IN THE SUPREME COURT OF FLORIDA

CONNIE RAY ISRAEL,

Petitioner,

v.

JAMES R. MCDONOUGH, ETC.,

Respondent(s).
_____/

Case No. SC06-653

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" found on page 1 of the petition correctly recites Article 1, Section 13 of the Florida Constitution. The citation form used in the petition appears to be accurately described. The remainder of the "Preliminary Statement" is argumentative and is denied.

RESPONSE TO REQUEST FOR ORAL ARGUENT

The Respondent defers to the Court's judgment as to whether oral argument is necessary or justified in this case.

RESPONSE TO INTRODUCTION

The "Introduction" set out on pages 2-3 of the petition is argumentative and is denied. To the extent that the "Introduction" states that issues decided on direct appeal which should be "revisited" are contained in the petition, such issues

are not identified and cannot be found within the four corners of the petition.

RESPONSE TO STATEMENT OF JURISDICTION

The jurisdictional statement found on pages 3-4 of the petition accurately sets out the basis for this Court's habeas jurisdiction. The remainder of that part of the petition is argumentative and is denied.

RESPONSE TO GROUNDS FOR RELIEF

No error occurred in Israel's case, and he is not entitled to relief.

RESPONSE TO PROCEDURAL HISTORY

The procedural history contained in the petition is greatly abbreviated. The Respondent relies upon the following factual and procedural history of this case:

> Connie Ray Israel was charged with burglary of a dwelling with a battery, kidnaping, sexual battery with great force, and first-degree murder arising out of the December 27, 1991, murder of Esther Hagans in her home in Putnam County. At Israel's first trial, the jury was unable to reach a verdict and a mistrial was declared. On February 2, 1999, Israel's second trial began and the evidence revealed the following facts. Neighbors and friends indicated that Esther Hagans was known to carry large amounts of money on occasion. They indicated she rarely missed work unless she was very ill. On the morning of December 27, 1991, when she did not report for work, a fellow employee went to Hagans' neighbor's house to ask about her. The neighbor noticed that Hagans' car was in the carport and called her house. When Hagans did not respond to the telephone call, the neighbor called the police.

The police found Hagans' front door ajar and discovered her body in the bedroom. Hagans was lying naked on the bed with her legs spread apart and her hands tied behind her back. The medical examiner identified trauma to the left side of Hagans' head, determined that her right eye was full of blood, and described cuts to the left eyebrow and temple, as well as abrasions on the right side of her face. The medical examiner also identified a tear on the right side of Hagans' head that resulted from blunt trauma, which caused major hemorrhage to the brain. The medical examiner stated there were external vaginal injuries consistent with sexual assault. As to the cause of death, the medical examiner explained that Hagans had a weak heart which gave out due to the stress and shock of the beating and sexual assault she had endured.

At the crime scene, the police found footprints on the front porch steps and in a drainage ditch that ran along the front of the house. A screwdriver was found outside a window. Based on these factors it was determined that the point of entry was a window leading into Hagans' bedroom. Sperm and semen stains were discovered on a pillowcase in the Hagans' bedroom. Semen was also found on a slip and a bedspread recovered from the bedroom. The semen on both the slip and the bedspread was consistent with the semen recovered from the pillowcase. Likewise, semen found on vaginal swabs taken from the victim was consistent with the semen from the other items in the bedroom. Human blood was also found on a towel at the scene.

The evidence showed that Israel registered at the Palatka Holiday Inn on December 28, 1991, and paid for two nights in cash. Maryann Pittman testified that she was a prostitute working in Palatka and knew Israel. [FN1] Pittman stated that in December of 1991 she went with Israel to the Holiday Inn where they used crack cocaine. Pittman took a shower in the hotel room. She indicated that she saw a pair of pants and a shirt in the bathtub and that the water in the bathtub was red. Pittman also saw a black purse under the bed in the hotel room. She testified that Israel had money in his wallet when she looked through it. Israel told her he received the money from the Florida Lottery.

[FN1] Maryann Pittman was unavailable for Israel's second trial and thus her prior testimony was read into evidence.

Israel's friend, Melvin Shorter, testified that he saw Israel and Pittman at the Holiday Inn where they were using crack cocaine. Shorter testified that he sold crack cocaine to Israel three or four times that day. Israel paid cash for the crack cocaine with money he retrieved from a wallet under the bed in the hotel room. Israel told Shorter he had "hit the lottery."

Israel also registered at the William Penn Motel on December 30, 1991, and paid for one week in cash. Israel stayed only one night and was given a cash refund, for which he signed a receipt.

Israel and three other individuals were developed as suspects in Hagans' murder. Eventually, the Florida Department of Law Enforcement was solicited to help with the investigation and after more interviews a blood sample was taken from Israel. After DNA testing comparing Israel's blood sample to the semen stains found on the pillowcase and the slip, Israel was identified as the source of the semen stains in Hagans' bedroom and was arrested in 1993.

