IN THE FLORIDA SUPREME COURT
CASE NO. SC04-201

MICHAEL DUANE ZACK, *Petitioner*

v.

JAMES V. CROSBY, *Respondent*.

AMENDED RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Zack was represented on direct appeal by Assistant Public Defender David A. Davis. He wrote a 101 page initial brief raising twelve issues in the direct appeal: (1) the court erred in admitting Williams rule evidence; (2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; (3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; (4) the trial court erred in instructing the jury on felony murder based upon a burglary; (5) the sentencing

order failed to consider all of the mitigating evidence presented; (6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; (7) the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner; (8) the trial court erred in using victim impact evidence; (9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; (10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; (11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and (12) the trial court erred in refusing to admit a family photo during the penalty phase. *Zack*, 753 So.2d 9, 16 n.5 (Fla. 2000). Appellate counsel then wrote a 43 page reply brief further addressing nine of the twelve issues. Appellate counsel is a board certified criminal appellate specialist who was admitted to the Florida Bar in 1979. Appellate counsel succeeded in getting two of the aggravators stricken on appeal - the avoid arrest aggravator and the felony probation aggravator. *Zack v. State*, 753 So.2d 9 (Fla. 2000).

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel.

Davis v. State, 2003 WL 22722316, *10, 28 Fla. L. Weekly S835 (Fla. Nov. 20, 2003). In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). A habeas

petitioner cannot establish prejudice unless the issue was a "dead bang winner". *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang winner"). Petitioner must show that he would have won a reversal from this Court had the issue been raised. The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A *BATSON* CHALLENGE TO THE PROSECUTOR'S STRIKE OF TWO JURORS?

Zack contends that appellate counsel was ineffective for failing to raise the issue of the prosecutor's peremptory challenges of two African-American women. Appellate counsel was not ineffective. First, the standard of review of this issue is clearly erroneous which is a difficult standard for an appellant to met. Appellate counsel is not deficient for recognizing that the standard of review is against him. Additionally, the issue was not preserved. Furthermore, because the issue is meritless, appellate counsel was not ineffective for not raising it. The prosecutor struck the two jurors because they were employed at

a local mental health clinic, not because of their race. A prosecutor's reason to strike must only be genuine, it need not be reasonable. A juror's employment which, in the trial court word's, gives the juror "some special knowledge" is a genuine, race neutral reason. Appellate counsel was not ineffective.

Shelia Gillam was prospective juror no. 2 (T. I 16). There were two prospective jurors with the last name Jones- Rhonda P. Jones and Rita T. Jones. (T. I 16). During jury selection, defense counsel observed that Zack may be suffering from PTSD and inquired whether any of the prospective jurors had any knowledge of the disorder. (T. I 132). Mr. Salter, who was not on the final jury, responded that he worked around it every day at the VA clinic. (T. I 132, 151). Ms. Hellner, who was an actual juror, was a psychology student at the University if West Florida had discussed it in class but had no personal experience with it. (T. I 132, 151). Ms. Padgett, who was not on the final jury, was a nurse who had read about the disorder. (T. I 132, 151). Mr. Somerville, who was not on the final jury, had experience with it as a Vietnam veteran. (T. I 133, 151). Mr. Mraz, who was on the final jury, also was a Vietnam veteran. (T. I 133, 151). Ms. Jones, was a medic in Vietnam who had personal friends who suffered from it. (T. 133). If this was Rhonda Jones, she was on the final jury, but if it was Rita Jones, she

was not on the final jury. (T. 151). Ms. Schaffer, who was not on the final jury, had a family friend that suffered with it. (T. 133, 151). Ms. Thorton, who was not on the final jury, mother suffered from it. (T. I 134). Defense counsel also inquired whether any of the prospective jurors had any knowledge of fetal alcohol syndrome. (T. I 134). Ms. Jones had knowledge from being a nurse. (T. 134). If this was Rhonda Jones, she was on the final jury, but if it was Rita Jones, she was not on the final jury. (T. 151). Mr. Somerville, who was not on the final jury, was familiar with it from being an EMT. (T. 134, 151). Ms. Lewis, who was not on the final jury, had an aunt and uncle who adopted a child with the syndrome. (T. 135, 151). The prosecutor struck prospective juror no. 2 who was Shelia Gillam. (T. I 136). Defense counsel objected because she was a black female. (T. I 136). The prosecutor noted that it was his first strike, so there was no pattern. The prosecutor then explained that the reason for the strike was that she was employed a Lakeview Center and because of the amount of psychological evidence that was going to he presented he was uncomfortable. (T. I 136-137). The prosecutor then challenged Ms. Worthey, who was an African-American female, for cause because she had started to cry during the questions and the prosecutor thought there had been a murder or sexual battery. (T. I 137). She explained that her sister had been murdered in an abusive

relationship and because the victim were beaten in this case, she "could not deal with that". (T. 137-139). The trial court excused her for cause. (T. I 139). The prosecutor then struck juror No. 11, Rita Jones, because she was also employed at the Lakeview Center. (T. I 139). The prosecutor explained that the center administers psychological support, therapy, and counseling, "not the least of which is either heavily abused used by the criminal justice system." (T. I 140). Defense counsel objection because he did not think it was an adequate reason. (T. I 140). The trial court observed that he was a little concerned because the mere fact that she was employed somewhere that gave her special knowledge that the other jurors don't have. (T. I 141). The prosecutor explained that this was his concern as well as the nature of the patients at the Center who have drug, alcohol additions and PTSD. (T. I 141). The trial court allowed the strike. (T. I 141). The final jury included Juror Mraz and Juror Hellner. (T. I 151).

Appellate counsel is not ineffective for failing to raise an issue when the standard of review is clearly erroneous. The standard of review for a *Neil* objection to a prosecutor's use of peremptory strikes is clearly erroneous. *Melbourne v. State*, 679 So.2d 759, 764 (Fla. 1996)(noting a trial court's decision turns primarily on an assessment of credibility and will be affirmed

on appeal unless clearly erroneous). Because the trial court is in the best position to observe the demeanor and judge the credibility of the attorney who exercised the challenge, great deference is accorded to a trial court's conclusion that the proffered reasons were genuine. Appellate counsel may reasonably decide to limit the issues raised to those issues with more favorable standards of review such as *de novo*. Appellate counsel cannot win when the standard of review is clearly erroneous and is not ineffective for recognizing this. *Armstrong v. State*, 862 So.2d 705, 720 (Fla. 2003)(rejecting an ineffective assistance of appellate counsel claim where appellate counsel would have faced two very high standards of review).

This issue was not preserved for appellate review. To preserve an *Neil* objection for appellate review, defense counsel must renew his objection to juror who was stricken before accepting the jury and allowing it be sworn. A defendant waives any objection to peremptory strikes against minority jurors if he affirmatively accepts the jury. *Joiner v. State*, 618 So.2d 174 (Fla. 1993); *Melbourne v. State*, 679 So.2d 759, 765 (Fla. 1996)(concluding that the defendant failed to preserve this issue for review because she did not renew her objection before the jury was sworn). The reason a defendant must renew her

objection is that it is possible that events transpiring subsequent to the initial objection may cause a defendant to become satisfied with the jury and abandon her objection. *Melbourne v. State*, 679 So.2d 759, 765 (Fla. 1996). For example, a defendant may object to the prosecutor's use of a peremptory strike because the prospective juror is the only minority on the panel and the defendant is facing an all white jury if that prospective juror is stricken. However, as jury selection progresses and backstrikes occur, the actual jury selected may be composed of several minority jurors and defendant is more pleased with the actual jury than he was with the jury composition when he made the original objection.

