

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1963

MARBEL MENDOZA,

Petitioner,

vs.

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

Respondent.

**ON PETITION FOR
WRIT OF HABEAS CORPUS**

AMENDED RESPONSE

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
CLAIMS	2
A. INTRODUCTION	2
B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT’S ORDER PROHIBITING DEFENDANT FROM PRESENTING IRRELEVANT EVIDENCE OF VICTIM’S PAST INVOLVEMENT IN BOLITO.	3
C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO APPEAL THE DENIAL OF DEFENDANT’S MOTION FOR MISTRIAL FOR THE PROSECUTOR’S COMMENT IN CLOSING.	8
D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES PERTAINING TO THE COMMENTS MADE BY THE TRIAL COURT CONCERNING DEFENDANT’S RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE.	9
E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT’S ALLEGED MID-TRIAL REVERSAL OF ITS PRE-TRIAL RULING ON THE ISSUE OF VICTIM’S ALLEGED BOLITO ACTIVITY.	15
F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES RELATED TO TECHNICIAN GALLAGHER’S TESTIMONY.	18
G. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR	

	FAILING TO RAISE ON APPEAL THE ALLEGED FUNDAMENTAL ERROR OF STATE’S IMPROPER USE OF NON-STATUTORY AGGRAVATING FACTORS.	24
H.	APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL AN ALLEGEDLY ERRONEOUS JURY INSTRUCTION PERTAINING TO EXPERT TESTIMONY.	27
I.	APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL NON-MERITORIOUS ISSUES RELATING TO VARIOUS ARGUMENTS BY THE PROSECUTOR AND TRIAL COURT’S STATEMENTS	28
J.	APPELLATE COUNSEL WAS NOT INEFFECTIVE IN THE MANNER IN WHICH HE APPEALED THE TRIAL COURT’S ALLEGED EX PARTE COMMUNICATION WITH THE JURY	41
K.	DEFENDANT’S CLAIM THAT THE STATE’S ARGUMENT TO THE JURY TO CONSIDER DEFENDANT’S PENDING ROBBERY TRIAL VIOLATED HIS EIGHTH AMENDMENT IS MERITLESS.	43
	CONCLUSION	45
	CERTIFICATE OF SERVICE	45
	CERTIFICATE OF COMPLIANCE	45

TABLE OF AUTHORITIES

CASES

<u>Austin v. State</u> , 271 N.W.2d 668 (1978)	5
<u>Barwick v. State</u> , 660 So. 2d 685 (Fla. 1995)	9,34
<u>Beasley v. State</u> , 774 So. 2d 649 (Fla. 2000)	22,31
<u>Breedlove v. Singletary</u> , 595 So. 2d 8 (Fla. 1992)	3,23 32
<u>Castor v. State</u> , 365 So. 2d 701 (Fla. 1978)	38
<u>Chandler v. State</u> , 702 So. 2d 186 (Fla. 1997)	24,29 39
<u>Commonwealth v. Sleighter</u> , 433 A.2d 469 (1981)	5
<u>Downs v. State</u> , 740 So. 2d 506 (Fla. 1999)	27,40 42
<u>Dupree v. State</u> , 615 So. 2d 713 (Fla. 1st DCA 1993)	5
<u>Edwards v. State</u> , 181 N.W.2d 383 (1970)	4
<u>Elledge v. State</u> , 346 So. 2d 998 (Fla. 1977)	25,43
<u>Ferguson v. State</u> , 417 So. 2d 639 (Fla. 1982)	23,32
<u>Flanagan v. State</u> , 586 So. 2d 1085 (Fla. 1st DCA 1991)	38
<u>Francis v. Barton</u> , 581 So. 2d 583 (Fla. 1991)	43
<u>Groover v. Singletary</u> , 656 So. 2d 424 (Fla. 1995)	3,10 13,14

	18,23
	24,26
	27,28
	29,32
	33,35
	37,39
<u>Grossman v. Dugger</u> , 708 So. 2d 249 (Fla. 1997)	3,10
	13,14
	18,24
	26,27
	28,29
	37,39
<u>Gutierrez v. State</u> , 731 So. 2d 94 (Fla. 4th DCA 1999)	10
<u>Hayes v. State</u> , 581 So. 2d 121 (Fla. 1991)	5,16
<u>Herera v. State</u> , 532 So. 2d 54 (Fla. 3d DCA 1988)	38
<u>Hildwin v. Dugger</u> , 654 So. 2d 107 (Fla.), cert. denied, 516 U.S. 965 (1995)	3,23
	32,33
<u>Johnson v. Singletary</u> , 695 So. 2d 263 (Fla. 1996)	3,10
	24,29
	39
<u>Kiley v. State</u> , 770 So. 2d 1278 (Fla. 4th DCA 2000)	12,13
	37
<u>Kilgore v. State</u> , 688 So. 2d 895 (Fla. 1996)	24,29
	39
<u>Kokal v. Dugger</u> , 718 So. 2d 138 (Fla. 1998)	3
<u>Mann v. State</u> , 603 So. 2d 1141 (Fla.1992),	

<u>cert. denied</u> , 506 U.S. 1085 (1993)	15,36
<u>McDonald v. State</u> , 743 So. 2d 501 (Fla. 1999)	24,39
<u>Mendoza</u> , 700 So. 2d 670	25,39 42,43
<u>Moyers v. State</u> , 197 S.E. 846 (1938)	4
<u>Schwarck v. State</u> , 568 So. 2d 1326 (Fla. 3d DCA 1990)	9,34
<u>Shaara v. State</u> , 581 So. 2d 1139 (Fla. 1st DCA 1991)	9,34
<u>State v. DiGuillo</u> , 491 So. 2d 1129 (Fla. 1986)	9,10 24,34 40
<u>State v. Marshall</u> , 476 So. 2d 150 (Fla. 1985)	10
<u>State v. Pierce</u> , 490 P.2d 584 (1971)	5
<u>State v. Schaefer</u> , 790 P.2d 281 (Ct.App.1990)	5
<u>State v. Self</u> , 713 P.2d 142 (1986)	5
<u>Story v. State</u> , 589 So. 2d 939 (Fla. 2nd DCA 1991)	6
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	2,3 6
<u>Swafford v. Dugger</u> , 569 So. 2d 1264 (Fla. 1990)	42
<u>Teffeteller v. Dugger</u> , 734 So. 2d 1009 (Fla. 1999)	7,8 15,16 36,38 39

<u>Thomas v. State</u> , 584 So. 2d 1022 (Fla. 1st DCA 1991)	4,7 16
<u>U.S. v. Rhodes</u> , 631 F.2d 43 (5th Circ. 1980)	38
<u>Vannier v. State</u> , 714 So. 2d 470 (Fla. 4th DCA 1998)	6,7
<u>Williamson v. Dugger</u> , 651 So. 2d 84 (Fla. 1994), cert. denied, 516 U.S. 850 (1995)	2
<u>Wilson v. Wainwright</u> , 474 So. 2d 1162 (Fla. 1985)	2

INTRODUCTION

The symbol “D.A.R.” will refer to the record from the direct appeal. The symbol “D.A.T.” will refer to the transcript of trial proceedings contained in record on direct appeal. The symbol “D.A.R.S.S.” will refer to the supplemental record. The symbols “R.” and “T.” will refer to the record and transcripts from the Rule 3.850 proceeding, respectively.

