IN THE SUPREME COURT OF FLORIDA

PAUL H. EVANS,

Petitioner,

vs. Case No. SC07-494

JAMES MCDONOUGH,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Paul H. Evans, Defendant below, will be referred to as "Evans" and Respondent will be referred to as "State". The record references will be as follows:

Trial record: "TR";
Postconviction record: "PC-R";
Postconviction transcripts: "PC-T"
Supplemental records: "S" before the record supplemented;
Petition: P.

All references will be followed by the volume number, where appropriate, and page number(s).

STATEMENT OF THE CASE AND FACTS

On August 6, 1997, Defendants, Evans and Connie Evers Pfeiffer, were indicted for the March 23, 1991 first-degree murder of Alan F. Pfeiffer. (TR.1 13-14). Their trials were severed with Evans proceeding to trial first. Evans' first trial started October 26, 1998, but on November 4, 1998, ended in a mistrial. (TR.7 229, TR.18 1796-1800). On January 11, 1999, the second trial commenced, but the next day, it too ended in a mistrial, this time due to improper information being disclosed by a potential juror during voir dire (TR.20 1837-38; TR.22 2112-20). The third trial began on February 1, 1999, and on February 11, 1999, a guilty verdict was rendered. (TR.3 411; TR.24 2162; TR.38 4283-84). The penalty phase was held the following day with the jury rendering a nine to three vote

recommending death (TR.3 412; TR.39 4291, 4459-62). On March 8, 1999, the court conducted a hearing pursuant to Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) (TR.40 4469-4501). Sentencing was held on June 16, 1999 and death was imposed (TR.3 501-12; TR.40 4511-24).

This Court affirmed the conviction and sentence. Evans v. State, 808 So.2d 92, 100, 109-10 (Fla. 2001). Certiorari review was denied on October 15, 2002. Evans v. Florida, 537 U.S. 951 (2002). On October 3, 2003, Evans filed his motion for postconviction relief (PC-R.1 1-99). Following the evidentiary hearing held November 8, 9, and 22, 2004, and the parties' written closing arguments, the court denied postconviction relief. (PC-R.4 697-698; PC-R.5 767-1095; PC-R.6 1105-28). The subsequently filed postconviction appeal is pending before this Court under case number SC05-1617.

On direct appeal, this Court outlined the facts as follows:

> The trial record establishes the following facts. This is a murder-for-hire case involving four coconspirators: Evans, who was nineteen at the time of the crime; Sarah Thomas, Evans' girlfriend; Donna Waddell, Evans' and Thomas's roommate; and Connie Pfeiffer, the wife of the victim. At trial, the sequence of events regarding the murder, and Evans' role in the murder, were provided predominantly by Thomas and Waddell, who both testified on behalf of the State. FN1 Waddell signed a deal with the State in which she agreed to plead guilty to second-degree murder in exchange for giving a sworn statement explaining her involvement in the murder and agreeing to testify in any proceeding. Thomas was never charged with any crime. The evidence at trial demonstrated

that the victim and Connie had a “rocky” marriage, and that each were dating other people while they were married. A few weeks before the murder, Connie approached several individuals about killing her husband, but each person refused. Connie then asked Waddell if she knew anyone who would be willing to kill her husband, and Waddell suggested that Evans might be willing to commit the murder. Thomas testified at trial that Evans told her that he would kill Alan in exchange for a camcorder, a stereo, and some insurance money.

Waddell stated at trial that she, Evans, Connie, and Thomas all collaborated to come up with the plan to kill the victim. Testimony also established that Evans initiated the plan to commit murder and that he was the “mastermind” behind the plot. Pursuant to the agreement, on Saturday morning, March 23, 1991, Waddell, Connie, and Evans all participated in arranging the Pfeiffers' trailer to make it look like a robbery had taken place. Waddell testified that it was Evans' idea to stage the robbery. They stacked electronic equipment near the back door. During the staging of the robbery, Evans wore gloves.

After the trailer was arranged, Waddell and Evans went to her parents' house to steal Waddell's father's gun. Evans broke into the house through a window to steal the gun and also stole a jar of quarters from Waddell's father's bedroom. Waddell and Evans disposed of the jar, keeping the quarters, and then Waddell, Evans, and Thomas went to test-fire the gun.

Waddell testified that after firing the gun, she, Evans, and Thomas went back to the trailer to go over the alibi with Connie, and Evans told the other three what to say. Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.

Waddell testified that she, Evans, and Thomas were at the fair that evening but left the fair and arrived at the trailer at dusk. They went in the front door. Evans had a bag containing the gun and dark clothing. Waddell and Thomas left Evans in the trailer, locked the door, and went back to the fair. FN2 They paid for the fair with the quarters stolen

from Waddell's parents' house.

Thomas testified that she and Waddell paid with quarters to avoid having their hands stamped, so it would not look like they left the fair and later returned. Thomas also testified that she and Waddell stayed at the fair for approximately one to two hours before returning to the trailer. According to Thomas, it was Evans who told them to wait at the fair before returning to the trailer.

Between 7 p.m. and 7:15 p.m. that evening, Alan's girlfriend, Linda Tustin, met Alan at the store where he worked. She observed that Alan was agitated and talking on the phone to Connie. When Alan got off of the phone, he told Tustin that "his wife and her biker friends were going to clean him out." He left work to drive back to the trailer at approximately 7:30 p.m. Alan worked thirty minutes away from the trailer.

Although there is some dispute between the testimony of Waddell and Thomas as to the following sequence of events,FN3 both witnesses agreed that they returned to the pickup site, where Evans got into the back of the car and said, "It's done." Waddell stated that Evans told her that he turned the stereo up loud so that nobody would hear the gunshots, then hid behind some furniture and shot Alan when he came into the trailer. Leo Cordary, one of the Pfeiffers' neighbors, testified that he heard gunshots between 8 p.m. and 8:30 p.m., but did not recall anyone running from the trailer.

Waddell also testified that Evans did not want to tell her or Thomas too much about the murder so that they would not be able to tell the authorities anything if they were caught. Evans told Waddell, "Just stick to the story that we were at the fair and just we were all together all night at the fair." Thomas and Waddell both testified that they disposed of the gun in a canal near Yeehaw Junction.FN4 They then went back to the fair to meet up with Connie.

Although there is a dispute in the testimony of Waddell and Thomas as to the timing and specific circumstances, both women stated that Evans tried to burn his pants in the bathtub following the murder.FN5

Thomas testified that shortly after the murder, Evans took the camcorder apart and threw the pieces in a dumpster because he was afraid this could implicate him. Moreover, Waddell testified that she, Thomas, and Evans smashed the television and that Thomas and Evans disposed of the pieces.

