IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-161

LOWER TRIBUNAL NO. 96-5639

STEVEN EVANS,
Petitioner,
v.
JAMES V. CROSBY,
Secretary,
Florida Department of Corrections,
Respondent,
and
CHARLIE CRIST,
Attorney General,
Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: The writ of habeas corpus shall be grantable of right, freely and without costs.@ This petition for habeas corpus is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Unites States Constitution and the corresponding provisions of the Florida Constitution. This petition will show that Mr. Evans was denied a fair and reliable trial, sentencing hearing and effective appeal of the errors that occurred during trial and sentencing.

References made to the record prepared in the direct appeal of Mr. Evans= conviction and sentence and are of the form, e.g., (Dir. Vol. I, pg. 123). References to the trial transcript are in the form, e.g. (TT Vol. I, pg. 123). References to the record of the most recent postconviction record on appeal are in the form, e.g. (ROA Vol. 1, pg. 123).

REQUEST FOR ORAL ARGUMENT

Mr. Evans has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Evans.

Table of Contents

PAGE

Table of Authorities

Page

Other Authorities Cited

INTRODUCTION

On Mr. Evans' direct appeal from the adjudication of guilt and the imposition of the death sentence, appellate counsel failed to raise and argue significant errors. Moreover, some of the issues raised on the direct appeal were ineffectively presented to this Court for appellate review.

Appellate counsel's failure to raise and argue certain issues and failure to present effectively other issues, was clearly deficient and actually prejudiced Mr. Evans to the extent that the fairness and the correctness of the outcome were undermined.

This Petition also presents questions that were raised on direct appeal, but should be reheard under subsequent case law or legal argument to correct errors in the appellate process that denied Mr. Evans fundamental constitutional rights. This petition will demonstrate that Mr. Evans is entitled to habeas relief.

PROCEDURAL HISTORY

In 1996 Mr. Evans was arrested and charged by indictment with first degree murder. On April 9,1998, and October 14, 1998, the circuit court found Mr. Evans incompetent. The court committed Mr. Evans to the custody of the Department of Children and Families. Mr. Evans spent brief periods of time in Florida State Hospital in Chatahoochee and the North Florida Treatment Center in Gainesville, purportedly for competency training and restoration. Mr. Evans continues to dispute whether he was

ever competent to stand trial, and, in this Petition, whether he is competent to be executed.

Mr. Evans was tried, convicted and sentenced to death in 1999. The circuit court found five aggravating factors in support of the death penalty. The trial court gave substantial weight to one statutory mitigating factor: the capital felony was committed while Evans was under the influence of extreme mental or emotional disturbance. The trial court gave some weight to the statutory mitigating factor that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Evans v. State, 866 So. 2d 182, 192, fn. 4 (Fla. 2001). The trial court found that the evidence did establish that Evans suffers from some sort of mental or emotional disorder, but it did not establish that Mr. Evans was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Id. Mr. Evans also offered 42 non-statutory mitigating factors. Id.

Mr. Evans filed a motion for postconviction relief. The motion was subsequently amended and an evidentiary hearing was held on August 30 through September 1, 2004. The court denied all relief by written order dated November 8, 2004. Mr. Evans appealed and has concurrently filed an Initial Brief with this Petition.

GROUNDS FOR HABEAS CORPUS

This is Mr. Evans's first petition for habeas corpus in this Court. Mr. Evans asserts in this petition for writ of habeas corpus that his capital conviction and death sentence

were obtained in the trial court and then affirmed by this Court in violation of Mr. Evans's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

JURISDICTION FOR PETITION AND HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See. Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030 (a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. This Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Evans's death sentence.

Jurisdiction for this petition lies with this Court because the fundamental constitutional errors raised occurred in a capital case in which this Court heard and denied Mr. Evans's direct appeal. *see, e.g.,* Smith v. State, 400 So.2d 956, 960 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Evans to raise the claims presented herein. *See, e.g.,* Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987).

This Court has the inherent power to do justice. Justice requires this Court to grant the relief sought in this petition, as this Court has done in the past. This petition pleads claims involving fundamental constitutional error. *See* Dallas v. Wainright, 175 So. 2d 785 (Fla. 1984). This Court's exercise of its habeas corpus relief jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this

action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Evans= claims.

GROUND I

EXECUTION OF PHYSICALLY HANDICAPPED/MENTALLY ILL INDIVIDUALS SUCH AS MR. EVANS VIOLATES THE 8TH AND 14TH AMENDMENTS PROHIBITING CRUEL AND UNUSUAL PUNISHMENT. MR. EVANS= CURRENT DEATH SENTENCE, IMPOSED UPON A PARANOID SCHIZOPHRENIC, BLIND, TERMINALLY PHYSICALLY ILL, INCOMPETENT INDIVIDUAL CONSTITUTES ARBITRARY, CAPRICIOUS, CRUEL, AND UNUSUAL PUNISHMENT UNDER THE 8TH AND 14TH AMENDMENTS. THE LOWER COURT ERRED IN FAILING TO CONVERT MR. EVANS= DEATH SENTENCE TO A LIFE SENTENCE, OR GRANT HIM A NEW PENALTY PHASE SUCH THAT A JURY COULD HEAR OF HIS CHANGE IN PHYSICAL CONDITION SINCE THE ORIGINAL TRIAL

The United States Supreme Court in the new millennium has banned the execution of the mentally retarded and the execution of juveniles in the cases of Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 125 S. Ct. 1183 (2005). Both cases cited to Aevolving standards of decency@ in today=s society as the main factors justifying vacation of those death sentences. This Court reversed the death sentence of one individual who exhibited characteristics quite similar to Mr. Evans:

> The record on resentencing is replete with evidence of Fitzpatrick's substantially impaired capacity, his extreme emotional disturbance, and low emotional age. Those present at the scene of the shooting testified that Fitzpatrick appeared "psychotic," "high," "spacey," "panicky" and "wild." Fitzpatrick's family members and those who had known him for throughout most of his life testified that he frequently talked to himself as if he were hearing voices and that during conversations he would "phase out" or "just go off in left field." His landlord referred to him as "goofy."

[Fitzpatrick v. State, 527 So. 2d 809, 810 (Fla. 1998)]

People stated the following about Mr. Evans: Asomething is wrong with him,@ and on the night of the offense, he was described as Acoked up,@ Ahuffing and puffing,@ Anot saying anything,@ Af'd up,@ Asitting there all spaced out,@ looking like the AJoker in Batman.@ In 1986 in the case of Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court barred the execution of the insane.

In Ford the Court stated the following:

> We begin, then, with the common law. The bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded "savage and inhuman." 4 W. Blackstone, Commentaries * 24-* 25 (hereinafter Blackstone). Blackstone explained:
>
> > "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it: because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Ibid.* (footnotes omitted).
>
> Sir Edward Coke had earlier expressed the same view of the common law of England: "[B]y intendment of Law the execution of the offender is for example, ... but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others." 3 E. Coke, Institutes 6 (6th ed. 1680) (hereinafter Coke). Other recorders of the common law concurred. See 1 M. Hale, Pleas of the Crown 35 (1736) (hereinafter Hale); 1 W. Hawkins, Pleas of the Crown 2 (7th ed. 1795) (hereinafter Hawkins); Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How.St.Tr. 474, 477 (1685) (hereinafter Hawles).

> As is often true of common-law principles, see O. Holmes, The Common Law 5 (1881), the reasons for the rule are less sure and less uniform than the rule itself. One explanation is that the execution of an insane person simply offends humanity, Coke 6; another, that it provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment. *Ibid.* Other commentators postulate religious underpinnings: that it is uncharitable to dispatch an offender "into another world, when he is not of a capacity to fit himself for it," Hawles 477. It is also said that execution serves no purpose in these cases because madness is its own punishment: *furiosus solo furore punitur*. Blackstone. More recent commentators opine that the community's quest for "retribution"--the need to offset a criminal act by a punishment of equivalent "moral quality"--is not served by execution of an insane person, which has a "lesser value" than that of the crime for which he is to be punished. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L.Rev. 381, 387 (1962). Unanimity of rationale, therefore, we do not find. "But whatever the reason of the law is, it is plain the law is so." Hawles 477. We know of virtually no authority condoning the execution of the insane at English common law.

[Ford at 406-408.]

Evidence in the record suggests that Steven Evans is profoundly mentally ill and remains incompetent to this day (*See Motion to Determine Competency* at ROA Vol. 6, pp. 1078-1085). The defendant was twice found incompetent to stand trial based on his mental illness. Jeffrey Danzinger, M.D. was one of the doctors appointed to analyze the defendant for competency recently in postconviction, yet he was unable to initially reach an opinion due to the defendant=s refusal to cooperate with the examination. (*See Dr. Danzinger=s April 15, 2003 competency report* at ROA Vol. 8, pp. 1370-1383). The defendant was then placed in the transitional care unit of the prison to assist Drs. Mings and Dee in evaluating the defendant for competency in this latest round of postconviction (*See Order for Transfer of Defendant to the Transitional Care Unit or Other Like*

Facility for Observation Regarding Mental Status at ROA Vol. 8, pp. 1384-1386), yet only Dr. Mings was able to evaluate the defendant because the defendant refused to see Dr. Dee. Dr. Mings opined that the defendant was competent to proceed. The lower court submitted orders finding the defendant competent on October 20, 2003 (*see* ROA Vol. 8, pp. 1397-1403), yet pursuant to subsequent defense motion the court entered another order directing Drs. Dee and Danzinger to attempt a re-evaluation of the defendant (*see* ROA Vol. 10, pp. 1898-1902). A re-evaluation was attempted by Dr. Danzinger, and the defendant refused again to be evaluated. Dr. Danzinger said his opinion was difficult to reach but ultimately opined that the defendant was competent to proceed. (*See Dr. Danzinger=s written report dated July 27, 2004* at ROA Vol. 11, pp. 1921-1928). Similar to what transpired pre-trial, Dr. Danzinger was able to make a finding of marginal competency prior to the evidentiary hearing, but his final opinions were loosely based on a few minutes spent with a subject who refused to be subjected to a mental health examination. Although there may be evidence in the record to support a finding that Mr. Evans is currently competent, the recent finding of competency is accompanied by only one full examination performed by Dr. Mings.

The defendant has been housed on Florida=s death row for six years now. His mental illness coupled with his sarcoidosis and complete and total blindness should prohibit him from being executed under the 8th and 14th Amendments. Some legal philosophers and analysts might opine that execution serves no purpose in this particular case because the defendant=s grave physical and mental illnesses are their own

punishment: *furiosus solo furore punitur*. Mr. Evans currently sits on death row severely physically and mentally handicapped. To execute him would constitute extreme inhumanity contrary to our society=s evolving standards of decency.

At the evidentiary hearing the defendant presented considerable testimony concerning the defendant=s current state of physical and mental health. The lower court failed to address any of the issues raised by physician Dr. Vivian Allen, the defendant=s first witness. Although this Court has upheld the constitutionality of Florida=s death penalty on its face, the defendant notes that the lower court failed to address the issue of whether the death penalty in this particular case is constitutional as applied. This is not the most unmitigated or atrocious of crimes. This case involves the single murder of a fellow Agang member@ nicknamed ACapone@ who was shot in the head with a .22 caliber pistol. The defendant is severely mentally ill, he was so at the time of the crime, and he is now completely blind. As applied, the imposition of the death penalty in the instant case is arbitrary and capricious. This claim could not have been fully raised or addressed on direct appeal because the defendant was not blind and the diagnosis of sarcoidosis had not been made prior to his direct appeal. This claim has become fully ripe only now. It was unknown at the time of the direct appeal that sarcoidosis had invaded the defendant=s pulmonary system, eyes, stomach and pancreas, and he is dying. At the time of the filing of the defendant=s Amended Motion, the extent of the defendant=s illness was not known, but it was thoroughly discussed at the evidentiary hearing by medical Drs. Vivian Allen and Michael Gutman. Claim X of the defendant=s amended motion cited that Florida=s

death penalty scheme was unconstitutional on its face *and as applied*. The lower court failed to address whether the death penalty was unconstitutional in the instant case *as applied*. As such, the defendant asks this Court to rule that the death penalty in the instant case is unconstitutional *as applied,* or remand this case back to the trial court for the proper analysis. The defendant urges that the death penalty in the instant case is unconstitutional as applied as evidenced by the record and testimony from the evidentiary hearing.