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. *Mendoza v. State*, No. SC01735. The State will therefore rely on its statement of the case and facts contained in its brief in that matter.

CLAIMS

A. INTRODUCTION

Defendant asserts that his appellate counsel was 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 (Fla. 1998); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Appellate counsel is also not ineffective for failing to raise unpreserved issues. *Kokal*, 718 So. 2d 138 (Fla. 1998); *Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover*, 656 So. 2d at 425.

B. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT'S ORDER PROHIBITING DEFENDANT FROM PRESENTING IRRELEVANT EVIDENCE OF VICTIM'S PAST INVOLVEMENT IN BOLITO.

Defendant asserts that appellate counsel was ineffective for failing to raise on appeal the trial court's ruling that he was prohibited from presenting evidence of the victim's alleged past bolito activities. Defendant claims that such evidence was

relevant to establish he did not commit or attempt to commit a robbery. Thus, Defendant concludes that he was prejudiced because had the jury believed he was merely collecting a bolito debt, he would not have been convicted of robbery nor, consequently, first degree felony murder. Defendant concludes that this amounted to a denial of his right to present a defense.

Defendant argues that the alleged evidence of the victim's bolito past is relevant in establishing that Defendant was merely collecting a debt. Assuming Defendant could provide an evidentiary nexus between the victim's alleged bolito operations and Defendant's theory that he was "merely collecting a debt,"¹ such evidence is still irrelevant because collecting a debt using unlawful force is still robbery. *See Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991)(where defendant claimed he was collecting money that belonged to him, First DCA held that "claim of right" was not a defense to robbery when defendant sought to collect a debt by use of force or threat). Similarly, Defendant is entitled to no claim of right defense negating specific intent for robbery under the pretense he was only "collecting a debt." It is well-settled throughout state courts in the U.S. that "taking money from a debtor by

¹ Other than the bald assertion that the victim's alleged bolito activities demonstrated that Defendant was merely collecting a debt, Defendant has not proffered or presented any evidence whatsoever that remotely linked any "debt" to such bolito operation.

force to pay a debt is robbery. The creditor has no such right of appropriation and allocation.” *Edwards v. State*, 181 N.W. 2d 383 (1970). See also *Moyers v. State*, 197 S.E. 846 (1938); *State v. Pierce*, 490 P. 2d 584 (1971); *State v. Schaefer*, 790 P.2d 281, 284 (Ct.App.1990); *State v. Self*, 713 P.2d 142, 144 (1986); *Commonwealth v. Sleighter*, 433 A.2d 469 (1981); *Austin v. State*, 271 N.W.2d 668 (1978). “Trial counsel cannot be deemed ineffective for failing to raise meritless claims or claims that had no reasonable probability of affecting the outcome of the proceeding.” *Teffeteller v. Dugger*, 734 SO. 2d 1009, 1018 (Fla. 1999).

Furthermore, evidence of a victim’s character is generally inadmissible. *Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991). While character evidence of the victim is admissible under section 90.401(1)(b) when a claim of self-defense is made, see *Dupree v. State*, 615 So. 2d 713 (Fla. 1st DCA 1993), self-defense was not available to Defendant’s robbery charge. Indeed, the idea that Defendant was acting in self-defense is utterly ridiculous when the evidence established he performed reconnaissance of the victim in advance of the robbery, armed himself with a handgun, and hid behind the car parked in the driveway of victim’s home, as he lay in wait for his attack of the victim. (D.A.T. 1037, 773, 774, 1047, 1067, 1048)

Moreover, counsel advised the jury in opening that the victim was a bolitero. (D.A.T. 611) Additionally, Humberto Cuellar specifically testified at trial that the victim

was a bolitero and therefore presumed to be carrying around \$6000 on his person. (D.A.T. 1034-35) As the jury indeed heard evidence that the victim was a bolitero, appellate counsel would not have been able to establish any prejudice on appeal. *Strickland v. Washington*, 466 U.S. 668 (1984).

Defendant's reliance on *Story v. State*, 589 So. 2d 939 (Fla. 2nd DCA 1991) and *Vannier v. State*, 714 So. 2d 470 (Fla. 4th DCA 1998) is woefully misplaced. Both cases involve a trial court's ruling, which prohibited the presentation of evidence relevant to disprove the defendant's intent to commit a crime or that the defendant committed a crime. As previously mentioned, even assuming the victim's alleged bolitero activities were relevant to prove Defendant was only attempting to collect a debt, the collection of debt using unlawful force is *still* robbery. In *Story*, the defendant was charged with conducting multiple sales of fruit from the same groves and consequently failing to deliver substantial number of boxes of fruit to the subsequent buyers. *Id.* at 940. The defendant sought to introduce evidence of fraud committed against her by two employees, upon whom it was established that she largely relied upon to conduct her sales transactions. The Fourth DCA declined to find that the evidence of fraud committed by the two employees was "reverse *Williams* rule" evidence, rather it held that the fraud perpetrated by them upon the defendant demonstrated that she lacked the specific intent to commit the crimes of theft with

which she was charged because her sales transactions were based upon fraudulent information provided to her by the two employees. Thus, the evidence of the two employees' fraud upon the defendant bore directly upon her intent to commit the charged crimes. Conversely, evidence of the victim's alleged bolitero matters not to Defendant's intent to commit a robbery, regardless of whether Defendant was merely collecting a debt with deadly force or not.

Likewise, in *Vannier*, the Fourth DCA ruled it was erroneous for the trial court to exclude letters written by the deceased victim, when the letters supported the defendant's argument that the victim committed suicide rather than was killed by defendant. *Id.* at 473. Clearly, if the victim committed suicide, then the defendant was not guilty of murder. Conversely, in the instant case, even if the alleged evidence of the victim's bolitero proved that Defendant was only collecting a debt using unlawful force, Defendant would still be committing robbery. *See Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991).

Accordingly, the evidence of the victim's alleged past bolitero activities were wholly irrelevant to Defendant's felony murder case and was properly excluded at trial. Counsel is not ineffective for failing to pursue non-meritorious issues. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

C. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO APPEAL THE DENIAL OF DEFENDANT’S MOTION FOR MISTRIAL FOR THE PROSECUTOR’S COMMENT IN CLOSING.

Defendant argues that appellate counsel was ineffective for failing to appeal the alleged reversible error of the trial court’s denial of Defendant’s motion for mistrial for the following comment during the guilt phase by the prosecutor:

State: [Y]ou promised in jury selection that this part of the trial is the guilt or innocence phase. It has nothing to do with the penalty, nothing. And if you don’t like the penalty the other guys got, then adjust your recommendation then. Forget about the death penalty –

Defense: Objection.

Court: Sustained.

Defense: Objection. Move to strike.

Court: I’m going to tell you the same thing. This case must not [be] decided for or against anyone because you feel sorry for anyone or are angry. Your duty is to determine whether the defendant is guilty or not guilty in accord with the law. Ms. Seff, you made your objection before Mr. Suri made his. Please follow the guidelines of the Court.

