IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-161

STEVEN MAURICE EVANS

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

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

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

COUNSEL FOR RESPONDENT
KENNETH S. NUNNELLEY
Fla. Bar No. 998818
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENTS 22

ARGUMENTS 24

I. **THE "EXECUTION OF THE PHYSICALLY HANDICAPPED" CLAIM.** 24

II. **THE FAILURE TO FILE A MOTION TO SUPPRESS** 26

III. **THE INEFFECTIVENESS CLAIM**..... 27

IV. **THE INEFFECTIVENESS FOR FAILURE TO INVESTIGATE CLAIM**..... 30

V. **THE "ALIBI WITNESS" CLAIM** 43

VI. **THE INEFFECTIVENESS/MENTAL STATE DEFENSE CLAIM** 44

VII. **THE "CUMULATIVE ERROR" CLAIM**..... 49

CONCLUSION..... 50

CERTIFICATE OF SERVICE 50

CERTIFICATE OF COMPLIANCE 50

TABLE OF AUTHORITIES

CASES

Arbelaez v. State,
898 So. 2d 25 (Fla. 2005) 44

Brady V. Maryland,
373 U.S. 83 (1963) 41, 42, 48

Bryan v. State,
748 So. 2d 1003 (Fla. 1998)..... 49

Davis v. State,
30 Fla. L. Weekly S709 (Fla. Oct. 20, 2005) 44

Evans v. State,
800 So. 2d 182 (Fla. 2001) 15, 40

Fleming v. Kemp,
748 F.2d 1435 (11th Cir. 1984)..... 30

Hunter v. State,
660 So. 2d 244 (Fla. 1995) 49

Rodriguez v. State,
30 Fla. L. Weekly S385 (Fla. May 26, 2005) 44

Rompilla v. Beard,
125 S. Ct. 2456 (2005) 29

State v. Spaziano,
692 So. 2d 174 (Fla. 1997) 44

Stephens v. State,
748 So. 2d 1028 (Fla. 1999)..... 28, 43, 45

Strickland v. Washington,
466 U.S. 668 (1984) 23, 24, 43, 49

Wike v. State,
813 So. 2d 12 (Fla. 2003) 49

MISCELLANEOUS

Fla. Stat. § 944.405 27

Fla. R. Crim. Pro. Rule 3.851 45

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State recognizes that oral argument is routinely granted in cases in which the defendant is under a sentence of death. The State defers to the judgment of this Court as to whether oral argument is justified in this case.

STATEMENT OF THE CASE

The statement of the case and facts set out on pages 1-6 of Evans' *Initial Brief* is argumentative and incomplete. The State relies on the following statement of the case and facts.

Evans filed a Motion to Vacate Judgment of Conviction and Sentence and a Motion to Determine Competency on October 16, 2002. (R907-1077, R1078-1085). The State filed a response on December 13, 2002. (R1208-1232). On December 24, 2002, Evans filed a *Pro Se* motion withdrawing his original motion to vacate. (R1314-1320). The court ordered a competency evaluation on February 19, 2003, (R1343-1347) and, on October 23, 2003, found the defendant competent to proceed. (R1401-1403). Evans filed an Amended Motion to Vacate on December 15, 2003. (R1414-1520). The State filed a Response on February 16, 2004. (R1521-1867). An evidentiary hearing was held before the Honorable Jay Paul Cohen, Circuit Court Judge for the Ninth Circuit of Florida, in and for Orange County, on August 31-September 1, 2004. (R1-521). An Order denying Evans' Amended Motion to Vacate was filed on November 8, 2004. Evans filed a Motion for Rehearing on November

22, 2004. (R2059-2085). An order denying the Motion for Rehearing was issued on December 20, 2004. (R2086-2088). A Notice of Appeal was filed on January 14, 2005. (R2091-2092).

STATEMENT OF THE FACTS

Kenneth Zercie, a forensic consultant and Assistant Director of the crime lab for the Department of Public Safety, State of Connecticut, has conducted several thousand crime scene investigations during his career. (R6, 8, 10). Zercie reviewed a voluminous amount of documentation regarding the crime scene. (R11-14). The victim had been shot at least five times at close range, approximately 18 inches. (R17-18). He did not believe there would have been any back spatter of blood or brains on the shooter. (R18). He was aware that Evans hold told his girlfriend (Shana Wright) that blood and brains had splattered on his clothing and he had to "buy himself a new suit." (R15, 120).

There was no sooting located on the victim, which would normally be found with a hard contact wound. (R20-21).

During his proffered testimony, Zercie said his evaluation of the location of the shell casings indicated the weapon was in the same position when all six shots were discharged. (R58-9). He did not recall that the weapon had been recovered. (R65).

Crime reports indicated that a homemade silencer had been used when the victim was killed, possibly a plastic shampoo bottle. (R71). The homemade silencer would have inhibited the

powdering or sooting from the weapon. (R72). He did not perform any analysis of the actual items in evidence. (R77).

Dr. Vivian Allen, an ophthalmologist, examined Evans on two occasions in September 2002, and January 2004. (R25, 27, 29). At one point, she determined that Evans had acute blindness and sarcoidosis, "an autoimmune disease [that] has a high propensity to affect the eye." (R30). Subsequently, Evans has gone blind in both eyes. (R32).

Evans wrote to Dr. Allen on two occasions. (R45). In his first letter dated December 28, 2002, he indicated his impaired vision was due to pesticide spray in his housing quarters. (R46). Supposedly, all medication for visual impairment had been terminated. (R47). His second letter of March 2003, indicated he was receiving eye medication but was having adverse reactions and needed an antibiotic. (R49-50).

Sarcoidosis, a progressive disease, can attack an individual's brain. (R51-52). In addition, it can induce lung or liver failure, and eventually cause death. There is no cure for this disease. (R52).

Evans was able to articulate his concerns to Dr. Allen. (R53). The onset of sarcoidosis in Evans probably occurred in 2000. (R54). Evans completely cooperated with her during the diagnostic procedures administered to him. (R55).

Cassandra Holley is a former resident of the apartment complex where the victim was murdered. (R83-4). She was friends with Shana Wright, another resident (and Evans' girlfriend), and the women double-dated with their respective boyfriends. (R84, 120). In the early morning hours the day of the murder, Shana Wright asked to use her telephone; she rarely came to her apartment and had never asked to use the phone. (R85). Wright did not tell her why she needed to use the phone, but her demeanor was "normal." (R86). Behind the apartment complex, there was a ditch with a fence around it. The fence was knocked down periodically due to "people running into it." There was quite a bit of drug trafficking and criminal activity in this area. (R87-8, 94).

Holley did not hear any of the phone conversation that Wright had at her apartment that morning as she was fast asleep. (R89-90).

Mark Quinn and Evans were friends during their high school years. (R96). Prior to Kenneth Lewis' murder, Evans asked Quinn to give his friends and him a ride from Sanford back to Orlando as Lewis had stolen their car. (R97).

Evans, Edward Francis (a/k/a "Kid"), Gervalow Ward (a/k/a "Dred") and another individual known as "Jersey," brought the victim, Kenneth Lewis, to the ditch at the back of the apartment complex. Quinn did not go with them. (R97-8). Quinn and another

friend, Blaine Stafford, remained in front of the complex. (R98). Quinn did not hear any gunshots. After the men joined Stafford and Quinn, Quinn saw "Dred, and I think Jersey with a - - I don't know if it was a .22, but it was a pistol." Dred put the pistol underneath his jacket. (R99).

Subsequently, they all left the complex. Quinn took Evans to "go get gas money" at a convenience store. Quinn said, "Kid and Jersey was bragging about how they became O.T. (sic). How they shot Capone (Kenneth Lewis)." (R99-100). "Kid" bragged on two more occasions about shooting Lewis. (R100). "Kid" did not say that Evans had nothing to do with Lewis' murder. He said, "They said that they pulled the trigger, shot Capone." (R101).[1]

Evans appeared to be suffering from a lack of sleep the night of the murder. He was paranoid and thought Quinn was an undercover police officer. Evans was delusional about being in a gang. (R104-05). On the night of the murder, the group was doing "powder cocaine." Evans thought the victim was going to rob Shana Wright. (R105).

Evans used cocaine all the time. He placed it in his marijuana cigarettes. (R106). Quinn told Evans the night of the murder, "Man, you have lost your mind." (R106). Evans appeared spaced out and did not say much the night of the murder. (R107).

[1] "L.A." is Evans' nickname. (R101).