Arthur McComb, a prisoner who was a legal clerk and who was housed in the same cell with Israel, testified that Israel asked for help with his case. During their discussions, Israel stated he was charged with first-degree murder and that he tried to knock the victim's head off because she tried to "gum him." Additionally Israel indicated that he sexually assaulted the victim and had gone to the victim's house to steal church money and had taken $ 7,000 to $ 10,000.

Israel testified in his own defense, stating he was told by law enforcement officers that when the first officers arrived on the scene and found Hagans dead, they made it appear Hagans was beaten to death in order to keep $ 5,000 discovered in a dresser drawer. Israel testified he had nothing to do with breaking into Hagans' house. Israel also insisted his semen was not found at the crime scene and that his blood was planted on objects found at the crime scene. He stated

that he had only allowed McComb to read the accusations against him but had never confessed.

On March 1, 1999, the jury found Israel guilty as charged. After penalty proceedings, the jury returned a recommendation of death by a vote of eleven to one. Following the Spencer [FN2] hearing on May 14, 1999, the trial court sentenced Israel to death on May 28, 1999, finding four aggravating circumstances [FN3] and two statutory mitigating circumstances. [FN4]

> [FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).
>
> [FN3] The aggravating circumstances were: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of use of violence to a person; (2) the crime was especially heinous, atrocious or cruel; (3) the crime was committed while the defendant was engaged in the commission of a sexual battery, burglary, and kidnaping; and (4) the capital felony was committed for pecuniary gain.
>
> [FN4] The mitigating circumstances were: (1) the defendant was under the influence of an extreme mental or emotional disturbance at the time the crime occurred (some credence); and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some credence).

Israel raises seven issues on appeal, claiming the trial court erred in (1) conducting portions of the trial when Israel was involuntarily excluded; (2) denying Israel's motion for continuance of trial; (3) denying Israel's motion for mistrial; (4) requiring Israel to be held in visible restraints before the jury; (5) ignoring nonstatutory mitigating evidence of drug abuse, brain damage, and low intellectual functioning presented during the penalty phase; (6) allowing the jury's death sentence to stand even

> though it was grounded on a split jury vote; and (7) ruling Israel's death sentence was proportionate.

Israel v. State, 837 So. 2d 381, 383-385 (Fla. 2002). The United States Supreme Court denied Israel's petition for writ of certiorari. *Israel v. Florida*, 539 U.S. 931 (2003).

Israel then filed a *Florida Rule of Criminal Procedure* 3.851 motion, which was denied on August 9, 2005. (R847-893). The appeal from that decision is pending.

I. THE AGGRAVATING CIRCUMSTANCE CLAIM

On pages 5-7 of the petition, Israel argues that the jury instruction on the "commission of a murder during the course of a kidnapping is unconstitutional on its face and as applied." Israel also argues that the jury's "sense of responsibility" was diluted by unidentified misleading comments and jury instructions.

None of these claims were preserved by timely (or any) objection at trial, and it is well-settled that appellate counsel cannot have been ineffective for not raising an unpreserved claim. *Morris v. State/McDonough*, 31 Fla. L. Weekly S250, 255 n.14 (Fla. Apr. 20, 1996); *Nixon v. State/McDonough*, 31 Fla. L. Weekly S245, 249 (Fla. Apr. 20, 2006); *Walls v. State/Crosby*, 31 Fla. L. Weekly S101, 107 (Fla. Feb. 9, 2006). To the extent that Israel challenges the validity of the during the course of a felony aggravator, this Court has repeatedly

rejected that claim. *Pooler v. State*, 704 So. 2d 1375, 1381 (Fla. 1997); *Hunter v. State*, 660 So. 2d 244, 252-53 (Fla. 1995). To the extent that Israel claims that Florida's death penalty statute violates *Caldwell v. Mississippi,* or "shifts the burden of proof," this Court has held:

> First, Miller challenges the instruction that purportedly diluted the jury's responsibility by labeling their penalty phase verdict as advisory and not binding. This Court has repeatedly rejected this claim. *Perez v. State*, 919 So. 2d 347, 30 Fla. L. Weekly S729, S735 (Fla. 2005); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001)(holding that claim that instructions "that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate Caldwell *v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)" was without merit); *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998)(holding that the standard jury instructions fully advise the jury of the importance of its role, correctly state the law, do not denigrate the role of the jury, and do not violate *Caldwell*). Next, this Court has repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence. *Rodriguez*, 31 Fla. L. Weekly at S47, 2005 Fla. LEXIS 1169 at *64; *San Martin v. State*, 705 So. 2d 1337, 1350, 1350 n.5 (Fla. 1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence). Also, this Court has rejected the claim that the standard mitigation instructions fail to define mitigation adequately. *Belcher v. State*, 851 So. 2d 678, 685 (Fla. 2003) ("The trial court did not abuse its discretion by giving a 'catch-all' jury instruction about mitigation instead of giving [a] list of nonstatutory mitigators."). Thus, all of Miller's claims challenging the substance of the jury

> instructions are procedurally barred and without merit.