(D.A.T. 1337-39) As reflected by the transcript, upon defense counsel’s objection, the trial court did give a cautionary instruction. *Id.* Moreover, defense counsel’s theme in closing was the alleged disparity of justice for Defendant when his co-defendants were given plea deals. He repeatedly asked the jury “do you see equal justice here

anywhere? (D.A.T. 1332) He contended that the co-defendant's plea deals rendered

Defendant's case unfair:

“Humberto Cuellar told you I went to do a robbery. I smashed Mr. Calderon over the head with a gun and split open his head. I went there to do a robbery and somebody that was with me then shot him to death. You what that is? That is first degree murder. That is what Humberto Cuellar did, if you believe his words. Is he standing trial for first degree murder? No, he's not. No, he's not. They set the limits on what this case is about. . . . Is that equal justice?”

(D.A.T. 1333-34) Thus, the prosecutor was merely responding to defense counsel's charge that it was unfair that the co-defendants were not subject to a first degree murder conviction and the possibility of the death penalty. Defense counsel's comments invited the State's comment and thus any error was invited. *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *Shaara v. State*, 581 So.2d 1139 (Fla. 1st DCA 1991); *Schwarck v. State*, 568 So.2d 1326 (Fla. 3^d DCA 1990). Moreover, the comment was brief and the prosecutor moved on after Defendant objected, thus any error was harmless. *State v. DiGuillo*, 491 So.2d 1129 (Fla. 1986). Accordingly, Defendant cannot establish any prejudice resulted from appellate counsel's failure to raise such issue on appeal. *Strickland v. Washington*.

D. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES PERTAINING TO THE COMMENTS MADE BY THE TRIAL COURT CONCERNING DEFENDANT'S RIGHT TO

REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE.

Defendant argues that appellate counsel was ineffective for failing to raise on appeal alleged violations of Defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by several comments made by the trial court to the jury venire during voir dire. Specifically, Defendant contends that the trial court committed fundamental error by improperly commenting on Defendant's right to remain silent and shifting the burden to Defendant to prove himself not guilty. Defendant further contends that such errors were exacerbated by the prosecutor's comment in closing. However, no objection was lodged at trial and thus, this claim was unpreserved for appeal. See *Gutierrez v. State*, 731 So. 2d 94 (Fla. 4th DCA 1999) ("While an improper comment on a defendant's right to remain silent may be constitutional error, it is not considered fundamental error."); see also *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985), *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Appellate counsel is not ineffective for failing to raise unpreserved issues. See *Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995). Moreover, Defendant fails to demonstrate that the comments in question were improper taken in context and that any request for a mistrial would have been granted had such been requested.

The first comment to which Defendant objects concerns the trial court's admonishment to the jury that Defendant has an absolute right to remain silent:

You will understand that the defendant has an absolute right to remain silent and you are not to draw any inferences in this conduct. There may be a number of reasons why somebody remains silent; that is, somebody may not testify, and I am sure you can give many reasons why they have chosen to do that, whether they can't articulate themselves or perhaps it is their inability to remember the facts, or the lawyer's recommendation not to testify.

(D.A.T. 285-86) Shortly thereafter, the trial court reiterated that "in every proceeding the defendant has an absolute right to remain silent. At no time is it the duty of the defendant to prove his innocence." (D.A.T. 289). The second comment concerning Defendant's right to remain silent that Defendant contends vitiated his constitutional rights followed moments later in the same address to the jury venire by the trial court:

You may be asked who would like to hear from the defendant. Number one, understand that the defendant doesn't have to do anything. You understand that the defendant has an absolute right to remain silent. Now you may personally feel that you would like to hear from him. There is nothing wrong with that as long as you understand that he doesn't have to anything or say anything. Does everybody understand that?

(D.A.T. 298) Similarly, Defendant contends the following remark by the trial court during voir dire improperly shifted the burden to Defendant to prove himself not guilty:

Now, the I told you the defendant is presumed innocent.

That presumption stays with him throughout the trial until those jurors who are selected go into the jury room and find that he has been proven either [sic] not guilty, and then the case will be over, or if you should in your deliberations decide that he is guilty beyond and to the exclusion of every reasonable doubt, of course, the presumption of innocence leaves him at that stage. Does everybody understand that?

(D.A.T. 278) The trial court's comments to the jury venire properly reflected the rights accruing to Defendant and absolutely nothing in his address abridged such rights. Thus, defense counsel did not object because there was nothing improper about the trial court's comments.

Moreover, the remarks about which Defendant complains were made during the informal introductory portion of the trial in which the trial court addressed the jury venire informally. Indeed, the trial court even advised the jury during this segment that "of course, the lawyers and myself prior to coming in are trying to relax you. We do exercise a degree of levity, however, no matter how humorous this portion may be, it is intended to relax you and help us in getting to know you. Do you understand that this is a very serious matter to the defendant and a very serious matter to the State of Florida?" (D.A.T. 285) At the close of all the evidence, however, the trial court read the standard jury instructions, including both instructions pertaining to Defendant's presumption of innocence/the State's burden of proof and Defendant's right to remain silent, without deviation or conversational improvisation. (D.A.T.1375-80)

Accordingly, even if the trial court had mischaracterized Defendant's right to remain silent and the burden of proof, any error would have been harmless in light of the fact that the jury was formally instructed properly prior to deliberation. *See Kiley v. State*, 770 So. 2d 1278 at 1278 (Fla. 4th DCA 2000) In *Kiley*, the defendant claimed that the trial court's introductory remarks to the venire during jury selection were improper comments on his right to remain silent and on his burden of proof. The comments were unpreserved. Nonetheless, the Fourth DCA held that "[e]ven if preserved, and we concluded that the trial court's preliminary comments at the start of jury selection did not accurately reflect Florida Standard Jury Instruction 1.01, we would affirm...[T]he judge's comments in this case were presented in a conversational manner. After the jury was sworn, however the judge did in fact read the proper instruction." *Id.*

Defendant's claim pertaining to allegedly improper comments by the trial court during voir dire were procedurally barred and meritless. Appellate counsel is not ineffective for failing to raise meritless or procedurally barred claims. *Johnson v. Singletary*, 685 So. 2d 263, 266-67 (Fla. 1996); *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Finally, Defendant contends that appellate counsel was ineffective for failing to argue that the prosecutor committed constitutional error with the following comment

in closing:

Let [defense counsel] explain to you how it is that they have any evidence whatsoever that contradicts what Humberto Cuellar told you and that you should believe Humberto Cuellar.

