IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-161

STEVEN EVANS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Dir. ROA Vol. I, pg. 123). References to the trial transcript are in the form, e.g. (TT Vol. 1, 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). Generally, Steven Evans is referred to as Athe Defendant@ throughout this motion. The Office of the Capital Collateral Regional Counsel B Middle Region, representing the defendant, is shortened to "CCRC."

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.

STATEMENT OF THE CASE AND OF THE FACTS

Steven Evans was tried and convicted in 1999 for the first degree murder and kidnapping of Kenneth Lewis and sentenced to death. The murder occurred in 1996. The main reason for the delay in trying this case was the defendant's incapacity to stand trial due to mental illness. He was twice adjudged mentally incompetent to stand trial due in part to a rare form of paranoid schizophrenia. Co-defendant Edward Francis, who testified against the defendant in 1999, was tried and convicted for this same crime and is currently serving a life sentence for his participation in the offense. Co-defendant Gervalow Ward pled to the lesser charge of kidnapping for his actions in this homicide, received a 10 year negotiated prison sentence, and testified against Mr. Evans at trial. Several individuals involved in this case in some fashion were never charged with any crimes for their actions, and also testified against the defendant. The State largely utilized the aforementioned and other testimonial evidence of several individuals involved in the subject events to secure the conviction and death sentence against Mr. Evans.

The facts of the guilt phase of this case were summarized as follows by this Court on direct appeal:

> On April 26, 1996, Steven Maurice Evans (Evans), and his friends Edward Francis (Francis), Gervalow 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.

[Evans v. State, 800 So. 2d 182 at 185-186 (Fla. 2001)]

Steven Evans is not the strong mastermind, ring leader, or dominating force that he was portrayed as at trial. Evidence presented at the evidentiary hearing held last year revealed that Mr. Evans is now completely blind due to a very serious and fatal disease called sarcoidosis. (ROA Vol. 1, pp. 25-57). The sarcoidosis, which acts like a spreading cancer, is in advanced stages and is running ramped throughout Mr. Evans' body. In a nutshell, sarcoidosis is an immune system complication that causes the body to seek out

and destroy vital organs with white blood cell formation and concentration. The sarcoidosis first attacked his eyes, and now has moved into his chest, pulmonary system, abdomen and pancreas. He is completely blind, and evidence reveals that he is refusing his medication and medical treatment for fear that treatment providers and prison officials are poisoning him. There is treatment for the disease but the defendant is refusing the recommended treatment. The prognosis is poor, and there is no cure (ROA Vol. 1, pg. 34).

Mr. Evans was originally arrested for this crime while riding in a van with an uncharged participant named Mark Anthony Quinn. A "tactical response team" from the Orlando Police Department actually arrested Mr. Evans, purportedly on a warrant for an unrelated escape offense. Upon arrest his shoes were confiscated by law enforcement. (TT Vol. 7, pg. 1308).

The state ultimately utilized those shoes against him at trial to secure a conviction. The state successfully argued at trial that because the shoe tracks at the murder scene matched the defendant's shoe treads, he was obviously involved in the shooting of Kenneth Lewis. The defense *never* requested or ordered the escape file, never spoke with the attorneys on the escape case, and never moved to suppress items of evidence seized from Mr. Evans pursuant to an arrest that was proved unlawful in postconviction. The lower court never actually addressed the legal merit of his postconviction claim that the defendant was unlawfully arrested based on a faulty arrest warrant, and that counsel was ineffective for failing to file a motion to suppress. The instant appeal primarily

concerns the lower court=s AOrder Denying Amended Successive Motion to Vacate Judgment of Conviction and Sentence.@ (ROA Vol. 11, pp. 2030-2058). The Defendant urges this Court to reverse the aforementioned ruling and afford the Defendant a fair trial.

SUMMARY OF ARGUMENT

Steven Evans should not be on death row. The lower court erred in denying relief following the evidentiary hearing in this case. The 8th Amendment to the United States Constitution prohibits cruel and unusual punishment. Execution of physically handicapped/mentally ill individuals such as Mr. Evans constitutes cruel and unusual punishment. Although Florida's death penalty scheme has been ruled constitutional as pointed out by the lower court, the lower court failed to address the issue of the constitutionality of the death penalty *as applied* in this particular case. Mr. Evans' current death sentence, imposed upon a paranoid schizophrenic, blind, terminally physically ill, and incompetent individual constitutes arbitrary, capricious, cruel, and unusual punishment under the 8th Amendment. Recently the United States Supreme Court has banned the execution of the mentally retarded and juveniles, citing to diminished maturity and culpability, and to the evolving standards of decency. The evolving standards of decency in today's society should prohibit the execution of Mr. Evans, and the lower court's order failed to address these issues.

Additionally, the lower court erred in denying relief based on Mr. Evans' claims that his 4th and 6th Amendment rights were violated at the lower level due to several

instances of ineffective assistance of counsel. Specifically counsel was ineffective for failing to investigate the circumstances of Mr. Evans' arrest, for failing to request the court file pertaining to his arrest, for failing to request, inspect and research the arrest warrant that served the basis for his arrest, and for failing to file a motion to suppress all evidence illegally seized by law enforcement following the illegal arrest of Mr. Evans. Counsel was ineffective for failure to investigate Mr. Evans' prior criminal record, failure to prepare Mr. Evans to testify (specifically regarding his prior criminal record), and for failure to mitigate the circumstances of his prior record once it was revealed to the jury during the guilt phase that Mr. Evans had been convicted of the charge of escape. Just as the United States Supreme Court has recently reasoned and ruled that a defendant cannot receive a trial if he is excessively shackled in front of the jury, Mr. Evans did not receive a fair trial because the jury learned during the guilt phase that he had been convicted of escape. Trial counsel was ineffective for not investigating and not challenging the forensic evidence and the alleged admissions made by Mr. Evans, and for not presenting his alibi witness at trial. Trial counsel was ineffective for not investigating the defenses of sanity and voluntary intoxication, and for failing to forward vital information to the mental health experts. Mr. Evans was further prejudiced by the inaction of counsel when this led to erroneous conclusions regarding his competency to stand trial. The cumulative effects of the constitutional errors throughout the guilt phase and penalty phase alleged in this appeal denied Steven Evans a fair trial.

ARGUMENT 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

Standard of Review

In reviewing this type of claim, this Court gives deference to the circuit court=s findings of fact if they are supported by competent and substantial evidence. Provenzano v. State, 761 So. 2d 1097 (Fla. 2000).

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 "evolving standards of decency" in today's society as the main factors justifying vacation of those death sentences. This Court reversed the death sentence of an 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)].

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 based on similar reasoning. In Ford the Court stated:

> 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.

The lower court dismissed this claim, Claim X of his Amended Motion, as follows in its Order Denying Amended Motion to Vacate Judgment and Conviction and Sentence:

> Mr. Evans alleges Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty. He argues that the State should not seek, and the Court should not allow, the execution of the mentally ill, and that the death penalty is reserved for only the most unmitigated and atrocious crimes. Finally, he points out that he was twice adjudged to be incompetent to stand trial because of mental illness.
>
> The Florida Supreme Court has consistently denied claims that the death penalty is susceptible to arbitrary and capricious imposition, and has upheld the constitutionality of the death penalty statute. *See, e.g., Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003). Furthermore, this claim could have been raised on direct appeal; therefore, it is procedurally barred. As for the claims relating to mental illness, that issue has already been raised in previous claims and rejected as a basis for relief.

[ROA Vol. 11, pg. 2085]

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 "gang member" nicknamed "Capone" 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 has 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 –medical 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, pp. 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.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM SEVEN OF MR. EVANS' MOTION FOR POSTCONVICTION RELIEF. SPECIFICALLY COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO SUPPRESS ALL EVIDENCE ILLEGALLY SEIZED BY LAW ENFORCEMENT FOLLOWING THE ILLEGAL ARREST OF MR. EVANS.

Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim was presented in Mr. Evans' Amended Motion in Claim VII wherein the following allegation was made:

> Counsel was ineffective in failing to file a motion to suppress based on a faulty arrest warrant.

[*Amended Motion to Vacate Judgment and Conviction and Sentence*, ROA Vol. 8, pg. 1461]

Law enforcement in the instant case illegally arrested Mr. Evans, and pursuant to an unlawful arrest on an unrelated Brevard County escape charge, Orlando authorities seized Mr. Evans' shoes and utilized that evidence against him at trial to prove their murder case. The faulty arrest warrant, identified and presented by the state at the evidentiary hearing, is located in this record at ROA Vol. 11, pg 2085. Identity was a genuine issue disputed at trial. Mr. Evans testified at trial that he was never at the scene of the crime where Kenneth Lewis (AKA "Capone") was shot to death. At trial, the state

presented the testimony of law enforcement and forensic witnesses who stated that the defendant's tennis shoes were recovered at the time of his arrest, and his tennis shoe treads were consistent with shoe treads left at the scene of the crime. This testimony was so crucial that the jury requested during their deliberations that they be able to observe the shoe casts introduced in evidence to see if the casts indeed matched the shoes confiscated during Mr. Evans' arrest. The defendant urges that had these items been suppressed, the defendant would have been acquitted. The lower court never actually addressed the nuances of the core Fourth Amendment issues of Mr. Evans' case, but rather curtly, abruptly and improperly dismissed them. Consequently, Mr. Evans' rights under the 4th, 6th, 8th and 14th Amendments have all been violated.

Counsel was deficient for failing to file a motion alleging that the arrest of Mr. Evans was illegal and that the evidence that law enforcement obtained from the illegal arrest should have been suppressed. Had counsel filed a motion on this issue, the trial court would have been required to grant the motion and the witnesses would not have been able to testify that Mr. Evans' shoe treads matched the impressions found at the crime scene. The introduction of evidence seized contrary to principles established by the 4th Amendment certainly undermined the verdict and was therefore prejudicial. If trial counsel had moved to suppress and the trial court failed to suppress, Mr. Evans would have had these issues for appellate review.

The trial court would have been legally required to grant the motion because the arrest of Mr. Evans was unlawful. The issue of the legality of Mr. Evans' arrest

connected with this case has not been addressed by the lower court, and actually has not been addressed by the state either. The main issue concerns the validity of the arrest warrant which was relied upon to effectuate the arrest of Mr. Evans. The legal question presented is whether an individual verifying the facts underlying an arrest warrant is required to sign and subscribe to the facts contained therein to preserve the integrity and validity of an arrest warrant; stated alternatively, does an arrest warrant and application become invalid when someone else signs and subscribes to the facts justifying the arrest? The defendant urges that an arrest warrant loses any validity if someone else signs and subscribes to it. That is exactly what happened in this particular case. As such, trial counsel was ineffective in failing to research this issue and file a motion to suppress.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 686 (1984). Mr. Evans proved both prongs of Strickland. The trial court was in error to deny him relief.

It appears that the lower court did not even reach the first prong of the Strickland analysis for failure to grasp the facts or gravity of this issue. The lower court stated simply the following in its Order denying relief on this claim:

> Faulty Arrest Warrant: Mr. Evans alleges counsel failed to file a motion to suppress based on a faulty arrest warrant, but he provides no supporting facts in the Motion. At the evidentiary hearing, he presented arguments regarding the validity of the arrest warrant in his Brevard County escape case, but he did not establish an adequate connection to the instant case or present any evidence which established the absence of a valid warrant in the instant case.

[ROA Vol. 11, pg. 2053]

This issue was raised and sufficiently pled, an evidentiary hearing was granted on this claim at the case management conference, extensive evidence was presented to support the claim, and extensive and legally sound evidence was presented and valid arguments were made in support of the claim. The defendant complied with the technical requirements of the rules of procedure and his claim was sufficiently preserved and pled.

The defense was restricted to 50 pages of written closing argument by the lower court. The defendant utilized approximately 8 of those restricted pages to discuss the complications with the defendant's arrest warrant. Approximately 16% of the defendant's written closing argument was based on the faulty, invalid, and unlawful arrest warrant utilized to secure the defendant's arrest and his shoes that were so crucial to the prosecution. The legal issues were never addressed by either the state or the lower court.

The lower court's order states that a connection between the escape case and the instant murder case was not established, and states that although arguments were made concerning the validity of an arrest warrant, no evidence was presented to show the absence of a valid arrest warrant. The defendant respectfully disagrees with that ruling. The state claimed in their written closing argument that because the arrest warrant utilized to arrest Mr. Evans in Orlando was only marked for identification at the evidentiary hearing, but not entered into evidence, it cannot be considered. (ROA Vol. 11, pg. 2024). The state should not be allowed to prevail on such a cowardice defense of this claim. The state produced the arrest warrant, and actually marked it for identification at the

evidentiary hearing, presumably to refute the claim that Mr. Evans' arrest was unlawful. Now that the state sees the defects in the arrest warrant, they claim that the warrant was not actually introduced into evidence. This warrant was discussed extensively by witnesses at the evidentiary hearing, and is a part of the record; the state produced it and marked it for identification at the evidentiary hearing to refute the defendant's claim that counsel was ineffective for failing to file a motion to suppress.

If a tree falls in the forest, it makes noise. The arrest warrant that served as a basis for Mr. Evans' arrest by the agency investigating the Kenneth Lewis murder, the Orlando Police Department, was marked for identification by the state at the evidentiary hearing, it was physically handled and reviewed by the court, extensive arguments were made, yet the legal issues were never addressed. In a nutshell, Mr. Evans' 4th Amendment rights were violated when he was arrested based on an unlawful arrest warrant. His 6th Amendment rights were violated when his trial counsel failed to investigate the legality of his arrest, and failed to file a motion to suppress. The legal merits of this claim have yet to be ruled upon.

The defendant's written closing argument filed with the lower court at ROA Vol. 11, pp. 1939-1984, included the following detailed allegations regarding the unlawful arrest warrant:

> But perhaps more important than the mitigation value found in Mr. Chauvin's testimony regarding the escape is the value of the information contained within his file concerning the circumstances of his escape. The file was introduced at the evidentiary hearing. The information contained within the file could have been used to support a motion to suppress items

seized from Mr. Evans on his April 30, 1996 arrest, specifically, the Nike shoes. Yet trial counsel testified that she may not have requested the file on the escape charge.[2] The file contained sworn affidavits from the Defendant's employers participating in the work release program and supervising Mr. Evans, the Cocoa Center representatives who housed and supervised Mr. Evans, and Brevard County Sheriff representatives who searched for Mr. Evans with negative results. It is interesting to note that the affidavits documenting his escape status were not signed until *after* Mr. Evans was arrested in Orlando. Mr. Evans was arrested on April 30, 1996, yet the documentation and affidavits were not signed until May of 1996. Presumably the Department of Corrections must obtain the proper documentation from individuals who have personal knowledge that Mr. Evans escaped from the work release center so that they can prepare a valid arrest warrant. Yet, the individuals who possessed the personal knowledge of the escape warrant did not attest and swear to the facts in support of the escape charge until May of 1996. And a Brevard County Circuit judge did not sign a Writ for the Defendant to be brought to Brevard County to answer to the charge of escape until late May, 1996. After years of requests from CCRC to the State and FDLE to turn over the alleged arrest warrant that served the basis of Mr. Evans' April 30, 1996 arrest, the State finally turned over a document entitled "Fugitive Warrant for Escaped Prisoner" on July 29, 2004. The document, marked as "State's Identification A" at the evidentiary hearing, has serious problems and cannot serve the basis for a valid arrest. The document is dated and signed January 23, 1996, which is indeed prior to the Defendant's April 30, 1996 arrest. But, the necessary and proper subscription is lacking in this document. It is the Defendant's position that the Secretary of the Department of Corrections, Harry K. Singletary, did not subscribe or swear to the facts contained within the warrant because he lacked the necessary documentation to support the allegations of escape. It is clear from the documents contained within Michael Chauvin's file that the persons with personal knowledge of the escape did not sign or subscribe to the allegations regarding the escape until after the Defendant was arrested, and after the DOC generated the warrant. As such, documentation was lacking within the DOC and they technically could not generate a valid fugitive warrant.

[2]As with many answers from Andrea Black at the evidentiary hearing, she said she could not remember whether she requested a copy of Michael Chauvin's file. It is noted that Michael Chauvin testified that he never received a request for a copy of his file. (ROA Vol. 2, pp. 250-251).

It appears that an individual named Hugh Ferguson signed off on the fugitive warrant "for Harry K. Singletary." This is improper and negates the validity of this warrant. Hugh Ferguson is not listed in the body of the affidavit, therefore he is not swearing or attesting to the allegations contained within the warrant. Without Hugh Ferguson's name contained within the body of the document, and without the sworn signature of Harry K. Singletary, the warrant is invalid. As it stands with the document at hand, Harry Singletary cannot be charged with perjury because he never signed or subscribed to the warrant. Hugh Ferguson cannot be charged with perjury because he did not attest to the facts contained within the warrant. By analogy, if a police officer was applying for a warrant, and he was swearing to and attesting to certain facts to serve the basis for a search or arrest warrant, that police officer must personally sign the affidavit. He cannot have another police officer sign his name or swear to the facts contained within the affidavit. If this was attempted, a judge would surely send the affidavit back to the police officer and tell him he cannot grant the warrant application unless the officer listed in the affidavit personally attests and swears to the facts as true. Analogies are helpful but not necessary in the case at bar because there appears to be a case or cases right on point on this issue. As the case law discusses, problems with warrants cannot be overlooked as mere technicalities or trifles. Warrants are guided by the dictates of the Fourth Amendment which allows American people to be free of illegal searches and seizures not supported by probable cause or valid warrants. In the case of Collins v. State, 465 So. 2d 1266 (Fla. 2d DCA 1985), the Court ruled that an officer's failure to swear to the truth of a supporting affidavit [invalidated the] search warrant. Although this case applies specifically to search warrants, it applies specifically to the 4th Amendment. And obviously an arrest is a greater imposition on one's liberty than a search of one's apartment. In Collins, the officer testified at a suppression hearing that he was never placed under oath before he signed an affidavit and application for a search warrant of a suspect's apartment. In the case at bar, the affiant, Harry K. Singletary, was never placed under oath. He did not even sign the warrant. The notary, Connie Padgett, placed Hugh Ferguson under oath, but Hugh Ferguson is not listed in the body of the affidavit. Therefore Hugh Ferguson could not have been swearing to the facts contained within the affidavit. Harry K. Singletary was never placed under oath nor did he sign the warrant, so he could not have been charged with perjury should it be found that the facts were untrue. Therefore the affidavit is improper, the warrant is invalid, and trial counsel should have filed a motion to suppress in this case based on an unlawful arrest and invalid arrest warrant. The Collins court stated:

The key to a valid oath is that perjury will lie for its falsity. Such an oath must be an unequivocal act in the presence of an officer authorized to administer oaths by which the declarent knowingly attests to the truth of a statement and assumes the obligations of an oath. Markey v. State, 47 Fla. 38, 37 (Fla. 1904), Youngker v. State, 215 So. 2d 318 (Fla. 4th DCA 1968). It is essential to the offense of perjury that the statement considered perjurious was given under an oath actually administered. Markey; Nix v. State, 173 So. 2d 465 (Fla. 1st DCA 1965).

In this case, the police officer testified that he was not sworn before signing the af[f]idavit. He did no unequivocal act by which he attested to the truth of his statements. If the statements had been false, he could not have been prosecuted for perjury because no oath was ever administered. His answer to the judge that his statements were true was a mere assertion of truth, not an oath....

We do not believe that a search warrant unsupported by an oath is a mere technicality that good faith can cure. An oath is basic to the validity of the supporting affidavit and the ensuing warrant. It has often been held that statutes and rules authorizing searches and seizures must be strictly construed. Therefore, affidavits and warrants must meticulously conform to statutory and constitutional provisions. State v. Tolmie, 421 So. 2d 1087 (Fla. 4th DCA 1982); Hesselrode v. State, 369 So. 2d 348 (Fla. 2d DCA 1979). Section 933.06, Florida Statutes (1983), [FN 2] as well as our federal and Florida Constitutions, require a sworn basis for a search warrant....

We fought a war to obtain these rights. This Nation pledged its wealth, its goods, its lives and many, many lives were, in fact, lost fighting that war against a then autocratic, dictatorial government to obtain these rights. These rights were not easily won or wrestled away from that government across the sea whose agents here did their will at their whim in violating their own citizens homes, papers, and persons by searches without cause, much less probable cause, but on mere suspicion or personal whim. The then continentals were often treated as merely chattels without rights. It was not merely because of a tea tax that this Nation fought the sovereign across the sea–it was not merely taxation without representation that this Nation undertook a cruel and lengthy war–it was more than that. It was to secure freedom for all peoples of this Nation, all citizens, not just a preferred few. And because of the []

> abuses of power of the government across the sea, abuses directly against our pioneering predecessors, our founding fathers correctly believed that it was right, meet and proper that those abuses should not ever again be given a chance to be inflicted upon the citizenry under its new government; so mush so, that inhibitions against the new government in the form of a Bill of Rights and other amendments to the Constitution were written down and passed into law, to be a permanent and basic, fundamental law of the land, forever protecting the citizens from despotism and the threat of its reappearance in this land.
>
> The Fourth District in State v. Tolmie held that the failure of an affiant to subscribe to the supporting affidavit invalidated the warrant. We chose also to require strict compliance with the statute and hold that the failure of an affiant to swear to the truth of the supporting affidavit invalidates the warrant. The trial court erred in denying the appellant's motion to suppress the fruits of the search based on the invalid warrant.
>
> Accordingly, we reverse appellant's conviction and remand to the trial court for a new trial.

[Collins at 1268-1269]

In the case at bar, the purported affiant, Harry K. Singletary, failed to subscribe to the supporting affidavit and warrant. Pursuant to Collins, this invalidated the warrant. Again, the test is, can the affiant be prosecuted for perjury in the instance that the facts contained in the affidavit are found to be untrue. In the case at bar, neither Ferguson nor Singletary could have been prosecuted for perjury should the facts contained in the affidavit be found to be untrue. *See* Pepilus v. State, 554 So. 2d 667 (Fla. 2d DCA 1990) (held, warrant valid because the officer swore to the affidavit and subjected himself to the charge of perjury if the affidavit proved untrue) and State v. Johnston, 553 So. 2d 730 (Fla. 2d DCA 1989) (held, the Department of Motor Vehicles would not have authority to suspend appellee's driver's license without an officer's sworn statement swearing that the defendant refused a breath test). Because the "Fugitive Warrant for Escaped Prisoner" in the case at bar fails to contain the necessary subscription from Harry K. Singletary, it is invalid and trial counsel should have filed a motion to suppress the shoes taken from Steven Evans following his arrest based on the invalid warrant for escape. As such, the Defendant is entitled to a new trial wherein the state is precluded for utilizing the illegally seized items against him.

> A motion to suppress in this case was crucial. Following his arrest, a pair of Nike shoes were seized from the Defendant. The State used the shoes to place the Defendant at the crime scene. The testimony at trial was that Mr. Evans' shoe treads were consistent with two impressions located at the crime scene. State witness Deborah Fisher testified that she found similar tread design and class characteristics in the shoes recovered from Evans compared to tread impressions left at the crime scene. R. 1344-1350. It was apparent that the jury was paying very close attention to the testimony concerning the shoe treads. The State had made casts of impressions left at the crime scene. The casts were discussed during the examination of Deborah Fisher. Into the jury deliberations the jury asked if they could examine the shoe tread casts. R. 1527. Had counsel provided effective assistance of counsel, the circumstances of the arrest would have been fully investigated, the warrant would have been thoroughly inspected for fatal defects, the defects would have been discovered, a motion to suppress would have been filed, the motion would have been granted, and the shoe evidence would have been excluded. Instead, this prejudicial forensic evidence was introduced and the verdict of guilty was largely based thereupon. Had this evidence been properly excluded, the jury would have had reasonable doubt and the jury would have acquitted.

[ROA Vol. 11, pp. 1957-1963]

This case's ROA "Index to Evidence" following the "Index to Record" prepared by the 9th Circuit Court Clerk notes and lists that on September 1, 2004, the *state* marked for identification at the evidentiary hearing, "Identification A, Composite/Fugitive Warrant for Escaped Prisoner." This exhibit is clear on its face that the arrest warrant utilized to arrest Steven Evans shortly after the murder of Kenneth Lewis was unlawful. It is also marked as "Attachment C" to the defendant's Motion for Rehearing at ROA Vol. 11, pg. 2085.

In response to the lower court's order the defendant filed a Motion for Rehearing. The Motion for Rehearing was filed to clarify that the subject warrant was related to the

instant case. Attachments A-C of the defendant's Motion for Rehearing contain the deposition of the lead detective, Charles Howard Jones, police reports related to the arrest of Steven Evans, and the Arrest Warrant for Steven Evans. The nexus between the unlawful arrest warrant and the instant case was clarified in part as follows in the defendant's Motion for Rehearing:

> 4. The Court erred in failing to address the merits of the postconviction Motion regarding the Defendant's claim that counsel was ineffective for failing to file a motion to suppress the shoes recovered in this case based on an invalid warrant/illegal arrest. This claim is supported by the record and reaches the level of fundamental error as the actions of the law enforcement officers who arrested the Defendant in the case at bar did so in violation of the Fourth Amendment. The failure to investigate the validity of the arrest warrant and failure to file a motion to suppress constituted a Sixth Amendment violation.
> 5. The Court stated in its Order at page 24 that the Defendant failed to establish an adequate connection between the Brevard County escape case and the instant murder case. The Defendant asserts that the connection was made clear the trial level and at the evidentiary hearing through the testimony of Mark Anthony Quinn, Brevard County Assistant Public Defender Michael Chauvin, and exhibits introduced and offered at the evidentiary hearing. To further clarify the claim and the connection, attached to the instant pleading is the deposition of lead Detective Charles Howard "Bud" Jones (Attachment A) detailing connection between the Brevard County escape case and the instant murder case.[1] The record makes clear that Evans was arrested for escape rather than the actual murder:
>
> > Q: Okay, at what point did you put out a–well, I guess it was after you got the arrest warrant on Evans for him to be picked up. What date did you actually get the warrant because mine is not dated here.
> > A: I've not indicated–let's see (Examining) On the third of May.

[1]It is noted that Andrea Black failed to attend the deposition of this lead detective. Attorney Warren Turner was "filling in" for Andrea Black (see page 9 of deposition transcript).

Q: Okay. Now, Evans himself, though, was picked up prior to that; is that correct? I mean, your report seems to indicate 4/30/96.
A: Yes.
Q: Now, what was he apprehended on–well, I guess he was apprehended on being an escaped–
A: Correct.
Q: --prisoner. Okay?
A: Right. I never read a warrant for him. They did the Information for him in the grand jury.
Q: Right. Okay. So he was basically picked up on his other pending stuff?
A: Correct.
[Deposition of Detective Jones, 4/24/97, pp. 26-27]

Steven Evans was arrested in a van in Orlando at the 700 block of Dunbar Court on April 30, 1996 along with Mark Quinn on the charge of escape. The arrest was unsupported by a necessary lawful arrest warrant. A police report dated 4/30/96 references that the Defendant was "arrested on a warrant" (see police reports, attachment B). As argued previously, the escape warrant generated from DOC was defective in that it was signed by the wrong official.[2] Therefore the arrest was unlawful and should have been followed by a motion to suppress for illegal arrest. The state argued at page 40 of their written closing argument that because the DOC arrest warrant for escape was not introduced at the evidentiary hearing, it should not be considered as evidence of an unlawful arrest. The Court should not adopt such an argument. The DOC arrest warrant was at least marked for identification and considerable testimony focused on this arrest warrant (specifically, during the testimony of Michael Chauvin and Andrea Black) at the evidentiary hearing. Simply because the state's arrest warrant was not introduced at the evidentiary hearing is not grounds for determining that an otherwise unlawful arrest is lawful. Presumably the state marked the document for identification in support of their assertion that the arrest was lawful. The state has failed to show that the arrest was lawful in light of the obvious defects in the warrant, therefore the state has failed to rebut the Defendant's assertion that a motion to suppress should have been filed by trial counsel. The Defendant asks the Court in this Motion for Rehearing to address his claim on the merits.

[2]The document, attached to this pleading at attachment C, was offered by the state for identification and discussed in detail at the evidentiary hearing.

Other portions of the Detective Jones deposition again make clear the connection between the escape case and the instant murder case:

Q: And when you attempted to interview him did you tell him specifically what you wanted to talk to him about?

A: ***I told him he had been arrested for escaping*** and I told him I wanted to talk to him about a murder. (Emphasis added).

. . . .

Q: All right. ***Now, prior to the grand jury being presented this case, was he arrested at all on any other charge other than the escape? I mean, did you actually arrest him for the murder prior to the indictment coming down***?

A: ***No***. (Emphasis added)

Q: Okay. ***So the only thing pending against him when he was back out there at the Central Florida Reception Center was the escape; is that correct***?

A: ***Correct. If the Grand Jury Indictment had not already been obtained, which I don't think it had at that point–*** (Emphasis added)

Q: Let me just jump forward to where you were at the Reception Center. When you went out there at this point, did you tell him you wanted to talk to him about the murder again?

A: Yes.

Q: Alright. And what was his response?

A: Again, he told me that he couldn't talk to me about it.

[Deposition of Detective Jones, 4/27/97, pp. 30-31]

Pursuant to an unlawful arrest in Orlando, law enforcement was able to recover the Defendant's shoes at the police station which were matched to foot prints located at the murder scene. The following testimony was taken from crime scene technician Lewis Knack:

Q: On May the 2nd of 1996, did you have an occasion to take a pair of shoes from an individual that was in the custody of the Orlando Police Department?

A: Yes. I did.

Q: Do you see that individual in the courtroom here today?

A: Yes. I do. It's the gentleman sitting there.

. . . .

Mr. Ashton: Your Honor, may the record reflect that the witness indicated the defendant.

The Court: Any Objection?

Miss Black: No objection.

[State of Florida v. Steven Evans, Case CF96-5639, Trial Transcript, Vol. 7, pp 1306-1307]

[then on voir dire of the witness]:

Q: Detective Knack, on what day did you confiscate those shoes?

A: It was on 4-30 of '96.

Q: 4-30 of '96, and they were not taken from the scene of this particular case?

A: No, ma'am. They were taken at the police station.

[State of Florida v. Steven Evans, Case CF96-5639, Trial Transcript, Vol. 7, pg. 1308]

The trial transcript continues with the testimony Lewis Knack and Deborah Fisher. The trial transcript is clear that the state forensically utilized the soles of Mr. Evans' shoes to match foot prints located near the crime scene. During deliberations, the jury even asked to examine the shoe casts [Trial Transcript, Vol. 8, pg. 1529].

The connection between the escape case and the murder case is clear.[3] It is clear that law enforcement jumped the gun in the case at bar and arrested the Defendant unlawfully, utilizing the unlawful arrest to seize items of clothing from the Defendant which were ultimately instrumental in securing a conviction against the Defendant. As trial counsel failed to investigate this issue and file a proper motion to suppress, they were ineffective, and the Defendant should be afforded a new trial which does not include the illegally seized items.

In its Order at page 24, the Court stated that there was insufficient evidence presented to establish the absence of a valid arrest warrant in the instant case. There was an invalid arrest warrant at least marked for ID at the evidentiary hearing, if not entered into evidence. The DOC warrant flies in the face of validity. The Court failed to address the fatal defects in the warrant. Namely, the DOC secretary (the "affiant") with personal knowledge regarding the inmate's status as an "escapee" failed to swear to and sign the affidavit. In its Order, the state failed to address or distinguish the case law cited in the Defendant's closing argument.

[ROA Vol. 11, pp. 2059-2063]

[3]See additional police reports (attachment B) detailing the Evans "warrant" arrest; these reports were introduced at the evidentiary hearing.

In its Order Denying the Motion for Rehearing, at ROA Vol. 11, pp. 2086, the lower court refused to consider the attachments, ignored the testimony at trial concerning the shoes, and stated that the claim concerning the unlawful arrest warrant as pled in the Amended Motion was conclusory, legally insufficient, and failed to provide any specific facts. The defendant respectfully disagrees with this ruling. The claim was sufficiently pled, considerable evidence and testimony concerning this claim was presented at the evidentiary hearing and in the pleadings, and the lower court simply continued to refuse to address the claim on its merits.

The following testimony presented at the evidentiary hearing illustrates that a nexus was established between the defendant's arrest for the instant murder, and the arrest warrant from the Department of Corrections regarding the escape case, marked as state's ID "A," also located at ROA Vol. 11, pg. 2084. The following testimony was elicited from Mark Anthony Quinn, an uncharged participant in the murder of Kenneth Lewis, who was arrested with Mr. Evans:

> Q: You were arrested with Mr. Evans, right?
> A: Yes, sir.
> Q: I want you to tell me about the circumstances of that arrest.
> A: What happened?
> Q: What happened the day that you and Mr. Evans were arrested?
> A: Him and I was at Walter Law's (ph) house in Griffin Park, walking toward the van. I told him I need -- I had to take a leak.
> Q: Wait. When you said I told him, who are you referring to?
> A: I told L.A., Steve, that I needed to take a leak. So I went on, opened the doors up to the van, and while I was outside taking a leak, I seen little red dots on the side of the van door. Then they, police rushed in, and they –

Q: You said this was a, like a laser scope from, like that movie the Terminator, you saw those type of red lasers?
A: Lights.
The Court: Would that have been Terminator I or II or III?
Mr. Hendry: I think it was I.
The Court: Okay. I wanted to make sure.
By Mr. Hendry:
Q: So it was pretty soon after you saw the red dots the police swooped in, and what did they say? What did you hear the police say? What happened?
A: They was yelling for me to get down, and they was telling L.A. to get out, you know. And they handcuffed me, put me in the car.
Q: They arrested you?
A: They handcuffed me, put me in the car.
Q: Did the police tell you what you were charged with?
A: They didn't say anything. They just handcuffed me, put me in the car.
Q: Okay. They handcuffed Mr. Evans?
A: They did the same thing.
Q: Did they say what he was under arrest for?
A: No, they didn't.
Q: Okay. Did you ever remember seeing a copy of an arrest warrant that the police were holding?
A: No.
Q: So were you taken -- after being placed in the police car, where were you taken?
A: To interrogation.
Q: And did -- I imagine they asked you questions about the murder of Capone, Kenneth Lewis?
A: That's right.
Q: Did they show you pictures of Ed Francis, and did you, in fact, identify the pictures of Ed Francis?
A: I believe they showed pictures. I can't recall.
Q: Do you remember looking at pictures, identifying people as people you knew, people that you were with on the night of the murder?
A: Correct.

[ROA Vol. 1, pp. 107-110]

Apart from the documents attached to the defendant's Motion for Rehearing, the testimony above illustrates that Mr. Quinn and Mr. Evans were arrested together on April

30, 1996. Officer Lewis Knack testified that Mr. Evans' shoes were confiscated on the day of his arrest, April 30, 1996. Quinn and Evans were immediately sent to interrogation and interrogated regarding the murder of Kenneth Lewis by the Orlando Police Department.

At the evidentiary hearing, the defendant called Brevard County Assistant Public Defender Michael Chauvin to the stand. Michael Chauvin actually represented the defendant for the escape charge upon which he was arrested for in Orange County. Introduced as Defense Exhibit 6 was the public defender's file relating to that case. Steven Evans apparently left a work release center in Brevard County, went to Orlando, then ultimately was apprehended in Orlando. Law enforcement really wanted him in connection with the murder of Kenneth Lewis, but utilized the unlawful escape warrant as a basis for arrest.

Michael Chauvin testified as follows at the evidentiary hearing:

> Q: Good afternoon, sir. Could you state your name for the record?
> A: Michael Chauvin.
> Q: And what is your current position of employment?
> A: I am an assistant public defender in the 18th Judicial Circuit in Brevard County.
> Q: And how long have you been employed as an assistant public defender over there?
> A: Since June of '95.
> Q: Okay. I want to ask you some questions about a court case. Would have been a court case number 96-11857. That would have been State of Florida versus Steven Maurice Evans. Do you remember that particular case?
> A: Yes, I do.
> Q: Okay. If you could tell us, what was your experience with that case?
> A: The case had already been filed when I took it over. I took over for

another felony attorney. And at the time that I took over the case, Mr. Evans was apparently in custody somewhere, but not in our county jail. And so there were a couple of continuances while I was trying to find out where he was, trying to see if we can resolve the case. Ultimately, we were not able to resolve the case. He was brought to our jail. We went to trial on that case.

Q: Okay. Did you bring the court file or your public defender file here with you today?

A: I've got my file with me.

Q: Okay.

A: It's in the front row there.

Q: Might want to ask you some specific questions about the file, so --

A: The gray file.

Q: This was a charge of escape from Brevard County?

A: That's correct.

Q: Okay. And do your notes indicate there when Steven Maurice Evans was actually taken into custody, arrested for that charge of escape?

A: It appears -- yes, the notes indicate that there was -- that he was in custody as of, I believe, April 30 of 1996.

Q: Okay. He was in custody in Orange County on that date, correct?

A: That's what's indicated in the notes, yes.

Q: Okay. Do you ever -- do you ever remember seeing a copy of a warrant in this particular case?

A: I don't recall ever seeing a copy of a warrant, no, sir.

Q: There was no arrest warrant?

A: I don't believe I've ever seen one.

Q: Okay. I want to show you -- you have your file there. I have marked defense identification D. I want to go through some documents in these materials with you.

[ROA Vol. 2, pp. 227-229]

The above passage clearly illustrates that Mr. Evans was arrested on the charge of a Brevard County escape in Orlando on April 30, 1996. Law enforcement in Orlando utilized that escape charge and the aforementioned arrest warrant to take Mr. Evans into custody because they did not have the benefit of a valid arrest warrant for the Kenneth Lewis murder case. Just as it would have been unlawful to arrest Mr. Evans for the

murder of Kenneth Lewis due to the lack of probable cause and a warrant, it was unlawful for Steven Evans to be arrested for escape because the fugitive warrant from DOC lacked the necessary and proper oath (*see* State's Evidentiary Hearing Identification Exhibit "A", *also* ROA Vol. 11, pg. 2085)

The arrest warrant stemming from a Brevard County escape charge served as a basis for the Orlando Police Department to take Steven Evans into custody on April 30, 1996. The arrest warrant is defective. Therefore Steven Evans was unlawfully arrested by the Orlando Police Department. Therefore the items recovered from his person in Orlando, (to wit, his tennis shoes) following the unlawful arrest for the Brevard County escape must be suppressed in the instant Orlando murder case. The following excerpts from the evidentiary hearing illustrate that the unlawful warrant was not only identified during the testimony of Michael Chauvin, but it was presented to the bench, and the precise nature and details of the claim were explained to the trial judge. The following testimony was presented at the evidentiary hearing regarding the arrest warrant as it related to the escape charge and the murder charge during the state's voir dire of Michael Chauvin:

> By Mr. Lerner:
> Q: Now, you're only talking about this particular case arising out of Brevard County?
> A: The escape case, yes.
> Q: The escape case. In other words, he escaped, the assistant state attorney filed a charge of escape, the felony of escape on him, correct? And then that gave rise to this case?
> A: The allegation was he walked away from a work release facility, and that subsequently they did file a charge of escape on him, yes.

Q: Now, when someone walks away from a facility like that, there is also a warrant put out on them by the governor, isn't there?

A: I don't have any specific knowledge that that's the case.

Q: Well, let me show you a certified copy of a warrant that's been marked as state's exhibit A. Just look at that. Does that appear to be a warrant by the governor, who is in Tallahassee -- or, not by the governor, I think it was by maybe the Secretary of State, but that's a warrant for the fact that someone has escaped and needs to be taken back into custody, ordering all the sheriffs of Florida to effect that, isn't it?

A: That appears to be what that is.

* * * *

The state objected to the relevance of the Brevard County escape case, and the court inquired:

The Court: What is the relevancy of this line of testimony?

Mr. Hendry: Your Honor, one of the allegations in our 3.851 is ineffective assistance of counsel for failure to file a motion to suppress items of evidence, namely the shoes which were used against Steven Maurice Evans. We're using this testimony, these documents, going through them here to show that there was indeed a lack of investigation into this particular case, this particular escape case. This issue of escape became a great issue at trial in the murder trial against Steven Maurice Evans. What we're going to do through these documents –I have seen that document that Mr. Lerner was just going over. We have some concerns, great concerns for that document. I want to go through --

The Court: What does that mean? I have concerns with the warrant?

Mr. Hendry: Yes.

The Court: What do you mean we have great concerns with this document? Does that mean that you think the document is not accurate? I mean, I don't know what you mean by great concerns.

Mr. Hendry: Your honor, I have a couple cases which I can point the court's attention to. If your honor would take a look at that warrant, I can tell you what our concerns are with that warrant.

The Court: I'm listening.

Mr. Hendry: Harry Singletary is listed as the affiant if my recollection serves me correctly. Harry Singletary, affiant, from the Department of Corrections. The affiant attests certain facts which he must attest to, subscribe to, swear to, as being true in order to make that arrest warrant valid. Harry Singletary did not sign that document. That document is signed by another individual, a Hugh Ferguson. Get my warrant file. Our position is, your honor -- and, again, we just received that document about a month ago. We have been trying for a couple years now to get -- looking

> for an arrest warrant in this case. It's our position after doing that, that's not a valid arrest warrant because it's not signed by Harry Singletary. In order for a warrant -- in order for an affidavit to be valid, arrest warrant has to be signed by the individual who is attesting, swearing to the facts. By analogy, your honor, if a police officer were to be making a request for a search warrant to your honor, it would have been Joe Schmoe, officer, attests that this happened, that happened. I saw this, I saw that. These facts give rise to the belief there are items of contraband inside the house. If Joe Schmoe, the affiant down there on the line, does not sign that warrant, it's signed by a different individual, the warrant becomes invalid, your honor.
> The Court: it says sworn to, subscribed before me, 23rd day of January A.D. 1996 by Hugh Ferguson, personally known to me.
> Mr. Hendry: Yes, Your Honor. The problem is Hugh Ferguson is nowhere in the body of that affidavit. He is nowhere in the body of that application for an arrest warrant. So the only -- our position is that this warrant was invalid because Harry Singletary failed to sign it. Hugh Ferguson, the case which we --
> The Court: All right. All I wanted to do is ask you where you are going with it. You have explained that. I'll let you go forward. Objection overruled.
> Mr. Hendry: Thank you.

[ROA Vol. 2, pp. 231-236]

It appeared from the above discussion that the trial court understood the nexus between the Brevard County escape case, the DOC warrant, the instant murder case wherein the defendant was taken into custody by the Orlando authorities on April 30, 1996, and the instant postconviction proceedings. The Order denying relief speaks otherwise.

Regarding ineffective assistance of counsel, it is clear that trial counsel Andrea Black and Marlene Alva failed to fully investigate the Brevard County escape case and file the necessary motion to suppress based an unlawful arrest warrant. Brevard County Assistant Public Defender Michael Chauvin was asked if he was ever contacted by trial

counsel, and he answered no. (ROA Vol. 2, pp. 250-251). Trial counsel would have learned from Michael Chauvin that he actually proceeded to trial with Mr. Evans on the escape charge in Brevard County, then Mr. Evans was transported back to Orange County. Trial counsel has a duty to investigate a defendant's prior record for mitigation. Rompilla v. Beard, 125 S. Ct. 2456 (June 20, 2005). Had trial counsel contacted Michael Chauvin, at the very least trial counsel could have learned more about the circumstances of the escape, and perhaps mitigated the offense. Otherwise trial counsel could have conferenced with Mr. Chauvin, requested records, and finally learned that a motion to suppress was available based on a faulty arrest warrant. The following testimony came from Michael Chauvin.

> Q: Okay. Back at this time in 1997, were you ever contacted, did you ever speak with an Andrea Black?
> A: No.
> Mr. Lerner: Your Honor, I'm going to have an objection to relevance. In March of 1997 the trial, I believe -- oh, okay. I guess that would be relevant then. Trial wasn't until '99. Go on.
> By Mr. Hendry:
> Q: In the years 1997, 1998, and 1999, did you ever receive a phone call from Andrea Black?
> A: No.
> Q: Did you ever receive a phone call from a Marlene Alva?
> A: No.
> Q: Did you ever receive a request for records such as I made to you? Did you ever receive requests from that defense trial team?
> A: I did not.
> Q: Were you ever given a subpoena to testify at Mr. Evans's penalty phase?
> A: I was not given a subpoena.
> Mr. Hendry: No further questions.
> The Court: Cross-examination?

[ROA Vol. 2, pp. 250-251]

The state cannot defend the allegation that trial counsel was ineffective for failing to investigate the circumstances of the defendant's arrest and the escape case. The defendant was prejudiced because a valid motion to suppress was overlooked. Had one been filed, shoes would have been suppressed, and the jury would have found reasonable doubt and acquitted. Trial counsel Andrea Black testified as follows regarding her investigation and research on a motion to suppress in this case:

> Q: Ms. Black, I want to ask you what you did in order to investigate the circumstances of the arrest, and what you did to investigate whether there was a possible motion to suppress in this case based on –
> A: I don't remember.
> Q: Do you remember -- did you ever file a motion to suppress item seized pursuant to arrest, specifically the shoes which were recovered during his arrest?
> A: I don't believe so. I don't remember that, but that doesn't stick out in my memory.
> Q: Okay. Do you remember what he was arrested for?
> A: Not exactly. I remember that he was arrested – he was out on escape, and was arrested in a car. That's the most I can remember.
> Q: Do you remember who was in that car when he was arrested?
> A: No. Truthfully, I do not.
> Q: Okay. Do you remember if the police stated that Mr. Evans was arrested pursuant to an arrest warrant?
> A: I do not remember.
> Q: Okay. Do you ever remember attempting to obtain a copy of that arrest warrant?
> A: I do not remember, but I guarantee you if there was an arrest warrant, he was arrested, that I would have asked that that be provided, or looked for or gotten all the basic documents out of it. But if you are asking me specifically as to that particular item, I do not remember.
> Q: Okay. Let me ask you specifically, what documents did you request? What documents did you obtain in order to investigate the circumstances of this escape case in the escape warrant?
> A: I have no recollection of what specific documents I requested.

Q: Okay. Did you ever contact the Brevard County Public Defender's office and request records on the escape case?
A: I don't remember.
Q: Did you ever speak with an attorney with the Brevard County Public Defender's Office, Michael Chauvin?
A: I do not remember.
Q: Did you ever request from the Department of Corrections a copy of an arrest warrant?
A: Again, that would be my normal practice. I do not recall specifically in this case. I would request copies of any documents that related to this case, period. But I do not remember specifically.
Mr. Hendry: Your Honor, if I could ask Madam Clerk for a copy of, I believe it's state's exhibit A. I believe it might be defense exhibit A. It was the D.O.C. arrest warrant. Can I approach, your honor?
The Court: Yes, sir.
By Mr. Hendry:
Q: I'm approaching you with what's been marked as state's identification A and ask if you recognize that document.
A: Do I know what it is, or do I recognize it as having gotten it in this case? I'm not sure --
Q: Have you ever seen that document before?
A: I do not remember if I have or not.
* * * *
By Mr. Hendry:
Q: Ms. Black, do you remember doing any research to investigate whether there were possible problems with that arrest warrant?
A: I do not remember.
Q: Do you remember ever doing any research which might have indicated in case law that an arrest warrant, search warrant, such as this must be subscribed to and signed by the individual who is attesting to those specific facts?
A: I do not remember.
Q: You did not do a motion to suppress in this case, motion to suppress the shoes based on the problems which might be contained within this arrest warrant?
A: I don't recall that that was done. I don't remember specifically, though, quite honestly.
Q: And do you recall reviewing documents in the escape case from Brevard County which indicated when -- affidavit from certain individuals from the Cocoa Community Control Center, Brevard County Sheriff's Office, and from the actual place of employment where Mr. Evans was on

> work release, do you remember reviewing any of those types of documents?
> A: Do I specifically remember that, no.

[ROA Vol. 3, pp. 340-346]

The documents from the Brevard County escape case were introduced at the evidentiary hearing as Defense Exhibit 5. These records should have been requested and utilized by trial counsel in the instant murder case. The documents provide additional support for a motion to suppress in that Mr. Evans was arrested in Orlando, then later a Brevard County judge signed an order to take him into custody and transport him to Brevard answer the charges of escape. During the questioning of Andrea Black regarding her lack of investigation into the circumstances of Mr. Evans' Orlando arrest and a possible motion to suppress, the trial court stated,

> There is another thing for an arrest on an escape charge where, quite frankly, there probably is probable cause from—there doesn't even necessarily have to be a warrant.

[ROA Vol. 3, pg. 352]

The only basis that gave the Orlando Police Department the authority to take Mr. Evans into custody was the "Fugitive Warrant for Escaped Prisoner." As it turns out, that document was signed and sworn by the wrong individual from the Department of Corrections, therefore it was unlawful. The state and the lower court have pointed to no authority that says there is "probably probable cause" to arrest Mr. Evans in this situation, and no authority that says there "need not necessarily" be a warrant to arrest Mr. Evans in this situation. The Fourth Amendment says otherwise. The Brevard County escape

case file, which was obtained in postconviction, did not contain the "Fugitive Warrant for Escaped Prisoner" document. That document was obtained from the state who obtained it from DOC only shortly before the evidentiary hearing. The escape file reveals that most of the documents relating to the escape charge were generated post-April 30, 1996, the day that Mr. Evans was wanted for murder and was arrested by the Orlando Police Department.

Due to the lack of investigation into the circumstances of Mr. Evans' arrest, and due to the ineffective assistance of counsel under Strickland, a motion to suppress was not filed in the instant case. As such, Mr. Evans 4th Amendment and 6th Amendment rights were violated at trial, as well as his 14th Amendment rights. As a remedy, Mr. Evans should be afforded a new trial wherein the evidence seized unlawfully (to wit, the shoes) would be excluded.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM SEVEN OF MR. EVANS' MOTION FOR POSTCONVICTION RELIEF. SPECIFICALLY COUNSEL WAS INEFFECTIVE FOR FAILURE TO PREPARE MR. EVANS TO TESTIFY, FAILURE TO INVESTIGATE THE ESCAPE CASE AND FAILURE TO MITIGATE THE ESCAPE OFFENSE

Standard of Review

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with

deference only to the factual findings by the lower court. This claim was presented in Mr. Evans' Amended Motion in claim VII.

During the guilt phase of trial, Mr. Evans took the stand and was asked about his prior felonies. There was some confusion about whether he had been convicted of one or two felonies. During the confusion, Mr. Evans informed the jury that he had been convicted of the crime of escape, but informed it was only a "deviation." (TT Vol. 7, pp. 1394-1398). The ineffective assistance of counsel in failing to prepare the defendant for testimony completely prejudiced Mr. Evans in both the guilt phase and penalty phase. It is likely that the penalty phase was completely lost the moment the jury heard in the guilt phase that Mr. Evans had been convicted of escape. Once the jury heard about an escape conviction, and once the jury convicted, trial counsel should have called Michael Chauvin to the penalty phase to explain the arguably benign nature circumstances of the escape. Mr. Evans walked away from a work release camp; he did not orchestrate a violent prison break or secretly tunnel under a prison. Trial counsel had a duty to clarify this. The following testimony was presented regarding Mr. Evans' testimony and the revelation during the guilt phase that he had been convicted of escape:

> Q: Ms. Black, I want to ask you questions about things that happened in the trial; namely, specifically when Mr. Evans took the stand.
> A: Yes, sir.
> Q: And as he took the stand, do you remember there was a question about exactly how many felonies he had been convicted of, whether it be one or two?
> A: Specifically, I don't remember, but I do remember the context of that. I mean, I don't remember the exact question or language but I do remember that.

Q: Okay. And do you remember that it came out, I believe through Mr. Evans, that he said he had a charge of escape but it really was a deviation? Do you remember that testimony?
A: Yes, I do.
Q: And do you remember the jury heard that testimony during the guilt phase of Mr. Evans' trial, that he had been charged with escape?
A: Yes.
Q: Okay. How did you feel about that testimony?
A: I thought it was very damaging.
Q: And why is that?
A: Because then a jury would be likely to assume that he might escape again.
Q: And would that bode very bad as you were possibly going to proceed into a penalty phase in this case?
A: Yes.
Q: Do you think that information might cause a jury to impose death instead of life?
A: I can't answer that, but I do not think it was helpful to him at all.
Q: Okay. And apparently in the confusion, and in the questioning and talking about the escape charge, the jury learned during the guilt phase that he actually had been convicted of an escape charge. Do you remember that?
A: I don't remember the specifics of that. I don't remember how that came about or what actually happened with that.
Q: Okay. Now, this happened during the guilt phase, and the jury has now been informed that Mr. Evans has at least been charged with escape, possibly convicted of escape. And if you can recall, assuming the trial took place from April 5th of 1999 to April 9 of 1999, the jury would have heard this information about the escape on the final day of trial, probably April 9 of 1999?
A: Sounds about right.
Q: Okay. And assuming the penalty phase was conducted about a week later, a little shorter than a week later on April 14, April 15 of 1999?
A: Right.
Q: I want to ask you in that time period between April 9, 1999 and April 14 of 1999, between the verdict of guilty and the commencement of the penalty phase, did you make any efforts to contact the assistant public defender, Michael Chauvin?
A: I don't remember that I did or didn't. I have no recollection of that.
Q: Okay. Do you know if that escape charge and that escape conviction, do you have a recollection of whether that was a plea or a trial?

A: I don't remember.
Q: Do you ever remember seeing a transcript of a jury trial on the escape charge?
A: I don't remember. I might have. It's possible. I just don't remember.
Q: Did you ever consider -- did you ever consider calling assistant public defender Michael Chauvin to testify in the penalty phase, just to describe the circumstances of the charge of escape?

[ROA Vol. 3, pp. 354-357]

. . . .

[] A: I don't remember one way or the other.

[ROA Vol. 3, pg. 359]

Had Mr. Evans been adequately prepared by his attorneys for testimony, the number of convictions on his record would have been clear, and the jury would not have been made aware of the specific charge of escape on his record. It should not have been too tough to instruct the Mr. Evans, "When they ask you how many convictions you have, say two, and DO NOT inform them of the nature of the convictions." Unfortunately, the defendant mistakenly said "one conviction," then proceeded to inform the jury that he had inadvertently missed the "escape conviction." As part of damage control, the trial attorneys should have called Michael Chauvin to the penalty phase as a witness to explain to the jury that Mr. Evans did not break from prison violently or secretly tunnel under the prison. He simply walked away from a work release center. Testimony from the evidentiary hearing revealed that Ms. Black did not remember if she or anyone instructed and admonished the defendant about his convictions on the morning prior to him taking the stand:

> Q: Okay. Do you remember specifically speaking with Mr. Evans and talking with him about the number of convictions that he had, as he takes the stand, he is cross-examined by the state?
> A: I don't remember specifically, but we had two co-counsel in that case. Also times during trials when I'd be doing one thing, she would be doing another. So I cannot tell you exactly what happened or who talked to him or when it occurred but sometimes that does happen. You're asking me to assume. That's something that could have happened.
> Q: Could have happened?
> A: I do not remember.
> Q: Do you remember as you're having this conversation with the defendant, you and your co-counsel, do you remember telling the defendant you need to answer the question, you need to give them a specific number of convictions?
> A: Do I remember whether I specifically said that that day, that morning? No, I don't remember.

[ROA Vol. 3, pg. 363]

That conversation should have happened before the defendant took the stand. Because the defendant was ill-prepared for testimony, he incorrectly stated the number and nature of his convictions, and as a result, the jury was predisposed to sentence the defendant to death.

Trial counsel was ineffective under Strickland and Rompilla. The jury learned from Mr. Evans during the guilt phase that he had been convicted of the crime of escape. But they never learned in the penalty phase from Michael Chauvin that his escape offense simply concerned a work-release deviation. As such, the jury went into the penalty phase predisposed to sentence the defendant to death for fear that he would escape again. The circumstances surrounding the escape conviction showed that it was not an "escape" in the classic sense. He did not stage a prison break, overpower guards,

or tunnel under a fence. Yet the jury did not hear the circumstances of the conviction therefore they were left with the impression that Mr. Evans might escape from prison if they recommended life in prison.

First of all, counsel's performance was deficient in that counsel failed to instruct the defendant on how to answer questions regarding his priors. Mr. Evans should have been instructed by trial counsel, "On number of convictions, the answer is two." Instead, Mr. Evans answered "one," then the jury was able to hear the nature of his conviction: escape. The jury had already been informed that Mr. Evans was part of a gang. To minimize or soften the blow of the impact that the escape revelation had on the jury, Assistant Public Defender Michael Chauvin should have been called to the penalty phase to explain the nature of the charge. Counsel's performance was deficient for failure to investigate Mr. Evans's priors including the escape charge, failure to obtain that information and court file under Rompilla, and failure to salvage a life recommendation at the penalty phase by presenting the necessary information to the jury. Trial counsel's investigation and performance were lacking in this case, and as a result, Mr. Evans was convicted and sentenced to death. As a remedy, Mr. Evans must be afforded a new trial and or penalty phase to cure his 4^{th}, 5^{th}, 6^{th}, 8^{th} and 14^{th} Amendment violations.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM SEVEN OF MR. EVANS' MOTION FOR POSTCONVICTION RELIEF. SPECIFICALLY COUNSEL WAS INEFFECTIVE FOR NOT INVESTIGATING AND NOT CHALLENGING THE FORENSIC EVIDENCE AND THE ALLEGED ADMISSIONS MADE BY MR. EVANS.

Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So. 2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim was presented in Mr. Evans' Amended Motion in claim VII.

> Q: Were any experts—besides the psychiatrist, mental health professionals, was any expert consulted whatsoever?
> A: I don't remember. I don't know.

[Testimony of Trial Counsel, ROA Vol. 3, pg. 389]

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 "OG." (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).

Upon the conclusion of direct examination, Shana Wright informed that she failed to initially tell this to law enforcement because she was scared (TT Vol. 4, pg. 755) (note: she did not elaborate on what exactly she was scared of initially in her testimony). During the cross-examination of Shana Wright, this fear was revisited when the defense inquired again why she failed to inform law enforcement initially of her meeting and conversation with the Defendant in downtown Orlando shortly after the murder. To compound matters and the evidence against the Defendant further, Shana Wright testified specifically on cross-examination by the defense that she failed to inform law enforcement of this meeting and conversation because she was "scared of the Defendant." (TT Vol. 4, pg. 782). This testimony went to further bolster the state's contention that Evans was the mastermind of the shooting, or the "OG."

On redirect examination, the state asked Ms. Wright again what she feared. The defense objected, the objection was sustained, and the state asked to proffer the testimony. Out of the earshot of the jury, as a state proffer, testimony was elicited from Ms. Wright wherein she stated that she was afraid of being arrested herself, and that is why she did not tell the complete truth initially to law enforcement. (TT Vol. 4, pg. 791). The state was actually trying to elicit a response from the witness detailing that she

feared the Defendant because he beat her, and he was the leader and "OG" of a gang. After Shana Wright's response, the state announced that they would not be pursuing this line of questioning. The state then released Shana Wright after the defense indicated they had no further questions.

The defense failed to cross-examine her on her re-direct examination on this key issue. During cross-examination, the jury was told that Shana Wright feared Steven Evans, and that is why she was not forthcoming with law enforcement. Then during the proffer, defense counsel was made aware that Shana Wright simply feared being arrested, and that was the real reason why she was not forthcoming with law enforcement. This information was not presented to the jury for impeachment and substantive purposes. Defense counsel was ineffective in failing to present this crucial information and distinction to the jury. Not only would this information had impeached Ms. Wright's earlier testimony that she feared Mr. Evans, it would have negated the image that Mr. Evans was the terrifying mastermind of the shooting and leader of a gang.

There was no strategic reason why this vital information was withheld from the jury. Trial counsel agreed at the evidentiary hearing that she made a mistake in this regard.

> Q: Do you agree with me there is a big difference there between telling the jury I was afraid of the defendant, that's why I was untruthful, versus telling the jury I was afraid of being arrested myself, that's why I was untruthful? Would you agree there is a big difference there?
> A: Yes.
> Q: What's the better situation for the defense?
> A: Of course, that she is afraid to be arrested.

Q: The latter?
A: Right.
Q: Okay. Now this was -- as a proffer, this was out of the earshot of the jury where she said I was afraid of being arrested myself. Are you with me?
A: Yep.
Q: Okay. After this response about being afraid of being arrested, the state announced they would not be pursuing this line of questioning. The state then released Shana Wright, after the defense indicated they had no further questions. The defense failed to cross-examine her on redirect examination on this key issue. Then Shana Wright was released. I want to ask you, is there any reason why the defense would allow Shana Wright to be released rather than bring the jury back in, let the jury know that, no, it wasn't that she was afraid of the defendant, it was because she was afraid of herself --of being arrested herself?
A Are you asking me why that happened? I can't answer that. I don't know.
Q: Looking back, do you think that's something that should have been done?
A: In hindsight, sounds like it.

[ROA Vol. 3, pp. 385-386]

As such, the jury was left with the damaging and prejudicial misimpression that Ms. Wright was scared of Mr. Evans rather than scared of being arrested herself. It was vital that Ms. Wright be extensively impeached due to the nature of her testimony, and the defense dropped the ball in this regard. The defense failed in another regard. Trial counsel failed to investigate the forensic evidence as it related to the damaging admission that was introduced through Shana Wright. Had trial counsel fully investigated the forensic evidence, and consulted an expert on the forensic evidence, they could have completely cast doubt on the damaging admissions in this case.

At the evidentiary hearing, the defense called crime scene reconstruction expert

Kenneth Zercie. Mr. Zercie ultimately concluded that it would be near impossible for brains and blood to blow back on Mr. Evans given the distance at which the .22 caliber weapon was fired from the victim's head. Had such testimony been presented, the jury would have been informed that there was no way for blood and brains to be on Mr. Evans' suit if he indeed was the triggerman. The testimony from the evidentiary hearing reveals that trial counsel was completely ineffective in failing to investigate and challenge the state's evidence in this case.

> Q: Do you remember at trial the testimony of Shana Wright?
> A: No.
> Q: Do you remember who Shana Wright was?
> A: Yes.
> A: Who was Shana Wright?
> A: His girlfriend.
> Q: Do you remember if she provided any damaging testimony against Steven Maurice Evans?
> A: I have no memory of her testimony.
> Q: Do you remember the testimony where she said the defendant provided an admission to her regarding –
> A: I have no memory of that. I don't remember that at all.
> Q: Do you recall the testimony whereby Shana Wright said she saw Steven Maurice Evans the day after the murder, he said he was down in Orlando buying a suit because he got blood, brains all over his suit?
> A: I don't remember that.
> Q: Do you remember hearing that testimony and saying that is a big blow to the defense case?
> A: I don't remember the testimony.
> Q: Did you know that testimony before proceeding to trial?
> A: I'm sure we would have taken her deposition. I would assume. I can't recall specifically. But, you know, I don't know if that was my witness or not. It could have been. I don't even remember that.
> Q: Okay. What effort did you make to discredit that testimony?
> A: I have no recollection of what was done.
> Q: Did you consult a ballistics expert in this case?
> A: No.

Q: Did you consult a crime scene reconstruction expert in this case?
A: No.
Q: There was a ballistics witness, I believe her name was Nanette Rudolph, in this particular case?
A: I know a Nanette Rudolph. I don't remember if she was a witness.
Q: Who was responsible for handling the testimony of Nanette Rudolph?
A: I don't remember. My recollection is Marlene but I could be wrong. I don't remember.
Q: Do you remember the medical examiner, Doctor Broussard?
A: Yes.
Q: Who was responsible for –
A: I think that was Marlene, but again, I'm -- I don't remember.
Q: To your recollection, the person responsible for handling the medical examiner, Doctor Broussard, was Marlene Alva? Is that your testimony?
A: No, I said I don't remember. I think that's true, but I'm not –I can't swear to that.
Q: You don't remember if it was either you or Alva who handled Doctor Broussard?
A: No, I do not remember.
Q: Do you remember who handled Nanette Rudolph?
A: No.
Q: Do you remember asking Marlene Alva to handle Nanette Rudolph?
A: I do not remember.
Q: If I were to show you a memorandum whereby you made that request to Ms. Alva, might that refresh your recollection?
A: If that's what it says in the memo, that's probably it.
Q: So that would refresh your recollection?
A: Well, I don't know if it refreshes my recollection. I can look at the memo, say whether I wrote it.
Mr. Hendry: And Madam Clerk, I would like to have this marked as the next defense identification, which would be --
The Clerk: E as in Edward.
Mr. Hendry: Thank you.
By Mr. Hendry:
Q: I'm showing you a memorandum dated March 29, 1999. Let me ask you if you recognize that memorandum.
A: That looks like something I wrote. That's my initials so obviously I wrote it.
Q: And on the second page, reading that paragraph there, does that refresh your recollection that actually on March 29, 1999, about a week before trial, you asked Marlene Alva to do the bullet person, the ballistics

person, Nanette Rudolph?
A: Right.
Q: Okay. And what was your request to Marlene Alva?
A: "Can you do the bullet person?".
Q: Why did you ask Marlene Alva to do the bullet person?
A: "you seem to be better at those types of witnesses than I."
Mr. Hendry: Your Honor, at this time I would like to introduce this as the next defense exhibit.
The Court: The memo?
Mr. Hendry: The memorandum.
The Court: All right.
Mr. Lerner: Are we just talking about the one memo?
The Court: That's what we're talking about.
Mr. Hendry: At this point, the March 29 memorandum.
Mr. Lerner: He has something about an inch thick.
Mr. Hendry: I'll separate it. This is the only memorandum here I wish to introduce at this point.
The witness: Now the handwriting on that is not mine. The handwriting stuff.
Mr. Hendry: I have a clean copy.
The Court: Any objection, Mr. Lerner?
Mr. Lerner: No. Just to the memo.
The Court: Okay. It will be admitted. A clean copy.
Mr. Lerner: Although I think it's past recollection recorded, probably. On that basis, I won't object to it.
The Court: Overruled.
Mr. Lerner: I'm not going to object.
The Court: I'm sorry?
Mr. Lerner: He keeps asking to refresh your recollection. She keeps saying she didn't remember. But if she identified it, I won't object to it.
The Court: Okay.
The clerk: Defense exhibit for identification entered into evidence as defense exhibit 7.

[ROA Vol. 3, pp. 376-381]

The above testimony proves that there was a complete lack of investigation and preparation in this case. One week prior to trial lead counsel asks her co-counsel in a written memorandum to prepare for the crucial forensic evidence in this case and do "the

bullet person." No ballistics expert was ever consulted by the defense, and no crime scene reconstruction expert was consulted by the defense. Had adequate investigation been performed, the defense could have called a witness such as Kenneth Zercie, who could have completely cast doubt on the alleged admissions in this case. Additionally, trial counsel was ineffective for not calling the defendant's mother, Ms. Linda Evans, to the guilt phase, to inform the jury that her son is a braggart. This type of testimony would have led the jury to disregard the alleged admissions in this case. The defendant could not be believed when he allegedly told Ms. Wright that he was the shooter. Ms. Evans described her son's propensity to brag at the evidentiary hearing. (ROA Vol. 2, pg. 215).

If the jury believes the testimony that Mr. Evans had the victim's blood and brains on his pants, they would surely convict. That is why it was so vital to challenge that admission relayed through Shana Wright and cast doubt on it. Trial counsel failed in this regard. The defense called Kenneth Zercie at the evidentiary hearing to support this claim. Mr. Zercie's curriculum vitae was introduced as exhibit one. Mr. Zercie is the assistant director of the state crime lab in Connecticut, and was admitted as an expert in crime scene reconstruction analysis and blood spatter analysis (ROA Vol. 1, pg. 10). He testified as follows:

> Q: Okay. And in regard to that testimony, do you recall that it was -- the defendant allegedly had stated to Shana Wright that blood and brains had splattered back on his clothes, therefore, he was downtown getting himself a new suit?
> A: Yes, sir.

> Q: Okay. As far as what you reviewed, the crime scene reconstruction analysis, blood stain splatter analysis which you have conducted in this particular case, does that evidence conform to, or is that evidence consistent with, a statement of blood and brains splattered back on the shooter in this case?
> A: From the evidence provided to me for examination, the answer would be no.

[ROA Vol. 1, pg. 15]

This testimony could have refuted the main thrust of the state's case at trial. At trial, Shana Wright's damaging testimony was even corroborated and bolstered by the testimony of the medical examiner Dr. Broussard. On the redirect examination of Dr. Broussard, the State asked him if "it would 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). Realizing now that this question was speculative and prejudicial, the defense objected. The objection was overruled and the witness answered yes. This type of evidence is why it was so important for the defense to consult a crime scene reconstruction expert such as Kenneth Zercie. The speculative and prejudicial evidence presented at trial had the powerful effect of bolstering and corroborating the purported admissions in this case. Had an expert been called to refute the admissions of the Defendant and the bolstering speculation of the medical examiner, the jury would have acquitted. Mr. Zercie testified that the blow-back theory would not apply in the case at hand. The victim's hair was in a tight, nappy curl which would have acted as a further barrier when the projectiles from the small .22 caliber weapon entered the victim's head (ROA Vol. 1, pg. 20), and that there would be a minimal amount of blood that

would have blown back after the shooting, and it would be highly unlikely that brains would have left the skull upon impact. He further testified that the entry wounds appeared relatively clean and that there was a very little blood on the back of the victim's shirt, further refuting the reliability of the alleged admission in this case regarding blood and brain matter. No exploding or seeping was present in the photographs he reviewed. (ROA Vol. 1, pg. 22). The reports and photographs he reviewed in this case indicated that looking at the back of the victim's shirt in this case, there was an absence of blood or dripping patterns from the wounds themselves. (ROA Vol. 1, pg. 59). He concluded from his observations of the evidence and photographs in this case that "a large quantity of blood, grey matter, hair, bone, was not present on the surfaces." (ROA Vol. 1, pg. 62). The lack of gunpowder residue found around the wounds as mentioned in the medical examiner's report suggested that the shooting did not take place at extremely close range, further refuting the possibility of blow-back onto the shooter.

> "I would not expect to see back spatter from an entry wound coming back that far, no sir."

[Evidentiary Hearing Testimony of Kenneth Zercie, ROA Vol. 1, pg. 18]

Rather than adequately investigate and challenge the state's case and the defendant's purported admissions in this case, lead trial counsel ineffectively requested one week prior to trial that co-counsel do the "bullet person" because she was better at that. Strickland requires more than this, and in light of the prejudice that ensued, Mr. Evans should be afforded a new trial as his 6th and 14th Amendment rights were violated.

Had adequate investigation been conducted, and had the trial attorneys been adequately prepared at trial, they would have introduced information at trial indicating that Edward Francis was responsible for the murder of Kenneth Lewis.

The Weapon Used to Kill Kenneth Lewis Belonged to Co-Defendant Edward Francis, it was Used by Edward Francis on an Unrelated Victim Just Weeks Prior to the Murder, and Counsel was Ineffective in Failing to Present this Information to the Jury During Edward Francis' Testimony

In denying this claim, the lower court stated the following:

> Edward Francis: Mr. Evans alleges counsel failed to point out that the .22 weapon used in the murder of Kenneth Lewis actually belonged to Mr. Francis. He also alleges counsel failed to reveal that Mr. Francis had used the same .22 caliber weapon just weeks prior to the Kenneth Lewis murder to shoot someone named Arjun. Citing a memo from Ms. Black to Ms. Alva, he contends counsel intended to introduce this evidence at trial, but made no attempt to do so. He argues that if this information had been introduced, the jury would have found reasonable doubt and acquitted him.
>
> The record demonstrates that during closing arguments, counsel pointed out that "the testimony of the majority of these witnesses is that the .22 belonged to Edward Francis, Jersey. Jersey himself says that." (Trial transcript, page 1430). Thus, the jury did actually hear this information.
>
> Furthermore, during the evidentiary hearing, Mr. Francis testified that the guns used by the group, including the .22 in question, were stolen from Mark Quinn's employer, and the .22 became "his." He admitted using the .22 to shoot Argun, but testified that Mr. Evans generally kept the guns with him and passed them out when the group was going to commit an offense. On night of the murder, the plan was to rip off drug dealers. Mr. Francis further testified that after the murder, Mr. Evans kept the .22 and directed him to get rid of the shampoo bottle used as a silencer. Based on the foregoing, there is no reasonable probability that the outcome of the proceedings would have been different if counsel had introduced additional evidence regarding the technical ownership of the gun.

[ROA Vol. 11, pp. 2044-2045]

The lower court makes reference to trial counsel's closing argument, but not to any

evidence that was presented at trial. The jury instructions make clear that arguments are not to be considered evidence. Trial counsel failed to present extremely exculpatory evidence to the jury at trial. There could be no strategic reason why trial counsel would fail to cross examine Edward Francis on the issue of his ownership of the very same weapon used to kill Kenneth Lewis. There can be no strategic reason why trial counsel would fail to point out to the jury that Edward Francis used that very same weapon just weeks prior in an attempt to kill an individual named Argun, and no reason was presented at the evidentiary hearing by trial counsel. A memo introduced into evidence on this issue indicates that the trial attorneys intended to introduce this evidence as Williams Rule evidence but were under the impression that they missed a filing deadline (Defense Exhibit 7). Had the evidence been presented to the jury, the jury would have found reasonable doubt and would have acquitted Mr. Evans. Evidence was presented at the evidentiary hearing to reveal that Mr. Francis engaged in an attempted murder with the same murder weapon in the instant case just weeks before the Lewis shooting. Mr. Francis's postconviction deposition was introduced at the evidentiary hearing whereby he admits his involvement in the Argun shooting (Defense Exhibit 4), and he admitted to the same again at the evidentiary hearing. An argument could have been made at trial that since Argun survived the Francis shooting, Francis would have to kill someone to become an original gangster, or an "OG." Consequently, it is logical to believe that Francis shot and killed Lewis. Counsel was ineffective for failing to raise this issue and theory at trial, and the defendant was prejudiced as reflected by the guilty verdict.

Mr. Francis admitted the following at the evidentiary hearing regarding guns stolen from Mr. Quinn's employer:

> Q: Do you know whether Mr. Argun was shot prior to the shooting of Capone in April of 1996?
> A: Yes.
> Q: Was the Argun shooting before the Capone shooting?
> A: Yes.
> Q: And what was Capone's real name?
> A: Kenneth Lewis.
> Q: Could you estimate how much before?
> A: Good question. Not really sure.
> Q: Maybe we can get there. About how much before the Lewis shooting was the gun stolen that was used in the Lewis shooting?
> A: I say about a month.
> The Court: I'm sorry. I didn't hear that.
> The witness: About a month.
> The Court: Okay.
> By Ms. Morgan:
> Q: And a number of guns were stolen at the same time, right?
> A: Yes.
> Q: Could you describe what guns were stolen, and whom they were stolen from?
> A: Don't know the individual's name. But there was a .9 millimeter with a infrared beam on it. There was a .380 handgun. There was a .22 German Ruger, if I am correct. And then there is a 16-gauge double-barrel shotgun. Then there is a 410 double-barrel shotgun.
> Q: And do you know if those guns were stolen from the employer of Mr. Quinn?
> A: Yes.
> Q: Was one of those guns your gun? Did it become the gun that you thought of as your own that you carried around?
> A: Yes.
> Q: And which gun was that?
> A: German Ruger.
> Q: And was that a .22?
> A: Yes.
> Q: Was it an automatic?
> A: Yes.
> Q: Is it the gun that was used to kill Mr. Lewis?

A: Yes.
Q: Was it the gun that was also used to shoot Mr. Argun?
A: Yes.
Q: And you have claimed, have you not, Mr. Evans is the one that shot Mr. Lewis; is that right?
A: Yes.
Q: But you have admitted under oath to the state attorney already that you were the one that shot Mr. Argun; isn't that right?
The Court: Okay. You have a right not to answer that question. If you want to invoke your Fifth Amendment right to remain silent, you may do that.
The Witness: Ouch. Under oath? Yes. Yes, I did.
By Ms. Morgan:
Q: I'm sorry, I couldn't hear you.
A: I said, under oath, yes, I did.
Q: You did. Okay. That is the first person you ever shot?
A: Yes.

[ROA Vol. 1, pp. 139-142]

The above testimony was not elicited at trial, and trial counsel failed under Strickland to provide the effective assistance of counsel in so failing. Prejudice is evident by the verdict of guilty and death sentence. Had the jury heard the above testimony, they would have acquitted, or at the very least, recommended a life sentence in light of the obvious residual doubt. Mr. Francis shot Argun in the head with the .22 pistol just weeks before Mr. Lewis was shot in the head with the same .22 caliber pistol. It is logical to believe that Mr. Francis was the individual who shot Mr. Lewis, not Mr. Evans. The jury would have acquitted Mr. Evans had they heard the Mr. Francis's admissions revealed at the evidentiary hearing.

Q: With Ed Francis admitting to shooting Argun with the very same .22 Ruger just about a week prior to the murder of Kenneth Lewis, you said there was no strategic reason to not admit that evidence?

A: I can't tell you one right now. This was a group of guys that had the guns and had hung out together, so I mean, while I think that's an issue that needed to be dealt with, I can't remember why or why not at this point.

[Testimony of Trial Counsel, ROA Vol. 3, pg. 408]

Although the lower court's order makes a reference to closing argument wherein trial counsel made an argument about ownership or control of the murder weapon, there is absolutely no testimony or argument in the trial record regarding the fact that Francis used the murder weapon to shoot Argun in the head just weeks prior to it being used to shoot the victim in the instant case. This is crucial exculpatory information that should have been presented by the defense at trial. Trial counsel was unable to explain any strategic reason why this information was not presented to the jury, and the lower court's order does not address this particular claim. Trial counsel testified as follows at the evidentiary hearing:

Q: Going back, we have the situation, burglary, several guns taken, .22 Ruger is taken, Edward Francis claims that gun to be his own, keeps it in his possession. A week prior to the Kenneth Lewis murder, Edward Francis, with his .22 Ruger pistol, takes a shot at a victim named Argun. Doesn't kill him, leaves him to be a vegetable. Now through investigation of law enforcement, it's shown that this same .22 Ruger pistol that's owned, basically, by Edward Francis, is the very same gun that was used to kill Kenneth Lewis. Is there any strategic reason why you would not want to point that out to the jury?
A: Point out that Edward Francis shot that same gun before?
Q: Yes.
A: If there was a way to get it in, seems to me that's something that should be presented.
Q: What steps did you take in order to get that evidence in?
A: I don't remember. I have no recollection of that whole scenario except for what I have related to you.

[ROA Vol. 3, pg. 399]

Edward Francis admitted to the Argun shooting in a pre-trial deposition. The way to get the information in is to simply ask Edward Francis on cross-examination if he shot Argun with the same .22 weapon that was used to shoot Lewis, and he would have answered "yes." Had the jury heard this information, they would have acquitted Mr. Evans, or at the very least, recommend life instead of death.

Ineffective Assistance of Counsel for Failure to Call Mark Anthony Quinn Trial to Inform the Jury that Co-Defendants Gervalow Ward (Dred) and Edward Francis (Jersey) Thrice Bragged About Shooting Victim Kenneth Lewis

Mark Quinn testified at the evidentiary hearing but not at trial. Trial counsel was ineffective for failing to call him as a witness because he could have informed that Ward and Francis thrice admitted to the shooting. This would have caused doubt as to who actually killed Lewis, and the jury would have acquitted Mr. Evans. Mark Quinn testified as follows at the evidentiary hearing:

> Q: Okay. What happened there at the convenience store that you can remember?
> A: Kid and Jersey was bragging about how they became O.T. (sic). How they shot Capone.
> Q: Okay. So it wasn't Mr. Evans saying I shot Capone?
> A: No.
> Q: You say it was Kid and Dred who were bragging about shooting this gentleman Capone?
> A: Correct.
> Q: Okay. Did you hear Kid or Dred at some point again admit to this killing, this crime?
> A: Bus stop downtown. And on the news.
> Q: Okay. If you could describe on the news, what was it that you saw on the news exactly?
> A: Kid was getting -- being placed in the car. They were talking out

of the rage about how he shot the mother fucker, blah, blah.
Q: Okay. And there was another opportunity – I assume this happened before he was arrested, before he was placed on the news, you said that there was a bus stop where he made the –
A: Bus terminal downtown. Main bus terminal.
Q: Okay. And what were the circumstances of that conversation?
A: He was bragging in front of a group of people that he had, what he said, murdered somebody over on Mercy Drive.
Q: Okay. And who made that statement?
A: Kid.

[ROA Vol. 1, pp. 100-101]

Mark Quinn additionally swore in an affidavit introduced at the evidentiary hearing (Defense Exhibit 3) that at the time the group was at the convenient store after the murder, Kid said Mr. Evans had nothing to do with the shooting. Had the testimony of Mark Quinn been presented at trial, the jury would have acquitted. The failure to present the testimony of Mark Quinn at trial constitutes ineffective assistance of counsel, and accordingly, the defendant should be afforded a new trial under Strickland as a cure for his 6th and 14th Amendment violations.

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM SEVEN OF MR. EVANS' MOTION FOR POSTCONVICTION RELIEF. SPECIFICALLY COUNSEL WAS INEFFECTIVE FOR NOT INVESTIGATING AND FAILING TO PRESENT MR. EVANS' ALIBI WITNESS. COUNSEL WAS INEFFECTIVE FOR FAILING TO SECURE THE ATTENDANCE OF ALIBI WITNESS NICOLE TAYLOR.

Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim was presented in Mr. Evans' Amended Motion in claim VII.

Trial counsel was ineffective in failing to call alibi witness Nicole Taylor to trial. Prior to the close of the state's case, defense counsel brought up the matter of this witness. The discussion focused on the fact that although Ms. Taylor was subpoenaed to Court, it appeared she would not be coming to Court. Ms. Black informed the Court that she could not "ethically" ask the Court for a "writ of attachment" for Nicole Taylor's appearance. (TT Vol. 7, pg. 1297). Ms. Black then suggested perhaps that the Court issue a writ on its own motion. The Court stated that it would not get involved in the matter because for all the Court knew, Nicole Taylor may come to Court and hurt the defense case. The Court responded, "What you would need, if you want to secure the

appearance of the witness is–of course, I would be more than happy to have the witness served. You are not asking me to do that" (TT Vol. 7, pg. 1298). Defense counsel then inquired from the defendant on the record if he understood why it was that she could not ask for a writ of attachment. The defendant responded that his understanding was that it was a "transportation problem," and he thought that the investigator was to pick the witness up, but he was not sure what happened. (TT Vol. 7, pg. 1299). Defense counsel was ineffective for failing to secure the witness's attendance and failure to inform the defendant that he had the right to ask the Court to secure the witness's attendance notwithstanding counsel's ethical dilemma. Counsel merely stated that she herself could not ask for a writ of attachment. Then counsel asked the Court in its discretion to issue a writ. The Court refused to *sua sponte* issue such a writ. At that point, it was defense counsel's duty to inform the defendant of his right to ask the Court to issue a writ to secure his alibi witness's appearance. Defense counsel failed in their duty and provided ineffective assistance of counsel in that regard. Prejudice is shown by the fact that the jury, after their deliberations, asked to see the shoe cast presented in court. This is evidence that the jury had some reasonable doubt as to whether Evans was at the crime scene. Had the alibi witness Nicole Taylor testified, the outcome of the trial would have been different.

Nicole Taylor provided a pre-trial deposition wherein she stated that the defendant was staying with her every night at her apartment in the months of March and April of 1996. The defendant informed defense counsel that he wished to proceed on this alibi as

his theory of defense, and the defendant had a right to secure the attendance of Nicole Taylor to his trial to support the alibi. The record in this case shows that the defendant was not informed, or did not understand, his personal right to secure the attendance of his alibi witness when the witness failed to appear in Court. Counsel was ineffective for failing to secure the attendance of alibi witness Nicole Taylor. Counsel could have sent her investigator to pick up Nicole Taylor and bring her to Court, she could have requested that a bailiff or sheriff accompany her investigator to pick up Nicole Taylor if Ms. Taylor was unwilling to come to Court, or she could have made a formal motion for the Court to call Ms. Taylor as a Court witness. Instead, counsel abandoned the witness and failed to make a formal motion to summon her to court.

Nicole Taylor testified at the evidentiary hearing. She should have testified at trial. She stated that in April of 1996, at the time of the murder, she was living with Mr. Evans. (ROA Vol. 2, pg. 258). At the time she was living with him, he was never running around in a gang, and he was not involved in gang activity. (ROA Vol. 2, pg. 259). His whereabouts were always accounted for, and he never stayed out all night. . (ROA Vol. 2, pg. 260). Ms. Taylor testified as follows:

> Q: Okay. So if you could describe that phone call that you received from Steven Maurice Evans.
> A: He told me that he was in jail.
> Q: Okay. Did he tell you what he was in jail for?
> A: Yes, he did.
> Q: And what was that charge?
> A: Murder.
> Q: Did he say he did it?
> A: He told me he didn't do it.

Q: Was he truthful with you?
A: As far as I knew he was truthful with me.
Q: Did you ever catch him in lies?
A: No, I haven't.
Q: The information which you just stated to me, did you state that information to his trial attorneys, Andrea Black and Marlene Alva?
A: Yes, I did.
Q: Okay. And did you willingly provide a deposition to the state attorney, subpoena for deposition?
A: Yes, I did.
Q: You willingly accepted a subpoena for trial of state versus Steven Maurice Evans?
A: Yes, I did.
Q: Okay. Was there a situation, was there a problem -- did you have something going on in your life personally which caused you to not appear at the trial?
A: Yes, there was.
Q: If you could describe that situation.
A: I was in a real abusive relationship, and the guy I was with threatened me not to go.
Q: And what was the name of the individual that you were in an abusive relationship with?
A: His name is Dennis Bomar (ph).
Q: Okay. What did he say? What did he tell you?
A: He told me he was going to beat me half to death, in so many words.
Q: If you what?
A: If I was to go to court and testify.
Q: Is that why you did not appear in court?
A: Yes, it was.
Q: Did the defense attorneys ever offer to offer you some kind of protection or restraining order or make arrangements to allow you to come to court?
A: No, they did not.
Q: Did you receive a call from an investigator named Sandy Love regarding your appearance in court?
A: I called her.
Q: Okay. What was that conversation?
A: I told her why I couldn't make it to court. She was like, okay. She hung up the phone. She didn't try to get me to come or nothing.
Q: Okay. Did she offer to provide you with transportation or protection?

A: No, she did not.
Q: Did she say anything else during that conversation?
A: No, not -- nothing that I can recall.
Q: Did she ever tell you that it was imperative that you come to court?
A: No, she did not.
Q: Did Steven Maurice Evans Ever threaten you and say, you better come to court, you better come to court and lie for me in this case?
A: No, he did not.
Mr. Hendry: Can I have a moment, Your Honor?
The Court: Yes, sir.
By Mr. Hendry:
Q: Now, I just want to ask you about, you were living with Steven Maurice Evans during the entire month of April of 1996, correct?
A: Yes.
Q: Okay. And do you ever remember, you know, that you received that phone call, and the records here indicate that he was arrested on April 30 of 1996. Prior to April 30 of 1996 do you ever recall a time where Steven Maurice Evans came home after two o'clock or four o'clock in the morning?
A: No. I think I would remember that. No, he did not.

[ROA Vol. 2, pp. 261-264]

The state had an opportunity to call Sandy Love in rebuttal of this testimony, but they did not do so. Thus the defense is entitled to the presumption that the aforementioned testimony is true and correct, and therefore counsel was ineffective in failing to secure the attendance of Nicole Taylor. If such testimony would have been presented at trial, the jury would have acquitted. Mr. Evans should be afforded a new trial due to the deprivation of his rights under the 5th, 6th, 8th and 14th Amendments, wherein the testimony of Nicole Taylor is heard by a jury before deciding his guilt and sentence.

ARGUMENT VI

THE TRIAL COURT ERRED IN DENYING RELIEF ON MR. EVANS' MOTION FOR POSTCONVICTION RELIEF. SPECIFICALLY COUNSEL WAS INEFFECTIVE FOR NOT INVESTIGATING THE DEFENSES OF SANITY AND VOLUNTARY INTOXICATION, AND FOR FAILING TO FORWARD VITAL INFORMATION TO THE MENTAL HEALTH EXPERTS. THE DEFENDANT WAS FURTHER PREJUDICED BY THE INACTION OF COUNSEL WHEN THIS LED TO ERRONEOUS CONCLUSIONS REGARDING HIS COMPETENCY TO STAND TRIAL.

Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court. This claim was presented in Claim V of Mr. Evans' Amended Motion.

The most vital information available that should have been forwarded to the mental health experts was contained in the pre-trial depositions of Edward Francis and Mark Anthony Quinn. Those depositions were introduced at the evidentiary hearing as defense exhibits 5 and 6. Letters dated April 1, 1999 from trial counsel revealed that this information was not forwarded to the mental health experts until 4 days prior to trial (these letters are included in Defense Evidentiary Exhibit 8 and Defense Identification Exhibit "G"). As such, the defenses of insanity and voluntary intoxication were never investigated or explored, and vital information concerning the defendant's mental health was not considered by the experts in their last round of competency evaluations. Dr.

Gutman was shown the depositions of Francis and Quinn just before his April 1, 1999 video deposition, and he finally changed his opinion and was able to reach a firm conclusion that Mr. Evans was incompetent to proceed to trial. Strange letters and correspondence introduced at the evidentiary hearing as Defense Exhibit 18 indicate that the defendant is and was incompetent, and the record reveals that these letters failed to reach the mental health experts in their evaluations. Dr. Gutman testified as follows at the evidentiary hearing:

> Q: Well, this Quinn deposition, apparently this Mark Quinn deposition which was taken in March, 1998; is that what you recall?
> A: Yes.
> Q: Okay. You did not actually sit down to review that deposition, you were never provided with that deposition until April 1st of 1999?
> A: That's correct.
> Q: In that deposition in March of 1998, do you recall that Mark Quinn described the defendant as looking rough, as if he was suffering from a lack of sleep?
> A: Yes.
> Q: He referred to the defendant as paranoid, and how the defendant was having delusions Mr. Quinn was an undercover police officer?
> A: Yes.
> Q: Mr. Quinn felt the defendant was having delusions about being in a gang?
> A: Yes.
> Q: Mr. Quinn described the defendant in this deposition as impatient, wild, having a strange look in his eye?
> A: Yes.
> Q: And this is a totally different individual from -- it was Ed Francis who described the defendant as the joker. Here we have another individual, Mark Quinn, who is talking about these descriptions, right?
> A: Well, I remember there was some other depo or information that I had, and that -- I misapplied the exact -- the author of that statement, but, yes, it was something that I had read.
> Q: Okay. This type of information that's being relayed in this deposition in March of 1998, is this information -- would you use this information to

formulate an opinion that Mr. Evans was insane at the time of the offense?
A: Well, I could say that he was mentally ill. He has persisted, never wanting to talk about what happened. But from this type of information it would certainly point to that he was suffering a major mental disorder, paranoid schizophrenia, and that he may very well have lacked criminal responsibility for his acts at the time of the alleged offense. Without hearing from him the exact reasons for what he did and why he did it, I would prefer not saying that he was legally insane because I don't have direct information.
Q: Okay. As far as the information continues in that deposition -- that you didn't receive until April 1 of 1999, just a week prior to trial -- Mr. Quinn stated that the entire group is doing powder cocaine, he was paranoid and irrational, felt Capone was planning to rob him, take Shana Wright's tax refund. That situation there, where you are having information Mr. Evans is doing powder cocaine and he was paranoid at the time of the offense, could you utilize that type of information to formulate an opinion that there was voluntary intoxication at the time of the offense?
A: Yes.
Q: Mr. Quinn stated that Evans did cocaine all the time, and sometimes placed cocaine in his marijuana cigarettes. Is that further information you would utilize to formulate opinions regarding sanity at the time of the offense, and whether he was under the influence of illegal substances?
A: Yes.
Q: When he's described as mentally wild, sometimes having no emotion, going in and out like he bumped his head, went into another zone, is that the type of information you would have wanted to have received, this information, prior to giving your full competency evaluation throughout the year 1998?
A: Yes.
Q: And 1997?
A: Yes.
Q: Even into 1999?
A: I would.
Q: Okay. In fact, prior to April 1 of 1999, you had generated a competency report where you said – you stated that Mr. Evans was marginally competent?
A: Correct.
Q: It was because of the Mark Quinn deposition, and the Ed Francis deposition, that caused you to change your opinion as to competency --
A: That's correct.
Q: -- in this particular case? Okay. And the information continued.

Quinn told Evans, man, you lost your mind. Quinn's aunt's comments about Steven Evans, something is wrong with him. Mr. Quinn described Evans as coked up, huffing and puffing, not saying anything, f'd up, sitting there all spaced out. Is this information that you could utilize to formulate an opinion as to sanity at the time of the offense?

A: Yes. And it could be used in questioning him about specifics. I had nothing specific to go on, and if I had something specific I could have played with him, thrown out some things and waited to see his response. So it would have given me a much better foundation for my evaluation on criminal responsibility, which I maintained all along that I could not render an opinion on because he denied --wouldn't talk about it, or denied being present at the time of the offense.

Q: Okay. I want to show you a record which is contained within that large packet of information there. This is labeled, cover sheet for in-patient records, dated October 8 of 2002, and there is a discharge diagnosis on here. I'll ask you if you reviewed this note here, and if it has any impact on your opinion regarding the defendant's present competency or competency year of 2002?

A: Well, it did. It did have -- I do have an opinion.

Q: What does that notice say there?

A: Glaucoma, Uveitis, right greater than the left, probably secondary to sarcoidosis. Sarcoidosis was another diagnosis. Refused consultation and treatment. Doctor Nazarino (ph).

Q: Okay. What comment can you make about that refusal of the consultation and treatment?

A: Well, it's consistent with his refusal to get treatment, be evaluated, repeatedly, a pattern that goes back to even the times when we were evaluating him, meaning the psychiatrist, psychologist. That it was part of a dissembling or propending a distortion in order to not give the impression of being ill and to not cooperate. To not cooperate based on a delusional disorder was more psychotic and irrational than basing a refusal because of philosophical, religion, social, other reasons why a person might not want to talk about their crime. This was a pattern continually shown, even up until '02 and '03 and '04 when Doctor Danziger, whose report I read of July, has continually met with a seeming stonewalling, but it's unusual and bizarre stonewalling. It isn't the usually sociopathic -- I won't talk about that. This is bizarre stonewalling.

Q: Okay. You mentioned Doctor Danziger's report of July of this year. That's a pretty recent report, right?

A: Yes.

Q: And that was a competency report which found the defendant

competent at the present time?
A: Correct.
Q: What is your opinion of that report? And just detail why you have those certain opinions.
A: Well, I hate to cast aspersions on a fellow psychiatrist, but I will. I don't think you can examine somebody for a few minutes and not get into the inner details of their mental makeup, and then conclude that they're competent to stand trial or proceed, and then continue to say that there is no evidence of mental illness, which he says when he says he has two options why a person would refuse. One is psychotic reasoning and the second is obstinacy and not wanting to cooperate. And he says this man's refusal is not based on a mental illness.
And I disagree, categorically, that this --it is based on a mental illness, a paranoid delusional disorder, and, therefore, a five-minute or ten-minute interview with somebody on such a grave issue as competency to proceed, when I don't think he can testify relevantly, I don't think he can aid, assist counsel in his own defense, I don't think he understands the full adversary aspect of the criminal justice system, and I believe that he is not able to challenge witnesses and, so, in my opinion, he is incompetent to proceed. And a cavalier not competent to proceed, on the basis of all of the reports and all of the findings, all of the refusals, is too quick in nature.
Q: So the situation with Doctor Danziger's latest attempt at evaluation is that Mr. Evans refused to see Doctor Danziger?
A: Correct.
Q: Okay. Are you aware that Doctor Henry Dee attempted to perform a competency evaluation and that Mr. Evans refused that as well, although we don't have a report or opinion pursuant to that refusal?
A: I think he told me that, but I don't know if that happened.

[ROA Vol. 2, pp. 281-288]

The above passage illustrates, and the April 1, 1999 cover letters introduced at the evidentiary hearing reveal that incomplete records were furnished to the mental health experts in this case by trial counsel. There can be absolutely no reason why this information was not furnished to the mental health experts until four days prior to trial. The newly furnished information contained within the depositions was so important that

Dr. Gutman changed his opinion from competent to incompetent based on the account of a co-defendant and an uncharged participant. Had trial counsel furnished the information sooner, the defenses of voluntary intoxication and insanity could have been investigated and explored. Prejudice is evidenced by the verdict of guilty and the death sentence.

Mr. Francis revealed that Mr. Evans was drinking and may have been doing cocaine on the night of the murder (ROA Vol. 1, pg. 169). This information could have been used to develop a voluntary intoxication defense. Trial counsel was ineffective in failing to investigate and present this defense. Additional information was available to formulate a defense of voluntary intoxication or insanity but it was not investigated nor forwarded to the mental health experts by trial counsel. Mark Quinn testified as follows at the evidentiary hearing:

> Q: Mr. Quinn, your deposition was actually taken in this case in March of 1998. Do you remember that deposition?
> A: No, sir.
> Q: You do?
> A: I remember a little bit but not all of it.
> Q: Okay. I want to ask you if you agree with the following statements. This concerns Mr. Evans' behavior on the night of the crime. Okay. On the night of the crime, you were with Mr. Evans, correct?
> A: Correct.
> Q: Okay. At the time of the crime, at the night the crime was committed, did Mr. Evans appear rough? Did he look as if he was suffering from a lack of sleep?
> A: He did.
> Q: Okay. Was the defendant paranoid and did he detail -- was the defendant paranoid on the night of the crime, and was he having delusions that you were an undercover police officer?
> A: Correct.
> Q: Okay. Was Mr. Evans having delusions about being in a gang?
> A: Correct.

Q: Was there a gang?
A: I never seen one.
Q: The night of the crime, is it fair to say the defendant was impatient and wild and had a strange look in his eye?
A: Correct.
Q: On the night of the crime was the group doing powder cocaine?
A: Correct.
Q: Did Mr. Evans feel, on the night of the crime, that Capone was trying to rob him?
A: Did he feel Capone was trying to rob him?
Q: Or trying -- did he feel that Capone was going to rob Shana Wright and take her tax refund?
A: Take her tax money, correct.
Q: Did you feel that there was any rational basis behind those thoughts?
Mr. Lerner: Your Honor, I object on the basis of speculation.
The Court: Sustained.
Mr. Lerner: Or opinion testimony.
By Mr. Hendry:
Q: Was it fair to say Mr. Evans did cocaine all the time?
A: Correct.
Q: And did Mr. Evans regularly place cocaine in his marijuana cigarettes?
A: Correct.
Q: And, in fact, on the night of the crime was Mr. Evans placing cocaine in his marijuana cigarettes?
A: Correct.
Q: Is it fair to say Mr. Evans was mentally wild, sometimes having no emotion, going in and out, like he bumped his head, went into another zone? Does that sound to be a fair description of Mr. Evans on the night of the crime?
A: Correct.
Q: Do you remember on the night of the crime saying to Mr. Evans, man, you have lost your mind?
A: I remember saying that.
Q: Do you remember you introduced Mr. Evans to your aunt, and during that meeting your aunt said something was wrong with him?
A: Correct.
Q: At the time of the crime, would you describe Mr. Evans as coked up?
A: I would say so.
Q: Huffing and puffing, not saying anything, f'd up, sitting there all

spaced out? Those are all fair descriptions?
A: Correct.
Q: Did you ever speak with -- were you ever interviewed by a Doctor Alan Berns back at the time of this case, the trial?
A: I don't remember.
Q: Did you ever speak with a Doctor Michael Gutman at or around the time of this murder?
A: No, sir.
Q: Did you ever speak with a Doctor Michael Herkov at or about the time of this crime, after it was committed?
A: No.
Q: Is there any -- about the time of this crime did Mr. Evans have a belief, that you knew of, that the mailmen were actually undercover police officers?
A: Did he have a belief that they was police officers? Correct.

[ROA Vol. 1, pp. 104-107]

The above information was contained within Mark Quinn's pretrial deposition taken in March of 1998. Trial counsel was ineffective for failing to forward this vital mental health information to the doctors. Had the information been forwarded, additional defenses could have been investigated and explored (including voluntary intoxication and insanity), and the doctors would have found Mr. Evans incompetent to stand trial for a third time. Mr. Evans mental illnesses are what they are, and continue to be. Two brief state hospitalizations will not and did not magically restore Mr. Evans to competent mental health, as explained by Dr. Gutman.

The lower court's order states that the defendant failed to specify what "vital information" was withheld from the mental health experts. The transcript of the evidentiary hearing clearly specifies the vital information that never reached the mental health experts, or was received by the mental health experts too late. The information

includes depositions concerning the defendant's mental state on the night in question, including his drugging and drinking. Additional information that was not forwarded to the mental health experts includes the defendant's bizarre writings (Defense Exhibit 18) and DOC information concerning a suicide attempt (Defense Exhibit 14). The following testimony was presented at the evidentiary hearing concerning information that did not reach the mental health experts in time:

> Q: Would you consider [Mark Quinn] an important witness in this case?
> A: I think everybody was an important witness. I can't distinguish him as being important or not. I don't recall what he said, I don't recall the deposition, and don't recall his trial testimony.
> Q: Okay. Do you remember if he (sic, 'you') appeared at this deposition?
> A: No.
> Q: Okay. May I ask you, who was lead counsel?
> A: I was.
> * * * *
> A: Sure. (document tendered) I was not there [at the deposition].
> * * * *
> Q: Okay. With regards to depositions being taken March 27 of 1998, I'm going to ask you if you remember conversations with Ms. Alva about what information was gleaned from Mr. Quinn.
> A: I have no memory of those conversations. I'm sure we had them but I have no memory of what conversations there were.
> Q: Do you remember any specific conversations with Ms. Alva with regard to, we have some real evidence from Mark Quinn concerning voluntary intoxication and possible sanity at the time of the offense, and I think that -- the two of you thought that maybe you should forward those depositions to the mental health experts?
> A: I don't recall. Specifically if I remember those conversations, the answer is no.
> Q: Do you remember if you sent those -- do you remember if you sent that Mark Quinn deposition to the mental health experts?
> A: I don't recall what depositions were sent. Generally, it's my practice to send whatever depositions there are unless there is something in them that we think we don't really want the expert to have the information, to

have -- that might be damaging. Generally, it's my rule to send to any mental health expert most of the depositions in the case. But if I have a specific memory, the answer is no.

Q: It's in the record, it's Mark Quinn's deposition, and I want to tell you some of the information that's contained within that deposition. I want to ask you some questions about that information in the deposition, March 27, 1998.

Question stated that the defendant appeared rough, looked as if he was suffering from a lack of sleep. He referred to the defendant as paranoid and detailed how the defendant was having delusions Mr. Quinn was an undercover police officer. Mr. Quinn felt the defendant was having delusions about being in a gang. Mr. Quinn described the defendant as usually impatient, wild, having a strange look in his eye. Mr. Quinn stated at the time of the crime the entire group was doing powder cocaine. The defendant was paranoid, and evidence of rationale (sic), felt Capone was planning to rob him and take Shana Wright's tax refund. Mr. Quinn stated that Evans did cocaine all the time; sometimes placed cocaine in his marijuana cigarettes. He described Evans as mentally wild, sometimes having no emotion, going in and out, and like he bumped his head and went into another zone. At one point Mr. Quinn said to Evans, man, you lost your mind. He related that his aunt once met Steven Evans and she commented, something is wrong with him. He described Mr. Evans at the time of the crime as coked up, huffing, puffing, not saying anything, f'd up, sitting there all spaced out. And Evans' delusional thoughts made no sense to Quinn, as he stated in his deposition.

And I want to ask you if that type of information, the cocaine abuse and the description of being mentally wild on the night of this murder, is that evidence there of voluntary intoxication and sanity at the time of the offense?

A: Sounds like it.

Q: Is that something that you would want to forward to the mental health experts for them to formulate an opinion as to those two defenses?

A: If that's the defense we were pursuing, I would think. I might add, we each sent things to the -- to either doctors or took care of depositions, and so it's possible that either one of us might have communicated with or sent them information.

Q: Okay.

A: I don't know whether I did or didn't, but I'm saying --

Q: But you would want to investigate voluntary intoxication and sanity at the time of the offense, right?

A: You understand Mr. Evans didn't want to do that.

Q: The question was, you, as a criminal defense attorney, would want to investigate those possible defenses, would you not?
A: I think we did that. I think we did that.
Q: Okay. To do that, mightn't one way be to forward that information, that deposition, to the mental health experts?
A: Yes. And I think the answer to that -- but as I think I said, yes, that's something they want.
Q: You would want to forward that information to the mental health experts as soon as possible, as it was transcribed, right?
A: I don't know. I don't know why -- maybe we hadn't gone that route. I don't agree with that.
Q: The trial started on April 5th, 1999. Do you remember that it wasn't until April 1st of 1999 that you forwarded that deposition to the mental health experts?
* * * *
Q: Do you remember when it was exactly that you sent that Mark Quinn deposition to your defense expert, Doctor Herkov?
A: No.
Q: If I showed you a letter dated April 1st, 1 1999, four days prior to the commencement of this trial, might that refresh your recollection?
A: I'll be glad to look at it, but just because it was sent on that date doesn't mean that we had (sic) discussed it previously. One of the things that I do is we might discuss the issues that might come up, and then before trial to be sure that they are aware of all statements, not just the ones we discussed previously. Other times we'll send depositions, statements, so on, to the experts. Assuming they are going to testify.
* * * *
Q: This is an April 1st, 1999 letter from Andrea Black to Doctor Herkov. Ask if you could review that, and ask you if that refreshes your recollection as to when it was you sent a copy of the transcript of the Mark Quinn deposition to Doctor Herkov?
A: That shows that I sent him those depositions on that day. But again, I'm saying that it is highly likely that we discussed many of these issues. And what you do before trial is make sure they have everything that they can review, particularly one of the experts. But, yes, that's my letter.
* * * *
The Clerk: Defense exhibit F for identification entered into evidence as defense exhibit eight.
By Mr. Hendry:
Q: Looking back in hindsight, do you think it would have been a better idea to forward that Mark Quinn deposition to Doctor Herkov prior to April

1st of 1999?
A: No.

[ROA Vol. 3, pp. 427-434]

Presumably the cover letters and depositions were sent to Drs. Berns and Herkov by regular mail, which means they would not have been received even before trial. The paper trail of the evidentiary hearing reveals ineffective assistance of counsel for failure to timely forward vital information to the mental health experts. As far as prejudice, Mr. Evans was deprived a full competency determination, his competency was determined on incomplete information, he was tried while incompetent, he was unable to assist in the trial, and he provided extremely damaging information to the jury during his guilt phase testimony regarding his priors due in part to his incompetency and in part to the negligence of his counsel. The state did not call Ms. Alva to the stand, thus any argument that the vital information was timely forwarded to the experts is based on speculation, and is refuted by the cover letters from Ms. Black to the mental health experts.

Defense exhibit nine is a letter dated August 18, 1998 from Andrea Black to their expert Dr. Herkov, wherein she inquires if insanity may be a defense. Trial counsel specifically states that recent depositions have not been forwarded, but they will be under a separate cover. In her letter she mentions nothing about the defendant's cocaine use on the night in question, thus precluding any opinion on the issue of voluntary intoxication. Lead trial counsel admitted she failed to attend the deposition of Dr. Gutman. (ROA Vol. 3, pg. 442). Defense Exhibit 10 is an April 3, 1999 memo from Dr. Berns to Andrea

Black informing that he did not get pages 26-82 of Mark Quinn's deposition. This is all happening 2 days prior to trial. Writing on the message indicates that there were technical difficulties with trial counsel's copy machine. Defense Exhibit 11 is a March 8, 1999 letter from Andrea Black to Steven Evans informing that insanity and voluntary intoxication may be valid defenses to the crimes. The paper trail reflects that those defenses were never fully investigated or explored because vital information was not forwarded to the mental health experts. Trial counsel was asked what she did to investigate voluntary intoxication and insanity, and she answered, "I don't remember exactly." (ROA Vol. 3, pg. 448). Defense Exhibit 13 is a message regarding Dr. Berns dated March 22, 1999 that suggests Dr. Berns based his determination of the defendant's competency on incomplete information. Defense Exhibit 14 is a document from the Department of Corrections stating that Steven Evans attempted suicide as a child, and his mother may have tried to assist him in the suicide. The pre-trial competency reports from Drs. Herkov, Berns and Gutman deny any evidence or history of suicide, which shows that this vital information was not considered or forwarded by the trial attorneys to the mental health experts. Regarding the suicide attempt, Ms. Black stated that she did not inform the jury of this episode because she does not "remember seeing it or knowing about that." (ROA Vol. 3, pg. 457). Defense Exhibit 15 is a letter from trial counsel to the defendant dated September 11, 1998 wherein she informs that she never investigated insanity as a defense, and informs that she never forwarded the co-defendants' depositions to the mental health experts. The paper trail in this case documents and

memorializes the lack of investigation and failure to forward vital information to the mental health experts. Defense Exhibit 16 is a letter from the defendant to trial counsel stating that he wants to pursue the alibi defense. It is noted that the alibi witness Nicole Taylor was never presented at trial.

In Dr. Berns' March 9, 1999 pre-trial competency report finding the defendant competent, he listed nine sources of information that he reviewed in making his competency determination. The defendant's strange writings admitted as Defense Exhibit 18 were not listed as part of the material he reviewed. It is clear that vital information was not forwarded to the mental health experts in this case, therefore the third competency determination prior to trial was invalid. Dr. Berns seems to request in his competency reports information from any of the co-defendants regarding the defendant's state of mind on the night of the offense, and for some or for no reason, trial counsel failed to forward the depositions of Quinn, Wright, and Francis. None of the pre-trial competency reports from any of the doctors mention the writings contained within Defense Exhibit 18. Defense Exhibit 17 contains more letters with strange writings from Mr. Evans. Again, the paper trail in this case leads to the undeniable conclusion that trial counsel was woefully ineffective in failing to forward vital information to the mental health experts, and failing to investigate and present available defenses. This is the type of attorney nonfeasance that was discussed in the United States Supreme Court's seminal case of Wiggins v. Smith, 123 S. Ct. 2527 (2003). Under the dictates of Strickland and Wiggins, Mr. Evans' rights under the 6th, 8th, and 14th Amendments were violated and he

should be afforded a new trial and/or a new penalty phase.

ARGUMENT VII

THE CUMULATIVE EFFECTS OF THE CONSTITUTIONAL ERRORS THROUGHOUT THE GUILT PHASE AND PENALTY PHASE ALLEGED IN THIS APPEAL DENIED STEVEN EVANS A FAIR TRIAL

Mr. Evans submits that each of the arguments contained in this appeal, standing alone, justifies relief. Each argument shows that Mr. Evans was denied a fundamentally fair trial and that there cannot be any confidence in the verdict against him. When the deprivations of Mr. Evans' trial are considered cumulatively, this Court's decision is inescapable, Mr. Evans must be given a new trial, penalty phase, or converted to a life sentence based on the violation of his rights protected by the 4th, 5th, 6th 8th, and 14th Amendments of the United States Constitution.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Evans respectfully urges this Honorable Court to reverse the circuit court=s order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail to all counsel of record on this ____ day of August, 2005.

_____

David Dixon Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney for Appellant

Copies furnished to:

Honorable Jay Paul Cohen
Circuit Court Judge
Orange County Courthouse
425 N. Orange Avenue
Orlando, FL 32801

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Christopher A. Lerner
Assistant State Attorney
Office of the State Attorney
415 N. Orange Avenue
Orlando, FL 32801

Steven Maurice Evans
DOC# 330290; P1105S
Union Correctional Institution
7819 N.W. 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

_____

David Dixon Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney for Appellant