IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC06 -653
Lower Tribunal Case No. 93-1684-CF

CONNIE RAY ISRAEL,

Petitioner,

v.

JAMES McDONOUGH,
Interim Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Israel was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the trial proceedings shall be referred to as "R. ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PCR. ___" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action and of the Rule 3.851 appeal brought simultaneously pursuant to Fla.R.Crim.P. 3.851(d)(3) will determine whether Mr. Israel lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Mr. Israel accordingly requests that this Court permit oral argument.

INTRODUCTION

Errors involving several issues which occurred at Mr. Israel's capital re-sentencing were not presented to this Court on appeal due to the ineffective assistance of appellate counsel.

The issues demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Israel. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the issues omitted by appellate counsel establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on at trial or on appeal but should now be revisited in light of subsequent case law or in order to

correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Israel is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The Petition presents constitutional issues which directly concern the judgments of this Court during the appellate process and the legality of Mr. Israel's sentence of death.

Jurisdiction in this action lies in this Court for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Israel's direct appeal and his re-sentencing appeal. Wilson, 474 So.2d at 1163 (Fla. 1985); Smith v. State, 400 So.2d 956, 960 (Fla. 1981); Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Israel to raise the claims presented herein. Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Israel's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Israel asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

Connie Ray Israel was tried and convicted in Putnam County, Florida, in 1999 for the crimes of burglary of a dwelling with battery; kidnapping; sexual battery with great force; and first degree murder in 1991 of Esther Hagans. Following a jury recommendation in favor of death by a vote of 11 to 1, he was sentenced to death on May 28, 1999. On direct appeal, his convictions and sentences were upheld. Israel v.

State, 837 So.2d 381 (Fla. 2002). Mr. Israel's postconviction motion was denied on August 9, 2005. (PCR. Vol. V, 847). His appeal of that denial is before this Court and this petition is filed simultaneously pursuant to Fla.R.Crim.P. 3.851(d)(3).

CLAIM I

FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. ISRAEL'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT APPELLATE COUNSEL FAILED TO LITIGATE THESE ISSUES, APPELLATE COUNSEL WAS INEFFECTIVE.

The jury's instruction on the aggravator of commission of a murder during the course of a kidnaping is unconstitutional on its face and as applied. The trial court's instructions to the jury unconstitutionally diluted its sense of responsibility in determining the proper sentence. To the extent appellate counsel failed to litigate these issues, appellate counsel was ineffective.

The jury was given the following instructions at re-sentencing:

> Your advisory sentence should be based upon the evidence that has been presented to you in these proceedings.
>
> The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crimes of sexual battery, burglary and kidnapping.

(R. Vol. XIII, 2350).

The jury's deliberation was tainted by the unconstitutional and vague

instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance and Mr. Israel thus entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not.

The instruction was unconstitutionally vague. An aggravating circumstance that merely repeats an element of first-degree murder does not genuinely narrow nor does it provide the sentencer guidance in a weighing state as required.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Israel on the central sentencing issue of whether death was the appropriate sentence. Secondly, in being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Thus, the jury was precluded from considering mitigating evidence, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Because great weight is given the jury's

recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985) as applied to Ring v. Arizona, 122 S.Ct. 2468 (2002). To the extent that appellate counsel failed to litigate these issues, Mr. Israel is entitled to a new sentencing hearing because his sentencing was tainted by improper instructions.

CLAIM II

PETITIONER'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT TIME OF EXECUTION.

In accordance with Fla.R.Crim.P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The petitioner acknowledges that, under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the petitioner acknowledges that before a judicial review may be held in Florida, the petitioner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida

Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)("If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes").

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D.C. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Stewart v. Martinez-Villareal , 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, in In Re Provenzano, 215 F.3d 1233 (11th Cir. 2000), the Eleventh Circuit Court of Appeals has stated:

> Realizing that our decision in In Re Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, see United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
>
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a

competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion.

Federal law in this circuit, therefore, requires that a competency to be executed claim be raised in the initial federal petition for habeas corpus. In order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this claim.

The petitioner has been incarcerated since 1978. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS VIOLATES EQUAL PROTECTION AND DUE PROCESS RIGHTS, AND THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellate counsel was ineffective for failing to raise the issue that Florida's rule prohibiting counsel from interviewing jurors violates equal protection and due process rights, and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

To the extent defendants' counsel are treated differently from academics, journalists and other non-lawyers who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the concept is enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). See William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003).

The petitioner notes that a new procedural rule regarding juror interviews has been established effective on January 1, 2005. Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the

> failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The thrust of the argument is that Florida's restrictions on post-trial juror interviews is an equal protection violation as enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case.

Florida lawyers, including defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). Yet, academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005). The website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The

Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, Oct. 25, 2004 (available at http://www.sptimes.com/ advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

The point remains that application of justice in this case could well benefit from learning whether the petitioner's jurors agree with any of the several arguments in this proceeding and appeal. The answers to any number of hypothetical or direct questions are presently unknown and cannot come from counsel for the petitioner because of the "catch-22" nature of the rules. That the answers to juror-posed questions could come from an academic researcher, a journalist or a lawyer not connected with the case infringes upon the petitioner's rights to due process, access to the courts, and the equal protection concepts enunciated in Bush v. Gore, supra. The reliability and integrity of petitioner's capital sentence is thereby questionable based on these constitutional violations. Again, appellate counsel failed to raise this claim on

direct appeal and relief should therefore issue.

CLAIM IV

EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellate counsel was ineffective for failing to challenge, on constitutional grounds, the method of execution in Florida. At the time of petitioner's May 28, 1999, sentencing, electrocution was the prescribe method. Amended execution statutes, F.S. 922.10 and 922.105 [effective January 14, 2000], provide that death sentences in Florida may, by election, be presumptively carried out by the injection of poison into a condemned person's body. The change in the law appears inspired by the common perception that death by lethal injection is painless and swift. This method of execution can constitute cruel and unusual punishment.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments" and bars "infliction of unnecessary pain in the execution of the death sentence." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death. . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a "flexible and dynamic manner," Gregg v. Georgia, supra, 428 U.S. at

171 (joint opinion), and measured against "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 2 L.Ed. 2d 630, 78 S. Ct. 590 (1958)(plurality opinion).

Despite the perception that lethal injection is a painless and swift means of inflicting death, it is a method in which negligent or intentional errors may have caused the persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, it is not clearly demonstrated that they become unconscious of their pain and impending death. It is noted that a number of the persons executed by lethal injection in other states may have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary infliction of pain. Accounts of botched executions have been reported. See, e.g., the compilation prepared by Professor Michael L. Radelet; http://www.deathpenalty info.org/article.php. For example, the lethal injection of Rickey Ray Rector, was described as follows:

> On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. Joe Farmer "Rector, 40 Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-

Gazette, January 26, 1992.

Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards, lethal injection may be unreliable as a "humane" method for extinguishing life. Accordingly, execution by lethal injection constitutes cruel and unusual punishment. The Florida procedures for execution by lethal injection run the serious risk of causing excruciating pain to the condemned inmate and therefore is unconstitutional and violates the *Eighth* and *Fourteenth* Amendments to the United States Constitution and the Florida Constitution prohibition against cruel and unusual punishment.

The State of Florida has failed to establish legally sufficient administrative and procedural standards for the administration of lethal injection and has failed to designate adequate equipment or trained personnel for the preparation and administration of the injection. This raises substantial and unnecessary risks of causing extreme pain and suffering before and during execution.

The State of Florida does not provide that properly trained personnel insert the intravenous line or catheter ("IV"). Reference is to an individual or individuals trained to, among other things, locate usable veins, distinguish between usable and unusable veins, minimize the risk of injecting the chemicals directly into muscle or other tissue, or take appropriate action in the event of a technical problem).

If the catheter is not properly inserted, there is a risk that the chemicals will be inserted into a petitioner's muscle and other tissue rather than directly into his

bloodstream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly and the intended effects will not occur. Improper insertion of the IV catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose of chemicals.

There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The State of Florida does not provide that properly trained personnel (i.e., an individual or individuals trained to, among other things, deliver the chemicals in the proper sequence and in the proper dosages, and to prevent or treat extreme physical pain and suffering resulting from the injection) administer the lethal injection.

The pre-set dosage amounts may be inadequate to cause the intended sedation in petitioner. Because of his physical characteristics and medical history, as well as the fact that he will be in a state of stress during his execution, petitioner could retain or recover consciousness and sensation during the administration of the other chemicals used in the execution.

Under such circumstances, petitioner could suffer an extremely painful sensation of crushing and suffocation.

The state does not mandate that a physician or other trained medical expert be

present to render treatment or assistance to a prisoner in the event of an emergency. Instead, the state mandates only that a physician be present to oversee the cardiac monitor.

The state sets forth no adequate procedures (e.g., separate labeling of the syringes) to prevent the chemicals from being confused prior to or during the execution, and few if any procedures concerning the proper storage and safekeeping of the chemicals.

Absent comprehensive and coherent procedural safeguards, a prisoner is exposed to, at the very least, a risk of unnecessary or excessive pain. As the District Court noted in Fierro v. Gomez, 865 F.Supp. 1387, 1410 (N.D.Cal.1994), "[there is] a framework for determining when a particular mode of execution is unconstitutional: objective evidence of pain must be the primary consideration, and evidence of legislative trends may also be considered where the evidence of pain is not dispositive." Id. at 1412 (citation omitted). Significantly, the court in Fierro pointed out that the execution must also be considered in terms of the risk of pain. Id, at 1411. In McKenzie v. Day, 57 F.3d 1461, 1469 (9th Cir. 1995), the Ninth Circuit Court of Appeals held that execution by lethal injection under the procedures which had been defined in Montana was Constitutional. The Court of Appeal explained that those procedures passed constitutional muster because they were "reasonably" calculated to ensure a swift, painless death...." McKenzie v. Day, 57 F3d at 1469. Such a statement cannot be made about the known procedures in Florida. A swift,

painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to petitioner in a competent, professional manner by someone adequately trained to do so.

Similarly, in LaGrand v. Lewis, 883 F.Supp. 469 (D.C. Ariz. 1995) the District Court in Arizona upheld the written Internal Management Procedures prescribing standards for the administration of lethal injection because "they clearly indicated that executions are to be conducted under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to used, and...the presence of a physician is required."

Further, the United States Supreme Court's repeated holdings that "capital proceedings must of course satisfy the dictates of the Due Process clause," Clemons v Mississippi, 494 U.S. 738, 746 (1990) (citing Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion)), surely must apply to the procedures for actually carrying out an execution, which is the quintessential "capital proceeding." See also Hicks v. Oklahoma, 477 U.S. 343 (1980).

Most recently, a federal district judge has noted the following:

> The Eighth Amendment prohibits punishments that are "incompatible with the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(internal quotation marks and citations omitted). ... When analyzing a particular method of execution or the implementation thereof, it is appropriate to focus "on the objective evidence of the pain involved." Fierro v. Gomez, 77 F.3d 301, 306 (11th Cir. 1996)(internal citations omitted). ... In addition, many other courts have reviewed lethal-injection protocols similar to California's. To date,

> no court has found either lethal injection in general or a specific lethal-injection protocol in particular to be unconstitutional. See, e.g., (citing to Sims v. State, 754 So.2d 657 (Fla. 2000) among others) but cf. Rutherford v. Crosby, 546 U.S. —, No. 05-8795 (Jan. 31, 2006)(granting stay of execution pending disposition of cert. pet.); Hill v. Crosby, 546 U.S. —, No. 05-8794 (Jan. 25, 2006)(granting stay of execution and granting cert.); Anderson v. Evans, No. CIV-05-0825-F, 2006 WL 83039, at *3-*4 (W.D.Okla. Jan. 11, 2006)(denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it should be noted that the record now before this Court, which includes both additional expert declarations and detailed logs from multiple executions in California, contains evidence of a kind that was not presented in these earlier cases.
>
> Morales v. Hickman, No. C 06-219 JF, C 06-926 JF RS, 2006 WL 335427 at 1, 4 (N.D.Calif. Feb. 14, 2006)(denying plaintiff's motion for preliminary injunction conditionally on the defendant modifying its injection protocol).

Unlike Sims and Morales, since this is a habeas claim, the petitioner presents this issue with no evidentiary record. Consequently, relief should issue or the claim remanded for an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Connie Ray Israel, respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to Kenneth S. Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this _____ day of _____, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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