Trial counsel tendered the jury without renewing his objection to the two stricken jurors. (T. 150). Furthermore, it is impossible to tell which Ms. Jones is responding to defense counsel's inquires during jury selection. One of the two jurors with the last name Jones was not stricken. Trial counsel did not preserve any objection based on the responses of Ms. Jones to the questions during jury selection because he did not make the record clear as to which of the two Jones was responding to which questions. This issue was not preserved and appellate counsel is not ineffective for failing to raise unpreserved errors. *Power v. State*, 2004 WL 1057688, *9 (Fla. 2004)(noting

that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.); *Hamilton v. State*, 2004 WL 1207574, n.5 (Fla. 2004)(noting that in the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim); *Downs v. Moore*, 801 So.2d 906, 916 (Fla. 2001); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla. 1997)(stating: "[w]e have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.").

Furthermore, this issue is meritless. Both the United States Supreme Court and the Florida Supreme Court have held that the reason for striking a juror need not be "persuasive, or even plausible," so long as it is racial neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *Melbourne v. State*, 679 So.2d 759, 764, n.9 (Fla. 1996)(explaining that the explanation does not have to be reasonable only genuinely nonracial).

In *Purkett v. Elem*, 514 U.S. 765 (1995), the United States Supreme Court held an implausible reason for peremptory challenges was permissible. The respondent challenged a Missouri prosecutor's use of peremptory challenges to strike two black men from the jury panel. The prosecutor's explanation for

the strikes was that he did not like the prospective jurors' haircuts and their mustaches and beards looked "suspicious" to him. The Eighth Circuit granted the petition because the prosecution's explanation was not "plausible" and the reasons given did not affect the person's ability to perform his or her duties as a juror. The Supreme Court reversed, holding that the reason for the strike need not be plausible. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. The United States Supreme Court rejected the view that the prosecutor's reason must be abstractly true - *i.e.* that juror with beards are not good jurors. Whether facial hair impacts jury service is not the proper focus. The proper focus is whether there is racial discrimination. While the prosecutor's reason may be silly, it is not evidence of intentional discrimination. Silly does not violate the Constitution. Provided the silly reason is applied equally to all racial groups, it has no constitutional significance.

In *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), the Florida Supreme Court, in light of the difficulties that trial courts had been having applying state law, adopted the reasoning of *Purkett*. *Melbourne*, 679 So.2d at 764. The Court established guidelines to be used whenever a race-based objection to a

peremptory challenge is made. The first step is that a party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. This second step is that the trial court ask the proponent of the strike to explain the reason for the strike. At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. If the explanation is not facially race-neutral, the inquiry is over; the strike will be denied. *Melbourne*, 679 So.2d at 764, n.7. This third step is, if the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove racial discrimination. Furthermore, peremptory challenges are presumed to be exercised in a nondiscriminatory manner. The focus is <u>not</u> on the reasonableness of the explanation but rather its <u>genuineness</u>. The Florida Constitution does not require that an explanation be nonracial and reasonable, only that it be truly nonracial. Reasonableness is simply one factor that a court may consider in assessing

genuineness. *Melbourne*, 679 So.2d at 764, n.9. The Court receded from *Slappy* and its progeny to the extent they required a reasonable rather than a genuine, nonracial basis for a peremptory strike.

Actually, Zack is correct that the prosecutor "misinformed" the trial court regarding that law when he stated that the reason for the strike only need be "objectively reasonable", the standard is even lower. Petition at 8. A prosecutor's reason may be completely subjective and unreasonable. If the prosecutor's reason for the strike is unreasonable but genuine, then the trial court must permit the strike.

Here, Zack states that neither prospective juror "provided any reason for the State to be uncomfortable with them as jurors." Petition at 11. Whether a reason for striking a juror is abstractly true or reasonable does not matter. A prosecutor's reason for striking a juror may absurd and false provided that it is race neutral. Both were employed at the Lakeview Center. The prosecutor's objection to the Center was its connection with the criminal justice system and the nature of the patients treated there. (T. I 140). The mere fact, in the trial court's words, that she was employed somewhere that gave her special knowledge, which the other jurors did not have, is, indeed, a race neutral reason. (T. I 141).

The prosecutor not knowing or inquiring into whether the prospective juror worked as a "an administrator, counselor, nurse or even janitor," is not relevant. Petition at 9. The prosecutor is welcome to dislike the mere fact that a prospective juror works at a particular place and to strike the prospective juror based upon that fact without more information. The prosecutor not knowing or inquiring into whether Jones' familiarity with fetal alcohol syndrome was limited or expansive is also irrelevant. Petition at 10. The prosecutor is welcome to dislike the mere fact that a juror is a nurse with some familiarity with the syndrome and to strike the prospective juror based upon that fact without more information. These are arguments that the prosecutor's strikes are not reasonable without more information but reasonableness is not the test, genuineness is. Furthermore, while both prospective jurors' response that they could be fair and impartial would be relevant to a challenge for cause analysis, it is irrelevant to a peremptory strike analysis.

Contrary to Zack's claim, jurors with similar experience were not accepted by the prosecutor. Petition at 11. Several of the prospective jurors had different experiences. Juror Hellner, who was a psychology student, was only familiar with the disorder through class discussions. (T. I 132). She had no personal experience with PTSD unlike the stricken jurors. Juror

Mraz, who served in Vietnam, was familiar with the disorder was based on his military service, not his employment. There was no connection between his military service and the criminal justice system. Several of the prospective jurors were not on the final jury either. Mr. Salter, who also worked "around it everyday" at the VA clinic, while not stricken by the prosecutor, was not on the final jury. (T. 132, 151). Ms. Schaffer, who also had a family friend that suffered with it, while not stricken by the prosecutor, was not on the final jury. (T. 133, 151). Ms. Padgett, who was a nurse but whose experience seems to have been limited to reading about the disorder, while not stricken by the prosecutor, was not on the final jury. (T. 132, 151).

Moreover, while opposing counsel claims, without a record cite, that there were no other female African-American jurors included in the venire, there were other African-American jurors. (T. 282). The final racial composition of the jury may be considered in determining whether the prosecutor has intentionally discriminated. *Melbourne v. State*, 679 So.2d 759, 764, n.8. (Fla. 1996)(noting that the relevant circumstances may include--but are not limited to--the following: the racial make-up of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special

treatment). Furthermore, the defendant was white, not African-American. (T. 140); *Reed v. State*, 560 So.2d 203, 205-206 (Fla. 1990)(rejecting a *Neil* challenge where the prosecutor used eight of his ten peremptory strikes to excuse blacks from the jury and because both the defendant and the victim were white and distinguishing *Kibler v. State*, 546 So.2d 710, 712 (Fla. 1989)).

Zack's reliance on *Dorsey v. State*, 868 So.2d 1192 (Fla. 2003), is misplaced. In *Dorsey*, this Court held that the prosecutor's peremptory strike of an African-American prospective juror because she appeared "disinterested" was not supported by record. The prosecutor struck African-American prospective juror because she appeared "disinterested". The prosecutor stated that she was "sort of staring at the wall." Defense counsel objected because the African-American prospective juror was listening and she smiled the whole time he was up there talking. The trial court did not see the juror's conduct but accepted the prosecutor's word as an officer of the court and allowed the strike. The Florida Supreme Court reversed. While nonverbal behavior may constitute a genuine, race-neutral reason for a peremptory challenge, the purported behavior must be observed by the trial court or otherwise supported by the record. The *Dorsey* Court reaffirmed the prior holding of *Wright v. State*, 586 So.2d 1024 (Fla.1991), in which

this Court had disapproved the use of peremptory challenges based on body language unless observed by the trial judge and confirmed by the judge on the record.