(D.A.T. 1318-19) Again, this defense counsel did not object at trial and thus, any issue was not preserved for appeal. Accordingly, appellate counsel is not ineffective for failing to pursue unpreserved or meritless issues on appeal. *Johnson v. Singletary*, 685 So. 2d 263, 266-67 (Fla. 1996); *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Moreover, this comment was immediately following the prosecutor's careful review of all the evidence which corroborated Humberto's testimony: Humberto Cuellar's gun was found in Lazaro's car with human hair wedged in the handle consistent with having been used to strike the victim in the head as Humberto testified he had done; the police recovered the gun fully loaded consistent with it never having been fired, as Humberto had testified; Humberto had a bullet lodged in him at trial consistent with the victim shooting him; Humberto and Lazaro's hands are swabbed and found to have gunshot residue in an amount consistent with being in close proximity to Humberto's gunshot wound; Humberto's beeper is recovered from Lazaro's car with Defendant's number in the memory consistent with Humberto's

testimony that Defendant had beeped him to come and pick up Defendant to perform the robbery; and Humberto and Lazaro are found at the hospital after the shooting, and while Defendant absconds. (D.A.T. 1315-19) Clearly, the prosecutor's comment merely underscored that no evidence had been presented that contradicted Humberto's testimony while a wealth of evidence had corroborated Humberto's testimony. Hence, the prosecutor's remark was fair comment upon the evidence. *See Mann v. State*, 603 So.2d 1141, 1143 (Fla.1992), *cert. denied*, 506 U.S. 1085, 113 S.Ct. 1063, 122 L.Ed.2d 368 (1993). As such, appellate counsel would not have prevailed on such a meritless issue and cannot be deemed ineffective for opting to forgo raising same on appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

E. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S ALLEGED MID-TRIAL REVERSAL OF ITS PRE-TRIAL RULING ON THE ISSUE OF VICTIM'S ALLEGED BOLITO ACTIVITY.

Defendant claims that appellate counsel was ineffective for failing to raise on appeal the trial court's alleged "mid-trial reversal" of its ruling pertaining to whether defense counsel could present evidence related to the victim's alleged bolito activity. Defendant argues that he detrimentally relied upon the trial court's ruling that he was permitted to adduce evidence of the victim's bolito activity by advising the jury in opening that the evidence would establish that the victim was involved in bolito.

Defendant further contends that the trial court subsequently reversed its ruling and prohibited the defense from presenting such evidence and thereby violated Defendant's right to a fair trial. However, a review of the record patently refutes such contention.

It should be noted at the outset, that whether the victim was a bolito or not is irrelevant to Defendant's attempted armed robbery and murder of the victim. As previously discussed, Defendant's defense theory that he was merely collecting a bolito debt is mooted by the fact that the collection of a debt using unlawful force is still robbery. *See Thomas v. State*, 584 So. 2d 1022 (Fla. 1st DCA 1991). Additionally, evidence of a victim's character is generally inadmissible. *Hayes v. State*, 581 So. 2d 121, 126 (Fla. 1991). Accordingly, as evidence of the victim's bolito past is irrelevant, to the extent Defendant was properly limited in presenting such evidence, he cannot establish prejudice. *Strickland v. Washington*. Therefore, appellate counsel cannot be deemed ineffective for failing to pursue a non-meritorious issue. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Furthermore, contrary to Defendant's assertion, the trial court always maintained that defense counsel could adduce evidence that established the victim was involved in bolito but was not allowed to elicit hearsay testimony concerning the victim's withhold of adjudication for bolito in 1987, as the mere record of an arrest and

withhold of adjudication is not properly admissible evidence nor proof of guilt. The pre-trial motion pertaining to this issue clearly reflected that the trial court advised defense counsel that the victim's prior arrest for bolito was irrelevant and inadmissible but that defense counsel could inquire of witnesses whether the victim was a bolito:

I'm going to deny it. I didn't say you couldn't bring out the bolito issue. The fact that he got a withhold is irrelevant.

* * *

I am granting that motion in limine, however, if they want to call the wife or son, they can ask them if they knew or know that the victim was a bolito operator.

(D.A.T. 467, 470) Later, the trial court reiterated its earlier ruling:

Court: Well, I directed the attorney not to get into the racketeering or the withhold, but I did not limit them on bringing out that this gentleman was a bolito.

Defense: Bolitero.

Court: I thought that the asking of that question and the simple answer was permissible. I think that was my initial ruling.

Defense: It was, your honor.

Indeed, as reflected by the record, defense counsel acceded that the trial court's earlier ruling permitted defense counsel to elicit that the victim was a bolitero but not delve

into the victim's prior arrest. (D.A.T. 741) Defense counsel merely attempted to circumvent the trial court's ruling by intending to inquire of witnesses regarding their knowledge of the victim's arrest. (D.A.T. 744-45)

In fact, Humberto Cuellar testified that Defendant advised him that the victim was a bolitero. (D.A.T. 1034) Although Defendant contends that he was prejudiced because counsel advised the jury in opening that they would hear testimony that the victim was a bolitero, he fails to demonstrate any prejudice because the jury did hear such testimony. Accordingly, appellate counsel cannot be deemed ineffective for failing to pursue this non-meritorious issue. *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

F. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL MERITLESS ISSUES RELATED TO TECHNICIAN GALLAGHER'S TESTIMONY.

Next, Defendant argues that appellate counsel was ineffective for failing to raise on appeal that the trial court committed reversible error by denying Defendant's motion to exclude the rebuttal testimony of Technician Gallagher and motion for mistrial after the prosecutor allegedly violated the rule of witness sequestration by informing Gallagher of the testimony of defense witness Rao's testimony, whose testimony he was being called to rebut. However, a review of the record illustrates that

Defendant's claim is wholly without merit.

During opening statements, defense counsel told the jury that the evidence would establish that Lazaro Cuellar had lead particles on his hands, indicating that he was not in the car during the shooting as would be suggested by one or both of the Cuellar brothers, and that Humberto Cuellar not only had lead particles on his hands, but was also shot on the scene by the victim. In the opinion of defense counsel, the inference to be drawn by this evidence was that the brothers were responsible for the shooting and were naming Defendant as the shooter simply to shift blame from themselves and to negotiate a better deal with the State. (D.A.T. 607-613). The testimony at trial established that at approximately 4:00 a.m. on the morning of the murder, Defendant beeped Humberto, and Humberto called Lazaro and made arrangements to use Lazaro's car and have Lazaro drive to the robbery scene. (T. 1042-1044). According to Humberto, Lazaro stayed in the car while Humberto, armed with Lazaro's gun, and Defendant exited the vehicle to confront the victim. (D.A.T. 1040-1041, 1047). During the ensuing struggle, Humberto hit the victim in the head with Lazaro's gun and was shot by the victim. (D.A.T. 1048-1050). After he was shot, Humberto returned to the car and laid down in the back seat. (T. 1052-53). As he was running back to the car, Humberto heard more gun shots. (D.A.T. 1052-1053). When Defendant returned to the car, he told Humberto that he had shot the victim.

(D.A.T. 1055). Lazaro drove to the hospital, where Lazaro and Defendant helped Humberto into the hospital. (T. 1056). The Cuellar brothers were apprehended at the hospital. (T. 829). Palmetto Hospital employee Jack McColpin identified Defendant as the man he saw helping Humberto Cuellar into the hospital for treatment of a gunshot wound on the morning of the murder. (T. 725-729, 812). Lazaro's white Datsun was recovered at the hospital together with a 9mm automatic with a full clip and hair caught in the slide, Humberto's telephone book containing Defendant's address and telephone number, and Humberto's beeper containing Defendant's telephone number. (T. 695-98, 702, 819, 848-849, 862, 865). Humberto's testimony was further corroborated by the fact that Defendant's fingerprints were recovered from the scene near the victim's body and the fact that the victim had a wound on his head which was consistent with having been hit in the head by the gun recovered from Lazaro's car. (D.A.T. 893, 903, 905, 1151-1153). Defendant presented one witness, Gopinath Rao, to establish that Rao's report indicated that the shooting occurred at 5:40 a.m. and Lazaro Cuellar's hand swab was taken at approximately 9:00 a.m. (D.A.T. 1179) During defense counsel's direct, Rao further testified that gun shot residue dissipates very quickly and the amount of residue particles present in Lazaro Cuellar's swab at 9:00 a.m. was concentrated sufficiently such that it was consistent with Cuellar having fired a gun. (D.A.T. 1181) Rao admitted on cross-examination

that the presence and quantity of lead particles on the hands of the Cuellar brothers was equally inconsistent with the suggestion that neither had fired a weapon, but had both been in the presence of recently fired weapon or had touched Humberto's gunshot wound. (D.A.T. 1187-88) To rebut the testimony of Gopinath Rao regarding the timing of Lazaro Cuellar's hand swab, the State presented the testimony of Crime Scene Technician Richard Gallagher to establish that Lazaro's hands had in fact been tested at 7:45 a.m. and that Humberto's hands had been tested at 8:05 a.m. (T. 1283, 1289-1290). Technician Gallagher testified that despite the error in the information provided to Rao, the correct times in which the swabs were taken were properly recorded on the packaging itself. (D.A.T. 1289-1290) Gallagher also testified that defense counsel had specifically been made aware of these facts during deposition months before trial. (D.A.T. 1289-1290)

Nonetheless, the State had anticipated defense counsel potentially exploiting the discrepancy in the reports and had thus advised its witnesses of the possibility of being recalled to explain the conflict with the time listed in Rao's report. (D.A.T. 1262) After the defense rested its case and upon the notice that the State intended to recall Gallagher, defense counsel objected, alleging that the prosecutor was seen in the hallway after Rao's testimony discussing the case with Detective Ubeda and Technician Gallagher. (D.A.T. 1259-61) Ubeda and Gallagher were both called in for

voir dire concerning the nature of their conversation with the prosecutor. Detective Ubeda testified that he had previously been advised that he would possibly be called as a witness in the State's rebuttal case if there was a "conflict in I.D. Technician Gallagher's testimony" but that he did not discuss Rao's actual testimony during Defendant's trial. (D.A.T. 1262) Defense counsel also voir dired Gallagher on the issue of Rao's testimony. (D.A.T. 1264-65) Gallagher testified that the prosecutor had advised him he would be recalled for rebuttal as Rao had testified regarding the time at which Cuellar brothers had been swabbed. (D.A.T. 1264) Defense counsel objected and moved to strike the rebuttal testimony of Gallagher and moved for a mistrial, arguing that the State had violated the rule of sequestration. (D.A.T. 1264)

The trial court denied defense counsel's motion because he could not establish any prejudice. (D.A.T. 1264) Indeed, defense counsel had been made aware months before trial that the time of the swabbing indicated in Rao's report was an error. (D.A.T. 1289-90) The State had reviewed the possibility of rebuttal testimony with its witnesses prior to trial, in the event the defense called Rao. (D.A.T. 1262) All parties were aware that if the defense called Rao to testify, he would raise the issue of the error in the reports relating to when the Cuellar brothers had been swabbed and that the State would then recall one of its witnesses to address the clerical error. In fact, well in advance of Rao's actual testimony, defense counsel and the prosecutor

discussed the anticipated length of the trial and the State indicated it would be calling such rebuttal witnesses. (D.A.T. 781) As such, Defendant was not prejudiced.

The trial court properly conducted a full *Richardson* hearing, allowed for inquiry of witnesses who allegedly violated the rule of sequestration, and appropriately found that Defendant was not prejudiced. *See Beasley v. State*, 774 So. 2d 649 ((citing *Gore v. State*, 599 So. 2d 978)(Fla. 1992)(The rule of witness sequestration is designed to help ensure a fair trial by avoiding "the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand.")) Because the lower court found Defendant could establish no prejudice resulting from the rule of sequestration violation, it properly denied Defendant's motion to strike Gallagher's rebuttal testimony and motion for mistrial. "A motion for mistrial is addressed to the sound discretion of the trial judge and '...should be done only in cases of absolute necessity.' *Ferguson v. State*, 417 So.2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So.2d 745, 750 (Fla. 1978).)

Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this non-meritorious issue on appeal. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

G. APPELLATE COUNSEL WAS NOT INEFFECTIVE

FOR FAILING TO RAISE ON APPEAL THE ALLEGED FUNDAMENTAL ERROR OF STATE'S IMPROPER USE OF NON-STATUTORY AGGRAVATING FACTORS.

Defendant next contends that he was denied effective assistance of counsel when appellate counsel failed to raise on direct appeal the prosecutor's improper introduction and argument pertaining to non-statutory aggravating factors. Specifically, Defendant charges that appellate counsel should have raised on appeal several allegedly improper comments made by the prosecutor during the penalty phase closing argument and the prosecutor's presentation of Defendant's pending robbery charges. In order to preserve an issue regarding a comment in closing, a defendant must interpose a contemporaneous objection to the 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). Here, Defendant did not object to any of the comments about which he complains. As such, the issues were not preserved. Appellate counsel is not ineffective for failing to raise unpreserved or meritless issues. *See Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995).

Even if defense counsel had objected to the allegedly improper penalty phase

comments, any issue pertaining to same would have been meritless, as the comments were completely proper viewed in context. The prosecutor correctly charged that the death penalty is justified in certain cases in which sufficient aggravating circumstances exist and the mitigating circumstances do not outweigh such aggravating circumstances. (D.A.T. 1647) Likewise, the other comments to which Defendant objects merely indicated that Defendant had committed such crimes which, under the circumstances of the aggravating circumstances and lack of mitigating circumstances, justified the death penalty. (D.A.T. 1651, 1656)

Moreover, any error in these comments was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The State's initial closing argument nearly twenty pages of transcript, and the comments were brief. Further, the State presented overwhelming evidence of Defendant's guilt.

Defendant's claim of unauthorized presentation of the non-statutory aggravating factor of Defendant's pending charges was raised on direct appeal. *Mendoza*, 700 So. 2d at 675-678. Hence, appellate counsel cannot be deemed for failing to raise this issue, when he, in fact, did. *Strickland v. Washington*. Additionally, the State notes that on direct appeal, this Court specifically found that the details of the prior crimes were admissible and proper and that any reference to pending charges was harmless beyond a reasonable doubt. *Mendoza*, 700 So. 2d at 678; *see also Elledge v. State*,

346 So. 2d 998, 1001 (Fla. 1977) (the factual circumstances of prior violent felonies are admissible and proper at the penalty phase as are prosecutorial comments thereon, because, “we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of Defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”).

Finally, Defendant contends that the jury was not instructed regarding what was required before finding an aggravating circumstance, the record reflects that the trial court advised the jury:

The aggravating circumstance that you may consider are limited to any of the following that are established by the evidence.

The defendant has been previously convicted of another felony involving the use of violence to some person.

The crime for which the defendant is to be sentenced was committed while he was engaged, or an accomplice in the commission, or an attempt to commit or flight after committing or attempting to commit the crime of robbery and/or burglary.

The crime for which the defendant is to be sentenced was committed for financial gain.

* * *

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered in arriving at your decision.