In the early morning on March 23, 1991, the Vero Beach Police Department was summoned to the trailer that the victim shared with Connie, due to a complaint of loud music. The police found the south door of the trailer ajar and, upon entering, discovered the victim's body on the living room floor. The police noticed that the interior of the residence was illuminated by a dim kitchen light. Moreover, the police discovered that the dining area paddle fan light had been disabled. There were no signs of a forced entry or a struggle within the trailer, but the trailer was in a state of disarray, with electronic equipment and other items stacked near the south door. The victim was wearing two gold chains and had $48 in his pocket when the police found him. Moreover, the police found the victim's life insurance policies which were worth approximately $120,000 lying on the table. Each policy listed Connie as the beneficiary.

The police also discovered a marijuana roach on the end table in the living room and found a crack pipe and roach clip on the bedroom dresser. The roach in the living room had lipstick on it, but the police never sent it for DNA analysis. A television, camcorder, and VCR were reported missing from the trailer and never recovered. These items were rented from Alan's place of work.

Three bullets were recovered from the victim, one from his spine, and two from his head. The testimony at trial identified the bullets as .38 special Nyclad bullets that were fired from the same gun, and that the shots likely occurred from a distance of more than two feet away. Moreover, spent casings found in Waddell's father's home were consistent with those which would have held the Nyclad bullets.

The police did not speak with Connie until she arrived at the station the following afternoon. Detective Elliot testified at trial that Connie was

uncooperative throughout the investigation. Connie told Detective Elliot that she was at the fair with Evans, Waddell, and Thomas on the evening of the murder. Waddell stated that they stayed at the fair "long enough to be seen." Waddell, Thomas, and Evans each confirmed this alibi.

Thomas broke up with Evans about a month after the murder. Evans told her that he did not actually kill Alan, but that he had three African-American men do it. Moreover, Evans called Thomas some time after the murder and told her to "stick to the story."

Following the murder of her husband, Connie moved out of Vero Beach and purchased a horse farm near Ocala worth approximately $120,000, which was the same amount as the life insurance proceeds. Although Waddell testified that she never received anything for the death of Alan, Waddell acquired a taxi company some time after the murder. About three years after the murder, Waddell met with Evans. Evans told Waddell that she better keep quiet or his "old family members [were] going to kill" her. Evans also told Waddell that the person who killed Alan was dead. Evans told Waddell that he went and got the gun, took it apart, and took a bus to the woods in Ocala to dispose of the pieces. At the end of the conversation, Evans threatened to kill Waddell and her son if she talked to the police.

Ultimately, the case grew cold and was closed. However, in 1997, the Vero Beach Police Department reopened the case and Detective Daniel Cook focused his investigation upon Evans, Connie, Waddell, and Thomas. Thomas was the first suspect the police interviewed. Thomas explained the events surrounding the homicide and agreed to wear a wire and contact Waddell. At the meeting between Thomas and Waddell, Thomas stated: "We helped." Waddell responded: "I know. I think about it every day." The police arrested Waddell and, after the police showed Waddell the statement that she gave to Thomas, Waddell agreed to cooperate with the police and provide a statement. Based on Thomas and Waddell's cooperation, Connie and Evans were arrested for their alleged involvement in the murder.

Although Evans did not testify at trial,FN6 the State presented the statement Evans made to Sergeant Daniel Brumley on March 28, 1991, in which he stated that he was at the fair the entire night of March 23. With regard to Alan's death, Evans told Sergeant Brumley: “I know it was none of us. I don't care what nobody says. We were all together. One thing, Connie couldn't do a thing (sic) like that. Just the nature of her, how she is.”

The jury found Evans guilty of first-degree murder and the case proceeded to the penalty phase. The defense presented testimony establishing that Evans was a hyperactive child and was placed on Ritalin when he was six years old. His parents divorced at that time, and between 1978 and 1984, his father saw Evans only once because Evans' father was in the military. In late 1983, Evans' mother asked Evans' father to take custody of both Evans and his younger brother, Matthew, because of the children's behavioral problems. Shortly thereafter, Evans' father received news that Evans had accidentally shot Matthew while they were playing. Evans' parents testified at the penalty phase that Evans went through a “very emotional traumatic time” after the shooting. Although there was testimony from family members regarding the effect that the shooting incident had on Evans and the treatment he subsequently received, there was no expert testimony regarding any specific mental illness or impairment from which Evans may have suffered.

Dr. Gregory Landrum, a clinical and forensic psychologist, testified that Evans' intelligence was in the high average to superior range. Moreover, Dr. Laurence Levine, a psychologist who performed a number of psychological and neuropsychological tests on Evans, stated that Evans had above average intelligence and was an avid reader. Finally, Evans' mother and Dr. Levine both testified to Evans' artistic ability, with Dr. Levine stating that Evans was a “stupendous” artist.

Drs. Landrum and Levine both testified that Evans would respond well to a structured environment and would adapt well to prison. However, Dr. Levine stated on cross-examination that Evans' record at all of the institutions he attended was replete with disciplinary

problems. Deputies Carl Lewis and Gregory George, who were corrections officers at the Indian River County Jail, testified that Evans had been a good prisoner and had not exhibited any disciplinary problems. Finally, Paul George, a Jehovah's Witness who conducted bible study in prison with Evans, stated that Evans has a sincere belief in God.

Following the penalty-phase proceedings, the jury recommended the imposition of the death penalty by a vote of nine to three. The trial court found the following in aggravation: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). The trial court found only one statutory mitigator: Evans' age of nineteen when he committed the murder (little weight).FN7

In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans' good conduct while in jail (little weight); (2) Evans' good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans' family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans' artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the mitigation, the trial court imposed the death penalty.

FN1 Connie never testified at Evans' trial

because she invoked her Fifth Amendment rights. Connie was ultimately convicted of first-degree murder, the jury recommended a life sentence, and the trial court imposed a life sentence.

FN2 Although Waddell did not remember whether she went back to the fair after dropping Evans off at the trailer, Thomas testified that they did go back to the fair after dropping Evans off at the trailer.

FN3 Thomas testified that when she and Waddell originally went to the pickup spot for Evans, he was not there. Thomas stated that they proceeded to drive around and parked at a gravel parking lot. She testified that they did not see Evans, so they went back to the fair and waited another 30 to 45 minutes before leaving again to meet Evans at the pickup spot.

FN4 Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.

FN5 Waddell testified that this occurred the next day, and that they used pool chemicals. They also tried to burn the gun carrying case. According to Waddell, she, Evans, and Thomas were present when they tried to burn the pants. However, according to Thomas, she and Evans tried to burn Evans' pants after they got home from Denny's.

FN6. In fact, the defense presented no witnesses during the guilt phase.

FN7. The defense waived the following statutory mitigators: (1) lack of significant prior criminal history; (2) the defendant acted under the influence of another; (3) the defendant acted under any strong emotional duress; (4) impaired capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law;

and (5) the victim's participation in or consent to the defendant's conduct.

Evans, 808 So.2d 95-100.

Fourteen claims[1] were raised on direct appeal and rejected.

[1] As provided by this Court:

> Evans claims that: (1) the trial court erred in denying Evans' motion to quash the indictment or dismiss the charge; (2) reversal is required under Anderson v. State, 574 So.2d 87 (Fla. 1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans' family; (6) the trial court erred in denying Evans' motion for a statement of particulars and in allowing the State to argue in the alternative that Evans was the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans' death sentence is disproportionate; (10) Evans' death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to death eligibility; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling).