Here, unlike *Dorsey*, the prosecutor's strikes were not based on body language. The strike were based on the juror questionnaire and the jurors' transcribed responses. Moreover, there is record support for the strikes. Indeed, there is no dispute on this record that the two African-American prospective jurors were employed at the Lakeview Center. Nor did defense counsel at any time dispute the prosecutor's characterization of the Center.

The issue was meritless. Thus, appellate counsel was not ineffective for failing to raise this issue. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.)

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE PROSECUTOR'S COMMENTS?

Zack argues that his appellate counsel was ineffective for failing to raise several allegedly improper prosecutorial comments. None of the comments were improper and therefore, appellate counsel was not ineffective.

During closing of the guilt phase, the prosecutor was

discussing the jury instruction on the credibility of witnesses. (VII 1368). He noted that the defendant was a witness in the case and when that occurs the same rules apply to the defendant. (VII 1369). The prosecutor then applied those rules to the defendant's testimony. (VII 1369-1372). The prosecutor said: "that's not the truth, he didn't do that." (VII 1373). The prosecutor said: "lies always have some element of the truth" and they "originate from the truth but they are distorted to fit or reflect well on the liar. . ." (VII 1373). Defense counsel objected arguing that the prosecutor referring to the defendant as a liar was prosecutorial misconduct and moved for mistrial. (VII 1373). The prosecutor noted that the evidence showed that the defendant was a liar. (VII 1374). The trial court denied the motion for mistrial but suggested to the prosecutor that he refer to the defendant by some other term than liar but also noted that there may be some basis for the prosecutor's term. (VII 1374).

Zack testified in his guilt phase testimony that he has lied in the past. (T. VI 1110). On cross, Zack testified that he was an admitted liar. (T. VI 1118). The prosecutor may call the defendant a liar if such a characterization is supported by the evidence. *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1028-29 (Fla. 2000)(concluding that it is not

improper for counsel to state during closing argument that a witness "lied" or is a "liar," provided such characterizations are supported by the record, reasoning that if the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence); *Craig v. State*, 510 So.2d 857, 865 (Fla. 1987)(holding that is was not improper for a prosecutor to refer to the defendant's testimony as being untruthful and to the defendant himself as a 'liar' and observing that it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence and it is for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration."); *Pino v. State*, 776 So.2d 1081 (Fla. 3d DCA 2001)(finding prosecutor's characterizations of the defendant as a liar to be supported by the record); *Brown v. State*, 678 So.2d 910, 912 (Fla. 4th DCA 1996)(holding that it is proper for either counsel in closing argument to characterize specific witnesses as liars, so long as counsel relates the argument solely to the testimony of the

witnesses and evidence in the record); *Perry v. State*, 718 So.2d 1258, 1260 (Fla. 1st DCA 1998)(observing that it is "well-established" that a prosecutor may use the word 'lie,' when commenting on appellant's testimony, or characterizing the words of appellant as not those of an 'innocent man'). The prosecutor's characterization was clearly supported by the evidence. Indeed, it was supported by the defendant's own testimony. Once the defendant takes the stand, the prosecutor may comment on the defendant's credibility just as the prosecutor may comment on any other witness' credibility.

During closing of the guilt phase, the prosecutor said: "you come out here on behalf of the people of this community and the defendant and let your verdict speak the truth. (VIII 1449-1450). Defense counsel objected to the comment arguing that it was an improper "send a message to the community" comment and moved for mistrial. (VIII 1450). The trial court denied the mistrial. (VIII 1450).

This comment is not a "send a message" comment. The prosecutor said on "behalf of the people of the community". The rationale of the "send a message" cases does not apply to such a comment. The problem that the Courts identify with "send a message to the community" prosecutorial comments, is that it encourages the jury to convict based on some policy rather than

on the evidence in the particular case. *United States v. Sanchez-Sotelo*, 8 F.3d 202, 211 (5th Cir. 1993)(explaining that the comments had a prejudicial effect because they influenced the jury to convict the appellants based on a broad policy against drugs rather than on specific evidence of guilt). Here, the prosecutor was not attempting to get the jury to convict on some policy, he was asking the jury to convict based on the evidence. The prosecutor in the sentence, just before the challenged comment, implored the jury to "look at this evidence". (1449).

During closing of the penalty phase, the prosecutor was discussing the victim impact evidence that he presented. (T. XI 2077). The prosecutor said: "I don't want sympathy in that jury room on my evidence, and don't let it in the jury room on what the defense presented to you". (XI 2077). There was no objection either contemporaneously or at the end of the prosecutor's argument. (XI 2077, 2085).

This issue is not preserved. This Court has consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved by objection in the trial court. *Brown v. State*, 846 So.2d 1114, 1127 (Fla. 2003); *Gore v. State*, 846 So.2d 461, 471 (Fla. 2003)(noting that, in the absence of fundamental error, appellate counsel cannot be

ineffective for failing to raise an unpreserved claim); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996)(stating: "We have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.")

Furthermore, the comment is proper, especially given the context. The context was the prosecutor's discussion of his own victim impact evidence. The prosecutor is telling the jury to base their recommendation on the evidence, not sympathy. Such comments do not violate the Eighth Amendment. *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)(approving jury instructions informing jury not be influenced by "sympathy" in the penalty phase of a capital case and finding no violation of the Eighth Amendment); *Saffle v. Parks*, 494 U.S. 484 (1990)(finding a claim regarding an anti-sympathy instruction to be *Teague* barred because the result was not compelled by either *Lockett v. Ohio*, 438 U.S. 586 (1978), or *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which concerned what mitigating evidence the jury must be permitted to consider; whereas, an anti-sympathy instruction concerns how the jury must consider the mitigating evidence); *Parks v. Saffle*, 925 F.2d 366, 369 (10th Cir. 1991)(finding no violation of the Eighth Amendment in the giving of an anti-sympathy instruction

in conjunction with the prosecutor's comments to leave the "sympathy, and the sentiment and prejudice part out of it."); *Byrne v. Butler*, 847 F. 2d 1135, 1138-1140 (5th Cir. 1988); *People v. Emerson*, 522 N. E. 2d 1109, 1122 (Ill. 1987); *State v. Ramseur*, 524 A. 2d 188, 275-277 (N.J. 1987); *State v. Steffen*, 509 N. E. 2d 383, 396 (Ohio 1987); *Lay v. State*, 886 P.2d 448, 452 (Nev. 1994)(stating it is not error to instruct the jury not to be influenced by sympathy); *State v. Owens*, 359 S. E. 2d 275, 279 (S.C. 1987); *State v. Porterfield*, 746 S. W. 2d 441, 450-451 (Tenn. 1988).

During closing of the penalty phase, the prosecutor was discussing the HAC aggravator. (XI 2068-2070). He was describing the murder and the injuries to the victim. He was discussing the "unnecessarily torturous" requirement of the HAC aggravator. (XI 2070). The prosecutor said: Does his acts show any pity for the victim? Can any one of us imagine, except to look at the evidence, the terror that was coursing through the victim during her last few minutes of life." (XI 2070). There was no objection either contemporaneously or at the end of the prosecutor's argument. (XI 2070, 2086).

This issue is not preserved. This Court has consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved by objection in the trial

court. *Brown v. State*, 846 So.2d 1114, 1127 (Fla. 2003); *Gore v. State*, 846 So.2d 461, 471 (Fla. 2003)(noting that, in the absence of fundamental error, appellate counsel cannot be ineffective for failing to raise an unpreserved claim); *Johnson v. Singletary*, 695 So. 2d 263, 266 (Fla. 1996)(stating: "We have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.")

Furthermore, the comment is proper in the penalty phase of a capital trial where the prosecutor is attempting to establish the HAC aggravator. HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *Barnhill v. State*, 834 So.2d 836, 849-50 (Fla. 2002). Anxiety and fear are emotional states. The only way a juror can determine whether the victim suffered is to imagine their reaction to such a situation. While such a comment would be improper in the guilt phase where the aggravator is not at issue, it is proper in the penalty phase. Appellate counsel was not ineffective.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF NON-STATUTORY AGGRAVATION BEING

PRESENTED DURING THE PENALTY PHASE?

Zack asserts that his appellate counsel was ineffective for failing to raise as the State's rebuttal mental health expert testimony as non-statutory aggravation. The State respectfully disagrees. The evidence was admissible to rebut his guilt phase defense and his remorse mitigation. Furthermore, the admission of non-statutory aggravation is not a violation of the Eighth Amendment. The federal death penalty statute, as well as some states, permit non-statutory aggravation to be introduced. Additionally, the error, if any, was harmless. The prosecutor did not argue any non-statutory aggravator to the jury in closing and the trial court properly instructed the jury as to the aggravating factors they could consider. Thus, appellate counsel was not ineffective for failing to raise the issue.

At the penalty phase, defense counsel argued in opening that the defendant was "impulsive" because he was born with a "broken brain" due to fetal alcohol syndrome. (IX 1615-1617). The State presented a witness to establish the felony probation aggravator and victim impact witnesses, then rested. (XI 1635). The defense called several family members and friends to testify. The defense also called four mental health experts to testify - Dr. William Spence, Dr. James Larson, Dr. Barry Crown and Dr. Michael Maher - to establish mental mitigation. (T. X 1822, 1847, 1884, 1927). The Defense rested. (XI 1972). The State

called two rebuttal mental health experts - Dr. Eric Mings and Dr. Harry McClaren. (XI 1972, 2015). During Dr. McClaren's testimony, he referred the "hot button" theory of the defense. (XI 2025). The prosecutor asked him if there was any evidence of anger towards woman. (XI 2025). Defense counsel objected because it was not an aggravator. (XI 2026). The State's expert testified that there was evidence of anger towards women.(XI 2027). The defendant had said in his statement that a woman took his mother from him and a woman took his child which in the expert's opinion reflected a degree of hostility toward women. (XI 2027-2018). The State's mental health expert testified that during his interview with the woman the defendant had the longest relationship with in his life, she described a "very abusive relationship" and she told the expert that "he hit me all the time, and then it would be it'd never happen again, I'm sorry and then it would happen again." (XI 2028). Defense counsel again objected because it was "uncharged criminal conduct" and moved for a mistrial. (XI 2028). The trial court removed the jury. (XI 2029). Defense counsel explained that this was uncharged criminal conduct and he was not seeking the lack of any prior significant activity as a mitigator. (XI 2029). The prosecutor responded that the defense experts had opined that the murder occurred because the defendant has "a hot button" in regards to the death of his mother and the victim

pushed that button and the defendant was unable to conform his conduct and was under extreme emotional distress because of that button. (XI 2030). The prosecutor explained that this evidence rebutted that "hot button" theory by establishing his abiding anger towards women. (XI 2030). The trial court permitted the testimony. (XI 2031). Later, the State rested. (XI 2055). The prosecutor's closing in penalty was limited to the six aggravators he sought. (XI 2062-2072). He did not discuss Dr. McClaren's reference to the spousal abuse. The prosecutor did discuss the defense theory that the murder was a result of a fit of rage as part of his CCP presentation but he did not specifically refer to the defendant's anger toward women. (XI 2071). The prosecutor attempted to rebut the fetal alcohol syndrome and PTSD by pointing that vast numbers of persons suffer from these disorders and they do not commit crime. (XI 2073). The prosecutor also argued that the mental mitigation did not outweigh all the aggravation. (XI 2074). The prosecutor discussed the "hot button" theory. (XI 2075,2082). The prosecutor referred to Dr. McClaren's testimony to rebut the defense mental health experts on several occasions during his closing. The jury was instructed that they were limited to the six statutory aggravators. (XI 2108-2110). The State did not use either the defendant's anger towards women or the spousal abuse in its sentencing memorandum. (VI 793-817). The defense's

sentencing memorandum sought remorse as a mitigator. (VI 826). The defendant's statements at the sentencing hearing, while mainly focusing on his own suffering, did express some remorse. (VI 847).

The trial court's sentencing order did not use either the defendant's anger towards women or the spousal abuse as support for any aggravator. (T. VI 859-874). The trial court's sentencing order specifically noted that its consideration of aggravation was limited to the statutory aggravation. (T. VI 866). The trial court's sentencing order refers to the defendant's guilt phase defense that the murder occurred as a result of a fit of rage in its discussion of the CCP aggravator. (T. VI 865). The trial court's sentencing order refers to the defendant's "hot button" and rejected this theory as a motive for the crime in its discussion of the extreme mental mitigator. (T. VI 868). The trial court's sentencing order lists remorse as a mitigator based on the defendant's testimony. (T. VI 872).

Zack's defense at trial was that he killed the victim because she made disparaging remarks about his dead mother. The jury may consider any evidence of mitigation presented in either the guilt phase or the penalty phase. (IX 1593). The prosecutor felt he had to rebut the fit of rage defense to establish the CCP aggravator. (XI 2071). This defense could have been viewed as mitigating by a juror and the State was entitled to rebut

this by establishing he had an abusive relationship with a woman who presumably did not insult his mother. (XI 2053).

Furthermore, Zack sought and the trial court found the mitigator of remorse. Dr. McClaren's testimony rebuts this mitigator. Zack would commit battery and then say it would never happen again and then he would commit another battery. Zack would say he was sorry but he would do it again. This shows that his remorse was not meaningful.

Contrary to Zack's argument, there is no violation of the Eighth Amendment. Petition at 21. Even if the comments are viewed as non-statutory aggravation, the introduction of non-statutory aggravation is not a violation of the Eighth Amendment. Non-statutory aggravation is constitutionally permissible.[1] Indeed, the Federal Death Penalty Act explicitly

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[1] *Barclay v. Florida*, 463 U.S. 939 (1983)(noting that the trial judge's consideration of a non-statutory aggravating circumstance was improper as a matter of state law because Florida law prohibits consideration of nonstatutory aggravating circumstances but noting "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record"); *Wainwright v. Goode*, 464 U.S. 78 (1983) (holding that the trial court's reliance on an extra-statutory aggravating factor did not violate the Eighth Amendment); *Zant v. Stephens*, 462 U.S. 862, 878 (1983)(explaining that while statutory aggravating circumstances play a constitutionally necessary function, the Constitution does not require the jury to ignore other possible aggravating factors); *Fox v. Coyle*, 271 F.3d 658, 666 n. 3 (6th Cir. 2001)(noting that it is Ohio's capital punishment scheme that prohibits consideration of the nature and circumstances of the crime as aggravating factors, not the federal constitution); *Babbitt v. Calderon*, 151 F.3d 1170, 1178 (9th Cir.

allows consideration of non-statutory aggravation. *United States v. Allen*, 247 F.3d 741, 758 (8th Cir. 2001), *remanded for reconsideration on other grounds*, *Allen v. United States*, 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002)(finding no Eighth Amendment infirmity with the provision of the Federal Death Penalty Act (FDPA) which allows consideration of non-statutory aggravation once one statutory aggravator is found). Other states, such as Georgia, also permit non-statutory aggravation. It is only Florida law, not the constitution, that prohibits non-statutory aggravation. So, the error, if any, is not of constitutional magnitude.

The error, if any, was harmless. Even if the comments are viewed as non-statutory aggravation, they are minor compared to the facts of the murders and the statutory aggravators. This Court has found the introduction of much more damaging non-statutory aggravation, such as future dangerousness, to he harmless. *Walker v. State*, 707 So.2d 300, 313-314 (Fla. 1997)(finding nonstatutory aggravating circumstance of "future dangerousness" inadmissible but harmless error in a case where the prosecutor asked: "Well, do you think also that [Walker] may

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1998)(concluding to the extent that the defendant is arguing that the prosecutor's comments misled the jury into considering his background as aggravating, his argument fails because nothing in the Constitution limits the consideration of nonstatutory aggravating factors).

kill again?" because the prosecutor did not argue the improper non-statutory aggravator to the jury in closing and the trial court properly instructed the jury as to the aggravating factors they could consider). Here, as in *Walker*, the prosecutor did not argue the non-statutory aggravator to the jury in closing and the trial court properly instructed the jury as to the aggravating factors they could consider. (XI 2108).

Zack's reliance on *Perry v. State*, 801 So.2d 78, 89-91 (Fla. 2001), is misplaced. The Court held that permitting the defendant's ex-wife to testify, during the penalty phase, to specific instances of the defendant's violent behavior and to the defendant's statements regarding the use of a knife to kill someone, constituted impermissible nonstatutory aggravation. *Perry*, 801 So.2d at 89. In *Perry*, during the penalty phase, the prosecutor as his first witness asked the defendant's ex-wife if the defendant was ever violent or involved in violent activity during their marriage. Defense counsel objected on the ground that this subject was not an issue at trial. The trial court overruled the objection. The prosecutor asked ex-wife to recount some specific instances of violent behavior. The ex-wife described, "in detail, a vicious beating" Perry inflicted to another person. *Perry*, 801 So.2d at 89. The ex-wife testified to seven statements regarding the defendant's violent

behavior, all of which were unrelated to the crime charged. *Perry*, 801 So.2d at 89, n.12. In addition, she testified regarding various incidents of spousal abuse by Perry. She testified:

> He [Perry] used to slap me. He would beat me. When he was drinking, he would get angry and would hit me with things, whatever he could grab that was closest; clothes hanger, shoes. He was bad about slamming me up against the walls and he tried to choke me a few times."

Perry, 801 So.2d at 89, n.13. The *Perry* Court explained normally the evidence must related to one of the statutory aggravators. *Perry*, 801 So.2d at 90. The State may also rebut defense evidence of the defendant's nonviolent nature by specific acts of violence committed by the defendant. The State on appeal asserted the ex-wife’s testimony was admissible in the penalty phase because the defendant "opened the door" to it during the guilt phase by claiming to be nonviolent. The *Perry* Court rejected this argument because the State's answer brief made this assertion without providing any references to the record to support it and their own review of the record showed that the door was not opened during the guilt phase. The Court noted that ex-wife was the first witness called in the State’s

portion of the penalty phase, so, she could not have rebutted any mitigation presented in the penalty phase by the defense because none had been presented yet. The *Perry* Court also rejected the State's anticipatory rebuttal argument because the mitigating circumstances sought had not been finalized. The *Perry* Court seemed to suggest that the defense was forced to present that mitigator. *Perry*, 801 So.2d at 90, n.14. The trial court had used the ex-wife's improper testimony as support for the CCP aggravator. *Perry*, 801 So.2d at 90, n.15. The *Perry* Court found that the error was not harmless.[2]

Here, unlike *Perry*, the trial court did not use the improper testimony as support for any aggravator. (T. VI 859-874). Here, unlike *Perry*, Dr. McClaren was not called as the State's first witness in the penalty phase. He was called after the defense had called four mental health experts to testify. Dr. William Spence, Dr. James Larson, Dr. Barry Crown and Dr. Michael Maher had been previously called to support the defense's mental mitigation case. (T. X 1822, 1847, 1884, 1927). Zack's mental

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[2] The *Perry* Court seemed to think that the admission of non-statutory aggravation raised constitutional concerns. It does not. *Perry*, 801 So.2d at 91 *citing Kormondy v. State*, 703 So.2d 454, 463 (Fla.1997)(stating "our turning a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute."). As explained above, once the State establishes one statutory aggravator, it may introduce any number of non-statutory aggravators without any constitutional concerns.

health was clearly at issue prior to this testimony including his “hot button”. Here, unlike *Perry*, Dr. McClaren did not described, “in detail, a vicious beating” inflicted to another person. No other person was involved here. Dr. McClaren testified that the woman told him that Zack hit her all the time but no details of the abuse were given. Moreover, the State must rebut the defense’s presentation of mitigation before the jury instructions are finalized. Jury instructions on mitigation are typically determined at a conference held after the close of the evidence.

Most importantly, *Perry* was not available to appellate counsel when he wrote the briefs. *Perry* was decided in 2001. The initial brief was written in 1998, three years before *Perry* was decided. Nor was the option of filing an amended initial brief available. Zack’s direct appeal was final in 2000, one year before *Perry* was decided. While the general claim of non-statutory aggravation was available, the idea that spousal abuse amounted to non-statutory aggravation depended on the specific facts of *Perry*. The most recent caselaw available to appellate counsel when he was preparing the brief was *Walker v. State*, 707 So.2d 300, 313-314 (Fla. 1997)(finding nonstatutory aggravating circumstance of "future dangerousness” inadmissible but harmless). Under *Walker*, appellate counsel would have

reasonably believed that even if this Court viewed spousal abuse as non-statutory aggravation, an idea which was not supported by the facts of *Walker*, it would also view such error as harmless. The factual basis for the *Walker* Court's harmless error was also present in this case. Indeed, even if *Perry* were available to appellate counsel at the time, it provided no guidance on whether the error was harmless. The *Perry* Court's harmless error analysis was entirely dependent on the mistaken notion that the error was constitutional in nature, not the particular facts of the case. *Perry*, 801 So.2d at 91. Appellate counsel could have reasonable believed such an error would be found to be harmless even in the wake of *Perry* and he was not ineffective for not raising a non-constitutional error and that was harmless.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE ADMISSIBILITY OF GRUESOME PHOTOGRAPHS?

Zack asserts that his appellate counsel was ineffective for failing to raise the issue of the admissibility of two crime scene photographs and two slides of the *Williams* rule victim. The State respectfully disagrees. First, gruesome photographs issues are not winners. Appellate counsel is not ineffective for failing to raise an issue that traditionally has had little

success with this Court. Moreover, the issue is meritless because both the photographs and the slides were admissible. The photographs of the crime scene were relevant and therefore, admissible. The crime scene investigator used the photographs to explain how the victim was discovered to the jury. The trial court, following this Court's suggestion, limited the prosecutor to only two of the four photographs and to the least gruesome photographs. The slides of the victims were relevant and therefore, admissible. The medical examiner used the slides to explain the injuries to the two victims to the jury. The two slides of the ***Williams*** rule victim's face were admissible to prove the similarities between the injuries to the victims. Both victims had extensive blunt force injuries to their respective faces. For ***Williams*** rule evidence to be admissible, the State must establish the similarities between the two crimes. Thus, appellate counsel was not ineffective for failing to raise a meritless issue.

During the guilt phase, before the prosecutor called Charlie Suarez, who was a crime scene investigator with the Escambia County Sheriff's Department, through which the prosecutor was going to introduce a series of photographs, the prosecutor noted that defense counsel wanted to be heard. (II 308). Defense counsel did not object to every photographs, he objected to the

“unusually gruesome” ones. Defense counsel argued that the probative value was outweighed by the prejudicial effect. (II 308). There were four photographs depicting her face. The trial court agreed that four photographs were duplicitous and required the prosecutor to pick one or two. (II 308-309). Defense counsel still objected. (II 309). The trial court then required the prosecutor to explain why both photographs were necessary. (II 309). The prosecutor explained that the photograph showed the wounds and the bloodstains and that the other photographs was of the same scene but from a different view. (II 309). The trial court noted that the two excluded photographs were “much more gruesome”, so he admitted the two other photographs which were less gruesome. (II 309). The photographs were marked as exhibits 10-A and 10-B. (II 309). Defense counsel renewed his objection to both photographs arguing that the victim’s injuries could be described by the pathologist. (II 310). During the crime scene investigator’s testimony, the prosecutor introduced maps and a crime scene sketch. (II 315-316). The prosecutor also introduced the murder weapon - an oyster knife. (II 323-324). He also introduced the rape kit. (II 328). The prosecutor then introduced a series of photographs 10-A through I. (II 329). The crime scene investigator explained the photographs were of the victim and the crime scene. (II 330). The trial court allowed the

composite exhibit into evidence. (II 330). Defense counsel renewed his objection. (II 331). The prosecutor showed the photographs to the jury through a viewer. (II 331). The investigator described the victim's wounds with the photographs. (II 333-334). The investigator used the photographs to show the victim's face had been beaten "pretty badly" (II 333-334). The investigator explained that medical examiner photographs that body when it arrives but performs the autopsy after the body is cleaned. (II 334). Exhibit 10-I was a photograph of the victim after the body was cleaned. (II 334).

The chief medical examiner, Dr. McConnell, who was a board certified forensic pathologist, testified. (III 494-495,497). He had taken slides of the victim. (III 498). He testified that the slides would assist him in explaining the cause of death. (III 498). Defense counsel objected to A and B because they appeared to be the same. (III 499). The trial court noted that three of the slides were very similar and asked the prosecutor to choose one. The prosecutor requested that Dr. McConnell be asked why he choose those three. (III 499). Defense counsel stated that there were five and he thought that only one was necessary. The prosecutor showed slides 62-D, 62-B and 62-C to the medical examiner and asked him to explain to the trial court why the three slides were necessary. (III 500). The trial court excused the jury. (III 500). The medical examiner explained

that one showed the wounds on the right neck. (III 501). Another one showed the wounds on the left neck. The third one showed the wounds to the left neck as well as other injuries. Some of the details were visible on one slide but not others. The medical examiner also explained the necessity of other slides. (III 501). Defense counsel objected to the cumulative nature of the three slides. (III 502). The trial court disagreed finding a reasonable explanation was given as the necessity of all the slides. (III 502). The jury returned. (III 502). The medical examiner testified that Slide 62-A showed the victim's face and neck wounds. (III 505). He explained that the damage to the victim's face was from blunt force trauma such as banging the head onto the floor. (III 506). The medical examiner testified as to the internal injuries to the victim's brain. (III 506-507). The medical examiner used one of the challenged slides, 62-B, to demonstrate the facial injuries and on the left neck whereas, the earlier slide showed the right neck. (III 507-508). The medical examiner used another one of the challenged slides, 62-D, to demonstrate the bruises better than on the overexposed version and additionally, the bruising on the nose, right upper lip and right cheek. (III 508). The medical examiner used the third one of the challenged slides, 62-C, which was overexposed, to demonstrate before the body was cleaned up the chest injuries. (III 508-509). The prosecutor

also introduced evidence relating to the ***Williams*** rule victim, Laurie Russillo. (III 522). One of the deputies with the medical examiner's office had performed the autopsy on that case. (III 522). The medical examiner had reviewed the reports. (III 523). The medical examiner also had slides of the ***Williams*** rule victim. (III 524). The prosecutor and defense counsel went over these slides with the judge. (III 524). The victim's head and right arm were in the slides. (III 524). Defense counsel thought it was unnecessary to introduce any slides of the ***Williams*** rule victim. (III 524). He argued that they were gruesome. (III 525). The trial court again excused the jury. The prosecutor explained to the judge that he was attempting to establish the similarities between the injuries to the charged victim and the ***Williams*** rule victim. (III 525). The trial court noted that the charged victim was stabbed as well as beaten; whereas, the ***Williams*** rule victim was strangled as well as beaten. (III 526). The prosecutor responded that blunt force trauma was common to both victims. (III 526). The trial court explained, that while not a ruling, he did not think that there was any need to go into minute detail on the ***Williams*** rule victim. (III 527). The trial court was inclined to agree the slides of the ***Williams*** rule victim were not relevant. (III 527). The prosecutor suggested a middle ground, limiting the slides to

the *Williams* rule victim's raccoon eyes which the charged victim also had. (III 527). The prosecutor thought the two slides that depicted those injuries to the *Williams* rule victim were relevant. (III 528). The trial court agreed. The medical examiner choose three slides that showed the *Williams* rule victim's injuries. (III 528). The prosecutor showed the three slides to the medical examiner and had him explain each one. (III 529). The medical examiner, discussing 64-G, explained that it showed blunt force injury to the left mandible which was fractured. (III 529). The medical examiner, discussing 64-D, explained that it showed hemorrhages to the *Williams* rule victim's eyes as a result of strangulation. (III 529). The medical examiner, discussing 64-B, explained that it also showed the injuries to the *Williams* rule victim's eyes. (III 529). The prosecutor then asked if the two slides would be sufficient because the last two slides showed the same injuries and the medical examiner agreed (III 529-530). The prosecutor then agreed to limit his presentation to the two slides, 64-B and 64-G. (III 530). The trial court permitted those two slides only. (III 530). Defense counsel renewed his objection and the trial court overruled it. (III 530). The jury returned. (III 531). The medical examiner testified that as to the *Williams* rule victim's blunt force injuries. (III 532-533). The medical

examiner used one of the challenged slides, 64-G, to demonstrate the bruising and injuries to the victim's face. (III 534-535). The medical examiner also described the ***Williams*** rule victim's internal injuries. (III 535-536). The medical examiner used the other one of the challenged slides, 64-B, to demonstrate hemorrhages to the ***Williams*** rule victim's eyes. (III 537). Defense counsel objected to prosecutor's use of overhead projections of the "gory" photographs during the guilt phase closing. (T. VII 1407)

The standard of review for the admissibility of photographs is abuse of discretion. ***Douglas v. State***, 2004 WL 1057708, *5 (Fla. May 6, 2004)(stating this court reviews the admission of photographic evidence for an abuse of discretion ***citing Philmore v. State***, 820 So.2d 919, 931 (Fla.), ***cert. denied***, 537 U.S. 895 (2002)). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. ***Ford v. Ford***, 700 So.2d 191, 195 (Fla. 4th DCA 1997). Appellate counsel is not ineffective for recognizing this unfavorable standard of review. ***Armstrong v. State***, 862 So.2d 705, 720 (Fla. 2003)(rejecting an ineffective assistance of appellate counsel claim where appellate counsel would have faced two very high standards of review).

