Amendment. *Apprendi*, 530 U.S. at 477, n.3 (2000); *Hurtado v. California*, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). This distinction, standing alone, is dispositive of the indictment claim, at least as far as King relies on federal cases.

In light of that plain statement by the United States Supreme Court, which speaks volumes in the interpretation of *Ring*, there is no basis for relief of any sort. This Court has clearly held that death was the maximum sentence that could be imposed on Defendant by virtue of his convictions for the offense of first degree murder, and that is the end of the inquiry.

Therefore, *Ring* has no effect on prior decisions upholding Florida's capital sentencing scheme. This Court has previously recognized that the statutory maximum for first degree murder is death, and has repeatedly rejected claims similar to those raised herein. *Cox v. State*, 27 Fla. L. Weekly S585 (Fla. May 23, 2002); *Bottoson v. State*, 813 So. 2d 31, 36 (Fla. 2002), *cert. denied*, Case No. 01-8099 (U.S. June 28, 2002); *Hertz v. State*, 803 So. 2d 629, 648 (Fla. 2001), *cert. denied*, Case No. 01-9154 (U.S. June 28, 2002); *Looney v. State*, 803 So. 2d 656, 675 (Fla. 2001), *cert. denied*, Case No. 01-9932 (U.S. June 28, 2002); *Brown v. Moore*, 800 So. 2d 223, 224-225 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001), *cert. denied*, Case No. 01-7092 (U.S. June 28, 2002); *Mills*, 786 So. 2d at 536-38. This interpretation of state law demands respect, and offers a pivotal distinction between Florida and Arizona. *Ring*, at *13; *Mullaney v. Wilbur*, 421 U.S. 684 (1975). However, should there

be any question about the correctness of this conclusion, Florida juries routinely "authorize" the imposition of the death penalty by recommending that a death sentence be imposed, as in the instant case.

Moreover, On June 28, 2002, the Court denied certiorari in at least seven cases raising the "Ring" issue: *Holladay v. Alabama*, Case No. 00-10728; *King v. Florida*, Case No. 01-7804 (under warrant); *Bottoson v. Florida*, Case No. 01-8099 (under warrant); *Mann v. Florida*, Case No. 01-7092 (state habeas); *Card v. Florida*, Case No. 01-9152 (direct appeal); *Hertz v. Florida*, Case No. 01-9154 (direct appeal); and *Looney v. Florida*, Case No. 01-9932 (direct appeal). Obviously, if the Court had intended to apply *Ring* to Florida capital sentencing, it had every opportunity to do so. The fact that it did not speaks for itself. To the extent that Defendant may assert that certiorari was denied because the United States Supreme Court wants this issue to "percolate in the laboratories of the state courts," it is obvious that if the United States Supreme Court believed further consideration to be necessary, it could have easily remanded this cause to this Court for that purpose. *See Allen v. United States*, Case No. 01-7310 (U.S. June 28, 2002)

(remanding for consideration of *Ring*); *Cf. Hodges v. Florida*, 506 U.S. 803 (1992) (vacating this Court's opinion and remanding for further consideration in light of *Espinosa v. Florida*, 509 U.S. 1079 (1992)).

Moreover, Defendant's death sentences were also supported by a prior violent felony conviction, which provides a basis to impose a sentence higher than authorized by the jury without any additional jury findings. *See Almendarez-Torrez v. United States*, 523 U.S. 224 (1998), *Apprendi v. New Jersey*, 530 U.S. 466 (2000). There is no constitutional violation because the prior conviction constitutes a finding by a jury which the judge may rely upon to impose an aggravated sentence. In addition, Defendant's jury convicted him of two counts of armed robbery (necessarily finding the aggravating factor of during the course of a felony); the Sixth Amendment is satisfied by these jury findings as they are additional facts which authorize the judicially-imposed sentence.[7] As such, the claim should be denied.

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[7] Ring is not such a cataclysmic change in the law that any Sixth Amendment violation premised on that decision must be deemed harmful. *See Ring*, at *16, n.7 (remanding case for harmless error analysis by state court); *United States v. Cotton*, 122 S. Ct. 1781 (2002) (failure to recite amount of drugs in indictment was harmless due to overwhelming evidence). On the facts of this case, no harmful error can be shown.

CONCLUSION

For the foregoing reasons, Defendant's 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 **RESPONSE** was furnished by U.S. mail to **TODD G. SCHER,** Chief Assistant CCRC-SOUTH, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, this ____ day of July, 2002.

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CERTIFICATE OF COMPLIANCE

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

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