Quinn did not recall speaking with either Dr. Alan Burns or Dr. Michael Gutman at or around the time of this trial. (R107).

Quinn was arrested with Evans. (R108). When they were handcuffed and put into police vehicles, they were not told why they were being arrested. (R109). He was shown pictures of various people he was with the night of the murder. (R110).

Quinn had not seen Evans for approximately five years after high school. By then, Evans started getting together with "Jersey" and "Dred" and "Capone" (the victim), people he dominated and controlled. (R111). Evans was familiar with Tae Kwon Do and was proficient in using pressure points to inflict pain. (R114).

After the murder, Quinn took the men to a convenience store and was told "bits and pieces" of what happened. (R116-17). While he was waiting out front of the apartment complex, the group brought the victim to the back of the complex out of his sight and came back without him. (R117). Upon reviewing his deposition, he did not recall seeing any guns. (R118). Quinn currently takes quite a bit of medication for various medical disorders. The medication might have affected his memory of the events that occurred the night of the murder. (R119). Evans did not have a .22 - - he "had a bigger gun." (R121).

After the men returned from the back of the apartment complex, "Kid" (Ed Francis) had blood splatter on the front of

his shirt. (R122). Lewis, the victim, had been beaten before he was taken behind the complex. (R122). The gun used to kill Kenneth Lewis had been stolen from Quinn's employer. (R123-24).

Edward Francis (a/k/a "Jersey") was Evans' co-defendant in a case that occurred before the murder of Kenneth Lewis and is currently serving a life sentence.[2] (R132, 133, 139-40, 155). Francis did not recall entering a plea in that case, nor did he recall going to trial. (R132, 133, 139-40, 155) During that crime, approximately, one month before Lewis' murder, various guns were stolen from Mark Quinn's employer. (R140-41). Francis took possession of a "German Ruger" .22 caliber pistol that was used in an attempt to kill victim Mr. Argun (prior case), and, eventually, was used to kill Lewis. Evans was the person that killed Kenneth Lewis and Francis attempted to kill Mr. Argun. (R141). However, Francis stated, "we weren't allowed to actually keep them [the guns] with us. Evans mostly kept the guns with him." (R147).

Lewis, the victim, was a good friend of Evans' and, at one point, had possession of the .22 gun. (R148).

At one point, Evans had asked Francis to kill Evans' girlfriend. (R151). Evans also told him to shoot Mr. Argun, the victim in a prior case. (R152).

[2] The victim is in a vegetative state. (R133)

Francis did not see Evans use cocaine the night of Lewis' murder, but he was "hyper that night." (R155, 157). He then recalled that Evans and the victim "might have" used cocaine at a place called The Green Parrot. (R157). That night, the group went to Sanford to rob some drug dealers. After arriving, Evans "came from behind the house and said it's off, it's off, it's off ... I went back to the back of the house to see what was up. And that's when I noticed the car was gone." (R1587). Lewis (the victim) had been left with the car and a few guns. (R159). Evans "was hot. He was hot." Francis was upset as well because he was left in an unknown area and feared that the drug dealers they planned on robbing had guns of their own. (R159).

It took the group of men approximately 1½ hours to get back to Orlando. Evans was concerned because his girlfriend, Shana Wright, "... was home alone ... had money in the house ... and he believed that Kenneth Lewis would go and try to rob her." (R159-60). Evans said he was "going to make an example out of Lewis." (R161). Evans tried to call Wright at Mark Quinn's house (via Quinn's girlfriend) but was not able to speak with her. (R161-62). Upon arriving in Orlando, they waited in Wright's apartment (Wright was at her friend's house) for Lewis to arrive. They drank some wine and Evans and some of the others smoked. Evans "could have" used cocaine.(R162-63).

Lewis arrived approximately thirty minutes after the group. He had the guns with him and he was beaten up once he got into the apartment. (R165). Evans told Francis to "tie him up, and I had a chain and a lock so I tied his hands ... it fell off when he was elbowed in the face by Mr. Evans, when he hit the floor. So Evans said, I told you tie him up. If you don't tie him up this time, I'm going to shoot you and him." (R168). Evans has trouble controlling himself when he drinks. He was drinking that night and "may have" used cocaine. (R169).

When Lewis was taken out to the ditch and shot, Francis went with them. (R171). After he was shot in the head, the wound spilled out blood, but it was not flowing out of the head. (R172-73). He did not notice any blood on Evans' jersey. (R174). After the killing, the group of five (Evans, Ward, Quinn, Stafford and Francis) went to local convenience store. Evans ordered breakfast. (R175). Evans behavior was odd, "It was like a big joke to him." (R176). Evans told Francis to "get rid of the shampoo bottle ... [the] silencer."[3] Evans kept the .22 gun. (R178).

Evans organized the first crime, the attempted murder of Mr. Argun. (R182). Francis saw Evans use cocaine approximately two weeks before Lewis' murder as well as the gun robbery and Argun's attempted murder. (R183-84). He did not see Evans

[3] Evans eventually got rid of the shampoo bottle himself. (R194).

“actually inhale coke or snort coke or shoot coke or anything” the night of Lewis’ murder, “So that part I really can’t blame on coke.” (R186).

Joann Whitmore is the mother of Evans’ former girlfriend, Jolie Holloman. Holloman and Evans have a daughter, Jasmine. Whitmore and Evans had a close relationship. (R200-01). Evans and Whitmore corresponded with each other and the witness commented that “he had beautiful handwriting.” He sent letters that referred to the use of pesticides in prison and that he was sick. In addition, he wrote to Whitmore’s sister, a court reporter, and sent her a package. (R202-03). Evans wrote to her daughter as well, but she could not understand it. She told Evans he should seek medical help. (R204). She would have been available to testify at Evans’ trial. (R205).

Whitmore last saw Evans approximately two years before Lewis’ murder. (R206). At that time, he never drank to excess, did not use drugs, and worked regularly. (R207).

Linda Evans, Evans’ mother, had a severe car accident when she was nine months pregnant with him. (R208-09). They checked Steven Evans after he was born - - “he was physically okay.” (R210). She said, “I was just happy that he was born normally ... everything was okay.” (R212). Ms. Evans spoke with her son’s trial attorneys and explained his birth to them. (R213-14). When Steven was young, he wanted to become a fireman. (R215). He was

a braggart, as well. (R215). Although Steven was a truck driver at one point, Evans had no knowledge of her son ever going to “L.A.” (R216).

When he was young, he had an accident on his bicycle, hit his head on the curb and needed stitches. Subsequently, he had migraines which eventually subsided. As an adult, during one of his truck driving jobs, he feel asleep at the wheel, drove into a ditch, and re-injured his head. The headaches started again. He did not require any stays in the hospital. (R217).

He son liked to brag about different things but she never told his defense attorneys because they never asked her. (R217). She said, “[They] never told us a lot of stuff. Never really asked us a lot of stuff. We have to ask her. After we hear from Steven about the issue, we go to her, ask her.” (R218). Although she was told she would be called to testify, she was not told what the subject matter would be. But, “ ... what they called me about was what I was upset about.” (R218).

Steven never liked doctors. He was always very well kept and had good manners. Although he was given medicine for his recurring migraines, he did not take it because “he did not believe in putting anything in his body that was not going to help his body.” (R218).

Evans communicates with her son quite frequently. However, as he became sick, his handwriting began to suffer, “kept

getting worse and worse." Steven finally told her that he could not see anymore due to "them spraying the cell, and got spray in his eye." (R219).

Steven did not think he was getting proper legal representation during his trial. He was upset and did not believe defense counsel Black wanted "to deal with his case." Subsequently, his family made arrangements to talk to her. (R220). After speaking with her, they also did not believe that she wanted this case. Steven told her that he wanted a speedy trial. His mother did not know what that was so he asked his counsel, Ms. Black. Black told her this case came across her desk, "and I didn't look at it at the time, but we're working hard on it now." Steven believed Ms. Black was prejudiced against him and therefore was not helping him so he did not talk to her. (R221). Black told Evans and her husband that their son was not cooperating with her and that she really did not want this case. Evans said, "We really lost faith in her at that point ... but then again, we don't understand the law, how long things take or whatever." (R222).

Mrs. Evans spoke with Dr. Gutman prior to the evidentiary hearing. She told him that Steven's (step)father had passed away and had died of cirrhosis of the liver. (R222-23). That was the reason why her son did not want to drink - - the family had seen other family members die from alcoholism. (R223).

Steven was conceived as the result of his mother being raped when she was seventeen years old. She and her mother raised Steven. When he was seventeen, she told him of the circumstances that involved his conception. She said, "He didn't take it very well ... he thought that I did not love him ... I always loved him ... I always wanted him ... he knew that he was loved ... his stepfather loved him very much." (R223-24).

Mrs. Evans was not present at any of the meetings that took place between Steven and his lawyers. Steven would tell her about the sessions by letter. (R225). When she spoke with Dr. Gutman, they discussed Steven's "illness".[4] She told Dr. Gutman that she had helped arrange for Steven to be moved from the second floor of the prison to the first so he could maneuver better. She did not speak with Dr. Gutman during the trial. (R225).

Michael Chauvin, an assistant public defender, represented Evans on a charge of escape from Brevard County. (R228). Evans had walked away from a work release facility and a charge of escape was filed against him. (R231). Chauvin was not contacted by Evans' defense attorneys (Andrea Black and Marlene Alva)

[4] The "illness" is apparently sarcoidosis since it resulted in blindness. (R225).

regarding the circumstances surrounding the charge of escape.[5] (R250-51).

During the time period that Chauvin represented Evans for his escape charge, he interacted with "hundreds, if not thousands" of defendants. He developed a good sense on what to look for in deciding whether or not it was appropriate to file a motion raising competency claims. (R254).

Nichole Taylor is the mother of Evans' eleven-year-old son, Anthony. (R257). She did not testify at the trial. (R258). While she was at work, Evans would take care of her children and she could count on him being there when she returned. (R258-59). She never saw him involved in any gang activity nor did he stay out all night. (R259-60).

Evans called Taylor from jail and told her he had been charged with murder but "he didn't do it." As far as she knew, he did not lie to her. (R261). Taylor did not testify at trial because "I was in an abusive relationship, and the guy I was with threatened me not to go." (R262). The defense attorneys did not offer to make arrangements for her regarding protection in order to allow her to go to court. (R262). She called a defense investigator (Sandra Love) and told her she could not come to court for those reasons. Love did not offer her any kind of transportation or protection. (R263).

[5] See (R230-50).

Taylor was supposed to be Evans' alibi. (R264). She did not call the police to inform them of the threats made against her if she tried to go to court. (R265). She recalled that Evans was with her every night in April 1996.[6] (R267).

Dr. Michael Gutman, M.D., a psychiatrist, reviewed Evans' medical records which detailed his affliction with sarcoidosis, which he described as "an abnormal laying down of protein."[7] (R273, 275, 276). Dr. Gutman had found Evans incompetent in 1999, prior to trial. (R276). Dr. Gutman found Evans to be a "dissembler. He is a pretender. He is very sick, very paranoid, very delusional ... [pretends] to be not mentally ill. This is a well-known established ... mental illness, a delusional disorder or a paranoid disorder." (R277). He has diagnosed him as paranoid schizophrenic, treatable with anti-psychotic medicine. (R278-79). Since Evans has never told him what happened (the night of the crime) he could not say that Evans was legally insane. (R282-83).

Dr. Gutman did not agree with Dr. Jeffrey Danziger's report that Evans was competent in the month prior to the evidentiary hearing. (R286). Dr. Gutman does not believe that Evans

[6] Kenneth Lewis was murdered on April 26, 1996. *Evans v. State,* 800 So. 2d 182 (Fla. 2001).

[7] Dr. Gutman further described sarcoidosis as a "cancer-like condition that is spread throughout the body and affects connective tissue and causes other complications such as uveitis in the kidney, brain, liver, lung, wherever this abnormal protein is laid down." (R276).

understands the adversarial process and is not able to challenge witnesses. In his opinion, Evans is incompetent. (R287). Evans has refused to see Dr. Danziger and Dr. Henry Dee. (R288).

In reviewing the medical reports from Department of Corrections, it was noted that Evans had squeezed out all of his eye drops into the sink. (R288, 289). Evans believed the eye drop bottle was contaminated. (R291). Evans has had continuing periods of paranoia, "a continuing theme where his paranoia has been a streak, coloring everything." (R291). His writings and "bizarre talking" all point to the "mysticism and bizarreness that he is laboring under." (R292). Evans made contradictory statements to his mother and prison staff regarding the treatment of his eye problem. (R293, 294). Evans has been continually deteriorating and "is basically oblivious and looking the other way ... it's a pathological, delusional denial, not a realistic denial." (R293-94). He did not believe that Evans was malingering. (R303). Evans' "inner personality" has taken over and therefore he does not want to "look bad or be sick." Dr. Gutman has not met with Evans since 1999. (R306).

Dr. Gutman wrote four competency reports prior to Evans' trial; in two of those, he found him to be competent. (R308). Evans has a "blend" of mental illnesses that included paranoid schizophrenia or delusional paranoid disorders. He wants to pretend to be healthy. (R313). Evans' mental illness could "stay

static [or] gets better with treatment ... [or] progress and get worse." His illness could be any of the three. (R317). Sarcoidosis is progressive but he did not know enough about the disease in order to give any testimony. (R318).

Dr. Gutman had ordered an MRI for Evans at defense counsel Black's request prior to trial. Evans had told him prior to trial that he had given information to Doctors Berns and Herkov. Dr. Gutman reviewed their reports at a later time. (R319-20). He spoke with Evans' mother, reviewed jail clinic files, and the Florida State Hospital Forensic Unit report. (R320). He was aware of information relating to drug or alcohol abuse and knew it was an issue in this case. (R322). In reviewing his testimony at trial, Dr. Gutman agreed that he had told the trial court that Evans wanted to present himself as "being well" and as "wanting to look good when he is really ill." (R325). His opinion then and now was the same. (R325).

During the times that Dr. Gutman had met with Evans, his condition would change. He would be more organized, have better control, and appeared to understand the charges against him. (R330-31). Over time, Evans has been examined by at least five to ten mental status experts. None of them have agreed with Dr. Gutman's diagnosis. (R332).

Andrea Black was appointed to represent Evans for this case. (R339-40). Black did not specifically recall filing a

motion to suppress items pursuant to Evans' arrest and did not remember the specific circumstances of his arrest. She did not recall requesting specific documents, records, or speaking with Michael Chauvin, an assistant public defender from Brevard County. It would have been her normal practice to request a copy of the arrest warrant and "copies of any documents that related to this case, period." (R340-41, 342). She did not recall if she conducted specific research to investigate the validity of the arrest warrant. (R344-45). She did not recall reviewing specific documents relating to Evans' escape case from Brevard County. (R345, 347, 349). She did not remember "either way" whether or not she reviewed a statute which addressed the issue of an arrest for a defendant who had failed to report to his work release center. (R352). She did not specifically recall speaking with Investigator Robert Smith. (R353).

During the trial, she recalled that Evans testified as to his escape charge, but that it was a "deviation." (R354). She believed that testimony was very damaging because a jury might think he would escape again. (R355). She did not recall why she did not contact Assistant Public defender Chauvin about the escape charge. (R357, 359).

Black discussed with Evan's planned direct testimony "on numerous occasions". (R359). He was advised many times against taking the stand and the parameters of the things he should say.

(R359-60, 361). It was difficult to converse with Evans - - he was not cooperative. (R361).

This case was not fresh in her mind. She did not recall the specific number of previous felonies committed by Evans, but recalled this case involved kidnapping and murder in the first degree. (R365-66).

She recalled filing a motion to withdraw from this case as Evans and she "had a disagreement on how the case should be handled." She thought they needed more time to prepare for the case, but Evans did not. (R367-68). Evans filed a *pro se* motion for speedy trial, but the trial court dismissed it as he was represented by counsel. (R369).

Black had objected to Assistant State Attorney Linda Drane prosecuting this case as Evans had been the victim in a shooting case that Drane had handled. (R371-72). She did not remember any specific research she might have done regarding the issue of disqualifying the State Attorney's Office. (R375-76).

Black remembered Shana Wright as being Evans' girlfriend. She did not recall her specific testimony from the trial. (R376-77, 383). She did not consult a ballistics expert or a crime scene reconstruction expert. (R377). She could not recall who was responsible for handling the testimony given by ballistics expert Nanette Rudolph or the testimony given by the medical

examiner Dr. Broussard. (R378). She did not hire a blood spatter expert. (R388-89). She did not hire a shoe tread expert. (R392).

Black believed that Shana Wright's testimony indicating she was afraid of Evans was damaging. (R384). Black did not recall the specifics in trying to discredit an alleged confession made by Evans. (R389-90).

Black did not point out to the jury that co-defendant Edward Frances got a life sentence for this crime because "that information might suggest that, in fact, it was Steven Evans that was the shooter and not Edward Francis, since he got a life sentence." (R395).

Prior to going to trial, Evans wanted to use an alibi defense through Nichole Taylor. (R400, 409). However, Taylor told her that she had perjured herself at a deposition, and that "she wasn't going to do that again ... that he had asked her to lie for him, and that he threatened to kill her and her baby, and she wasn't going to do that." (R401-02). Evans agreed that Taylor should not be called as a witness. (R403). She did not recall why she did not introduce evidence that Edward Francis had admitted to shooting Mr. Argun, a victim in a prior case. (R408). She did not remember why she did or did not object to various closing arguments made by the State. (R417-18, 422). Black could not recall the specifics regarding the presentation of mitigation at the penalty phase. (R419-421). She would not

have presented competency reports during the penalty phase if they had contained information “we really don’t want the jury to know about.” (R424). Evans did not want to present a voluntary intoxication or insanity defense. (R431, 457, 459, 498).

Black was confident that she discussed various defenses and contents of depositions with Dr. Herkov, a defense expert witness. (R434). In addition, she forwarded copies of various depositions to Dr. Berns, another expert, as well. (R435-36). Black had communicated with Dr. Herkov during the trial, and requested that he determine if there was any legitimate insanity or mental health defenses available for Evans for the time of the crime. (R439).

Black recalled that Department of Corrections records had been requested. In addition, Evans had been offered a life sentence. (R448). She did not recall ever referring Evans to an ophthalmologist or recall anything about sarcoidosis. (R462).She did not present evidence that might have made him appear to be a “cold-blooded killer.” (R468).

Black has been practicing law for nineteen years and has handled many capital cases. (R471-72). This was the only capital case she handled where her client received the death penalty. (R472). There are many times where she did work on case and missed billing for it. (R473). She met with Evans and his

parents on numerous occasions. (R477;481). She ensured that Evans was aware of his own criminal history. (R479).

Black did write a letter to Dr. Herkov inquiring about a possible insanity defense. (R481). Herkov needed additional materials to determine if that defense would be available. (R482, 497).

Black and her co-counsel attacked Evans former friends and girlfriends regarding this case. (R486). Evans was very uncooperative "all the way through." (R493).

Deirdre Flowers made copies of various letters or documentation from defense attorney Andrea Black's file. (R511, 512). These documents are not at issue here.

SUMMARY OF THE ARGUMENT

Evans' "execution of the physically handicapped" claim does not present a constitutional issue. Nothing advanced in connection with this claim relates to the facts and circumstances of the offense -- instead, all matters post-date sentencing, and, because that is so, are not mitigating in nature.

The claim that trial counsel was ineffective for not filing a motion to suppress various items seized when he was arrested for escape is legally invalid. The arrest warrant was issued in accordance with the terms of the *Florida Statutes*, and Evans'

claim of error is meritless, as the collateral proceeding trial court found.

The collateral proceeding trial court correctly denied the ineffective assistance of counsel claim alleging that counsel did not prepare him to testify. That court's findings are supported by competent substantial evidence and should not be disturbed. Short of telling Evans to lie, he has not suggested what counsel should have done. There is no basis for relief.

The collateral proceeding trial court correctly denied relief on the "ineffectiveness for failure to investigate" claim. Nothing Evans has presented calls any of the detailed finding s of the Circuit Court into question, and he had not carried his burden under *Strickland v. Washington*, 466 U.S. 668 (1984) of demonstrating not only deficient performance by counsel, but also resulting prejudice. The denial of relief should be affirmed.

The collateral proceeding trial court correctly denied relief on the "alibi witness" claim. That claim presented the court with a credibility choice between the "alibi witness" and Evans' trial counsel. The collateral proceeding trial court resolved the credibility choice adversely to Evans, and this Court has repeatedly held that it will not substitute its judgment for that of the trial court on matters of credibility of witnesses.

The collateral proceeding trial court correctly denied relief on the ineffective assistance/mental state defense claim. At sentencing, the court found mitigation based on various aspects of Evans' mental state, and correctly concluded that if the recently offered mental state evidence had been presented, Evans would not be entitled to relief under *Strickland.* To the extent that Evans raises a competency issue, that claim was decided on direct appeal, and Evans had presented nothing to call that result into question.

The collateral proceeding trial court properly found that Evans was not entitled to relief based on the cumulative error claim because there was no error to "cumulate" in the first place.

ARGUMENT

I. THE "EXECUTION OF THE PHYSICALLY HANDICAPPED" CLAIM.

On pages 6-16 of his brief, Evans argues that his death sentence is "arbitrary and capricious" because he is 1) incompetent and 2) terminally ill. Despite the hyperbole of this claim, it is not a basis for relief, as the trial court properly found.

The claim contained in Evans' brief provides no basis for vacating his death sentence.

Neither claim contained in Evans' brief relates to his physical or mental status at the time of the offense. During the

pendency of the post-conviction proceedings, Evans filed a motion for determination of competency to proceed with his post-conviction relief motion, which ultimately resulted in a finding of competency by the trial court. (R2033; 1401-03). Evans does not challenge that determination of competency, but rather attempt to cast this claim as an Eighth Amendment violation under some unspecified theory. However, this is not a stand-alone claim of incompetence for execution, which would be untimely, given that no death warrant has been issued. Instead, Evans' claim is that he should be sentenced to life or given a new penalty phase so that evidence of his **present** mental health can be considered. As the trial court found, the competency to proceed order disposes of this claim, and, whatever the significance of Evans' current mental state may be, it is not a basis for relief from his conviction and sentence.

Evans also argues that he is entitled to sentence relief, or a new sentencing proceeding, because he suffers from sarcoidosis, which has resulted in various physical problems, including blindness. According to Evans, this disease is terminal. *Initial Brief*, at 12. However, as Evans concedes, **this disease was unknown at the time of his direct appeal.** *Id.* Regardless of what Evans' prognosis may be, he developed sarcoidosis well after he was sentenced to death, and that disease has no connection to the underlying offense. While

Evans' present physical condition may engender sympathy for him, it simply does not impact upon the legality of his conviction and sentence of death. It does not provide a basis for setting that sentence aside, nor does it supply a basis for a new sentencing hearing.

To the extent that Evans attempts to argue a constitutional dimension to this claim, the true facts are that there is no constitutional authority that renders his death sentence invalid based on his physical condition. The fact that Evans has (after sentencing) developed what may well be a terminal illness does not render his legally imposed death sentence arbitrary, capricious, or otherwise unconstitutional. Evans' argument to the contrary is an attempt to transform a clemency argument into a constitutional one -- that argument has no legal basis and is not a basis for relief.

II. THE FAILURE TO FILE A MOTION TO SUPPRESS

On pages 17-44 of his brief, Evans argues that trial counsel was ineffective for failing to move to suppress various items seized when Evans was arrested for escape. When stripped of its pretensions, the basis of Evans' argument is that the arrest warrant (which was for escape from a Department of Corrections facility) was signed by "Hugh Ferguson" as the designee of Harry Singletary, who was then the Secretary of the Department of Corrections. (R2085).

In denying the ineffectiveness claim, the collateral proceeding trial court held that Evans:

> 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 arrest warrant in the instant case.

(R2053). The record supports the trial court's finding that Evans failed to carry his burden of proof, and the denial of relief should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, it has no legal basis in addition to the failure of proof. Under § 944.405 of the *Florida Statutes*, the Secretary of the Department of Corrections, **or his designee**, is authorized to sign an arrest affidavit based upon an escape from the custody of the Department. The warrant for Evans' arrest was validly executed, and Evans' argument to the contrary is based upon a failure to consider the statutory provision applicable to the Department of Corrections. That statutory provision is fatal to his claim.

III. THE INEFFECTIVENESS CLAIM

On pages 44-49 of his brief, Evans argues that trial counsel was ineffective in failing to "adequately" prepare him to testify. The collateral proceeding trial court denied relief on this claim, finding that there was no reasonable likelihood of a

different result. *Stephens v. State* sets out the standard of review, which is *de novo* as to the legal conclusions, but deferential to the facts found by the trial court. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999). That finding should not be disturbed.

In deciding this claim, the collateral proceeding trial court held:

> Mr. Evans alleges counsel failed to discuss with him the possibility of testify on his own behalf or to prepare him for doing so. He complains that counsel asked no questions regarding his background, asked no other questions which might have humanized him, failed to anticipate the number of his prior convictions, and allowed the jury to learn he was previously convicted of escape.
>
> At the evidentiary hearing, Ms. Black testified that she warned Mr. Evans of the risks of testifying, and advised him not to do so. She admitted it was difficult to predict exactly what he would say. She was certain that she discussed with him the fact he would have to admit to prior felonies and thought it was damaging that the jury heard he was convicted of escape. (See also trial transcript, pages 1378-1382). It was Mr. Evans who tried to minimize the impact of his second conviction by explaining the surrounding circumstances, (trial transcript, pages 1396-1397).
>
> As for the additional questions which Mr. Evans believes should have been asked, the so-called "background" information would not have been relevant to the determination of guilt or innocence. If counsel had asked such questions, it is likely that State would have objected and the answers would have been ruled inadmissible. Any attempts to "humanize" him by showing good background and good character would have allowed the State to cross-examine him on examples of his bad background, thereby doing more harm than good. There is no reasonable probability that the outcome of

> the proceedings would have been different if counsel had asked additional questions on direct exam.

(R2048-49).

Those findings are supported by the record, and should not be disturbed.

To the extent that further discussion of this claim is necessary, the resentencing court found a number of mitigations:

> The trial court properly found five aggravating factors and a number of mitigating factors. Of the four statutory mitigating factors argued, the trial court gave substantial weight to the fact that Evans was under extreme mental or emotional disturbance, and gave some weight to the fact that Evans may have been unable to appreciate the criminality of his act or conform his conduct to the requirements of law. Of the forty-two nonstatutory mitigating factors, which were divided into seven categories, the trial court gave little weight to substance abuse issues and little weight to family, community, and character issues. The mental health issues were considered as a part of the trial court's findings on the statutory mental health mitigators. On the issues relating to the codefendants, the trial court explained the relative culpability of each of the codefendants and determined that Evans was the most culpable of all of the participants in this murder. The categories involving disappointments, physical injuries, and miscellaneous items were given no weight because the trial court found these items were not supported by the evidence or the incident was so remote in time as to not be mitigating under the facts of this case.

Other than instructing Evans to lie, he has not suggested what trial counsel should have done that was not done.[8] And, in a very

[8] Evans reads too much into the *Rompilla* decision, which in no way stands for the proposition that trial counsel is ineffective if

real sense, Evans' claim is that counsel was ineffective because he was sentenced to death. *Initial Brief*, at 49. Contrary to Evans' assertions, the fact that he was sentenced to death does not mean that counsel was ineffective, it means that he received the sentence that he deserved. *Fleming v. Kemp*, 748 F. 2d 1435, 1452 (11th Cir. 1984).

IV. THE INEFFECTIVENESS FOR FAILURE TO INVESTIGATE CLAIM

On pages 50-67 of his brief, Evans raises various claims of ineffectiveness -- the trial court made various findings concerning these claims which are entitled to deference as to the factual conclusions, but are reviewed *de novo* with regard to the legal conclusions reached by the court.

In deciding this claim, the Circuit Court found:

> Mr. Evans alleges he was denied the effective assistance of counsel, raising numerous specific sub-claims, which will be addressed individually.
> Shana Wright: At trial, Ms. Wright testified she had seen Mr. Evans in downtown Orlando the day after the murder, and he told her the victim's brains had splattered on his suit so lie had to buy a new one. She said that she initially failed to tell law enforcement officers about this meeting because she was "scared of Defendant." Mr. Evans now alleges counsel failed to bring out a statement Ms. Wright made during a proffer, which was that she was actually afraid of being arrested herself.
>
> This claim is refuted by the record. Ms. Wright did say she was scared of being charged with lying, and that she was scared "in general." (Trial transcript, page 797). However, she also admitted that she went to

---

they do not take every conceivable step in investigating the case. *Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

visit Mr. Evans one day after the incident in response to a phone call from him, and admitted that no one forced her to. do so. (Trial transcript, pages 782-784). Thus, defense counsel successfully impeached her claim that she was afraid of Mr. Evans, because if she bad been, she would not have gone to his apartment voluntarily. Finally, Ms. Black's closing argument included the following statements: When Miss Wright was asked what she was scared of; she indicated that she was scared of being charged here. Isn't that motivation to testify in the way that she did? You bet!" There is no reasonable probability that the jury would have found her less credible if counsel had brought out the specific detail that she was afraid of being charged with perjury.

Jeffrey Wright: Mr. Wright, the brother of Shana Wright, owned the blue Oldsmobile allegedly driven by the victim before his murder. The last question posed by the State during its direct examination of Mr. Wright was whether he had given Mr. Evans permission to use the car. Mr. Evans now alleges counsel failed to object to this "inflammatory and irrelevant" question. He argues this was not a grand theft auto case, and counsel should have objected because Ms. Wright had allowed him to use the car and the prosecutor's question gave the jury the impression that he was guilty of auto theft.

There was never any actual suggestion that Mr. Evans stole the car. Ms. Wright's testimony established that she had the car with her brother's permission, and in turn, she gave permission for Mr. Evans to use it. (Trial transcript, pages 725-726, 728-730, 733, and 745). Counsel had no valid basis to object to the prosecutor's question, and the Court finds that it did not contribute to any impression that Mr. Evans was somehow guilty of auto theft. There is no reasonable probability that the outcome of the proceedings would have been different if counsel had objected.

Dr. Broussard: The medical examiner, Dr. Broussard, was asked whether there appeared to be any brain matter on the outside of the skull, and he responded yes, to the best of his recollection, he was pretty sure that there was. Mr. Evans now alleges this testimony was speculative and prejudicial, and

constituted an attempt to bolster the purported confession elicited through Ms. Wright's testimony. He argues counsel failed to object and failed to hire a blood spatter expert who could have testified that brains would not have splattered given the small diameter of the .22 bullet used. He also argues a ballistics expert could have cast doubt on the "Drugfire" process used to match the shell casing found in the blue Oldsmobile to the five shell casings found at the scene.

At the evidentiary hearing, Mr. Evans called Kenneth Zercie, an expert in blood spatter analysis as well as firearms and ballistics, who had reviewed the evidence and reports produced in this case. Mr. Zercie testified that the evidence did not appear consistent with blood and brain matter being spattered on the shooter. He concluded that the shooting was not done at point blank range and that it resulted in a "clean" wound with no "blow-back" of brain matter or tissue. Mr. Evans contends that if counsel had called such an expert at trial, it would have shown that his alleged confession regarding having brains on his suit could not be believed.

Even if the shots did not produce significant spatter of blood or brain matter, the evidence also showed that the victim was badly beaten inside a nearby apartment before he was taken out and shot. An expert opinion that there was no spatter would not have eliminated the possibility that Mr. Evans did get blood on his clothes during the commission of the crime, blood which he mistakenly characterized as brain matter. He obviously thought he had blood on his jacket, because discarded it along with the clothes he was wearing at the time of the shooting. (Trial transcript, pages 937-941). Thus, the testimony of an expert such as Mr. Zercie would not have discounted the impact of Shana Wright's testimony that Mr. Evans admitted getting rid of his suit because he got brains all over it.

With regard to Mr. Evans's second issue, Mr. Zercie also testified about a new and more reliable process and database which has been developed to match shell casings. This system, called the National Integrated Ballistics Information Network (NIBIN) has been

integrated with the less advanced Drugfire system used in this case. However, he acknowledged that Drugfire was used by the majority of police agencies in 1996 and neither database was nationally integrated at the time, and ballistics examiners ultimately declare a match based on an actual examination of the cartridge, not just the use of a database. Mr. Zercie's testimony did not establish any defects in the Drugfire system which would have given counsel a valid basis to attack it. For the foregoing reasons, there is no reasonable probability that calling a blood spatter I ballistics expert such as Mr. Zercie would have made a difference in the outcome of the proceeedings.

Dennis McDowell: Mr. McDowell was the crime scene technician who testified that shoe print casts were made from shoe prints at the crime scene and latent fingerprints were recovered from the blue Oldsmobile. Mr. Evans alleges counsel failed to hire an expert for an independent inspection.

This claim is insufficient. Mr. Evans states only that a defense expert could have examined the casts to determine whether his shoe tread matched that of the prints located at the scene. He does not point to any specific faults in the identification process or assert that his own expert would have found no match. He is correct that an expert could have pointed out that many shoes could have made the impression found at the crime scene and that officers had no way of determining when the print was made. However, there is no reasonable probability that such testimony would have posed a challenge to that of Mr. McDowell or that it would have made a difference in the outcome of the proceedings. He presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Jose Martinez: Mr. Martinez was the crime scene technician who recovered five spent shell casings from the crime scene. Mr. Evans alleges counsel failed to point out on cross-examination that fingerprints could have been lifted from these casings in attempts to match them to his own, but this was not done.

This claim is merely speculative. Mr. Evans does not allege or establish that his fingerprints would not have matched any which might have been recovered from the casings. Furthermore, Ms. Black testified that in

her experience it is often difficult to obtain useful prints from shell casings. There is no reasonable probability that cross-examination on this point would have made a difference in the outcome of the proceedings. Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Todd Pursley: Officer Pursley testified that a matching .22 shell casing was found in the blue Oldsmobile. Mr. Evans alleges counsel failed to point out on cross-examination that no fingerprints were found on the casing which matched his own.

However, the record indicates the State made no attempt to introduce fingerprint evidence matching this particular shell casing to Mr. Evans. There is no reasonable probability that the outcome of the proceeding would have been different if counsel had pointed out this obvious fact. Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Edward Francis: Mr. Evans alleges that during cross-examination of co-defendant Edward Francis, counsel failed to point out that Mr. Francis had already been convicted of the murder of Kenneth Lewis and that he was serving a sentence of life in prison. He notes that counsel actually filed a motion to exclude this information and as a result, the jury was left with the impression that no one had been punished for Lewis's murder. He argues that this information would have informed the jury that Mr. Francis was responsible for the shooting and retribution had already been paid for the crime.

The State argues that the fact counsel made such a motion demonstrates that it was a matter of tactics and strategy. This argument is supported by the record, which indicates that the trial court granted the motion after considering extensive argument by counsel and conducting independent research. (Trial transcript, pages 647-661). It is even more clearly supported by Ms. Black's testimony at the evidentiary hearing, where she explained her rationale as follows: If the jury heard that Mr. Francis was sentenced to life for this offense, rather than death, it might

conclude that Mr. Evans was the actual shooter. Given the factual circumstances of this case, counsel's strategy was reasonable. Given the testimony adduced at trial regarding Mr. Evans's participation and leadership role in this offense, there is no reasonable probability that the outcome of the proceedings would have been different if the jury had learned of Mr. Francis's conviction and sentence.

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 Lewis murder to shoot someone named Arjun. Citing a memo from Ms. Black to co-counsel Marlene 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 said that." (Trial transcript, page 1430). Thus, the jury actually did 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 the 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 weapon.

Nicole Taylor: Ms. Taylor gave a pre-trial deposition wherein she stated that Mr. Evans stayed at her apartment with her every night during March and April of 1996. Mr. Evans alleges that he informed counsel he wished to proceed on this alibi as his theory of defense, but counsel failed to secure Ms. Taylor's attendance at trial or ask the Court to issue a writ if she was unwilling to testify.

At the evidentiary hearing, Ms. Taylor testified that at the time of the trial, she was in an abusive relationship with someone named Dennis, who had threatened to beat her if she went to court. She explained this to defense investigator Sandy Love, who did not offer to help her and. did not try to convince her to be there. She repeated her assertion that Mr. Evans was with her during the months in question and denied speaking to Ms. Black or Ms. Alva about Dennis's threats.

Ms. Black's hearing testimony was very different. She said Ms. Taylor told her that Mr. Evans had previously threatened her and her baby and told her to lie for him. She also claimed Ms. Taylor admitted perjuring herself during her deposition and refused to lie again for Mr. Evans. This put the defense in a difficult position, as Ms. Taylor was the only witness who could support an alibi defense. Ms. Black discussed the matter with Mr. Evans, who agreed it would not be good for Ms. Taylor to testify. Counsel's decision not to seek a writ of attachment to secure this witness's testimony was more than reasonable under the circumstances, given the risk that she would have suddenly denied the alibi set forth in her deposition. Even though Ms. Taylor repeated the alibi during the evidentiary hearing, her testimony is not credible, and there is no reasonable probability that the outcome of the proceedings would have been different if she had been summoned to testify.

Deborah Fisher: Ms. Fisher testified that the shoe impression found at the crime scene could have been made by one of Mr. Evans's shoes, then the State realized she was erroneously basing her testimony on the Reeboks belonging to Mr. Francis rather than the Nikes belonging to Mr. Evans. The trial court struck her earlier testimony and allowed the State to recall

her, whereupon she stated that the two impressions could have been made by Mr. Evans's left shoe. Mr. Evans alleges counsel failed to conduct an adequate cross-examination.

As with the claim relating to the shoe print testimony of Dennis McDowell, this claim is insufficient. The record, as cited by Mr. Evans, is clear that Ms. Fisher simply made a mistake with regard to the exhibit number. She testified only that his shoes matched the class characteristics of the print, so other shoes of the same brand and size could have made the same print. There is no reasonable probability that the cross-examination questions Mr. Evans now suggests would have made a difference in the outcome of the proceedings. Furthermore, he presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Nanette Rudolph: Ms. Rudolph testified that the shell casing found in the blue Oldsmobile matched the five casings found at the crime scene, in that they were all fired from the same weapon. Mr. Evans alleges counsel failed to conduct an effective cross-examination. This claim contains elements of several of his previous claims - including counsel's failure to explore the fact that Mr. Francis used the same weapon in the Arjun case, consult independent ballistics and blood spatter experts, and point out the absence of fingerprint evidence on the shell casings - and relief is not warranted for the reasons already set forth in this Order. There is no reasonable probability that additional cross-examination of this witness would have made a difference in the outcome of the proceedings.

Linda Evans: Mr. Evans contends that the defense rested without calling any witnesses to discredit the State's case. He argues that Shana Wright's testimony that he claimed to have killed Kenneth Lewis because he was the "OG" ("original gangsta") was most damaging, and counsel should have called his mother, Ms. Evans, who would have testified that he was a braggart and a big talker, thereby discrediting Ms. Wright's testimony and his purported confession to her.

Mr. Evans later insisted on taking the stand, against the advice of his attorneys. Therefore, it would have actually hurt his credibility to introduce the testimony of a witness who would have portrayed him as one who was not worthy of belief. Furthermore, any jury would assume that a mother's testimony would be biased. There is no reasonable probability that the outcome of the proceedings would have been different if counsel had called Ms. Evans during the guilt phase.

Newly Discovered Evidence: Mr. Evans alleged that newly discovered evidence would show that Ms. Wright actually stayed in her apartment and cleaned after the Kenneth Lewis incident, rather than going to work as she testified at trial. However, he does not explain how this relates to ineffective assistance of counsel or any other basis for relief; and this Court finds no such relation. Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Preparation for Testifying: Mr. Evans alleges counsel failed to discuss with him the possibility of testify on his own behalf or to prepare him for doing so. He complains that counsel asked no questions regarding his background, asked no other questions which might have humanized him, failed to anticipate the number of his prior felony convictions, and allowed the jury to learn he was previously convicted of escape.

At the evidentiary hearing, Ms. Black testified that she warned Mr. Evans of the risks of testifying, and advised him not to do so. She admitted it was difficult to predict exactly what he would say. She was certain that she discussed with him the fact he would have to admit to prior felonies and thought it was damaging that the jury heard he was convicted of escape. (See also trial transcript, pages 1378-1382). It was Mr. Evans who tried to minimize the impact of his second conviction by explaining the surrounding circumstances. (Trial transcript, pages 1396-1397).

As for the additional questions which Mr. Evans believes should have been asked, the so- called "background" information would not have been relevant to the determination of guilt or innocence. If counsel

had asked such questions, it is likely that State would have objected and the answers would have been ruled inadmissible. Any attempts to "humanize" him by showing good background and good character would have allowed the State to cross-examine him on examples of his bad background, thereby doing more harm than good. There is no reasonable probability that the outcome of the proceedings would have been different if counsel had asked additional questions on direct exam.

Burden-shifting: Mr. Evans alleges counsel failed to object to certain comments made by the State during closing argument. The State argued that it does not choose its witnesses, but the defendant does. Mr. Evans alleges this constituted improper burden shifting which led the jury to believe that he had a duty to present witnesses at trial, and it was prejudicial because he presented no witnesses.

His interpretation of this comment is incorrect. The State was not implying that a defendant has a duty to introduce witnesses or evidence, only that out that it called witnesses who knew about the case because of Mr. Evans's association with them. (Trial transcript, pages 1442-1443). Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Leader of a Gang: The State also argued that co-defendants Ward and Francis failed to tell the police that Mr. Evans shot the victim because Mr. Evans was the leader of the gang and they were protecting him. Mr. Evans alleges this was speculative argument on matters not in evidence.

However, he admits that counsel objected to a similar argument made shortly thereafter, resulting in an admonishment to the State not to use the term "OG" or to call him the leader of a gang. (Trial transcript, page *1458).* This was sufficient to preserve the entire matter for appellate review.

The appellate record demonstrates that this issue was raised in Point VII on Mr. Evans's direct appeal, which specifically referred to the State's second comment regarding the "OG." Thus, the underlying issue has already been raised on direct appeal, and it is

procedurally barred from being raised again in a motion for postconviction relief. Mr. Evans cannot circumvent this procedural bar by choosing another, nearly identical comment, and repackaging the claim in terms of ineffective assistance of counsel. Finally, even if counsel had objected to the first comment describing Mr. Evans as the leader of a gang, there is no reasonable probability that there would have been a different result in the proceeding, in light of the appellate court's finding that evidence of his gang membership constituted harmless error. *See Evans v. State,* 800 So. 2d 182 (Fla. 2001).

Blood on Shoes: Mr. Evans alleges counsel failed to object when the State argued there might have been blood on his shoes. However, the prosecutor's words constituted fair comment on defense counsel's argument that the State had not presented any evidence that there was blood on his shoes. (Trial transcript, pages 1438-1441 and 1481-1494). Furthermore, the prosecutor did not affirmatively argue that there was indeed blood on the shoes. Thus, counsel had no valid basis to object.

Father and Mother: Mr. Evans alleges counsel presented penalty phase evidence which was not mitigating when it called his father, mother, and Mondale Jordan to testify about his good upbringing, good conduct in the past, and a family environment which encouraged healthy activities.

Mr. Evans previously complained that his mother should have been called during the guilt phase in order to "humanize" him. Now he complains that such humanization was actually harmful because it showed he had no excuse for committing his crimes. Regardless, there is no reasonable probability that the outcome would have been different if this testimony had been omitted.

Malingering: During penalty phase closing arguments, the State insinuated that Mr. Evans was faking mental illness. Mr. Evans alleges this was improper, particularly since the State twice stipulated to medical reports finding him to be incompetent and in need of treatment at state hospitals. He also alleges counsel failed to introduce the entirety of the

competency reports, which all reflected that he was suffering from a mental illness.

Mr. Evans cites several specific comments made during the closing arguments, but none specifically accused him of malingering. (Trial transcript, pages 2004-2007). On the contrary, the prosecutor was exercising his right to make a fair comment on the evidence presented. There is nothing in the record to show that Mr. Evans had ever suffered from, or received treatment for, mental health problems prior to the murder. And, while the murder occurred in April 1996, the first document relating to a determination of competency was not filed until February 18, 1998, almost two years later. The State was entitled to argue that so much time had passed between the murder and the subsequent evaluations, it was questionable whether the evaluations validly reflected Mr. Evans's mental state at the time of the murder. Counsel had no legal basis to object to this line of argument. Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

Mark Quinn: Mr. Quinn was one of the "non-charged participants" in the murder. Mr. Evans alleges counsel failed to present Mr. Quinn's testimony, or in the alternative, he alleges it constitutes newly discovered evidence or a *Brady* violation. He contends Mr. Quinn would testify that it was Edward Francis and Gervalow Ward who shot and killed the victim and that he, Mr. Evans, had nothing to do with the shooting. He argues the jury would have acquitted him or recommended a sentence of life instead of death.

When Mark Quinn testified at the evidentiary hearing, he did repeat his assertion that Francis and Ward committed the murder. However, he was impeached with his 1998 deposition, in which he stated that Mr. Evans was the leader who dominated the younger men in the gang and used martial arts skills to cause pain and intimidate them. Although he claimed he never saw the gun in Mr. Evans's hands, his testimony placed Mr. Evans at the apartment complex where the murder occurred. He also confirmed that Mr. Evans was acting strangely on the night of the murder and believed the victim was going to rob Shana Wright, thereby establishing a possible motive for Mr. Evans to commit

the murder or direct others to do so. If he had testified at trial, these damaging statements would have been admissible as impeachment then, as well, and would have negated the benefit of any potentially exculpatory testimony he might have given. There is no reasonable probability that there would have been a different outcome in the proceedings if counsel had presented the testimony of this witness.

Mr. Evans's alternate claims of newly discovered evidence or a *Brady* violation will be discussed in more detail in Claim XV.

Foot Traffic: Mr. Evans alleges counsel failed to point out that the area behind the Palms Apartments carried busy foot traffic, so any number of shoes could have made the impressions found.

At the evidentiary hearing, Cassandra Holly testified that people running from the police sometimes used the area as an escape route and agreed there was a lot of traffic around the ditch. While the crime scene technicians who testified about shoe prints could not say with 100 percent certainty that it was Mr. Evans's shoe that caused the impressions lifted from the scene, there is no reasonable probability that the jury would have acquitted Mr. Evans even if it had discounted the shoe impression testimony completely.

Masonic conspiracy: Mr. Evans alleges counsel failed to consult or hire an expert regarding Masonic conspiracies and the effect of excommunication and humiliation within the Jehovah's witnesses. He makes the conclusory assertion that such testimony could have helped in both the guilt and penalty phases, but he provides no supporting facts. This claim is legally insufficient, and Mr. Evans presented no evidence or testimony at the evidentiary hearing to change this conclusion.

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.

(R2039-53).

The findings by the Circuit Court are supported by the evidence, and should not be disturbed. Evans' claim fails on the facts because those facts establish neither prong of *Strickland v. Washington,* 466 U.S. 668 (1984). Evans has failed to show either deficient performance or prejudice, as *Strickland* requires, and he is not entitled to relief.

V. THE "ALIBI WITNESS" CLAIM

On pages 68-73 of his brief, Evans argues that trial counsel were ineffective for not calling Nicole Taylor as an "alibi witness." Because this claim is one of ineffectiveness of counsel, it is reviewed under the *Stephens v. State* standard.

In deciding the Taylor-alibi witness claim, the collateral proceeding trial court stated:

> Ms. Taylor gave a pre-trial deposition wherein she stated that Mr. Evans stayed at her apartment with her every night during March and April of 1996. Mr. Evans alleges that he informed counsel he wished to proceed on this alibi as his theory of defense, but counsel failed to secure Ms. Taylor's attendance at trial or ask the Court to issue a writ if she was unwilling to testify.
>
> At the evidentiary hearing, Ms. Taylor testified that at the time of the trial, she was in an abusive relationship with someone named Dennis, who had threatened to beat her if she went to court. She explained this to defense investigator Sandy Love, who did not offer to help her and. did not try to convince her to be there. She repeated her assertion that Mr.

> Evans was with her during the months in question and denied speaking to Ms. Black or Ms. Alva about Dennis's threats.
>
> Ms. Black's hearing testimony was very different. She said Ms. Taylor told her that Mr. Evans had previously threatened her and her baby and told her to lie for him. She also claimed Ms. Taylor admitted perjuring herself during her deposition and refused to lie again for Mr. Evans. This put the defense in a difficult position, as Ms. Taylor was the only witness who could support an alibi defense. Ms. Black discussed the matter with Mr. Evans, who agreed it would not be good for Ms. Taylor to testify. Counsel's decision not to seek a writ of attachment to secure this witness's testimony was more than reasonable under the circumstances, given the risk that she would have suddenly denied the alibi set forth in her deposition. Even though Ms. Taylor repeated the alibi during the evidentiary hearing, her testimony is not credible, and there is no reasonable probability that the outcome of the proceedings would have been different if she had been summoned to testify.

(R2045-46). The trial court had the opportunity to observe the witnesses testify, and credited the testimony of defense counsel Black over the testimony of Taylor. This Court has repeatedly held that it will not substitute its judgment for that of the trial court, especially on witness credibility issues. *Davis v. State*, 30 Fla. L. Weekly S709, 718-19 (Fla. Oct. 20, 2005); *Rodriguez v. State*, 30 Fla. L. Weekly S385, 389 (Fla. May 26, 2005); *Arbelaez v. Sta*te, 898 So. 2d 25, 32 (Fla. 2005); *State v. Spaziano,* 692 So. 2d 174 (Fla. 1997). The trial court's disposition of this claim should not be disturbed.