(D.A.T. 1691-92). Hence, the jury was instructed that any aggravating circumstance must be proved beyond a reasonable doubt and was therefore not given “open-ended

discretion” in violation of due process. As such, this issue was meritless. Appellate counsel is not ineffective for failing to raise meritless or unpreserved issues. *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

H. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL AN ALLEGEDLY ERRONEOUS JURY INSTRUCTION PERTAINING TO EXPERT TESTIMONY.

Defendant next asserts that appellate counsel was ineffective for failing to raise on direct appeal the allegedly fundamental error of the trial court’s instruction concerning when a particular witness is qualified as an expert witness. However, Defendant did not object to the instruction at trial and, thus, any issue pertaining to the instruction was waived. As the issue was unpreserved, appellate counsel cannot be deemed in failing to pursue on appeal. *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Moreover, such a claim is insufficient as a matter of law, as the failure to appeal instructions that have been upheld and not invalidated by this Court does not establish deficient conduct within the meaning of *Strickland v. Washington*. *Downs v. State*, 740 So. 2d 506, 517-518 (Fla. 1999).

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE ON APPEAL NON-MERITORIOUS ISSUES RELATING TO VARIOUS ARGUMENTS BY THE PROSECUTOR AND TRIAL COURT'S STATEMENTS.

Defendant argues that various comments from the prosecutor during both the guilt phase and penalty phase and statements from the trial court amounted to fundamental error that deprived him of a fair trial. He further contends that appellate counsel was ineffective for failing to raise the totality of the following errors individually and/or cumulative on appeal: (1) the prosecutor's improper accusation of defense counsel that he was deliberately attempting to perpetuate a fraud upon the jury; (2) the prosecutor's violation of the rule of sequestration; (3) the prosecutor's discovery violation regarding the medical examiner's opinion that the victim's head laceration was consistent with being struck with Lazaro Cuellar's gun; (4) the prosecutor's comments during the guilt phase of Defendant's trial; (5) the trial court's failure to instruct the jurors on taking notes; and (6) the prosecutor's comments during the penalty phase of Defendant's trial. However, a review of the record illustrates that these claims were either raised on direct appeal or procedurally barred and meritless. Appellate counsel is not ineffective for failing to raise procedurally barred or meritless claims. *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Defendant claims that the prosecutor improperly accused defense counsel from deliberately trying to perpetuate a fraud upon the jury. Defendant complains about the following comment the prosecutor made concerning defense counsel's presentation of Rao's testimony regarding the gunshot residue:

...I suggest to you that what happened in regards to Technician Gallagher and the attempt to have Criminalist Rao tell you that all his opinions were based on nine o'clock in the morning. That the gunshot residue tests were performed at nine o'clock in the morning on Lazaro Cuellar is what the rest of this defense is about because you all know that is not true. Not only do you all know that the tests were not done at nine, you heard the witness and you saw it on the bag. They knew, Mr. Wax, in June of 1992. That was told to them by the technician when he took those tests and yet he proceeded to put on an expert witness who based an opinion on something that wasn't accurate. He knew it wasn't nine o'clock all along. Back in June of 1992 he knew that that was not accurate and he put that man in front of you to try to confuse and mislead you to based an opinion on something that is not true.

(D.A.T. 1302-03) Defendant also complains that the prosecutor reiterated this improper theme when she later repeated that defense counsel had presented Rao's testimony to suggest Lazaro Cuellar had fired a gun when Dr. Rao's "whole conclusion is based on the wrong time and they purposely put it on to mislead you because they knew the right time." (D.A.T. 1318-19) However, neither comment was objected to and therefore both comments were unpreserved for appeal. the

prosecutor's comments was fair comment on the evidence adduced at trial. *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997); *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996). As such, the issues were not preserved. Appellate counsel is not ineffective for failing to raise unpreserved or meritless issues. *See Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995).

Moreover, Technician Gallagher testified that he had advised defense counsel during his deposition months prior to trial that Rao's report reflected the incorrect time that the Cuellar brothers' hands were swabbed and that defense counsel was advised the evidence bag and other reports reflected the correct time. (D.A.T. 1289-1290) Indeed, defense counsel did present Rao's testimony as if his report reflected accurate data, rather than merely for the purpose of demonstrating the inconsistencies in the reports and arguing error. Thus, the prosecutor's comment that defense counsel was attempting to mislead the jurors as to the issue of when the Cuellar's hands had been swabbed.

Furthermore, both comments were brief and not a feature of the prosecutor's closing. Any error was certainly harmless in light of the overwhelming evidence that Defendant: enlisted the assistance of Humberto Cuellar and his brother to rob the victim, performed reconnaissance of the victim prior to the robbery, lay in wait in the

bushes outside the home of the victim in the early morning hours before attacking him with drawn pistol, informed a wounded Humberto Cuellar he had, in fact, killed the victim, and then absconded to his mother's home where he shaved his head and attempted to alter his appearance. (D.A.T. 1034-34, 1035-38, 1042-44, 1040-41, 1047, 1055, 830, 874-75, 1068, 1070)

Defendant next complains that appellate counsel should have pursued the prosecutor's alleged violation of the rule of sequestration on appeal. However, as previously discussed in Claim F, this issue is without merit. The State had anticipated defense counsel potentially exploiting the discrepancy in the reports and thus advised its witnesses of the possibility of being recalled to explain the conflict with the time listed in Rao's report. (D.A.T. 1262) After the defense rested its case and upon the notice that the State intended to recall Gallagher, defense counsel objected, alleging that the prosecutor was seen in the hallway after Rao's testimony discussing the case with Detective Ubeda and Technician Gallagher. (D.A.T. 1259-61) The court permitted voir dire of the State's witnesses on this issue. During the voir dire, Gallagher testified that the prosecutor had advised him he would be recalled for rebuttal as Rao had testified regarding the time at which the Cuellar brothers had been swabbed. (D.A.T. 1264) Defense counsel objected and moved to strike the rebuttal testimony of Gallagher and moved for a mistrial, arguing that the State had violated the

rule of sequestration. (D.A.T. 1264)

The trial court denied defense counsel's motion because he could not establish any prejudice. (D.A.T. 1264) Indeed, defense counsel had been made aware months before trial that the time of the swabbing indicated in Rao's report was an error. (D.A.T. 1289-90) The State had reviewed the possibility of rebuttal testimony with its witnesses prior to trial, in the event the defense called Rao. (D.A.T. 1262) All parties were aware that if the defense called Rao to testify, he would raise the issue of the error in the reports relating to when the Cuellar brothers had been swabbed and that the State would then recall one of its witnesses to address the clerical error. As such, Defendant was not prejudiced.

The trial court properly conducted a full *Richardson* hearing, allowed for inquiry of witnesses who allegedly violated the rule of sequestration, and appropriately found that Defendant was not prejudiced. *See Beasley v. State*, 774 So. 2d 649 ((citing *Gore v. State*, 599 So. 2d 978)(Fla. 1992)(The rule of witness sequestration is designed to help ensure a fair trial by avoiding "the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand.")) Because the lower court found Defendant could establish no prejudice resulting from the rule of sequestration violation, it properly denied Defendant's motion to strike Gallagher's rebuttal testimony and motion for mistrial. *Ferguson v.*

State, 417 So.2d 639, 641 (Fla. 1982)(citing *Salvatore v. State*, 366 So.2d 745, 750 (Fla. 1978).)