The photographs and slides were admissible. The State is

the one party who has a beyond a reasonable doubt standard of proof. The State needs "evidentiary value and depth" in its case to met this standard of proof. *Brown v. State*, 719 So.2d 882, 887 (Fla. 1998). The slides were necessary to establish the simlarities in the manner of death of the charged victim and the Williams rule victim. While the charged victim was stabbed and the *Williams* rule victim was strangled, both victim were beaten using blunt force. They sustained similar external and internal injuries. The defendant harmed both victim is a similar manner. The State used the slides to establishes these similarities.

In *Douglas v. State*, 29 Fla. L. Weekly S219, 2004 WL 1057708, *5 (Fla. May 6, 2004), this Court explained that crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. *Id. citing Looney v. State*, 803 So.2d 656, 669-70 (Fla. 2001). The *Douglas* Court also explained that autopsy photographs are admissible when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds. The *Douglas* Court explained that even where photographs are relevant, the trial

court must still determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jurors and distract them from a fair and unimpassioned consideration of the evidence. The *Douglas* Court noted that less graphic photos should be used if available. The *Douglas* Court reasoned that the single photograph of Hobgood, as she was found at the crime scene, was relevant to show how Hobgood's body appeared at the time the police and Dr. Areford arrived on the scene. The *Douglas* Court reasoned that in fact, Dr. Areford referred to this photograph when explaining his initial impressions and assessment of the injuries sustained by Hobgood. Because the crime scene photograph accurately depicted how Hobgood was found at the crime scene, the Court found the photograph was admissible. The *Douglas* Court concluded that the trial court did not abuse its discretion in admitting the photographs because they were relevant and not so inflammatory as to create undue prejudice in the minds of the jurors.

Here, as suggested in *Douglas*, the Court mandated the use of the least gruesome photographs. Moreover, the trial court limited to photographs to two of the proposed four photographs. The trial court also limited the slides to two slides. The two slides showed the similarities of the blunt force injuries of the charged victim with the injuries of the *Williams* rule

victim. As in *Douglas*, the crime scene investigator used the photographs to show the victim injuries when he found her at the scene and the medical examiner used the slides to describe the victims' injuries in his testimony. Thus, as in *Douglas*, the trial court did not abused its discretion in admitting the photographs and slides.

The issue was meritless because the photographs and sllides were admissible. Appellate counsel was not ineffective for failing to raise a meritless issue. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.). Nor is appellate counsel ineffective for recognizing that gruesome photographs issues rarely succeed. Gruesome photographs issues are not "dead bang" winners and appellate counsel is not ineffective for knowing the caselaw in this area was not favorable. *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang winner").

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR INADEQUATELY PRESENTING THE ISSUE OF THE ADMISSIBILITY OF THE *WILLIAMS* RULE EVIDENCE?

Zack argues that appellate counsel was ineffective for

inadequately presenting the issue of the admissibility of the *Williams* Rule evidence. Zack argues that although appellate counsel raised the issue, appellate counsel did not do it "adequately". If appellate counsel raises an issue, failing to convince this Court to rule in his favor is not ineffective assistance of counsel.[3] A contention that the issue was inadequately argued merely expresses dissatisfaction with the outcome of the appeal. *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla. 1987)(observing petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner" quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla. 1985)). Such a claim is also barred by the law of the case doctrine as well. *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002)(holding a claim that has been resolved in a previous review of the case is barred as "the law of the case" citing *Mills v. State*, 603 So. 2d 482, 486

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[3] *Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal and concluding that if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance).

(Fla. 1992)). Collateral counsel is relitigating the same issue raised and ruled on in the direct appeal. This Court held that this testimony was properly admitted in the direct appeal. It is improper to argue in a habeas petition a variant of a claim previously decided. *Porter v. Crosby*, 840 So.2d 981, 984 (Fla. 2003)(citing *Jones v. Moore*, 794 So.2d 579, 586 (Fla. 2001)).

In the direct appeal, this Court found:

> The first issue involves the propriety of admitting evidence of the other crimes Zack committed during the two-week period prior to this murder. Zack argues the trial court erred in admitting evidence of the theft of guns and money from Chandler and evidence of the murder and sexual assault of Rosillo because these crimes were not sufficiently similar to the crimes charged, did not prove intent or disprove voluntary intoxication, were not inextricably intertwined, and became a feature of the trial. We disagree. The trial court did not err in admitting this evidence because it was relevant as part of a prolonged criminal episode demonstrating Zack's motive, intent, modus operandi and the entire context from which this murder arose. See Heiney v. State, 447 So.2d 210 (Fla.1984).
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> In *Williams v. State*, 110 So.2d 654 (Fla.1959), this Court reiterated the standard rule for admission of evidence; that is, that any evidence relevant to prove a material fact at issue is admissible unless precluded by a specific rule of exclusion. See § 90.402, Fla. Stat. (1995). The Court also said relevant evidence will not be excluded merely because it relates to facts that point to the commission of a separate crime, but added the caveat that "the question of the relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible." 110 So.2d at 662. This rule concerning the admissibility of similar fact evidence has been codified by the Legislature as section 90.404(2), Florida Statutes (1995).

Later, in *Bryan v. State*, 533 So.2d 744 (Fla.1988), we made it clear that the admissibility of other crimes evidence is not limited to crimes with similar facts. We stated that similar fact evidence may be admissible pursuant to section 90.404, and other crimes or bad acts that are not similar may be admissible under section 90.402. We reiterated the distinction between "similar fact" evidence and "dissimilar fact" evidence in *Sexton v. State*, 697 So.2d 833, 837 (Fla.1997). Thus, section 90.404 is a special limitation governing the admissibility of similar fact evidence. But if evidence of a defendant's collateral bad acts bears no logical resemblance to the crime for which the defendant is being tried, then section 90.404(2)(a) does not apply and the general rule in section 90.402 controls. A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion. *Heath v. State*, 648 So.2d 660, 664 (Fla.1994). Thus, whether the evidence of other bad acts complained of by Zack is termed "similar fact" evidence or "dissimilar fact" evidence, its admissibility is determined by its relevancy. The trial court must utilize a balancing test to determine if the probative value of this relevant evidence is outweighed by its prejudicial effect. See § 90.403, Fla. Stat. (1995); *Gore v. State*, 719 So.2d 1197 (Fla.1998).

The facts and circumstances of this case clearly show that the trial court correctly struck that balance in favor of admissibility because the evidence of the crimes against Chandler and Rosillo demonstrated Zack's common scheme and method of operation; this evidence helped to put the present case in perspective. The evidence of the Rosillo murder also casts light on Zack's motive, intent and the timing of the Smith assault. The evidence surrounding the other bad acts Zack committed, beginning with Pope theft and culminating with the Smith murder, clearly demonstrates that he found his victims at bars, befriended them, gained their trust or sympathy, and thereafter committed some criminal act on or against them. Thus, the circumstances of the charged offenses were not happenstance but a series of calculated actions on the part of the defendant. Although this

evidence is undeniably prejudicial to the defendant, its probative value outweighs the prejudicial effect. This case is similar to the situation addressed by this Court in *Wuornos v. State*, 644 So.2d 1000 (Fla.1994). Wuornos was charged with the first-degree murder of a man who picked her up while she was hitchhiking. At trial she attempted to portray herself as the victim. She said the decedent viciously abused her both vaginally and anally and engaged in conduct indicative of an intent to kill her. Thus, she claimed to have acted in either self-defense or without an intent to kill. The State was allowed to introduce evidence of other crimes to rebut Wuornos' claim of lack of intent or self-defense. We held, "[T]his was a proper purpose under the Williams rule." Id. at 1007. Similarly, in the instant case, Zack argues he did not attack Smith upon entry into the house, and that he only retrieved the knife from the kitchen to protect himself. The State's use of the Williams rule evidence to rebut these assertions was valid and demonstrates the evidence was not introduced solely to show propensity.

Further, we do not agree that the *Williams* rule evidence became a feature of the trial or that the evidence was not relevant to the issue of intoxication. Two of the defenses offered by Zack were voluntary intoxication and fetal alcohol syndrome. Zack maintained that he could not form the requisite intent to commit either first-degree murder or robbery. Zack's minimal ingestion of alcohol during these other criminal episodes was relevant to these claimed defenses. Unlike the case of *Steverson v. State*, 695 So.2d 687 (Fla.1997), where this Court reversed a conviction based on the admission of extensive details of a collateral crime which focused on the injuries and recovery of a police officer, the evidence presented in this case was necessary to rebut the defenses offered and to piece together the sequence of events leading up to this murder. Although several witnesses testified to facts surrounding the Chandler and Rosillo incidents, each piece of evidence helped to paint a clear picture of the defendant in these bar settings, pieces of evidence that led to the conclusion that Zack did not drink excessively. The *Williams* rule evidence was relevant and was not

excessive under the circumstances of this case.

Zack, 753 So.2d at 16-17. This Court's prior holding regarding the admissibility of the ***Williams*** rule evidence should not be revisited.

ISSUE VI

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE ADMISSIBILITY OF THE BASEBALL CAP?

Zack asserts that his appellate counsel was ineffective for failing to raise the issue of the admissibility of the baseball cap. Appellate counsel was not ineffective. First, the issue was not properly preserved. Moreover, the standard of review for the admissibility of evidence is abuse of discretion which is not a favorable standard. Furthermore, the cap was admissible. The state needs "evidentiary value and depth" in its case to met its beyond a reasonable doubt standard of proof. Moreover, the admission of the cap, if error, was harmless. Thus, appellate counsel was not ineffective for failing to raise the issue.

At trial, Danny Schaffer, the boyfriend of the victim, was called by the State. (T. II 268). The prosecutor was going to have him testify that the cap, which was found in the front seat of the victim's black Conquest, was not his and he did not recognize it. (T. II 282). Defense counsel objected because the

cap had Confederate bars on it and there were African-American jurors. (T. II 281-282). Defense counsel argued that the cap had “no evidentiary value” because there were other articles of clothing of the defendant’s recovered from the car and the cap was prejudicial. (T. II 283). The trial court noted that the time between the defendant leaving the car and the car being impounded was brief. (T. II 283). The trial court overruled the objection. Defense counsel then moved for a mistrial which was denied. (T. II 283).

The State called the owner of the pawn shop. (T. IV 628). Zack had attempted to pawn the victim’s TV and VCR while wearing the cap on June 14, 1996. (T. IV 628,631,638). The pawn shop had a security system that recorded the transaction. The prosecutor asked the pawn shop owner if he recognized that cap as the cap Zack was wearing that day. (T. IV 638). Defense counsel again objected (T. IV 638). The trial court explained that this is the cap that the person was wearing in the video and the jury should be shown the cap to help identify the defendant. (T. IV 639). While the pawn shop owner could not identify the cap as the exact same one wore by Zack, it was similar to the cap in the video. (T. IV 639-640). The prosecutor replayed the part of the video that showed the defendant wearing the cap. (T. IV 640). Defense counsel then offered to stipulate. Defense counsel also objected to the

prosecutor's use of the cap during closing of guilt phase. (T. VII 1407).

The standard of review for the admissibility of evidence is abuse of discretion.[4] The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. *Ford v. Ford*, 700 So.2d 191, 195 (Fla. 4th DCA 1997). Appellate counsel is not ineffective for recognizing this unfavorable standard of review. *Armstrong v. State*, 862 So.2d 705, 720 (Fla. 2003)(rejecting an ineffective assistance of appellate counsel claim where appellate counsel would have faced two very high standards of review).

This issue was not correctly preserved. While defense counsel objected to the cap, his remedy of excluded the entire cap was incorrect. The prejudice was not from the cap itself but from the insignia on the cap. Defense counsel should have requested that the bars be removed or covered, not that the entire cap be excluded. It was only after the video was played that counsel offered to stipulate that he pawned the items. (T. VII 640). As this Court has repeatedly held, appellate counsel

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[4] *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997)(stating that all evidentiary rulings are reviewed for "abuse of discretion").

is not ineffective for failing to raise unpreserved errors. *Power v. State*, 2004 WL 1057688, *9 (Fla. 2004)(noting that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.); *Hamilton v. State*, 2004 WL 1207574, n.5 (Fla. 2004)(noting that in the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim); *Downs v. Moore*, 801 So.2d 906, 916 (Fla. 2001); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000); *Johnson v. Singletary*, 695 So.2d 263, 266 (Fla. 1997)(stating: "[w]e have consistently held that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.").

Furthermore, the cap was admissible. The State is the one party who has a beyond a reasonable doubt standard of proof. The State needs "evidentiary value and depth" in its case to met this standard of proof. *Brown v. State*, 719 So.2d 882, 887 (Fla. 1998). The cap was found in the front seat of the victim's car within two hours of the defendant being seen in it. The cap was not her boyfriend's who was the actual owner of the black Conquest. The cap tied the defendant to the pawning of the victim's TV and VCR. Zack was wearing this cap when he pawned the victim's color TV and VCR which was captured on videotape.

Moreover, the admission of the cap, if error, was harmless. The purpose of the cap was to prove identity. This was an DNA case. The identity of the perpetrator was established by highly reliable science. Thus, the error was harmless. Appellate counsel was not ineffective for failing to raise an issue that may not have been preserved, with a difficult standard of review, which is meritless and harmless.

Nor was appellate counsel ineffective for failing to raise the admissibility of Zack's statement. In his taped confession, Zack stated: "I been arrested a million time before". (T. 854). Defense counsel did not object. As this Court has repeatedly held, appellate counsel is not ineffective for failing to raise unpreserved errors. ***Power v. State***, 2004 WL 1057688, *9 (Fla. 2004)(noting that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.); ***Hamilton v. State***, 2004 WL 1207574, n.5 (Fla. 2004)(noting that in the absence of fundamental error, appellate counsel cannot be deemed ineffective for failing to raise an unpreserved claim); ***Downs v. Moore***, 801 So.2d 906, 916 (Fla. 2001); ***Rutherford v. Moore***, 774 So.2d 637, 643 (Fla. 2000); ***Johnson v. Singletary***, 695 So.2d 263, 266 (Fla. 1997)(stating: "[w]e have consistently held that appellate counsel cannot be ineffective for failing to raise

claims which were not preserved due to trial counsel's failure to object.”). Nor was there any prejudice. Zack testified in the guilt phase and admitted he had five prior convictions. The jury would have known that he had been arrested at least six before - the five prior convictions and the instant murder. Thus, appellate counsel was not ineffective.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Linda McDermott Esq., 141 N.E. 30th Street Wilton Manors, FL 32399-1050 this 16th day of June, 2004.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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