VI. THE INEFFECTIVENESS/MENTAL STATE DEFENSE CLAIM

On pages 73-88 of his brief, Evans argues that trial counsel were ineffective for not investigating insanity and voluntary intoxication defenses, as well as for "failing" to provide "vital information" to the defense experts.[9] This claim is an ineffectiveness claim, and is reviewed under *Stephens v. State.* For the reasons set out below, there is no basis for relief.

In denying relief on this claim, the trial court held:

> Mr. Evans alleges he was denied effective assistance of counsel and mental health experts during both the guilt and sentencing phases of his trial, when critical information regarding his mental state was not presented to the judge and jury. Specifically, he contends counsel failed to provide the appointed doctors with eyewitness statements or other documents which they had requested in order to assist them in evaluating his competency to stand trial. He argues that as a result, the doctors pronounced him competent to stand trial based on incomplete information, and that Dr. Gutman changed his original opinion after reviewing witness depositions given to him immediately before trial.
>
> Dr. Alan Berns and Dr. Michael Gutman were appointed to determine Mr. Evans's competency to stand trial and to give an opinion on his sanity at the time of the offense. Dr. Michael Herkov was also appointed to assist with mental health issues. However, at the evidentiary hearing, defense counsel Andrea Black testified that Mr. Evans "would not have it." That is, he refused to allow Ms. Black and co-counsel Marlene Alva to pursue a defense of insanity. He waived his right to proceed with a guilt-phase mental status defense when he instructed counsel not to prepare one, and it is not reasonable for him to he cannot complain now that counsel's performance was deficient for complying with his instruction.

[9] This claim was Claim V in the Rule 3.851 motion.

Mr. Evans points out that prior to trial he was involuntarily hospitalized twice for incompetency; thus, his judgment was clouded and it was unacceptable for counsel to adhere to the wishes of a client who unreasonably rejects the prospect of pursuing an insanity defense. At the evidentiary hearing, Dr. Gutman testified that he believes Mr. Evans is a "dissembler," one who tries to hide his mental illness, and has always refused mental health evaluations. Upon reviewing the depositions of Mark Quinn and Edward Francis immediately prior to trial, Dr. Gutman changed his original opinion and concluded that Mr. Evans was indeed incompetent to proceed and mentally ill at the time of the offense, noting Quinn's description of Mr. Evans as delusional and wild-looking. [Drs. Herkov and Berns never received this information, and declined to change their opinion when they testified telephonically on April 5, 1999.]

Ms. Black acknowledged that she sometimes found it difficult to communicate with Mr. Evans, because he was not cooperative, but she believed he did have the mental capacity to make decisions for himself. She discussed with him the risks inherent in taking the stand in his own defense, and he agreed not to testify. She also discussed with him the potential to proceed with defense of voluntary intoxication or insanity, but he remained adamant that he wished to pursue an alibi. She relayed the State's plea offer, which provided for a life sentence, and believed he was mentally capable of making the decision to reject the offer. At one point, she filed a motion to withdraw because she and Mr. Evans disagreed on how the case should be handled; she believed the defense needed more time to prepare whereas he wished to go to trial right away and had filed a pro se demand for speedy trial. [He later stated that he wanted Ms. Black to continue representing him.] In summary, Ms. Black's testimony provides no basis for this Court to conclude now that she rendered ineffective assistance by acceding to her client's specific demands not to pursue a mental status defense during the guilt phase. Moreover, Ms. Black testified that she did investigate mental health issues, and the record indicates that mental status mitigation was presented during the penalty phase of the trial. Dr. Herkov provided

> extensive testimony, as follows. He had diagnosed Mr. Evans with two major mental illness: psychotic disorder - which caused him to lose contact with reality and have delusions, false beliefs, or hallucinations - and bipolar disorder. (Trial transcript, pages 1899 and 1921). Dr. Herkov noted the existence of head injuries reported by Mr. Evans's mother and the fact that Mr. Evans had suffered from migraine headaches, sensitivity to light, and nausea after his injuries. (Trial transcript, pages 1922, 1924-1925, and 1947). He spoke with another relative and friend and reviewed the depositions of the co-defendants, learning that Mr. Evans had ingested marijuana and alcohol on the day of the murder, which could have exacerbated his bipolar condition. Perhaps most memorably, he testified that one of the co-defendants had described Mr. Evans on the night of the murder as "acting as the joker in the batman movies," behaving differently that anyone had ever seen, and explained that this inappropriate effect or emotion could be a sign of psychosis. (Trial transcript, pages 1951-1952).
>
> The trial court found (1) the capital felony was committed under the influence of extreme mental or emotional disturbance, and gave this mitigating factor "substantial" weight; and further found that (2) Mr. Evans's capacity to appreciate the criminality of his conduct or conform his conduct to the requirement of law was substantially impaired, and gave this factor "some weight." Thus, the trial court believed that the defense had succeeded in establishing the existence of mental health mitigation. This Court has now considered the testimony adduced at the evidentiary hearing, and finds no reasonable probability that additional mitigating factors would have been found, or that the result of the proceeding would have been different, if this information had been introduced during the penalty phase.

(R2034-37). Those findings are supported by competent substantial evidence, and should not be disturbed.

To the extent that discussion beyond the findings of the trial court is necessary, that court found, based on the testimony of trial counsel, that Evans insisted on pursuing an alibi defense, and rejected any defense based either on insanity or voluntary intoxication. (R 2035).[10] Further, to the extent that Evans' claim is that counsel should have provided additional mental status information to his trial experts, the collateral proceeding trial court stated:

> Mr. Evans raises the following allegations. He was not competent to proceed to trial, and both counsel and the trial court failed to act. He has suffered from long-term mental disorders and illnesses, and could not participate in his trail because he was not competent to understand the proceedings. Trial counsel did not request a full competency hearing, failed to forward "vital" information to mental health experts, failed to aid the experts in their evaluations, and failed to adequately challenge the findings of competency prior to trial. The State's failure to reveal any evidence of mental illness or any exculpatory evidence violates *Brady V. Maryland,* 373 U.S. 83 (1963).
>
> Mr. Evans's challenge to the trial court's failure to act is procedurally barred, because claims of trial court error could have been, should have been, or perhaps actually were raised on direct appeal. His *Brady* claim is insufficient, because he fails to set forth any specific supporting facts regarding the particular evidence the State allegedly withheld. Finally, his allegations of ineffective assistance of counsel, as set forth in this sub-section, are legally

[10] Evans was obviously not willing to undertake a defense strategy that required him to admit the offense. That is hardly an unreasonable position, given the infrequency of successful insanity or voluntary intoxication defenses, and the potential for disaster if such a theory fails. After all, both defense theories require admitting the underlying offense.

> insufficient, because they are devoid of any facts to identify what "vital information" counsel failed to provide to mental health experts, or how counsel could have aided those experts, or what sort of challenges counsel could have raised prior to trial. The issues are raised and addressed in greater detail in Ground IV, below.

(R2033-34). In any event, Evans' competency was litigated pre-trial, and was decided adversely to Evans on direct appeal. Of course, the expert opinions are not binding on the court making a determination of competency in the first instance -- rather, those opinions are advisory in nature, and may be rejected. *Hunter v. State*, 660 So. 2d 244, 247 (Fla. 1995). The collateral proceeding trial court properly denied relief, and that finding should be affirmed in all respects.[11]

VII. THE "CUMULATIVE ERROR" CLAIM

On pages 88-89 of his brief, Evans argues that "cumulative error" compels relief. The collateral proceeding trial court found that because there was no merit to any of the individual claims, the cumulative error claim failed, as well. (R2056). That result follows well-settled Florida law. *Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1998); *Wike v. State*, 813 So. 2d 12,

[11] On page 85 of his brief, Evans complains that the State did not call Evans' co-counsel to testify at the evidentiary hearing. Given that Evans has the burden of proof, it stands reason on its head to suggest that the State is required to call defense counsel to testify. If Evans believed that co-counsel had relevant testimony, it was his duty as an advocate to call her. His position as taken in his brief flies in the face of the presumption of competence *Strickland* affords to counsel's performance, and should be rejected by this Court.

22 (Fla. 2003). This claim is not a basis for relief, and the trial court should be affirmed in all respects.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee submits that the denial of post-conviction relief should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

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

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL