IN THE SUPREME COURT OF FLORIDA

**STEVEN MAURICE EVANS**

**Petitioner,**

**CASE NO. SC05-1526**

**v.**

**JAMES V. CROSBY, JR., ETC, ET AL.**

**Respondent.**

**_________________________________/**

## RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW the Respondents, and respond as follows to Evans' petition for habeas corpus relief, which was filed on or about August 25, 2005. For the reasons set out below, the petition should be denied in all respects.

RESPONSE TO INTRODUCTION

The "Introduction" set out on page 1 of the petition is argumentative and is denied.

RESPONSE TO PROCEDURAL HISTORY

The "Procedural History" set out on pages 1-2 of the petition is argumentative and is denied. The Respondents rely on the following statement of the facts and procedural history, which reflects the findings of this Court on direct appeal:

> On April 26, 1996, Steven Maurice Evans (Evans), and his friends Edward Francis (Francis), Geraldo Ward (Ward), and Kenneth Lewis (Lewis), traveled from Orlando to commit a home invasion robbery of a purported drug dealer who lived in Sanford, Florida. The robbery was called off when Lewis abandoned the

men and left in the getaway car, which was owned by Evans' girlfriend's brother. Stranded, Evans, Francis, and Ward went to the nearby home of Mark Quinn, an acquaintance of Evans. Evans called home and warned his girlfriend that Lewis might be coming there. Evans also instructed her to call the police, report the car stolen, and remove money from the home because he believed Lewis was going to go back to the home and steal his money.

Evans, Francis, Ward, Quinn, and a man named Blaine Stafford (Stafford) then went to Evans' apartment to wait for Lewis to get there. Evans was acting agitated and strange. He was laughing and pacing and had a strange look on his face. When the men saw Lewis drive up to the apartment, they positioned themselves around the door. When Lewis entered the apartment, they jumped him and beat him. He was bound and gagged. At some point, the police arrived to investigate the reported stolen vehicle. Still bound and gagged, and at Evans' direction, Lewis was taken to a back room to wait with the other men until the police left.

After the police left, Evans directed one of the men to retrieve a shampoo bottle, and with it he made a homemade silencer by stuffing the shampoo bottle with plastic bags. He taped the bottle to the barrel of his gun. He instructed Ward to check the backyard for any witnesses. Evans, Francis, and Ward then marched Lewis to the back of the apartment building to a culvert where Lewis was pushed down. Evans told Lewis that they were the last three people he would leave behind, and they were the last three people he would see on this earth. Evans then put the gun with the homemade silencer to Lewis's head and shot him six times. Five of the shots entered Lewis's head.

Evans was convicted of premeditated first-degree murder, and the jury recommended a sentence of death by a vote of eleven to one. In the sentencing phase of the trial, Evans presented the following evidence in mitigation.

Evans was born out of wedlock. While his mother went to school, he was raised by his maternal grandparents until the age of six or seven. When she married, he moved in with his mother and stepfather, who raised

him as a son. His parents were Jehovah's Witnesses. They had two more children, a son who was mentally impaired and a daughter. Evans was a devout Jehovah's Witness and cared for his mentally impaired brother and his sister. He participated with the Jehovah's Witnesses five days a week. He attended a public high school. When he was a teen, his stepfather accused him of masturbating and made him stand up in front of the congregation and ask for forgiveness. This evidence was apparently offered to show Evans was traumatized as a child and teen.

Evidence also indicated Evans experienced two head injuries as a child, one at the age of nine when he fell off his bike, and one at around the age of nineteen, when he was in a car accident. Sometime after the second injury, the family noticed a change in Evans' personality. Evans married around the age of eighteen or nineteen. There was at least one episode after he was married where his parents had to help his wife subdue him. Evans had gone out and apparently consumed alcohol, and when he returned he was out of control and ran down the street in his underwear. He has three children. Around the age of twenty-two or twenty-three, Evans committed adultery and was disassociated from the Jehovah's Witness congregation. From that point, there is no testimony about Evans' personal life and nothing else in mitigation. At the time of this crime, Evans was twenty-eight years old.

At the *Spencer* [FN1] hearing, Evans requested that no additional testimony or evidence be presented in mitigation and requested that the trial court follow the jury's recommendation and impose a death sentence. The trial court followed the procedure mandated in *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993), and reviewed all statutory and nonstatutory mitigating factors raised at the hearing, including all mitigating evidenced proffered pursuant to *Koon*.

*FN1 Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

Evans raises before this Court three guilt phase issues and five penalty phase issues. The three guilt phase claims are: (1) the trial court erred in finding Evans competent to stand trial; (2) the trial court

> erred in denying Evans' motion for mistrial after a State's witness referred to Evans' prior criminal record; and (3) the introduction of irrelevant and prejudicial evidence which the State could not tie to the crime denied Evans his constitutional right to a fair trial. The five penalty-phase claims raised are: (1) the trial court erred in finding that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification where the finding is unsupported by the evidence; (2) the trial court erred in finding the aggravating circumstance of an especially heinous, atrocious, or cruel murder; (3) the trial court improperly balanced the aggravating factors against the mitigating factors; (4) under Florida law, the death penalty is disproportionate to the facts of this case; and (5) Evans' death sentence was grounded on a split jury vote of eleven to one and is therefore unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

*Evans v. State,* 800 So. 2d 182, 185-187 (Fla. 2001).

**RESPONSE TO GROUNDS FOR HABEAS CORPUS**

On pages 2-3 of the Petition, Evans asserts that his conviction and sentence of death violate various State and Federal Constitutional provisions. These averments are denied.

**RESPONSE TO JURISDICTIONAL STATEMENT**

Respondents agree that, as a general proposition, this Court has jurisdiction over habeas corpus petitions in which the petitioner is under sentence of death. However, the remainder of the jurisdictional statement is argumentative and is denied.

**RESPONSE TO GROUNDS FOR RELIEF**

**I. THE "EXECUTION OF PHYSICALLY HANDICAPPED/MENTALLY ILL INDIVIDUALS" CLAIM.**

On pages 4-14 of the petition, Evans repeats the same claim that is claim I on appeal from the trial court's denial of his motion for postconviction relief. This claim was properly raised in Evans' *Florida Rule of Criminal Procedure* 3.851 motion, and, consequently, is not properly raised in a petition for habeas corpus relief. *Fotopoulos v. State/Moore,* 838 So. 2d 1122, 1135-1136 (Fla. 2002); *Bottoson v. State/Moore,* 813 So. 2d 31, 35-36 (Fla. 2002); *Mann v. Moore*, 794 So. 2d 595, 601 n.10 (Fla. 2001); *Atwater v. State/Moore,* 788 So. 2d 223, 227 (Fla. 2001). Litigating the same claim in two proceedings is nothing more than an inappropriate attempt to get two bites at the review apple -- this Court has flatly rejected such tactics, and there is no reason that the regularly enforced State procedural rules should not be applied in this case.

To the extent that further discussion of this claim is necessary, there appear to be two distinct parts to it: a competency component and a separate (and unrelated) component alleging that Evans is terminally ill with sarcoidosis. With respect to the competency component, this Court addressed that issue on direct appeal and decided the matter adversely to Evans. *Evans v. State*, 800 So. 2d 182, 187-188 (Fla. 2001). At this juncture, the claim contained in the habeas petition is nothing more than relitigation of this Court's direct appeal decision and of the claim contained in the Rule 3.851 appeal now

pending before this Court. This claim is not a basis for a reduction of Evans' sentence, nor is it a basis for a new penalty phase proceeding.

With respect to the claim that Evans is terminally ill, that claim is based on events that occurred well after Evans' trial. In addition to being improperly raised in this proceeding because they are being litigated in the Rule 3.851 appeal, whatever illness Evans has developed **after** he was sentenced to death has nothing to do with the correctness of his death sentence. Such subsequent events do not supply a basis for reopening final proceedings, and do not provide a basis for setting aside Evans' death sentence. Evans is not entitled to any relief.

Moreover, while Evans' condition is undoubtedly severe, the evidence from the evidentiary hearing does not support the dire claims contained in Evans' petition and brief. Sarcoidosis is **not** universally fatal, and the long-term prognosis for Evans is unknown.[1] The fact that Evans has lost his sight due to illness since being incarcerated does not change any fact of the offense, and is no different than if he had lost his sight as a result of an assault by another prisoner. Neither is a reason to disturb Evans' death sentence.

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[1]*See*,http://www.mayoclinic.com/health/sarcoidosis/DS00251/si=2765 http://www.nhlbi.nih.gov/health/dci/Diseases/sarc/sar_whatis.html. [copies attached].

## II. THE *RING/APPRENDI* CLAIM

On pages 14-51 of the Petition, Evans argues that his death sentence is unconstitutional under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). This claim is squarely foreclosed by this Court's decision in *Johnson (Terrell) v. State*, 904 So. 2d 400 (Fla. 2005), where this Court explicitly held that *Ring* is not retroactively applicable to cases, like this one, which were final when *Ring* was decided. While directly contrary to the position advanced in his brief, Evans has not acknowledged *Johnson,* which is dispositive of this claim.[2]

To the extent that further discussion of this claim is necessary, Evans' claim of ineffective assistance of appellate counsel is meritless -- *Ring* is not "fundamental," and, in any event, two of the applicable aggravating factors fall outside of any possible interpretation of *Ring.* Evans was under sentence of imprisonment at the time of the murder (an aggravator that was conceded), and had previously been convicted of a violent felony -- those aggravators fall outside of *Ring*, even if it applied in the first place. *Evans, supra*, at n. 4.[3]

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[2] The United States Supreme Court has likewise held that *Ring* is not retroactive. *Schiro v. Summerlin*, 542 U.S. 348 (2004).

[3] The throw-away *Caldwell* claim has been repeatedly rejected by this Court. Florida's capital sentencing scheme does not violate *Caldwell. Mansfield v. State/Crosby*, 30 Fla. L. Weekly. S598

## III. THE SECONDARY *RING* CLAIM

On pages 16-17 of the petition, Evans argues that his death sentence is unconstitutional because the sentencing judge found the under sentence of imprisonment aggravator even though it had not been submitted to the jury. Evans' argument is, at best, disingenuous because trial counsel conceded that this aggravator was present and properly found. *Evans v. State, supra*, at 195. Evans cannot concede the existence of an aggravating circumstance, and then invoke *Ring* in an effort to avoid a death sentence. And, in any event, even if the under sentence of imprisonment aggravator is taken out of the sentencing equation, there are **four** other aggravators which are not even challenged. Evans' claim, such as it is, is not a basis for relief.

## IV. THE "INCOMPETENCY FOR EXECUTION" CLAIM

On pages 17-18 of the petition, Evans argues that he "will be incompetent" at the time of his execution. However, as Evans admits, this claim is untimely because no death warrant has been issued. Under settled Florida law, a claim of incompetency at the time of execution is not ripe for review until such time as a death warrant has been signed. § 922.07, *Fla. Stat.*; *Johnson v. State*, 804 So. 2d 1218, 1225-1226 (Fla. 2001); *Thompson v.*

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(Fla. July 7, 2005); *Sochor v. State*, 619 So. 2d 285, 291 (Fla. 1993); *Turner v. Dugger,* 614 So. 2d 1075, 1079 (Fla. 1992).

*State*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999).

## V. THE INEFFECTIVENESS OF APPELLATE COUNSEL CLAIM

On pages 18-20 of the petition, Evans argues that appellate counsel was ineffective for not raising an issue relating to the testimony of the medical examiner, in the form of an opinion, that the shots fired into the victim's head could have caused blood and brain matter to end up on the shooter's clothing. Trial counsel objected to this testimony on the grounds that it called "for speculation and conjecture." (R882).[4] This claim is not a basis for relief for the following reasons.

As this claim is framed on page 19 of the petition, it interlocks with the Rule 3.851 claim that trial counsel was ineffective for not utilizing a "crime scene reconstruction expert." The collateral proceeding trial court rejected that claim -- for the reasons discussed in connection with Claim IV of the Rule 3.851 appeal, that disposition was correct. *Answer Brief,* at 30. However, since no "crime scene expert" testified for the defense, appellate counsel cannot have raised an issue based upon such "testimony." If appellate counsel cannot have been ineffective for not raising an unpreserved issue, and that is the law, then appellate counsel cannot have been ineffective

[4] Evans asserts that the defense asked to address this objection at sidebar -- the record reflects that the State made that request. (R882).

for not raising an issue based on testimony that was not even presented. *Zack v. State/Crosby*, 911 So. 2d 1190 (Fla. 2005); *Hendrix v. State/Crosby*, 908 So. 2d 412, 426 (Fla. 2005); *Rodriguez v. State/Crosby*, 30 Fla. L. Weekly S385 (Fla. May 26, 2005). In any event, this component of this claim, despite its pretensions, does nothing more than challenge the weight that should be given this testimony -- it has nothing to do with the admissibility.[5] This component of this claim has no merit.

The second component of this claim is Evans' claim that the medical examiner was not qualified to testify about the effect of a gunshot wound to the head in terms of whether such a wound would cause spattering of blood and brain matter. However, that was not the objection that was raised at trial, where Evans objected on the grounds that the proposed testimony "called for speculation and conjecture." (R882). Florida law is long-settled that a specific objection to the admission of evidence is required (except in circumstances that are inapplicable here), and that the objecting party is bound by the grounds stated at trial. §90.104(1)(a), *Fla. Stat.*; *Caldwell v. People's Bank of Sanford*, 73 Fla. 1165, 1174-75, 75 So. 848, 852 (1917). The "speculation and conjecture" objection interposed at trial is

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[5] Stated differently, Evans' claim is really that testimony "should" have been offered to challenge the testimony of the medical examiner, and that appellate counsel should have raised an issue on appeal based upon that unpresented "impeachment" testimony. That claim is absolutely meritless.

insufficient to preserve the objection contained in the habeas petition, which is that the medical examiner was not qualified to "answer a question involving ballistics and blood spatter." (*Petition,* at 20).[6] The issue that Evans asserts was not preserved at trial, and appellate counsel cannot have been ineffective for not raising an unpreserved claim. *Zack v. State/Crosby*, 911 So. 2d 1190 (Fla. 2005); *Hendrix v. State/Crosby*, 908 So. 2d 412, 426 (Fla. 2005); *Rodriguez v. State/Crosby*, 30 Fla. L. Weekly S385 (Fla. May 26, 2005).

Alternatively and secondarily, any error was harmless, and Evans suffered no prejudice. The medical examiner was qualified as an expert without objection (R822), and is certainly qualified by virtue of education, training and experience, to testify about the effects of gunshot wounds on a human body. There is no error.

**CONCLUSION**

For the reasons set out above, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

[6] The Respondents do not concede that an objection based on "lack of qualification" would have been well-founded, either. That issue is not before this Court, and is completely undeveloped based on the record.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **David Dixon Hendry,** CCRC - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ______ day of November, 2005.

Of Counsel

**CERTIFICATE OF COMPLIANCE**

This brief is typed in Courier New 12 point.

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