Dr. Vivian Allen testified at the evidentiary hearing on August 31, 2004. She testified that she first met Steven Evans on September 17, 2002. She was working at Memorial Hospital in Jacksonville, Florida as an opthamologist. (ROA Vol. 1, pg. 27). At the time, the hospital was contracted by the Department of Corrections to treat DOC inmates. (ROA Vol. 1, pg. 28). Dr. Allen testified as follows at the evidentiary hearing regarding her September 17, 2002 examination of Steven Evans:

> He was noted to have some mild mucous drainage on the right -- the right eye was very red. The cornea was cloudy. He was noted to have what is called a hypopyon in the inner chamber, which is basically a significant collection of white blood cells in the eye. And it did look, what we call granulomatous, which is a type of clumping. It was my impression that at the time that he had acute blindness, and an acute granular clump in the tissue. Differential diagnosis, at the time I was highly suspicious for sarcoidosis. I also listed herpes zoster was a possibility, as well as tuberculosis and syphilis since he denied a trauma. I did state there was a very unlikely possibility it would be a bacterial endomitis (sic) but I did not feel that was likely.
> Q: Okay. You used some terms there which Bmedical terms, and I guess if we could start with sarcoid, or sarcoidosis?
> A: Sarcoid is a condition that's very hard to describe. It is an autoimmune disease that no one really knows what causes it but it forms

nodules throughout the body. It has a high propensity to affect the eye. Also can affect other organs, especially the lungs. It forms nodular collection of the abnormal white blood cells. It's a very unusual disease. It's not the most common thing in the world. Like I said, nobody really knows what causes it but it does tend to respond to prednisone.
Q: Okay. What is prednisone?
A: Prednisone is a steroid, anti-inflammatory medication.
Q: Okay. Have you -- you said your suspicion was that this was sarcoidosis. Has that been confirmed or since --
A: At that time, yes.
Q: -- Confirmed that he has sarcoidosis? If you can tell us how severe, in your medical opinion, is this case of sarcoidosis?
A: Well, as it goes on in the record, it was found that he has significant lymphadenopathy. I'll get to that in my record.
Q: That word lympho, could you spell that?
A: Basically means there was a lot of lymph, swollen lymph nodes. Lymphadenopathy. L-y-m-p-h-a-d-e-n-o-p-a-t-h-y.
Q: Was that found in his lungs?
A: It was in his lungs. There is also a report that I'm looking for right now that shows he has it in other organs as well. If you wait just a minute.
Q: Okay.
A: Okay. I have a report from Memorial Hospital dated September 19, 2002 that was a CT scan. It shows that he had hilaradenopathy in the chest. The hilar is basically right around the trachea in the chest. That is very classic for sarcoidosis. He was also noted to have swollen lymph nodes under the arms as to axillary area. He was also -- the CT scan of the abdomen showed that he had what was called retro peritoneum lymphadenopathy, which basically means in the back of the abdomen. And there was also noted some swelling of the ducts around the liver that was thought to be related to all of this. So he had lymph nodes throughout his body. At that time, prior to surgery really being confirmed, there was also a suspicion that he could have lymphoma.
Q: What is lymphoma?
A: That's a type of cancer of the lymph nodes.
Q: Okay. Would it be important for that to --for other physicians to examine him, follow up on what exactly is going on with his body?
A: Correct.
Q: Okay. And I asked you how severe of a case of this sarcoidosis, in your opinion, how severe is this. Well, let me just ask you that question there.

A: Well, obviously, with the fact that he has gone blind in both eyes, I have to say it's a very severe case of the eyes. I did not have follow-up knowledge as to what's been going on with his body, but based on what I have from this point in time it's rather extensive throughout his body.
Q: Okay. We took your deposition. I think the words that you used is this is the worst case that you have ever seen, is that right?
A: That's correct.
Q: Okay. You talked about he is completely blind in both eyes. On September 17 you were talking about just one eye, is that correct?
A: At that time he could still see in his left eye.
Q: Okay. And when was it that you remember, from your review of the records, was it that he became blind in his left eye?
A: I examined him on October 31, 2003. He had lost the vision in his left eye.
Q: Okay. This sarcoidosis, do we know why, what is happening with his body? Is it a situation where his body thinks that his eyes are a foreign object to be attacked, is that what's going on?
A: Correct. That's exactly right. That's what an autoimmune disease is.
Q: Okay. It's completely destroyed his eyes, both eyes?
A: Yes.
Q: Okay. And it's in his lungs right now?
A: As far as I know.
Q: Okay. What other organs did you mention?
A: Also mentioned that he had swollen lymph nodes in the abdomen. There was also noted to be dilation of the ducts in the liver, which means there is a liver involvement as well.
Q: Any other organs of the body?
A: Just a second, sir. Not that I remember off the top of my head. The pancreas, but I don't see here -- do you have that from my deposition? Do you remember?
Q: Well, what is the chance -- is this disease curable?
A: No. There is no cure for this disease.

[ROA Vol. 1, pp. 30-34]

Dr. Allen testified that the disease would ultimately lead to lung failure and death, and that his prognosis is poor. (ROA Vol. 1, pg. 36). In her 20 years of practice, the doctor has only seen about 20 cases of sarcoidosis, and this is the worst case she has ever

seen. (ROA Vol. 1, pg. 39). Introduced as defense exhibit 2 at the evidentiary hearing were DOC records documenting the defendant=s medical condition and his refusals to accept medical treatment.

Read into evidence were two letters from Steven Evans to Dr. Allen written in late 2002 and early 2003 that illustrate the strange way in which Steven Evans communicates, and illustrate his irrational thought patterns. (ROA Vol. 1, pp. 45-52). The lower court in postconviction ultimately ruled that the defendant was presently competent to assist counsel in postconviction, but the undersigned notes the difficulties he had in communicating with Mr. Evans, and respectfully disagrees with the ruling.

Dr. Michael Gutman testified through video deposition at Mr. Evans= penalty phase and testified live at the evidentiary hearing. Dr. Gutman is a medical doctor and a psychiatrist. He has been practicing medicine for 40 years and is double-boarded certified in forensic psychiatry. He testified as follows at the evidentiary hearing:

> Q: Okay. So have you diagnosed [Mr. Evans] at this point as a paranoid schizophrenic?
> A: I have.
> Q: Okay. And is this mental -- is this a major mental illness?
> A: It is.

[ROA Vol. 2, 278-279]

The main thrust of this claim is that the defendant is profoundly mentally ill, severely physically handicapped, borderline competent at best, and is not a proper candidate for execution. His sentence of death violates the 8th and 14th Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious

imposition of the ultimate penalty as applied. This Court should conduct a new proportionality analysis, convert Mr. Evans=s death sentence to a life sentence in light of the 8th Amendment, or in the alternative, grant a new penalty phase to allow Mr. Evans to present evidence of his current physical and mental health.

Mr. Evans asks this Court to perform a new proportionality analysis taking into account his current medical condition and psychiatric history, and asks that this Court vacate his death sentence.

GROUND II

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Under Apprendi v. New Jersey, 120 S.Ct 2348, 2355 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), Mr. Evans= death sentence was unconstitutional because the aggravators were not submitted to the jury to decide whether they had been proven beyond a reasonable doubt, and the jury=s recommendation was not unanimous. In Apprendi the Court held that Aany fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt@ Id. Ring extended Apprendi, thus, because the aggravators in Mr.Evans= case were not each individually submitted to the jury for an individual verdict of whether the State had proved each one beyond a reasonable doubt, Mr. Evans= death

sentence was unconstitutional. In Ring, the Court held that Acapital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.@ Ring at 587. The jury instructions in Mr. Evans= case, in light of Ring also violated the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985), in that they diminished the juror=s true role in Mr.Evans= death sentence.

While this Court may have held otherwise in Bottoson v. Moore, 833 So. 2d 693 (2002), Mr. Evans claims that appellate counsel was ineffective for not raising this issue and that this issue was fundamental error to preserve this issue for federal review.

GROUND III

MR. EVANS= SENTENCE IS UNCONSTITUTIONAL UNDER RING BECAUSE THE TRIAL COURT FOUND AN AGGRAVATOR, SPECIFICALLY, THAT MR. EVANS WAS UNDER A SENTENCE OF IMPRISONMENT AT THE TIME OF THE OFFENSE, AND UTILIZED SUCH AN AGGRAVATOR TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY. AS SUCH, MR. EVANS= SENTENCE OF DEATH IS UNCONSTITUTIONAL AS IT WAS IMPOSED BY A JUDGE NOT A JURY, AND BASED UPON AN UNAUTHORIZED AGGRAVATOR NOT SUBMITTED TO THE JURY, THUS VIOLATING HIS 5TH, 6TH, 8TH AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

During the Spencer hearing, the state announced that they wanted the lower court to consider the additional aggravating circumstance that the defendant was an escaped prisoner at the time of the crime (under a sentence of imprisonment at the time of the murder). (ROA Vol. X, pg. 13). The defense objected stating that the state did not submit this aggravator to the jury, therefore the state was precluded from arguing it to the Court at a Spencer hearing. The state responded that since the defense was providing additional information to the Court, the state wanted to present additional information as well. The lower court wrestled with the issue, but ultimately ruled that it could consider this additional aggravating factor. The Court stated the following in its sentencing Order, A[T]he structure of Florida=s sentencing scheme makes it appropriate for the judge, who is ultimately responsible for imposition of sentence, to independently consider any and all aggravating circumstances establishedBeven those not considered by the jury.@ (ROA

Vol. XX, pg. 2309). The Court cited to the Davis and Engle cases to support this notion (Davis v. State, 703 So. 2d 1055 (Fla. 1997), Engle v. State, 438 So. 2d 803 (Fla. 1983)). That notion and the above cases above fly in the face of Ring and Apprendi. Evidence and argument supporting the death penalty not submitted to the jury was presented and argued to the trial court, and Mr. Evans was unconstitutionally sentenced to death because of this.

GROUND IV

MR. EVANS= EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE MR. EVANS WILL BE INCOMPETENT AT THE TIME OF EXECUTION, THUS VIOLATING HIS 5TH, 6TH, 8TH AND 14TH AMENDMENTS UNDER THE UNITED STATES CONSTITUTION

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if Athe person lacks the mental capacity to understand the fact of the impending death and the reason for it.@ This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399 (1986).

Mr. Evans acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Evans acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant.

Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin=s counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in Section 922.07, Florida Statutes (1985)).

This claim is necessary at this stage because federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Accordingly, Mr.Evans raises this claim now.

GROUND V

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT=S RULING CONCERNING THE MEDICAL EXAMINER=S OPINION OF WHETHER BLOOD AND BRAINS COULD BLOW BACK ON THE SHOOTER AFTER THE SHOOTING OF KENNETH LEWIS

Perhaps the most damaging testimony in this case came from the state=s first witness, Shana Wright. Shana Wright was allegedly Mr. Evans= girlfriend at the time of the murder. Although law enforcement was unable to obtain any admissions from Mr. Evans after his apprehension and arrest on the escape charge with Mark Quinn, the state presented very damaging admissions through witness Shana Wright. After some prodding from the state, Ms. Wright testified that she saw the Defendant in downtown Orlando the day after the murder, and he informed her that he shot the victim himself because he was the AOG.@ (TT Vol. 4, pg. 754). He said that others in the group wanted to shoot the

victim but it was his job to do. He allegedly informed that the victim=s brains splattered on his suit after the shooting, and he consequently had to travel downtown to purchase a new suit. (TT Vol. 4, pg. 754).

This alleged admission was extremely damaging to the defense. The state later bootstrapped this alleged admission with the testimony from medical examiner Dr. Broussard. The state inquired from Dr. Broussard on redirect examination, ASir, would it be possible for someone if they were standing next to the victim firing the shots into the brain to get blood and brain matter on their pants?@ (TT Vol. 5, pg. 882). The defense objected and asked to approach. The objection was ultimately overruled. The witness answered Ayes@ to this question. This issue was not raised on direct appeal. As such, appellate counsel was ineffective in failing to raise a crucial and vital issue. As raised in his initial brief in Claim IV, trial counsel was ineffective for failing to investigate and challenge the alleged admissions. Had a crime scene reconstruction expert been consulted, doubt would have been cast on the alleged admissions. Defense expert Kenneth Zercie testified at the evidentiary hearing that he would not expect that blood and brains would blow back on the shooter in this case. [ROA Vol. 1, pg. 15]. This is contrary to the testimony provided by the medical examiner Dr. Broussard at trial. Dr. Broussard is a medical examiner, not a crime scene reconstruction or ballistics expert. Dr. Broussard is not qualified to provide an opinion regarding blood spatter, and should not have been allowed to bolster the testimony of Shana Wright concerning blow back spatter

at trial. Trial counsel was correct to object to the question posed to the medical examiner, but appellate counsel was ineffective in failing to raise the issue on direct appeal.

Mr. Evans was prejudiced as a result of the ineffective assistance of appellate counsel. Had this crucial issue been presented on direct appeal, this Court would have reversed the judgment, conviction and sentence of death. Medical examiner Dr. Broussard was not qualified to answer a question involving ballistics and blood spatter, the lower court erred in failing to sustain the defense objection, and this issue should have been raised on appeal. As a result, Mr. Evans was prejudiced as his direct appeal was denied.

CONCLUSION

This Court should grant all relief requested in this petition for the reasons stated above. Moreover, this Court should grant any other relief that allows this Court to do justice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States mail to all counsel of record on this 25th day of August 2005**.**

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS of the Appellant was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210.

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