Accordingly, appellate counsel cannot be deemed ineffective for failing to raise this non-meritorious issue on appeal. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Similarly, Defendant argues that appellate counsel was ineffective for failing to raise on appeal that the State violated the rules of discovery by failing to advise the defense that the medical examiner was going to testify that the laceration on the victim's head was consistent with having been caused by Humberto Cuellar striking the victim with Lazaro's Taurus nine millimeter. However, the record reveals that upon counsel's objection, a full *Richardson* hearing was conducted. (D.A.T. 895-904) The hearing revealed that the State's medical examiner had previously been deposed by defense counsel and testified that the wound to the victim's head was consistent with a blow to the head from a gun. (D.A.T. 900-01) Although at the time of her deposition she had not been shown the specific Taurus nine millimeter gun, at the *Richardson* hearing she testified she could still not say that that specific gun caused the wound to the victim's head. (D.A.T. 900) Thus, faced with the fact that, in sum, the medical examiner's testimony had not changed from the time of her deposition to the time of

trial, defense counsel properly conceded he had not been prejudiced. (D.A.T. 901) As such, Defendant clearly was not prejudiced and appellate counsel cannot be deemed ineffective for failing to pursue this meritless issue. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995).

Defendant next asserts that appellate counsel was ineffective for failing to raise on appeal the following comment made by the prosecutor during the guilt phase:

State: [Y]ou promised in jury selection that this part of the trial is the guilt or innocence phase. It has nothing to do with the penalty, nothing. And if you don't like the penalty the other guys got, then adjust your recommendation then. Forget about the death penalty –

Defense: Objection.

Court: Sustained.

Defense: Objection. Move to strike.

Court: I'm going to tell you the same thing. This case must not [be] decided for or against anyone because you feel sorry for anyone or are angry. Your duty is to determine whether the defendant is guilty or not guilty in accord with the law. Ms. Seff, you made your objection before Mr. Suri made his. Please follow the guidelines of the Court.

(D.A.T. 1337-39) As previously discussed in Claim C, defense counsel's theme in closing was the alleged disparity of justice for Defendant when his co-defendants were given plea deals. He repeatedly asked the jury "do you see equal justice here

anywhere? (D.A.T. 1332) He contended that the co-defendant's plea deals rendered

Defendant's case unfair:

Humberto Cuellar told you I went to do a robbery. I smashed Mr. Calderon over the head with a gun and split open his head. I went there to do a robbery and somebody that was with me then shot him to death. You what that is? That is first degree murder. That is what Humberto Cuellar did, if you believe his words. Is he standing trial for first degree murder? No, he's not. No, he's not. They set the limits on what this case is about. . . . Is that equal justice?

(D.A.T. 1333-34) Thus, the prosecutor was merely responding to defense counsel's charge that it was unfair that the co-defendants were not subject to a first degree murder conviction and the possibility of the death penalty. Defense counsel's comments invited the State's comment and thus any error was invited. *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *Shaara v. State*, 581 So.2d 1139 (Fla. 1st DCA 1991); *Schwarck v. State*, 568 So.2d 1326 (Fla. 3^d DCA 1990). Moreover, the comment was brief and the prosecutor moved on after Defendant objected, thus any error was harmless. *State v. DiGuillo*, 491 So.2d 1129 (Fla. 1986). Accordingly, Defendant cannot establish any prejudice resulted from appellate counsel's failure to raise such issue on appeal. *Strickland v. Washington*. Accordingly, appellate counsel cannot be deemed ineffective for failing to pursue such claim. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Next, Defendant charges that the prosecutor denigrated the law by advising the

jury that they may find that some of the instructions that will be read to them by the trial court may not apply to Defendant. (D.A.T. 1300) Such comment was an accurate reflection of the province of the jury and the prosecutor committed no misconduct. Accordingly, appellate counsel cannot be deemed ineffective for failing to pursue such claim. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Similarly, Defendant argues that the prosecutor improperly shifted the burden to Defendant to produce evidence that he was not guilty. As discussed in Claim D, this issue was not preserved. Additionally, this comment was immediately following the prosecutor's careful review of all the evidence which corroborated Humberto's testimony: Humberto Cuellar's gun was found in Lazaro's car with human hair wedged in the handle consistent with having been used to strike the victim in the head as Humberto testified he had done; the police recovered the gun fully loaded consistent with it never having been fired, as Humberto had testified; Humberto had a bullet lodged in him at trial consistent with the victim shooting him; Humberto and Lazaro's hands are swabbed and found to have gunshot residue in an amount consistent with being in close proximity to Humberto's gunshot wound; Humberto's beeper is recovered from Lazaro's car with Defendant's number in the memory consistent with Humberto's testimony that Defendant had beeped him to come and pick up Defendant to perform the robbery; and Humberto and Lazaro are found at the hospital after the

shooting, and while Defendant absconds. (D.A.T. 1315-19) Clearly, the prosecutor's comment merely underscored that no evidence had been presented that contradicted Humberto's testimony while a wealth of evidence had corroborated Humberto's testimony. Hence, the prosecutor's remark was fair comment upon the evidence. *See Mann v. State*, 603 So.2d 1141, 1143 (Fla.1992), *cert. denied*, 506 U.S. 1085, 113 S.Ct. 1063, 122 L.Ed.2d 368 (1993). As such, appellate counsel would not have prevailed on such a meritless or unpreserved issue and cannot be deemed ineffective for opting to forgo raising same on appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Defendant also contends that the trial court's statements shifted the burden to Defendant to prove himself not guilty and violated his right to remain silent. As discussed in Claim D, The trial court's comments to the jury venire properly reflected the rights accruing to Defendant and absolutely nothing in his address abridged such rights. Thus, defense counsel did not object because there was nothing improper about the trial court's comments.

Moreover, the remarks about which Defendant complains were made during the informal introductory portion of the trial in which the trial court addressed the jury venire informally. At the close of all the evidence the trial court read the standard jury instructions, including both instructions pertaining to Defendant's presumption of

innocence/the State's burden of proof and Defendant's right to remain silent, without deviation or conversational improvisation. (D.A.T.1375-80) Accordingly, even if the trial court had mischaracterized Defendant's right to remain silent and the burden of proof, any error would have been harmless in light of the fact that the jury was formally instructed properly prior to deliberation. *See Kiley v. State*, 770 So. 2d 1278 at 1278 (Fla. 4th DCA 2000).

Defendant's claim pertaining to allegedly improper comments by the trial court during voir dire were procedurally barred and meritless. Appellate counsel is not ineffective for failing to raise meritless or procedurally barred claims. *Johnson v. Singletary*, 685 So. 2d 263, 266-67 (Fla. 1996); *Grossman v. Dugger*, 708 So.2d 249, 253 (Fla. 1997); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995).

Defendant also complains that the trial court erroneously permitted the jury to take notes without properly instructing them regarding the use of such notes. Additionally, Defendant contends that the error was made worse by the prosecutor's encouragement that they compare notes during deliberation. Defendant did not object at trial regarding this issue; accordingly, any claim with regard to this issue was unpreserved for appeal. *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Flanagan v. State*, 586 So.2d 1085 (Fla. 1st DCA 1991), *see also Herera v. State*, 532 So.2d 54 (Fla. 3^d DCA 1988).

Additionally, as Defendant concedes, permitting the jurors to take notes during the trial falls within the sound discretion of the trial court. *U.S. v. Rhodes*, 631 F. 2d 43 (5th Circ. 1980). Defendant fails to allege any grounds for his conclusory assertion that such note-taking was improper or the prosecutor's comment that the jurors might compare their notes during deliberation was improper. As such, this issue is insufficiently plead and meritless. Appellate counsel is not ineffective for failing to pursue meritless or unpreserved issues on appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla. 1999).

Finally, Defendant contends that appellate counsel was ineffective for failing to raise on appeal the alleged error of the prosecutor's comments during the penalty phase of Defendant's trial. Defendant claims that the prosecutor denigrated Defendant's case for mitigation and impermissibly inflamed the passions of the jury. However, the transcript reflects that the prosecutor's comments were appropriate comment on the evidence presented at the penalty phase. The prosecutor only argued that Defendant failed to establish evidence that he suffered from drug addiction to the extent he was unaware of his conduct during the murder. (D.A.T. 1653-61) Rather, the evidence at trial established that Defendant coldly and methodically planned the robbery. Thus, this issue is meritless and appellate counsel is not ineffective for failing to raise meritless issues on appeal. *Teffeteller v. Dugger*, 734 So. 2d 1009 (Fla.

1999). With regard to the claim concerning the prosecutor's elicitation from Dr. Toomer that Defendant had pending robbery charges, this issue was raised on direct appeal and this Court found any reference to pending charges was harmless error beyond a reasonable doubt. *Mendoza*, 700 So. 2d at 678.

Finally, Defendant argues that the prosecutor made comments that improperly inflamed the passions of the jury. As discussed in Claim G, no issue with regard to the allegedly improper comment was properly preserved. *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). Appellate counsel is not ineffective for failing to raise unpreserved or meritless issues. *See Grossman v. Dugger*, 708 So. 2d 249, 253 (Fla. 1997); *Johnson v. Singletary*, 695 So. 2d 263, 266-67 (Fla. 1996); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995).

Even if defense counsel had objected to the allegedly improper penalty phase comments, any issue pertaining to same would have been meritless, as the comments were completely proper viewed in context. The prosecutor correctly charged that the death penalty is justified in certain cases in which sufficient aggravating circumstances exist and the mitigating circumstances do not outweigh such aggravating circumstances. (D.A.T. 1647) Likewise, the other comments to which Defendant objects merely indicated that Defendant had committed such crimes which, under the

circumstances of the aggravating circumstances and lack of mitigating circumstances, justified the death penalty. (D.A.T. 1651, 1656)

Moreover, any error in these comments was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The State's initial closing argument nearly twenty pages of transcript, and the comments were brief. Further, the State presented overwhelming evidence of Defendant's guilt.

While Defendant contends that appellate counsel should have argued that the result of his trial and sentencing were not reliable due to the cumulative effect of the above alleged errors, appellate counsel cannot be deemed ineffective for failing to make such argument when the alleged errors were either procedurally barred or without merit, as seen above. *Downs v. State*, 740 So. 2d 506, 509 n.5 (Fla. 1999).

**J. APPELLATE COUNSEL WAS NOT INEFFECTIVE
IN THE MANNER IN WHICH HE APPEALED THE
TRIAL COURT'S ALLEGED EX PARTE
COMMUNICATION WITH THE JURY.**

Defendant asserts he was denied his fundamental right to a fair and impartial trial when the trial court had out-of-court, ex parte communications with the jury.

As Defendant concedes, appellate counsel did raise this issue on appeal. This

Court found:

First, we point out that this communication does not fall within the scope of Florida Rule of Criminal Procedure

3.410, which provides that if, after the jury retires to consider the verdict, the jurors request additional instructions, such instructions shall be given only after notice to the prosecuting attorney and to counsel for defendant. Fla. R.Crim. P. 3.410....These comments were made during the type of normal encounter between a judge and a jury which is likely to occur during a trial recess. In the courthouse in which this trial took place, the dining area is necessarily used by both the judge and jurors during a trial. Thus, the judge and jurors cannot avoid encountering one another outside the courtroom. It would be unrealistic and wrong for us to instruct a judge not to respond at all to jurors who ask questions during such encounters. Rather, we expect a judge to respond to jurors with no more than minimal, courteous answers. In this case, the record of the judge's response reflects exactly the course we would expect a trial judge to take. The judge replied as succinctly and as innocuously as common courtesy permitted under the circumstances. Shortly thereafter, the court put the encounter into the record so that the parties and the reviewing court would be aware of what had occurred. Accordingly, we find no error.

Finally, even if we considered the judge's comments to be error, communications outside the express notice requirements of rule 3.410 should be analyzed using harmless-error principles....We find harmless in this case any error in the judge's responding to jurors during a lunch break by courteously indicating a constraint upon engaging in conversation. The court correctly informed the parties in open court of the brief exchange with jurors and allowed the parties an opportunity to object on the record. Thus, any error in the judge's brief communication with jurors was harmless.

Mendoza, 700 So. 2d 670 at 674. As such, appellate counsel was not ineffective for failing to raise this issue on appeal. *Strickland v. Washington*. Defendant fails to

allege any facts demonstrating how appellate counsel was deficient in the manner in which he argued this issue. Instead, Defendant merely offers the conclusory allegation that “direct appeal counsel was ineffective in the manner this issue was argued on direct appeal.” As Defendant fails to establish that he was in any prejudiced by the manner in which appellate counsel handled this issue, he is entitled to no relief. *Downs v. State*, 740 So. 2d 506, 510-13 (Fla. 1999).

K. DEFENDANT’S CLAIM THAT THE STATE’S ARGUMENT TO THE JURY TO CONSIDER DEFENDANT’S PENDING ROBBERY TRIAL VIOLATED HIS EIGHTH AMENDMENT IS MERITLESS.

Defendant asserts that to the extent that appellate counsel failed to raise that the State’s questions and argument concerning Defendant’s pending trial in other robberies using a firearm violated his eighth amendment, appellate counsel was ineffective. The claim of unauthorized presentation of non-statutory aggravating factors was raised on direct appeal, and as such, is procedurally barred in these post-conviction proceedings. As noted previously, post-conviction proceedings are not a second appeal, and issues raised on direct appeal are procedurally barred. *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990); *Francis v. Barton*, 581 So. 2d 583, 584 (Fla. 1991). Finally, the State notes that on direct appeal, this Court specifically found that the details of the prior crimes were admissible and proper and that any

reference to pending charges was harmless beyond a reasonable doubt. *Mendoza*, 700 So. 2d at 678; *see also Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977) (the factual circumstances of prior violent felonies are admissible and proper at the penalty phase as are prosecutorial comments thereon, because, “we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of Defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”). In sum, the instant claim is procedurally barred, and without merit, and should be denied.

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 **Dan D. Hallenberg**, Assistant CCR South, Office of the Capital Collateral Regional Counsel - South, 101 NE 3rd Ave. Ste. 400, Fort Lauderdale, FL 33301 this day of October 29, 2001.

LISA A. RODRIGUEZ
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

—
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