Evans v. State, 808 So.2d 92, 100 (Fla. 2001). Also, this Court reviewed the case for sufficiency of the evidence, even though

Where pertinent to Evans' claims here, such will be addressed in the body of the response. On February 12, 2002, Evans' rehearing was denied and the Mandate issued the same day. Subsequently, on July 16, 2002, Evans sought certiorari review with the United States Supreme Court wherein he raised three questions.[2] The petition was denied on October 15, 2002. Evans v. Florida, 537 U.S. 951 (2002).

On October 3, 2003, Evans filed his Florida Rule of Criminal Procedure 3.851 Motion for Postconviction Relief (PC-R.1 1-99). Following the State's response (PC-R.1 100-691), the Case Management Hearing was held on February 10, 2004 and the court granted an evidentiary hearing[3] addressed to Evans' claims

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Evans did not raise the issue, and found the evidence "sufficient to support the murder conviction." Id. at 100.

[2] 1 - Whether the state court violated the Sixth, First, and Fourteenth Amendments in excluding petitioner's parents and the public from a substantial portion of the questioning of potential jurors?

2 - Whether there was a violation of the Due Process, Jury and Cruel and Unusual Punishment Clauses where the state presented the jury with alterative theories that Evans either shot the decedent or acted as an accessory who was not present at the time of the murder and told the jurors that they could be divided as to which theory they accepted?

3 - Whether there was a violation of the Jury, Due Process or Cruel and Unusual Punishment Clauses where the jury did not make findings qualifying the defendant for the death penalty?

[3] Claim I (ineffective assistance of guilt phase counsel), Claim II (ineffective assistance of penalty phase counsel except for "that part of Defendant's Claim II wherein he alleges failure to object to serious misstatements of the law in the standard jury

of ineffective assistance under Strickland v. Washington, 466 U.S. 688 (1984) and a violation of Brady v. Maryland, 373 U.S. 83 (1963). An evidentiary hearing was held on November 8, 9, and 22, 2004 after having to be reset due to the 2004 hurricanes.

After hearing from Evans' witnesses,[4] the State's witnesses,[5] and entertaining written closing arguments, the court concluded that Evans' failed to carry his burden for any of he evidentiary hearing claims. Further, postconviction relief was denied summarily on the balance of the claims. (PC-R.6 1105-28). Following the denial of postconviction relief, Evans appealed and with the filing of his initial brief in case number SC05-1617, he filed the instant petition for writ of habeas corpus to which the State responds as follows.

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instructions...."; and Claim III (ineffectiveness of counsel during voir dire). Postconviction claims IV - VI were found not to require a hearing. (PC-R.4 697-98).

[4] Evans called the following witnesses on his behalf: Assistant Public Defender Mark Harllee, Public Defender Diamond Litty, Rosa Hightower, Jesus Cruz, Christopher Evers, Mindy McCormick, Anthony Kovaleski, Patricia Dennis, Sandra Kipp, Dr. Silversmith, and Dr. Harvey.

[5] The State called Assistant State Attorneys Nikki Robinson and Christopher Taylor.

SUMMARY OF THE ARGUMENT

Issue I – Appellate counsel did not render ineffective assistance as the discovery issues Evans claims should have been raised were meritless. The dictates of Strickland v. Washington, 466 U.S. 688 (1984) have not been satisfied.

Issue II – Evans was 19 years-old at the time of the murder and his IQ has been tested with doctors reporting he was in the average/superior range with scores of 102 and 127. As a result, Evans fails to qualify for relief under either Roper v. Simmons, 125 S.Ct. 1183 (2005) or Atkins v. Virginia, 536 U.S. 304 (2002). Further, his attempt to equate his alleged mental condition and youthfulness at the time of the crime does not meet the strict guidelines set forth in Roper and Atkins. Moreover, Evans has never claimed, nor availed himself of the procedures under Florida Rule of Criminal Procedure 3.203, thus, he is not entitled to raise the issue here.

Issue III – Not only is Evans procedurally barred from challenging the constitutionality of the death penalty statute under Ring v. Arizona, 122 S.Ct. 2428 (2002) as he raised this claim on direct appeal based upon Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) and Jones v. United States, 526 U.S. 227 (1999), but Ring has no impact on Florida's capital sentencing. Death eligibility occurs at time of conviction and this Court has rejected all challenges arising from Ring and Apprendi.

ARGUMENT

ISSUE I

EVANS' APPELLATE COUNSEL RENDERED EFFECTIVE ASSISTANCE ON DIRECT APPEAL (restated)

Evans challenges the representation he received from appellate counsel during his direct appeal in case number SC60-96404. Both sub-claims are addressed to appellate counsel's failure to raise the issue of the trial court's denial of a motion for mistrial and request for a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971) following alleged discovery violations.[6] **Sub-claim 1** involves the change and/or clarification of Charles Cannon's ("Cannon") testimony between

[6] While Evans cites to Brady v. Maryland, 373 U.S. 83 (1963) in the heading to Claim I, he does not discuss the matter again; he makes no argument that there was a Brady violation. In order to prove a Brady violation, Evans must show "(1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Rogers v. State, 782 So.2d 373, 378 (Fla. 2001) (citing Strickler v. Greene, 527 U.S. 263, 280-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999))." Sochor v. State, 883 So.2d 766, 785, n. 23 (Fla. 2004). The only factors he cites are matters which are not exculpatory evidence and/or were not suppressed by the State – sub-claim 1, clarification of witness's testimony that he could not recall seeing the victim's car and sub-claim 2, witness offering surprise testimony that she thought Evans was involved in a gang. Neither matter is exculpatory; neither constitutes Brady material. Also, Evans' failure to offer argument on the alleged Brady claim, renders it insufficiently plead and constitutes a waiver. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003).

the first and second trials. **Sub-claim 2** involves Donna Waddell's ("Waddell") surprise testimony regarding Evans' alleged involvement in a "gang." While a petition for writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000); Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995), this Court will find that Evans is not entitled to relief on either sub-claim. The petition should be denied.

The dictates of Strickland v. Washington, 466 U.S. 688 (1984) apply, and set forth the standard for reviewing claims of ineffective assistance of appellate counsel. Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002). This Court stated recently:

> ... the Court must consider first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. ... "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." ... Nor is appellate counsel "necessarily ineffective for failing to raise a claim that might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue."... Additionally, this Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object. See, e.g., Ferguson v. Singletary,

> 632 So.2d 53, 58 (Fla. 1993) (finding appellate counsel was not ineffective in failing to raise allegedly improper prosecutorial comments made during the penalty phase where trial counsel did not preserve the issues by objection).

Walls v. State, 926 So.2d 1156, 1175-76 (Fla. 2006) (citation omitted). See Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle, 837 So.2d at 907-08 (citations omitted) See Rodriguez v. State, 919 So.2d 1252, 1282 (Fla. 2005). Further, appellate counsel is not ineffective for failing to raise non-meritorious claims on appeal. Id. at 907-08 (citations omitted). "If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Armstrong, 862 So.2d at 718. See Jones v. Barnes, 463 U.S. 745, 751-753 (1983); Provenzano v. Dugger, 561 So.2d 541, 549 (Fla. 1990). This Court has reiterated that "the core principle" in reviewing claims of ineffectiveness raised in a state habeas corpus petition is that "appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success." Holland v. State, 916

So.2d 750, 760 (Fla. 2005). Under these principles in mind, Evans has not met his burden, and relief must be denied.

Sub-claim one - Evans asserts that his appellate counsel rendered ineffective assistance by failing to challenge the trial court's denial of the defense motion for a mistrial following the testimony of Charles Cannon (P at 9-20) - This claim is without merit. Even had the matter been raised on direct appeal, Evans would not have prevailed given the record and the trial court's conclusions that there was no discovery violation. Neither deficient performance nor prejudice have been shown, thus, Evans has failed to carry his burden of proving ineffective assistance of counsel.

At trial, with respect to Cannon's testimony on cross-examination (TR.33 3506-17) and his proffered testimony (TR.33 3519-24), defense counsel made three motions after being given time to consider what objections he wished to make: (1) he moved for a mistrial following Cannon's response on cross-examination indicating that there had been a prior trial (TR.33 3527); (2) he asked for additional time to investigate the contacts the State had with Cannon between the prior trial and his present testimony (TR.33 3530); and (3) after Cannon had been cross-examined and excused and another witness presented, counsel asked for a Richardson hearing based on what counsel termed

Cannon's changed testimony (TR.35 3580). The denials of these requests were not raised on direct appeal.

The trial court denied the request for mistrial for Cannon's comment about the prior trial as such was inadvertent given defense counsel's continued questioning of Cannon on what transpired between his first testimony and the present cross-examination. (TR.33 3527-30). The court also denied the request for time to investigate the matter further as counsel had thoroughly cross-examined Cannon on the differences between the two testimonies, but finding that the testimonies were not so different.[7] This was based in part on Cannon's proffer during which the following was revealed:

> BY MR. HARLEE (defense counsel)
>
> ...
>
> Q Do you remember how important your testimony was in the first trial?
>
> A I remember the one article said that – yes, I do remember one article that said my name in it.
>
> Q Did you feel somehow guilty or bothered that what you had told the Jury under oath the first time may have led to the mistrial and may have led to not a unanimous verdict?

[7] During the October 29th trial (first trial), Cannon responded to questions about the victim's TransAm. In response to the question, "You didn't see the TransAm there at that time?", Cannon replied, "Not that I remember." and then responds similarly: "I didn't see the TransAm. I didn't see – I didn't really study over there. I just didn't see – I don't remember seeing the TransAm." (TR.33 3530-31).

A Well, the only thing I wanted to make sure is everything that I'm saying is everything I do honestly remember. And I do know that some of the things – I know when I was interviewed by the police ... I mean I was remembering clothes and times better and everything else, and now I'm having a hard time just really remembering the day other than the only thing I remember specifically, and still have it envisioned in my mind, is the two girls in and out of the trailer pounding on the door. And that was only because it was so bizarre, you know. But everything else, I'm just trying to remember honestly what I do remember and don't remember that day.

Q Let me give you another chance to look at our trial statement back from October 29th, 1998. Look at the end of Page 31, the last question, and top of Page 32, the first five lines.

...

Q And then, "I'm sorry, not the trailer, The TransAm." And you said, "I didn't see the TransAm, no."

A And I don't remember seeing it; right.

Q "I didn't see the TransAm, no." Is that what you said right there in the trial the last time?

A Right; I don't remember seeing the TransAm; right.

Q Do you feel like you've been pressured by the State Attorney to alter your testimony in this trial?

A No. I don't feel at all I've been pressured. It's probably self-inflicted pressure, to tell you the truth. I'm just – I'm trying to recall, you know, a series of events that day. And my biggest problem now with whether the cars were there or not when I'm going through this over and over is that I was in and out of that trailer park all the time, and they were also, and now I'm trying to pinpoint whether I just remember, specific times, seeing that. And I'm saying that I just don't recall everything exact. You know,

was that car there. May or may not have been. I'm not sure.

(TR.33 3521-23)

The court concluded that Cannon had testified to what he was told by the State, that any change was "self-inflicted", and he noted the number of contacts he had with the prosecutor. According to the court, the only thing that was not presented to the jury was that it was Cannon who "self-inflicted" the "change" in testimony. (TR.33 3531-32). After another witness was taken, and the Richardson hearing request was made, the trial court revisited the differences in Cannon's testimony.

In response to the Richardson hearing request, the court reviewed Cannon's discovery depositions, pre-trial statements, and testimony at the first and second trial. Additionally it heard from the prosecutor as to her conversations with Cannon and considered argument from the State and defense as to whether or not there had been a discovery violation. During this review, the following transpired:

> THE COURT: All right. Looking at Page 30, ... Lines 11 through 18, Question: "What cars were there then?" Answer: "I believe the Fiero was still there, but that's the only car. I'm sorry, the only car that I remember ever seeing there all night was the Fiero." Question, "You didn't see the TransAm there at the time?" Answer: "Not that I remember, no." "And that's 930, 9:45?" Answer: "Correct." ... well, I guess I'll have to go back to the prior page. There was a question on Page 31, Line 24. ... Question: "I'm sorry, not the trailer, the TransAm." Answer: "I didn't see the TransAm, no. I didn't see – I didn't

> really study over there, but I just didn't see – I don't remember seeing the TransAm."
>
> All right. That was his testimony October -- ... – 29th, 1998.
>
> His testimony today was he really doesn't remember.
>
> ...
>
> Bottom line, he doesn't remember. So it's the State's position that October 29th of '98 he did not remember either based on what I've just read.

(TR.34 3581-82).

Continuing that court heard from the prosecutor, who noted that Cannon really did not change his testimony from October 29th, that the defense had been given all written statements made by Cannon, and that she believed that Cannon would testify in conformity with his prior statements, thus there was no discovery violation. (TR.34 3582-83). The court inquired of the prosecutor: "So what you're saying is when you talked with the witness about his appearance in court today, he made no indications to you that his testimony would be any different than what he testified to back on October 29th?" In response, Ms. Robinson stated: "Yes, Judge, that's basically it. Basically I questioned him about that, and he said – "I don't remember" is what he said specifically about that point." (TR.34 3583). In response to the defense argument that Cannon's most recent testimony was different from his prior accountings, and

thus the State was obligated to have notified the defense, the court reviewed additional statements in light of Cannon's proffered testimony that any difference in his testimony was "self-inflicted" and not caused by the State.

The record reflects the following:

> MR. HARLEE: I believe in his (Cannon's) deposition, Judge, he may have stated the opposite, that on Page 17 of his deposition, he says, "Well, I think if I remember, I believe the car was home, the red TransAm."[8] So it's red Fiero and a black TransAM. But then he goes on to say, "The only reason I remember that was because the guy took a lot of care of it. He was always out waxing on it." So it's up here, Page 17 of his deposition. So his statement in the last trial was different from his deposition.
>
> ...
>
> THE COURT: All right. That's his statement of March 28th, 1991?
>
> ...
>
> THE COURT: He indicates "I'm pretty sure the Fiero was there." Question: "That's the red car?" Answer: "Right. Yes." "Okay." Answer: "I'm trying to think if I remember physically seeing his – the TransAm or Camaro or whatever that is."
>
> Then in his deposition ....
>
> THE COURT: Sworn to the 25th of February, '98.

(TR.34 3585-86).

Based upon the foregoing, Cannon's various statements and testimonies, the proffer regarding what transpired between the

[8] As this Court will recall, the victim, Allen Pieffer, drove a black TransAM, and his wife, Connie, the co-defendant in this case, drove a red Fiero.

two trials, the prosecutor's representations, and argument of counsel, the court concluded that there was no discovery violation, thus, the Richardson hearing was denied. (TR.34 3587). The court found:

> ... Based upon the proffered testimony of Mr. Cannon, **I'll find that this really does not qualify under the discovery rules**. Also, based upon the representations made by the State as to conversations they had with him, **it appears that he really still hasn't pinpointed exactly what he saw that night, and I think he's been kind of wrestling with that dilemma from the first statement forward through today's testimony**.
>
> So I'll deny the request for a Richardson Hearing, **find that there is no violation**.

(TR.34 3587) (emphasis supplied).

The standard of review for the denial of a mistrial as well as the denial of a Richardson hearing is abuse of discretion. This court has stated that a ruling on a motion for a mistrial is within the sound discretion of the trial court and should be "granted only when it is necessary to ensure that the defendant receives a fair trial." England v. State, 940 So. 2d 389 (Fla. 2006); Perez v. State, 919 So. 2d 347 (Fla. 2005); Gore v. State, 784 So. 2d 418, 427 (Fla. 2001). This court elaborated that "[i]t has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity." Id., at 402; Thomas v. State, 748 So. 2d 970, 980 (Fla. 1999) (citing Salvatore v.

State, 366 So. 2d 745, 750 (Fla. 1978)). With respect to Richardson hearings,[9] one is required only where a discovery violation is found. Consalvo v. State, 697 So.2d 805 (Fla. 1996) Under that situation, this Court considers whether the trial court abused its discretion in determining whether a discovery violation occurred. Pender v. State, 700 So.2d 664 (Fla. 1997) (opining "where a trial court rules that no discovery violation occurred, the reviewing court must first determine whether the trial court abused its discretion").

Here, that court heard from the parties as to whether there had been a discovery violation and determined that the witness' testimony from the outset was unsettled, i.e., Cannon was never sure of what he saw that night and was consistent in reporting such concern. It was the court's reasoned judgment that there had been no change between Cannon's account between the first

[9] Pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971):

> [W]hen the State violates a discovery rule, the trial court has discretion to determine whether the violation resulted in harm or prejudice to the defendant, but this discretion can be properly exercised only after adequate inquiry into all the surrounding circumstances. In making such an inquiry, the trial judge must first determine whether a discovery violation occurred. If a violation is found, the court must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what affect [sic] it had on the defendant's ability to prepare for trial.

and second trial and that three was no written statement which was discoverable under Florida Rule of Criminal Procedure 3.220(b)(1)(B),[10] thus, there was no discovery material to be

[10] It is interesting to note that Harlee, when questioned about his alleged failure to request a Richardson hearing at an earlier time, testified that he did not believe that had been a discovery violation as the statements by Cannon were not in writing, thus, there was nothing for the State to disclose. However, he did move for one based on what he termed a significant change in Cannon's testimony. (PC-T.10 284-92). Based in part upon this testimony, the trial court rejected the claim of ineffective assistance of guilt phase counsel on this point, reasoning:

> . . . At the trial in October 1998, Cannon testified that he did not see the TransAm parked at victim's home. In February 1999, at the third trial, Cannon testified that he could not remember whether or not he saw the car. During cross examination followed by proffer, Cannon explained that between trials he had inquired of the State whether he should testify to what he remembered, or to what he had said in prior statements. Without inquiring into the content of the testimony, Assistant State Attorney Nikki Robinson advised Cannon that if he did not remember he should answer accordingly. (ROA Vol. 37, 3505-3533)
>
> The defense did not become aware of the change in testimony until Cannon testified at the third trial. Consequently, the defense requested a mistrial on two grounds: (1) Cannon told the jury that there was a "last trial" and (2) Cannon's change in testimony regarding the sighting of the TransAm. In addition, the defense requested additional time to investigate. The trial court denied both requests. (ROA Vol. 37, 3505-3533) Later, defense counsel in fact did move for a Richardson hearing based on Cannon's significant change in testimony. . . . The trial court considered the argument, found no discovery violation, and denied the request for a Richardson hearing. (ROA Vols. 37 & 38, 3580-3587)

disclosed and was no discovery violation. This finding is supported by the evidence, and ends the need for a Richardson hearing. Both the prosecutor and Cannon reported having a conversation regarding how Cannon should testify if he did not recall a fact. Both reported that no pressure was imposed by the State, that Cannon was told to merely tell the truth, and that Cannon was, from the outset, unsure of what he recalled having seen on the night of the murder. Under rule 3.220(b)(1)(B), statements of any person whose name was furnished in compliance with rule 3.220(b)(1)(A) must be turned over to the defense and in this context, statement "includes a written statement made by the person or signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." Cannon's inquiry as how to testify, even if construed as an indication that he was less sure of his testimony that he may

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> . . .Further, the record shows that the Richardson hearing was denied on the basis that there was no discovery violation and not on the basis that the motion was untimely. (ROA Vol. 38, 3587) Thus, defense counsel could do no more in that the trial court found no discovery violation. Therefore, absent other evidence of a discovery violation and prejudice in trial preparation, the Court finds that Evans fails to demonstrate deficient performance of counsel or prejudice to the proceedings required to satisfy both prongs of the Strickland standard.

(PC-R.4 1109-11).

have indicated earlier, is not a written statement requiring disclosure under rule 3.220. Thus, appellate counsel was not ineffective in not raising a non-meritorious claim. King v. Dugger, 555 So.2d 355, 357-58 (Fla. 1990).

Further, while the court denied the request for a Richardson hearing, it did so only after having heard defense counsel's position on whether there had been a change of testimony which caused the defense harm. For all intent and purposes, a Richardson hearing was held. When read in context, both the proffer of testimony, Cannon's cross-examination, and the request for a Richardson hearing, it is clear that the matter was fully considered, including any impact it may have had on the defense. Given the multiple statements the defense had from Cannon, wherein he equivocated as to his recollections of whether he saw the TransAm on the night of the murder, the cross-examination before the jury, wherein Cannon was challenged with his prior statements, it cannot be said that the defense was unaware of Cannon's equivocal position. As the trial court concluded, throughout Cannon's statements, he was always unsure of just was he saw that night, thus, there was no change in his testimony. Any unwillingness on the part of Cannon to be more positive about what he saw was purely a matter of "self-inflicted" desire to be as truthful as possible as to what he recalled. There was no discovery violation. The State did not

pressure Cannon to change his testimony, nor did Cannon change his testimony. At best, he clarified his position. He always maintained that he could not recall accurately seeing the TransAm. During the final trial, he clarified that he could not recall whether or not he saw the TransAm. This does not equate to a change in testimony which required disclosure to the defense. Had this issue been raised on direct appeal, relief would have been denied as the court's findings of fact are supported by competent, substantial evidence, and the law was applied properly. There was no abuse of discretion. As a result, Evans has not shown that counsel was ineffective as required by Strickland.

Setting aside for the moment the issue of deficiency, for Evans to prevail he must show prejudice arising from the denial of the motion for mistrial and request for a Richardson hearing. He must show that had these matters been presented on appeal, there is a likelihood that this Court would have found the trial court abused its discretion in denying the motion. Evans has not met this steep burden, and, as the record indicates, the trial court came to the correct rulings.

To the extent Evans points to Pender, 700 So.2d at 666; State v. Schopp, 653 So.2d 1016 (Fla. 1995); and Scipio v.

State, 928 So.2d 1138 (Fla. 2006)[11], his reliance is misplaced as they support the State's position that the court correctly denied the Richardson hearing upon the finding of no discovery violation. These cases deal with the analysis which must be conducted when a discovery violation is found, a Richardson hearing denied, and harmless error is argued. No discovery violation was found here, thus, this Court, under Pender merely must determine if the trial court abused its discretion. As analyzed above, there was no abuse; the decision rests on competent, substantial evidence that Cannon did not change his testimony, and such was not reduced to writing which would require disclosure. As such, Evans has not shown that had the issue been raised, the result of his appeal would have been different.

Furthermore, Pender and Scipio show that there was no discovery violation here. In Pender, photographs of the victim's injury were not disclosed and in Scipio, a witness's statement, albeit a verbal change, was not revealed. Here, there was no evidence, such as a photograph, withheld. In a light best for the defense, there was a verbal indication Cannon would change his testimony. However, as revealed by Scipio, there must be a clear change in testimony. In Scipio, the

[11] Evans' correctly notes Scipio issued after his case was decided and that counsel cannot be held responsible for future law.

witness gave a deposition stating that he did not see anything at the crime scene, but when it can to trial, he testified that he saw the defendant with a gun. Such is clearly distinguishable from the situation in the instant case. Cannon, as is clear from is several written statements, merely clarified at trial what he meant by his inability to remember seeing the victim's car. Clearly, the trial court did not abuse its discretion in finding no discovery violation under the circumstances outlined above.

However, to the extent that argument can be made that Cannon changed his testimony, and that the defense was harmed because defense counsel promised the jury that he would show, through Cannon, that the victim was not home at the time the State set for the crime, the facts of the case belie any ineffectiveness on appellate counsel's part. Merely because defense counsel may have overstated the value of Cannon's testimony from the first trial does not establish a discovery violation in this case or ineffective assistance of appellate counsel for not having raised the matter on appeal. The defense was well aware of Cannon's equivocal testimony regarding the car, and while it may have behooved Evans to get a more definitive statement from Cannon as to what he meant by not recalling seeing the TransAm, such does not establish a discovery violation which would be meritorious on direct appeal.

Cannon's equivocation, as the trial court pointed out, was from Cannon's first statement to the final trial. Counsel overstated what he hoped Cannon would say, but Cannon was under a "self-imposed" duty to be very honest, clarified what he meant by not recalling seeing the TransAm on the night of the murder to mean he did not know whether or not he saw it. In spite of the fact that Cannon asked the prosecutor how he should answer if he could not recall, and was told to be truthful, does not make this a written statement of a witness which required disclosure. Furthermore, defense counsel was able to show Cannon gave other testimony which could be argued to counter the State's timeline and for Evans' benefit. As such, on this record, there is no evidence that the State's conversation with Cannon caused him to alter his testimony or hampered the defense in its trial preparation. Schoop. Any self-imposed clarification of Cannon's testimony had a negligible effect of Evans' case, and by extension, the result of the appeal would not have been different had the matter been raised.[12] Because the trial court

[12] Evans' suggestion that Cannon's testimony critical fails to recognize the extensive evidence the State had against Evans' from his admissions and the testimony of Sarah Thomas and Donna Waddell. See Evans, 808 So.2d at 95-99. The evidence established Evans as the person who agreed to do the contract killing of Alan Pfeiffer, developed the plan for how such should be accomplished to make it look like a robbery, while giving the participants an alibi. Further, Waddell and Thomas identified Evans as the shooter, and testified about his obtaining the murder weapon, destruction of the clothing he wore that night

did not abuse its discretion relative to the motion for a Richardson hearing or mistrial to investigate the matter further, Evans can not have suffered any harm. Because counsel cannot be deemed ineffective for failing to raise nonmeritorious claims, Valle, 837 So.2d at 907-08, this issue is without merit.

Sub-claim 2 – appellate counsel failed to raise on direct appeal the trial court's denial of a mistrial following Donna Waddell's testimony that Evans was associated with a gang and the trial court's failure to conduct a Richardson hearing *sua sponte* – Evans claims that appellate counsel was ineffective for failing to challenge the denial of his motion for a mistrial and the trial court's failure to *sua sponte* conduct a Richardson hearing upon hearing Waddell testify Evans was part of a gang. The record reflects[13] counsel did not request a Richardson hearing, thus, appellate counsel cannot be found ineffective unless fundamental error would have allowed the unpreserved error to be raised for the first time on appeal. See Valle, 837 So.2d at 907-08. (noting "appellate counsel cannot be considered

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and the electronic equipment he received for the contract killing. (TR.31 3136-37, 3219, 3258-59; TR.32 3317-21, 3388, 3404, 3414-17, 3445-48, 3474-83; TR.33 3486-91, 3497-3502, 3549-57, 3571; TR.34 3616-17, 3656-61, 3674-81, 3692-3703; TR.35 3797-3810, 3815-19; TR.36 3826-55, 3862-64; TR.37 4019-22, 4047).

[13] Evans admits that trial counsel failed to request a Richardson hearing as he made the failure to request the hearing an issue of ineffective assistance in his postconviction motion. (See Claim I – sub-claim 3b).

ineffective under this standard for failing to raise issues that were not properly raised during the trial court proceedings and do not present a question of fundamental error"). Likewise, habeas petitions may not be used to obtain a second appeal. While petitions for writ of habeas corpus properly address claims of ineffective assistance of appellate counsel; Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000), such "may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction motion." Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). By claiming that appellate counsel should have raised as error the trial court's failure to *sua sponte* hold a Richardson hearing is an attempt to circumvent Valle, 837 So. 2d at 907-08 and obtain a second appeal by disguising it as one of ineffective assistance. Nonetheless, had these issues been raised on appeal, Evans would not have been entitled to relief, thus, Evans has failed to show either deficiency or prejudice under the Strickland standard.

Initially, because no request was made by Evans relative to having a Richardson hearing, counsel may not be deemed ineffective in not raising the issue. Thompkins v. Dugger, 549 So.2d 1370 (Fla. 1989) (appellate counsel is not ineffective for failing to raise claims not properly preserved for appeal), cert. denied, 493 U.S. 1093 (1990). As such, relief must be denied. Furthermore, a variant of this calim was raised in the

postconviction litigation. Because that claim failed, Evans now wishes to relitigate the claim here as ineffectiveness of appellate counsel issue. A petitioner for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White v. Dugger, 511 So.2d 554, 555 (Fla. 1987). See Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). This fact is a further basis to deny relief. However, if this Court reaches the merits, it will find Evans is not entitled to relief.

During Waddell's direct testimony, the discussion turned to Evans' threats to kill Waddell in order to secure her silence and to preclude her from talking to the police.

> A. And he's writing all this down. He's not talking. And he asked me if, you know, I had been spoken to, and I said, "Yes," and he said, "Did you tell them anything?" And I said, "No." And he says, "Well, you better not, because you'll lose your child and the old family will kill you."
>
> Q. I'm sorry, the old family?
>
> A. Old family.
>
> Q. What did he mean by that?
>
> A. It was just a gang he was in, I guess, called the ---- his old family.

(TR.36 3855). Defense counsel moved for a mistrial based upon Waddell's "surprise" testimony that Evans was in a gang. The

State responded that they were just as surprised by this testimony and were about to lead Waddell to clean up what they believed to be a misstatement of fact. Waddell admitted in her proffer that she was just assuming that Evans was in a gang, but had no concrete knowledge of it.

> Q. Ms. Waddell, you said – I asked you what he said – would you repeat again what you just answered about what he said? And I'd asked you about an old family, and what did you say?
>
> A. All right. That he would have me killed by his old family.
>
> Q. Did he say old family or did he say an old family member?
>
> A. Old family member. Sorry.
> Q. And you said something about a gang. What was that about, the gang?
>
> A. I guess that would be the old family member, one of his gangs.
>
> Q. Were you aware of him being in a gang?
> A. No, not really.
>
> Q All right. So you're just assuming from that answer, old family member, that he was talking about a gang?
>
> A. Yeah.

(TR.36 3858) Following the proffer, the court denied the mistrial and ensured that the proffered testimony would be relayed to the jury in order to clear up Waddell's misstatement. Unsatisfied with the proposed proffer, defense counsel renewed his motion for mistrial. Counsel proposed a curative from the

bench that “there is no evidence that Paul Evans has ever been in a gang. This statement by Ms. Waddell is pure speculation on her part.” (TR.36 3860). Following a short discussion, the judge requested the jury reenter the courtroom and issued the curative as defense counsel proposed.

The granting of a mistrial is within the sound discretion of the trial court and should be "granted only when it is necessary to ensure that the defendant receives a fair trial." England, 940 So.2d at 389. The fact that the jury was given a proper curative instruction, in fact one approved by the defense, wherein the jury was told that there was no evidence of gang involvement and such was purely speculative on Waddell’s part, it hardly can be said that the court abused its discretion. Evans has not shown that confidence in the trial was undermined. The trial court exercised sound discretion in denying the motion, and subsequently, there remains no basis on which Evans’s ineffective assistance of counsel claim may stand. Mendoza v. State, 2007 Fla. LEXIS 952 (Fla. 2007) (stating “We find that the trial court gave an appropriate curative instruction following the inappropriate comment by the prosecutor. Mendoza has failed to establish that the trial court abused its discretion in denying the motion for mistrial.”); Jones v. State, 949 So.2d 1021 (Fla. 2006); Perez v. State, 919 So.2d 347, 364 (Fla. 2005).

With respect to the failure to allege trial court error in not conducting a Richardson hearing *sua sponte*, the record establishes that there was no discovery violation. The State had no knowledge that Waddell was going to make such a statement. (TR.36 3855-62). The prosecutor noted she was unaware that Waddell was going to comment as she did and that the last time Waddell testified she said "an old family member." The State did not "know where [Waddell] got the gang." (TR.36 3856). Clearly, the State was as surprised as the defense and was willing to clarify that Waddell was referring to an old family member. (TR.36 3856). Waddell admitted, in her proffer, that she had no knowledge Evans was in a gang; she was just making an assumption. The trial court denied the motion for mistrial. (TR.36 3858). The State's explanation negated any need for a full Richardson hearing as the prosecutor was unaware of Waddell's intent to speculate as to gang membership. It cannot be said that the lack of a Richardson hearing under these facts was error so fundamental that it should have been raised for the first time on direct appeal. Given that fact that the State did not know of this "evidence" and that it was instead mere speculation by Waddell, which the jury was told to disregard,[14]

[14] The jury is presumed to follow the court's instructions. See U.S. v. Olano, 507 U.S. 725, 740 (1993)(finding there is a presumption, absent contrary evidence, jurors follow court's instructions); Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla.

appellate counsel render neither deficient performance nor prejudice in excluding this issue from the direct appeal. Evans has not carried his burden under Strickland.

ISSUE II

EVANS'S CLAIM THAT HIS CAPITAL SENTENCE IS UNCONSTITUTIONAL UNDER ATKINS V. VIRGINIA AND/OR ROPER V. SIMMONS IS PROCEDURALLY BARRED AND MERITLESS

Evans asserts that his capital sentence violates the Eighth Amendment to the United States Constitution under Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 125 S.Ct. 1183 (2005), not because he falls under the strict holdings of either case, but because he was youthful, only nineteen years old at the time of the murder, and because he has mental issues, i.e., that he "suffers from life-long cognitive deficits and mental and emotional impairments."[15] Not only is this matter barred, but this Court has rejected this claim in Hill v. State, 921 So.2d 579 (Fla. 2006) and Evans has not offered a basis for this Court to recede from Hill. Relief must be denied.

The matter is procedurally barred because Evans is not claiming that he falls under the strict holdings of Atkins and Roper which have retroactive application. Instead, he is

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1st DCA 1998)(finding law presumes jurors followed judge's instructions in the absence of contrary evidence). Thus, no prejudice under Strickland can be shown for counsel's decision to omit this clearly meritless claim.

[15] Questions of law are reviewed *de novo*. Elder v. Holloway, 510 U.S. 510, 516 (1994) (holding the issue is a question of law, not one of "legal facts," which is reviewed de novo on appeal).

claiming that his youthfulness and alleged mental illness at the time of the crime render him ineligible for the death penalty. Such are arguments which could have been made at trial and on direct appeal. In fact, Evans did challenge the weight assigned to the statutory age mitigator found by the court and could have challenged the mitigation found regarding his difficult childhood which resulted in psychological and emotional problems. Having made certain arguments on direct appeal and left others unchallenged, Evans may not use his habeas corpus petition to relitigate or gain a second appeal. Blanco, 507 So. 2d at 1384 (confirming "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial."). This claim is barred and should be denied.

Also, to the extent Evans is attempting to prove mental retardation and to challenge his sentence based upon his age at the time of the homicide, the matter is barred. He never availed himself of the provisions of Fla. R. Crim. P. 3.203(d)(4)(C) which would have allowed him to raise a mental retardation issue in his then pending postconviction motion. Evans' postconviction motion was pending on October 1, 2004 when rule 3.203 went into effect. Under this rule, Evans had 60 days to amend, and having failed to do so, cannot make a claim of retardation at this time.

Turning to the merits, in Roper, the United States Supreme Court determined that it was a violation of the Eighth Amendment to execute a defendant who had committed first-degree murder before he turned eighteen years old. Roper, 543 U.S. at 569-579 (determining "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"). Evans has not offered any precedent or rationale for expanding Roper by altering the bright-line rule it put in place. As noted above, Hill, 921 So.2d at 584 is on point. In Hill, this Court opined:

> Hill's third claim is that his mental and emotional age places him in the category of persons for whom it is unconstitutional to impose the death penalty under *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). This claim is without merit.
>
> *Roper* does not apply to Hill. Hill was twenty-three years old when he committed the crimes at issue. *Roper* only prohibits the execution of those defendants whose chronological age is below eighteen. *See* 125 S.Ct. at 1197-98 (recognizing that the rule prohibiting the death penalty for juveniles was necessary even though the mental and emotional differences separating juveniles from adults may "not disappear when an individual turns 18"), see also *Rodriguez v. State*, 919 So.2d 1252, 1265-67 (Fla. 2005) (affirming the trial court's denial of a motion for postconviction relief even though a mental health expert testified that the defendant's mental age was seven years).

Hill, 921 So.2d at 584.

In addition to relying upon *Roper*, Evans attempts to gain solace from *Atkins*. However, *Atkins* bars the execution of the

mentally retarded, not those that have "low intellectual functioning or have mental and/or emotional impairments." In fact, the doctors who have evaluated Evans for mental health issues have reported that he was very bright with an IQ in the above average/superior range, based on test scores of 102 and 127 (PC-T.11 382-83; PC-T.12 573, 583-84) This alone shows that Evans does not fall under purview of Atkins or sections 916.106(12) and 921.137(1), Florida Statutes which define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." "Significantly subaverage general intellectual functioning" is defined as "performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rule of the department." Adaptive behavior is defined as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of the individual's age, cultural group, and community." See sections 916.106 (12) and 921.137(1), Florida Statutes. As reaffirmed in Rodriguez v. State, 919 So.2d 1252, 1266, n.8 (Fla. 2005): "Even where an individual's IQ is lower than 70, mental retardation would not be diagnosed if there are no significant deficits or impairments in adaptive functioning. Adaptive functioning refers

to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting."

In order for mental retardation to be diagnosed, there must be significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure." (citations omitted). Such definitions comply with those suggested in Atkins and set forth in Rule 3.203. Having failed to avail himself of rule 3.202 and having failed to show he meets the criteria for mental retardation, Evans cannot rely upon Atkins as a bar to his capital sentence. Neither individually, nor together, do Atkins and Roper bar the imposition of Evans's death sentence. Relief must be denied.

ISSUE III

EVANS' CLAIM THAT HIS DEATH SENTENCE IS UNCONTITUTIONAL UNDER RING v. ARIZONA, 122 S.Ct. 2428 (2002) IS PROCEDURALY BARRED AND MERITLESS (Restated).

Evans challenges the constitutionality of the Florida's capital sentencing statute, section 921.141, Florida Statutes under Ring v. Arizona. Evans asserts that Florida's capital sentencing statute is unconstitutional based upon the following grounds: (1) Florida capital sentencing scheme violates the

Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; (2) in Florida, the sentencing decision rests with the trial judge, and not the jury, to find sufficient aggravating factors to support the death penalty. On direct appeal, Evans challenged the constitutionality of his death sentence based upon Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and Jones v. United State, 526 U.S. 227 (1999). Such claim was rejected by this Court. Evans, 808 So.2d at 110, n.10. Given this, the matter is procedurally barred. Likewise, the instant claims have been known since Proffitt v. Florida, 428 U.S. 242, 252 (1976) (holding Constitution does not require jury sentencing). See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 423 So. 2d 171, 173 n.1 (Fla. 1983). Hence, Evans could have raised his related arguments earlier, and having failed to do so, is barred from raising them now. Moreover, this Court has rejected similar challenges to Florida's capital sentencing. Relief should be denied.

A petition for "habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings." White v. Dugger, 511 So. 2d 554, 555 (Fla. 1987). See Blanco v. Wainwright, 507 So. 2d 1377 (Fla.

1987); Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). It is well settled that it "is not proper to argue a variant to an already decided issue" in a habeas petition. Jones v. Moore, 794 So. 2d 579, 583 n.6 (Fla. 2001). Having challenged the constitutionality of Florida's death penalty statue on direct appeal, Evans is barred from raising related issues in his habeas petition. Jones.

This Court has rejected all of the claims raised by Evans as violative of the constitution. In Parker v. State, 904 So.2d 370, 383 (Fla. 2005) this Court opined:

> Parker next challenges the constitutionality of his death sentence because the recommendation for death and the aggravating circumstances were not found by a unanimous jury. This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote. *See Whitfield v. State*, 706 So.2d 1 (Fla. 1997); *Thompson v. State*, 648 So.2d 692 (Fla. 1994); *Brown v. State*, 565 So.2d 304 (Fla. 1990); *Alvord v. State*, 322 So.2d 533 (Fla. 1975). Moreover, this Court has rejected claims that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), requires aggravating circumstances to be individually found by a unanimous jury verdict. See *Hodges v. State*, 885 So.2d 338, 359 n. 9 (Fla. 2004); *Porter v. Crosby*, 840 So.2d 981, 986 (Fla. 2003). Moreover, one of the aggravating factors found to exist in this case is a prior violent felony, a factor that was determined by a unanimous jury and which satisfies the constitutional requirements of *Ring. See Doorbal v. State*, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003) (noting that prior violent conviction aggravator was supported by contemporaneous felonies charged in the indictment and of which the jury found the defendant unanimously guilty).

Parker, 904 So.2d at 383. See Suggs, 923 So.2d at 442 (rejecting claims capital sentencing unconstitutional under Ring); Porter v. Crosby, 840 So.2d 981, 986 (Fla. 2003) (rejecting argument aggravators must be charged in indictment, submitted to jury, and individually found by unanimous verdict); Brown v. Moore, 800 So.2d 223, 224-25 (Fla. 2001) (rejecting constitutional challenge based on Ring where aggravators were not listed on indictment).

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court Deny the petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Suzanne Myers Keffer, Esq. and Christina Spudeas, Esq., Capital Collateral Regional Counsel-South, 101 N.E. 3rd Ave., Suite 400, Fort Lauderdale, FL 33301 this 15th day of June, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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