Miller v. State/McDonough, 31 Fla. L. Weekly S188, 192 (Fla. Mar. 23, 2006). This claim is meritless, in addition to being procedurally barred because it could have been raised at the time of trial, but was not.

II. THE COMPETENCE FOR EXECUTION CLAIM

On pages 7-9 of the petition, Israel argues that because he "may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated." Florida law is settled that this claim is not ripe until a death warrant has been issued, an event that has not occurred in this case. *Morris v. State/McDonough,* 31 Fla. L. Weekly S250, 255 n.15 (Fla. Apr. 20, 2006); *See Griffin v. State*, 866 So. 2d 1, 21-22 (Fla. 2003) ("While Griffin is under a death sentence, no death warrant has been signed and his execution is not imminent. Thus, the issue of Griffin's sanity for execution is not ripe . . . ."). Because no warrant has been issued for the execution of Ireael's sentence, this claim is not a basis for relief.

III. THE "JUROR INTERVIEW" CLAIM

On pages 10-13 of the petition, Israel argues that appellate counsel was ineffective for not arguing that the rule

prohibiting juror interviews is unconstitutional. This claim is not a basis for relief for the following reasons.

First, no motion to interview jurors was ever filed, and, because that is so, there is no adverse ruling from which to appeal. Appellate counsel cannot have been ineffective for not raising an issue that was not preserved. *Hendrix v. State*, 908 So. 2d 412, 426 (Fla. 2005); *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000).

Second, this claim lacks merit, as this Court has repeatedly held. *Duckett v. State/Crosby*, 918 So. 2d 224, 231 (Fla. 2005); *Elledge v. State/Crosby,* 911 So. 2d 57, 78 (Fla. 2005); *Johnson v. State*, 804 So. 2d 1218, 1224-25 (Fla. 2001) (rejecting contention that Rule Regulating the Florida Bar 4-3.5(d)(4) conflicts with defendant's constitutional rights to a fair trial and effective assistance of counsel). Israel's claim has no basis:

> Suggs has neither filed a motion requesting permission to interview jurors, alleged any specific juror misconduct, nor submitted any sworn statements in this regard. His claim appears to be nothing more than a request to investigate possible grounds for finding juror misconduct. *See Arbelaez v. State*, 775 So. 2d 909, 920 (Fla. 2000) (finding that a defendant does not have a right to conduct "fishing expedition" interviews with the jurors after a guilty verdict is returned). [FN20]
>
> > [FN20] The only matter specifically identified by petitioner about which he would like to interview jurors is the effect that the medical examiner's testimony had on

> the jury. This is not a proper matter for jury inquiry because it concerns the subjective impressions of the jurors and not any overt prejudicial act. *See Baptist Hospital of Miami, Inc. v. Maler*, 579 So. 2d 97, 99-100 (Fla. 1991).

Suggs v. State/Crosby, 923 So. 2d 419, 440 (Fla. 2005). This claim is meritless and is not a basis for relief.

IV. THE LETHAL INJECTION CLAIM

On pages 13-20 of the petition, Israel claims that execution by lethal injection will violate his constitutional rights. This claim could have been but was not raised on direct appeal, and is procedurally barred. *Suggs v. State/Crosby*, 923 So. 2d 419, 441 (Fla. 2005). This claim also could have been raised in Israel's *Florida Rule of Criminal Procedure* 3.851 motion, but was not. Because it could have been raised in the post-conviction relief motion, it is not cognizable in habeas. *Hunter v. State,* 817 So. 2d 786 (Fla. 2002); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary,* 595 So. 2d 8 (Fla. 1992); *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988). Finally, notwithstanding the double layer of procedural bar, this claim is meritless. *Suggs v. State/Crosby*, 923 So. 2d 419, 441 (Fla. 2005); *Sochor v. State*, 883 So. 2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Johnson v. State*, 804 So. 2d 1218, 1225 (Fla.

2001); *Provenzano v. State*, 760 So. 2d 137 (Fla.) (finding that lethal injection is not unconstitutional method of execution), *cert. denied*, 530 U.S. 1255, 147 L. Ed. 2d 979, 120 S. Ct. 2709 (2000); *Bryan v. State*, 753 So. 2d 1244 (Fla.) (same), *cert. denied,* 528 U.S. 1185 (1999); *Sims v. State*, 754 So. 2d 657 (Fla.) (finding no *ex post facto* violation), *cert. denied,* 528 U.S. 1183 (2000). This claim is not a basis for relief, and should be denied as procedurally barred and, alternatively, meritless.

CONCLUSION

For the reasons set out herein, the petition should be denied.

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: **Robert T. Strain,** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of June, 2006.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL