IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1974

WYDELL JODY EVANS

Petitioner,

v.

JAMES V. CROSBY, Secretary,
Florida Department of Corrections

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

COUNSEL FOR RESPONDENT
BARBARA C. DAVIS
Fla. Bar No. 410519
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

PRELIMINARY STATEMENT

Petitioner, Wydell Evans, was the defendant at trial and will be referred to as "Evans." Respondent, the State of Florida, will be referred to as the "State." References to the appellate records will be consistent with those in the Answer Brief filed simultaneously with this Response, i.e. AR@ for the original record on direct appeal, “T” for the trial and penalty phase on direct appeal; and APCR@ for the record on post-conviction relief.

STATEMENT OF THE CASE AND FACTS

On November 10, 1998, the grand jury for Brevard County returned an indictment charging Evans with first degree premeditated murder, kidnapping, aggravated assault and possession of a firearm by a convicted felon. (R[1] Vol. III, 451-452) Evans filed a motion to suppress statements and admissions on the grounds they were not voluntary and were obtained in violation of his Miranda[2] rights. (R Vol. III, 497-504, 529) A hearing on the motion to suppress was conducted July 8, 1999, and October 18, 1999. (R Vol. I and II, 1-296) Following testimony and argument of counsel, the trial court denied the motion to suppress. (R Vol. II, 265-266, 290; Vol. III, 544-545) Upon defense motion, the trial court granted the motion to sever the possession-of-a-firearm-by-a-convicted-felon charge from the remaining charges. (R Vol. III, 554-555)

Jury trial was held on October 25, 1999, the Honorable Jere Lober presiding. (T Vol. V-XV, 1-2145) Defense counsel made a motion *in limine* to prevent disclosure that Evans had previously been in jail when a phone conversation between Evans and the

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[1] AR@ designates the original Record on Appeal which consists of pages 1-680. AT@ designates the original trial record and penalty phase which consists of pages 1-2429. "PCR" designates the postconviction record on appeal.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

victim was overheard by pod-mate Edward Rogers. (T Vol. XIII, 1633) The trial court denied the motion but agreed to give a limiting instruction. (T Vol. V, 33) After the jury was sworn, but before opening statements, defense counsel moved for invocation of the rule of sequestration. Defense counsel asked that Evans' mother be excluded from the rule but the trial court refused to do this. (T Vol. IX, 944) Evans objected to the trial court's excusal of the victim's father from operation of the rule of sequestration. (T Vol. IX, 944-953)

During opening statement, defense counsel objected to the prosecutor giving jury instructions in her opening statement. (T Vol. IX, 967) The trial court overruled the objection but did give a cautionary instruction to the jury. (T Vol. IX, 967) During the testimony of the first state witness, the victim's father caused a courtroom disturbance. (T Vol. IX, 1000) Defense counsel moved for a mistrial because of this outburst. The motion was denied. (T Vol. X, 1015) Following the testimony of Edward Rogers, the trial court instructed the jury not to infer that Evans was guilty of any other crime simply because he had been in jail when Rogers heard the statements he testified to. (T Vol. XII, 1417) Evans' statements to the police officers were admitted into evidence over objection. (T Vol. XII, 1509, 1536-1537)

Defense counsel moved for judgment of acquittal arguing that the evidence failed to show any premeditation as to the murder charge and that there was no evidence of a kidnapping since the alleged victims could have left at any time. (T Vol. XIII, 1738-1754) The trial court denied the motion. (T Vol. XIII, 1754) The motion was renewed at the end of all the evidence and again denied. (T Vol. XIV, 1886) During the state's rebuttal argument, defense counsel objected and moved for a mistrial when the state suggested that Evans could have prevented the situation by turning over the gun. Defense counsel argued that such comment, coupled with a previous comment, improperly shifted the burden of proof to the defense. (R Vol. XIV, 2098-2099) The trial court denied the motion and overruled the objection stating that the State's argument went to Evans' motivation. (T Vol. XV, 2100) Following deliberations, the jury returned verdicts finding Evans guilty as charged on all three counts. (T Vol. XIV, 2143-2145)

The penalty phase began November 3, 1999. (T Vol. XVV-XVII, 2196-2418) Defense counsel objected to the State presenting the summaries of prior offenses contained in a pre-sentence investigation report. (T Vol. XVI, 2224) The trial court ruled that the summaries were admissible and also noted that the objections to them were preserved for appellate purposes. (T

Vol. XVI, 2229, 2243) Following deliberations, the jury returned an advisory recommendation that Evans be sentenced to death by a vote of ten to two. (T Vol. XVI, 2418)

On November 8, 1999, Evans filed a motion for new trial. (R Vol. IV, 606-611) A hearing on the motion was conducted on December 21, 1999. (R Vol. II, 297-337) The motion was denied. (R Vol. III, 400) On January 4, 2000, the trial court conducted a Spencer[3] hearing. (R Vol. II, 338-381)

On February 15, 2000, Evans was sentenced to life in prison as a Prison Releasee Reoffender for the kidnapping conviction and a concurrent term of 108.15 months in prison for the aggravated assault conviction. These sentences were to run consecutive to the sentence of death imposed for the first degree murder charge. (R Vol. III, 446; R Vol. IV, 634-641) The trial court filed written findings of fact in support of his sentence of death. (R Vol. IV, 642-662)

This Court affirmed Evans=s conviction and death sentence. *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), with the following fact findings:

> On October 21, 1998, two days after being released from prison, Wydell Evans shot and killed his brother's seventeen-year-old girlfriend, Angel, during an argument over her alleged unfaithfulness to Evans'

[3] Spencer v. State, 615 So.2d 688 (Fla. 1993).

> brother. At the time of the shooting, Evans was in an automobile with Angel, Erica Foster, Sammy Hogan, and Lino Odenat. At some point during the argument, Angel laughed, to which Evans responded, "You think it's funny? You think it's funny?" Evans then pulled out a gun and shot Angel in the chest.
>
> After the shooting, Evans directed Hogan to drive to the home of a man called "Big Dick." As they drove, Evans passed the gun to Odenat and told him to dispose of it. When they arrived at Big Dick's house, Evans left the car and talked to Big Dick. While Evans was talking, Odenat decided to get out of the car and let the others take Angel to the hospital. As Odenat opened the door and stepped out, Evans told him to get back into the car and Odenat obeyed. Within a few minutes, Evans returned and directed Hogan to drive into a nearby parking lot. There, Evans threatened Foster and Hogan not to tell who shot Angel or he would kill them and their families. After threatening Foster and Hogan, Evans tried to wipe his fingerprints from inside the car and left with Odenat. Once Evans was out of the car, Foster and Hogan rushed Angel to the hospital where she later died of her wounds.
>
> At the hospital, Foster and Hogan were questioned by the police, at which time they first told police that a white man driving a cream-colored car shot Angel over a drug deal. They later changed their story and reluctantly identified Evans as the shooter. The police found Evans at a motel the next morning. He was taken into custody, charged, and after a jury trial, convicted of one count of first-degree premeditated murder one count of kidnapping, and one count of aggravated assault.

Id. at 1092.

The trial judge found that two statutory aggravators were proven beyond a reasonable doubt: (1) the existence of prior violent felonies; and (2) the crime was committed while Evans was on probation. The judge rejected the statutory mitigating circumstance that the victim was a participant in Evans' conduct, finding that although there was some testimony that the victim slapped the gun away causing it to misfire, this testimony was rendered implausible by the testimony of the medical examiner and the location of the bullet in the car.

The trial judge also found that several non-statutory mitigators were proven: (1) Evans had an abused or deprived childhood as a result of his mother's crack addiction (little weight); (2) he contributed to society as evidenced by his exemplary work habits (little weight); (3) he performed charitable or humanitarian deeds (some weight); (4) he counseled youth to avoid crime and stay in school (little weight); and (5) he had good behavior in prison (little weight). The trial court rejected the mitigator of remorse, finding it was not proven. After concluding that the aggravators far outweighed the mitigators, the judge agreed with the jury's recommendation and sentenced Evans to death. *Id.* at 1097.

Evans appealed his sentence to the Florida Supreme Court, raising six issues:

POINT I

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT HEARSAY TESTIMONY THROUGH ITS POLICE OFFICER WITNESSES.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING EVANS' MOTION FOR MISTRIAL BASED ON COMMENTS BY THE PROSECUTOR DURING CLOSING ARGUMENTS IN THE GUILT PHASE WHICH IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE EVANS.

POINT III

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9, 16 & 17 OF THE FLORIDA CONSTITUTION, EVANS WAS DENIED DUE PROCESS BECAUSE OF THE INCOMPLETE AND CONFUSING JURY INSTRUCTION GIVEN BELOW.

POINT IV

THE TRIAL COURT ERRED IN DENYING EVANS' MOTION FOR JUDGEMENT OF ACQUITTAL AS TO PREMEDITATED MURDER AND KIDNAPPING.

POINT V

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 9 & 16 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT PORTIONS OF A PRE-SENTENCE INVESTIGATION DURING THE PENALTY PHASE WHERE EVANS WAS NOT GIVEN ANY OPPORTUNITY TO REBUT THE INFORMATION.

POINT VI

> IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

Initial Brief of Evans, Florida Supreme Court Case No. SC00-468. Evans sought certiorari review in the United States Supreme Court. Review was denied October 6, 2003. Evans v. Florida, 540 U.S. 846 (2003).

Evans filed a Motion for Postconviction Relief on February 26, 2004 (PCR Vol. V, 487-666). The State filed a Response (PCR Vol. V, 668-705). The court ordered an evidentiary hearing to begin October 18, 2004 (PCR Vol. V, 717-718). The evidentiary hearing took place October 18-19 and December 16, 2004. The trial judge denied relief, and Evans appealed that denial. The appeal is pending before this court in Case No. SC05-632. The following issues were raised on appeal from denial of postconviction relief:

> (1) The lower court erred in holding that Mr. Evans was not denied the effective assistance of counsel at the guilt/innocence phase of his capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Trial counsel was ineffective in failing to investigate, prepare, and present the defense of diminished capacity, and as a result, Mr. Evans' conviction and death sentence are unreliable.

(2) The lower court erred in holding that Mr. Evans was not denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately challenge the State's case. Counsel's performance was deficient, and as a result, the death sentence is unreliable.

(3) The lower court erred in holding that Mr. Evans was not denied the effective assistance of counsel at the penalty phase because his attorney was ineffective in failing to request that statutory mitigation jury instructions be given in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ARGUMENT

ISSUE I

RING V. ARIZONA DID NOT RENDER FLORIDA'S DEATH PENALTY STATUTE UNCONSTITUTIONAL.

Evans, without challenging appellate counsel's effectiveness, makes a direct challenge to his death sentence on the grounds it violates Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000). The claim now raised was not argued on direct appeal and is procedurally barred. Dufour v. Crosby, 905 So.2d 42 (Fla. 2005). Moreover, neither Apprendi nor Ring are retroactive. Johnson v. State, 904 So. 2d 400 (Fla. 2005). Furthermore, the trial court found the aggravating circumstance of prior violent felony, thus taking Evans outside the application of Ring.

This Court has rejected Ring challenges to death sentences repeatedly. Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015 (2001) and the United States Supreme Court has not overruled any of its cases finding Florida's capital sentencing scheme constitutional. See Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242, 252 (1976). See Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (rejecting constitutional challenge based upon Ring); Owen v. State, 862 So. 2d 687, 703-04 (Fla. 2003) (same); Kormondy v.

State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors to be presented at sentencing or a special verdict form indicating the aggravating factors found by the jury); Jones v. State, 845 So.2d 55 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) (noting "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments" including that aggravators read to the jury must be charged in indictment, submitted to jury and individually found by unanimous jury); Anderson v. State, 841 So. 2d 390, 408-09 (Fla. 2003); Cox v. State, 819 So. 2d 705 (Fla. 2002); Conahan v. State, 844 So. 2d 629, 642 n.9 (Fla. 2003); Spencer v. State, 842 So. 2d 52, 72-73 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122 (Fla. 2002); Doorbal v. State, 837 So. 2d 940 (Fla.), cert. denied, 539 U.S. 962 (2003); Bruno v. Moore, 838 So. 2d 485 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002); Bottoson v. Moore, 833 So. 2d 693, 694-95 (Fla.), cert. denied, 537 U.S. 1070 (2002); Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) (reaffirming "Court has defined a capital felony to be one where the maximum possible punishment is death").

ISSUE II

CALDWELL V. MISSISSIPPI DOES NOT RENDER FLORIDA'S DEATH PENALTY STATUTE UNCONSTITIONAL.

This issue was not raised at trial or on direct appeal and is procedurally barred. Dufour v. Crosby, 905 So.2d 42 (Fla. 2005). The claim is raised as ineffective assistance of counsel (without any argument in the brief) in order to avoid the procedural bar. Appellate counsel is not ineffective for failing to raise issues not preserved for appeal. See Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991); Roberts v. State, 568 So. 2d 1255, 1261 (Fla. 1990).

This Court has repeatedly rejected objections based on Caldwell v. Mississippi, 472 U.S. 320 (1985), to Florida's standard jury instructions. See Sochor v. State, 619 So. 2d 285, 291 (Fla. 1993); Turner v. Dugger, 614 So. 2d 1075, 1079 (Fla. 1992). Mansfield v. State/Crosby, 30 Fla. L. Weekly S598 (Fla. July 7, 2005). Since this issue has no merit, counsel cannot be ineffective. 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 present the meritless issue will not render appellate counsel's performance ineffective." Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)). This is generally true with regard to issues that would have been found to be procedurally barred had they been

presented on direct appeal. See id. Moreover, appellate counsel is not required to present every conceivable claim. See Atkins v. Dugger, 541 So. 2d 1165, 1167 (Fla. 1989).

ISSUE III

WHETHER EVANS IS COMPETENT TO BE EXECUTED IS NOT REVIEWABLE AT THIS TIME SINCE THERE IS NO ACTIVE DEATH WARRANT.

Evans alleges no facts in support of this allegation, nor did he offer any support of this claim at the trial level. In fact, he concedes that this claim is not ripe for consideration at this time. (Habeas petition at p. 12). See Thompson v. State, 759 So. 2d 650, 668 (Fla. 2000); Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Fla. R. Crim. P. 3.811(d). This claim has no merit. Johnson v. State, 804 So. 2d 1218, 1225-1226 (Fla. 2001).

Although Evans claims in the title that counsel was ineffective for failing to litigate this claim on direct appeal, there is no argument and this claim has no merit. Counsel cannot be ineffective for failing to raise an issue that has no merit. *See* Freeman v. State, 761 So. 2d 1055, 1071 (Fla. 2000).

ISSUE IV

THE JURY INSTRUCTIONS DO NOT SHIFT THE BURDEN OF PROOF; COUNSEL WAS NOT INEFFECTIVE.

This claim is procedurally barred because a claim of error regarding the instructions given by the trial court should have been presented on direct appeal and is not cognizable through collateral attack. See Stewart v. State, 801 So. 2d 59, 64 n.6 (Fla. 2001).

Although Evans does not acknowledge adverse authority, this claim appears to be a recycled Arango claim and has been denied repeatedly by this Court. Arango v. State, 411 So. 2d 172 (Fla.), cert. denied, 457 U.S. 1140 (1982). Stewart v. State, 549 So. 2d 171 (Fla. 1989), cert. denied, 497 U.S. 1032 (1990); See also Teffeteller v. Dugger, 734 So. 2d 1009, 1024 (Fla. 1999); San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997); Lewis v. State, 572 So. 2d 908, 912 (Fla. 1990); Preston v. State, 531 So. 2d 154, 160 (Fla. 1988). In Arango, this Court held:

> Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

> In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.
>
> In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Arango 411 So. 2d at 174 (Fla. 1982). Appellant has offered this

Court no compelling reason to revisit established precedent. Appellate counsel cannot be deemed ineffective for failing to raise a claim which "would in all probability" have been without merit or would have been procedurally barred on direct appeal. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000) (quoting Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)).

ISSUE IV

EXECUTION BY LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT

This Court has repeatedly rejected this claim as being without merit. See Sims v. State, 754 So. 2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment); Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005); Robinson v. State, 30 Fla. L. Weekly S576 (Fla. July 7, 2005).

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____

BARBARA C. DAVIS
Fla. Bar No. 410519
ASSISTANT ATTORNEY GENERAL
444 SEABREEZE BLVD., SUITE 500
DAYTONA BEACH, FLORIDA 32114
(386)238-4990
FAX - (386) 226-0457

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Richard E. Kiley, and James V. Viggiano, Jr.**, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of November, 2005.

_____
BARBARA C. DAVIS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionate-ly.

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