IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ,
Appellant,

v.

CASE NO. SC07-952
Lower Ct. F95-37867

STATE OF FLORIDA,
Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR DADE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Mr. Chavez will respond to each of the three issues raised in the Initial Brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RULING THAT MICHAEL AMIZAGA WAS NOT AN EXPERT QUALIFIED TO OFFER OPINION TESTIMONY ABOUT THE DIFFERENCES BETWEEN THE CUBAN AND AMERICAN CRIMINAL JUSTICE SYSTEMS AND THE DIFFERENCE IN THE RIGHTS AFFORDED TO CRIMINAL SUSPECTS IN CUBA AS OPPOSED TO THE UNITED STATES.

In this issue Mr. Chavez argues that the trial court erred when ruling that Mr. Michael Amizaga would not be permitted to testify as an expert as to the differences between the constitutional rights provided to criminal defendants in Cuba as opposed to those constitutional rights provided to criminal defendants in the United States, specifically those embodied under the Fifth and Sixth amendments which are contained in the Miranda warnings, including the right to remain silent, the right to consult with an attorney prior to and during questioning, and the right to terminate questioning at any time. Mr. Amizaga, through his study and experiences with the Cuban criminal justice system would have testified that

a criminal defendant in Cuba would not be entitled to the constitutional protections afforded to the accused in the United States. Mr. Amizaga would have further testified that Mr. Chavez's experiences in Cuba, including those he encountered at the hands of Cuban military jailers, would not have provided him with an understanding of the constitutional rights embodied in Miranda and how those rights could be exercised in the United States.

The first disputed point between Mr. Chavez and the State centers on the qualifications of Mr. Amizaga to serve as an expert witness. Mr. Chavez contends that Mr. Amizaga, through independent study and travel to Cuba, had the acquired the requisite special knowledge of the Cuban criminal justice system to testify what rights were afforded to the accused in Cuba and how a Cuban defendant could exercise their significantly more limited rights as compared to the constitutional rights embodied in the Miranda warnings. Mr. Amizaga's testimony would have been particularly important because he would have been able to explain how the criminal justice system operates in Cuba, including presenting testimony to aid the trial court about the contrast between the roles that an attorney for a defendant plays in Cuba versus the United States. The State

does not agree that Mr. Amizaga's independent study of the Cuban criminal justice system qualifies him as an expert and cites to Jordan v. State, 694 So.2d 708, 716 (Fla. 1997) to support their position.

Jordan is distinguishable from this case. The defense in Jordan objected to the State's expert, who was rendering an opinion on certain mental health aspects of the defendant. Part of the basis for the defense objection was that the witness was a mental health counselor who was testifying to areas outside her expertise. The witness was permitted to render an opinion that the defendant derived a "high" from his violent behaviors. The defense pointed out that the witness had a B.S. in psychology, a master's in counseling, and worked as a mental health counselor primarily with sex offenders and in the domestic area, but she had no background or experience in the area of forensic mental health, was not a diagnostician, and had never previously worked in the area that she offered her "expert" opinion. The witness admitted that the basis for her opinion came from reading some articles with her professor husband on the internet. The Florida Supreme Court concluded that a review of a few articles on a subject from the internet did not render one an "expert" if the opinion

testimony given would only be a summary of the articles or literature that had been read. This Court found that the state witness did not qualify as an expert.

Mr. Amizaga did not simply go on the internet and review some articles about the Cuban criminal justice system as the witness in Jordan did. Mr. Amizaga engaged in research and direct observation of the Cuban system. He met and learned from those working in the Cuban system, judges and lawyers, and observed a criminal trial in Cuba. He had first hand experience that was demonstrated to be unique given travel restrictions to Cuba. The State's comparison of Mr. Amizaga to the witness in Jordan is not supported by the analysis of this Court in Jordan.

This Court found that a street level drug dealer could offer expert testimony by identifying a substance as cocaine in Brooks v. State, 762 So.2d 879 (Fla. 2000) absent any showing the witness had received a degree in chemistry or received professional training in the identification and measurement of drugs. The experience and observations of the drug dealer provided him with sufficient knowledge that would assist the trier of fact. A police officer was qualified to testify as an expert as to the meaning of street drug parlance absent any showing that

he had received training or education as a linguist or social anthropologist in Daniels v. State, 381 So.2d 707 (Fla. 1st DCA 1979) aff'd. 389 So.2d 631 (Fla. 1980) Again, experience and observation provided the necessary credentials to qualify the officer as an expert witness. Mr. Amizaga met the qualifications to be considered an expert in this case. Mr. Amizaga should have been recognized as an expert in his ability to identify the differences between the Cuban and American criminal justice systems and apply them to this case. His expertise was gained through independent, ongoing study and by having the unique vantage of having observed the Cuban criminal justice system first-hand. Mr. Amizaga should have been permitted to testify that, premised on his interview with Mr. Chavez and by virtue of the knowledge he gained through his occupation and independent study, Mr. Chavez would not have understood the significance of the rights he would waive under Miranda because the Cuban criminal justice system does not provide the same rights to counsel and the bounds of representation that counsel in Cuba can provide is significantly limited when compared to level of representation that defense counsel provides in the United States. While it may be, as the State argues, that

everyone would presume that a communist country provides for fewer rights, Mr. Amizaga should have been permitted to outline exactly what those limitations were. There is no record evidence that either the trial court or any of the attorney's present could identify with specificity the actual differences between the exercise of rights and the role of counsel between Cuba and the United States.

The State argues that an error regarding the exclusion of Mr. Amizaga's testimony would be harmless error because the defense attorney, Mr. Koch was not required to shop around for an expert who would support his position if a previous expert had failed to do so. (Answer Brief, p.62-63) That is not what happened in this case. Koch had retained Dr. Ofshe to render an opinion on whether or not the confession in this case was coerced as result of many factors that did not require the specific consideration of alienage. Dr. Ofshe's opinion focused on factors of the interrogation such as the length of time of the interrogation, the mode and manner of the interrogation, and whether or not police conduct lead to a false, coerced confession. The type of coerced confession that Ofshe addressed focuses on the conduct of law enforcement and whether or not the conduct led to a false or coerced

confession. It is apparent from the record that Dr. Ofshe subscribes to the philosophy that only a false confession can be coerced. Whether or not a confession is voluntary encompasses more than just the element of police misconduct. A confession may be involuntary for other reasons, including the failure of the accused to understand the rights he is waiving. This is where the issue of alienage becomes critical.

The issue of alienage does not relate to the conduct of law enforcement to determine whether or not a statement is coerced. The issue alienage addresses is whether or not an individual, as a result of his cultural frame of reference, is able to grasp, understand, and voluntarily relinquish his rights under Miranda. If you do not understand that a lawyer is permitted under the Constitution to defend you, to file motions on your behalf and to advocate against the government, then you do not understand what the right to counsel entails. If you do not understand what the right to counsel provides, you cannot knowingly waive that right. The federal courts, as evidenced by the citations on page 73 of the Initial Brief, have recognized this distinction. This Court should recognize the distinction as well.

The State's argument that Koch would have been "expert shopping" if he had pursued the issue of alienage after an unfavorable response from Ofshe is not supported by the record. Dr. Ofshe has never testified in any proceeding and the record contains no evidence of his report. There is no basis in the record for the assertion that Dr. Ofshe even considered the question of alienage and its' interplay with an understanding of the right to counsel in reaching whatever conclusion he reached. Dr. Ofshe's opinion is not part of the record. Because Dr. Ofshe's opinion and the basis for that opinion is not contained in this record it is not possible to say that the use of Mr. Amizaga was "expert shopping". Experts who examine a defendant may reach different conclusions because they evaluate different areas. For example, one expert may evaluate a defendant for alcohol or drug usage/addiction as an explanation for the commission of a crime, but that those findings do not preclude a second expert from evaluating and identifying a a different mental issue as causation. Since there is no record evidence of what Dr. Ofshe concluded or if he considered the question of alienage, it cannot be logically argued that Mr. Amizaga's opinion simply differed from Ofshe on the same set of facts and analysis. There is no

evidence of "witness shopping". Mr. Koch did not understand the distinction between Ofshe's analysis of a coerced confession premised on physical factors affecting the psychological status of the accused and the analysis of alienage impacting the voluntariness of a waiver of Miranda. Using an expert in alienage was not witness shopping- using an expert in alienage provided a separate and distinct basis for suppression.

The trial court's determination to exclude Mr. Amizaga from rendering an expert opinion was error. Mr. Amizaga was sufficiently qualified to testify as an expert and his testimony was germane to the question of whether or not alienage rendered Mr. Chavez's confession involuntary. Remand for an additional hearing on this issue is required where expert testimony can be presented.

ISSUE II

THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PRESENT THE TESTIMONY OF DR. QUINTANA AS MITIGATION EVIDENCE.

In his second claim for relief, Mr. Chavez argued that trial counsel, and in particular penalty phase counsel Mr. Manny Alvarez, was ineffective for failing to present the

testimony of Dr. John Quintana for consideration as mitigation evidence. The state responds that the decision was tactical, and even if the decision constituted deficient performance, any error was harmless. Mr. Chavez disagrees.

The decision to forgo the testimony of Dr. Quintana cannot be deemed tactical because the attorney who ultimately was responsible for the penalty phase, Mr. Alvarez, did not adequately analyze the factors necessary to make a strategic decision at the time of trial. While Mr. Alvarez provided some very weak rationalizations for not presenting Dr. Quintana's testimony to the jury, he offered no reasons for failing to present the testimony at a Spencer hearing and admitted that it was not until 2008 that he considered that possibility. Mr. Alvarez's rationalizations for not using Dr. Quintana focused on the effect the testimony would have on the jury. Those same reasons would not apply to the presentation of Dr. Quintana's testimony to the court.

One concern Mr. Alvarez expressed was the elevation of a score on the MMPI which Mr. Alvarez incorrectly believed was indicative of sociopathy.(IX,R462-63) He did not want the jury to hear the term "psychopath" thrown around.

However, Dr. Quintana testified that under the accepted scoring model which applied to this version of the test, Mr. Chavez scored within normal limits, a 67. A score of 70 would be necessary in order for a finding of sociopathy to be made. The trial court's written order addressing the scoring of this scale and how that score affected Mr. Alvarez's decision to forgo presenting Dr. Quintana's testimony should be disregarded because it is not based on competent, substantial evidence. The trial court determined that the score of 67 provided a sufficient basis to exclude Dr. Quintana's testimony. The trial court found that "Since the Defendant answered questions to his own advantage, it is possible that his actual score would be 70." (IV,R731-732). The trial court's conclusion that Mr. Chavez had a score that exceeded 67 should be disregarded because it is not supported by substantial, competent evidence. There is no testimony in this record which supports this finding. Dr. Quintana testified that while Mr. Chavez was motivated to answer questions favorably, there was no evidence on the internal monitoring features of the test that gave indications that the results were false or showed evidence of manipulation.(III,R616) The State presented no evidence to contradict Dr. Quintana's

testimony that Mr. Chavez's score was legitimate. More importantly, there is no expert or any other testimony to suggest that the score of 67 was not the true score and that a "true" score would be higher. The trial court's finding that the score was higher and that higher score supported a strategic reason to forgo Dr. Quintana's testimony should be disregarded.

Dr. Quintana's testimony should have, at minimum, been submitted for consideration to the trial court. Any strategic basis trial counsel Alvarez may have had to shield the jury did not apply to the court.

ISSUE III

MR. CHAVEZ WAS DENIED PER SE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 16 OF THE FLORIDA CONSTITUTION WHERE THE DEFENSE ACTIONS AND INACTIONS CAUSED THE ADVERSERIAL PROCESS TO BECOME UNRELIABLE.

In his third issue, Mr. Chavez has argued that the internal conflicts between the various lawyers assigned to represent him coupled with the dictatorial and unreasonable directives of lead attorney Koch, he was denied *per se* effective assistance of counsel. The State disagrees,

first alleging that this issue was not presented below and then arguing that there has been no showing of prejudice.

Mr. Chavez disagrees with the State's contention that this issue was not presented below. In the Amended Rule 3.851 Motion for Post-Conviction Relief filed by attorney Weissenborn, it was alleged that systemic ineffective assistance of counsel was present in this case due to conflicts inherent in the Office of the Public Defender.(II,R198-214;271) A cumulative error claim was further included in the final motion for post-conviction relief, which alleged that all the previously pled claims, when taken together, constituted ineffective assistance of counsel. A post-conviction motion need not contain a summary of all the evidence intended to be presented. A brief summary of fact is sufficient. Peedee v. State, 748 So.2d 253 (Fla. 1999). The pleading requirements of this claim were met. The State was clearly on notice that Mr. Chavez had raised a claim that the effectiveness of his defense had been compromised by personality conflicts within the Office of the Public Defender.

The testimony at the evidentiary hearing further amplified the extent to which the conflict of interest extended. The fundamental basis for the conflict was

presented in the combined written motions. The evidentiary basis for the systemic conflict caused by Koch through his interactions with Mr. Brummer, his co-workers, and Mr. Chavez and the resulting failure of the other lawyers assigned to the case to exercise independent legal judgment was appropriately developed at the evidentiary hearing.

This Court, along with the United States Supreme Court, have recognized that there are two types of conflict- actual conflict and *per se* conflict under the Sixth Amendment in the representation of criminal defendants. *Per se* ineffective assistance of counsel addresses systemic conflict and does not require the showing of prejudice. A Sixth Amendment claim of *per se* ineffective assistance of counsel depends on the actual legal representation provided to the client. See, Crist v. Florida Ass'n of Criminal Defense Lawyers, 978 So.2d 134 (Fla. 2008). A showing of prejudice is not required in *per se* Sixth Amendment claims because the claim arises when the actions or inactions in the delivery of legal services fail to protect the client's interests. This Court has recognized the existence of *per se* conflicts of interest in determining the inherent conflict created by fee caps for criminal defense attorneys and the failure to act with

diligence on behalf of indigent clients. See, Makemson v. Martin County, 491 So.2d 1109 (Fla. 1980) and Hatten v. State, 561 So.2d 562 (Fla. 1990).

An actual conflict of interest requires a showing of prejudice, a requirement that is absent from the *per se* conflict of interest. To the extent that the State has pointed out the requirement for a showing of prejudice as being necessary in the case of an actual conflict, they are correct. However, that is not the claim raised by Mr. Chavez below and in the Initial Brief. Mr. Chavez has clearly identified his claim as one of *per se* ineffective assistance of counsel which does not require a showing of prejudice.

The Initial Brief drew this Court's attention to specific instances where the systemic, *per se* conflict of interest was created by the representation of Mr. Koch in this case. The incidents were raised as issues in the Lipinski motion, but are more appropriately used to demonstrate the *per se* conflict. These include the failure of Koch to timely investigate the missing horse trailer witness, the failure to pursue an expert on alienage after Ofshe refused to work on the case, his presentation of false testimony regarding the presence of Mr. Chavez's

watch during interrogation, and the failure to recognize the need to develop a cohesive penalty phase and investigate mitigation even when pursing a not guilty defense, and the failure to introduce evidence of sexual abuse that had been contained in Mr. Chavez's statement as mitigation.

The decision to forgo a mitigation investigation is particularly troublesome. Throughout the entire trial level proceedings and extending into the post-conviction hearing, attorney Koch did not understand that investigating and preparing for a mitigation phase does not prevent a first phase defense of not guilty. The two are not mutually exclusive as is recognized in Rompilla v. Beard, 125 S.Ct. 2456 (2005). It was never the intent of Georgi and Harper to use what the State characterizes as an "admission and avoidance" defense.[State's Answer Brief, p.82] If that had been the case, Mr. Harper would have allowed Mr. Chavez to immediately plead guilty as Mr. Chavez desired upon his arrest rather than exhaustively work with him to convince him to allow the criminal process to play out. Mr. Koch's assertions that second phase counsel "believed that 99% of capital defendants are guilty" and they wanted to pursue a defense based on

perjury is completely contradicted by the testimony of Georgi and Harper. Mr. Koch's testimony, to echo the trial court, is not credible. Koch, despite his position as lead counsel and his experience, did not and does not understand the investigation requirements required for an effective penalty phase.

Mr. Koch never understood that a well-developed penalty phase is a critical component for constitutionally sound representation and a thorough penalty phase investigation is not inconsistent with a guilt phase defense of innocence. The failure of Koch to recognize the need for a penalty phase investigation because of his misguided belief that such an investigation was an admission of guilt constituted *per se* ineffective assistance of counsel because it infected the remaining proceedings. Koch's failure to grasp the need for a strong guilt phase and a strong penalty phase was communicated to Mr. Chavez by Koch and resulted in erroneous advice being given to him by Koch. As a result of Koch's deficient understanding of the need for both phases to be developed, conflict arose to the degree that two highly skilled penalty phase attorneys were removed from the case, Mr. Chavez did not understand the necessity and role of a

penalty phase investigation, and resulted penalty phase being conducted by a lawyer who understood from Koch that the penalty phase was to be "minimal".(IX,T443) Mr. Alaverz had only worked one capital case prior to representing Mr. Chavez. He had significantly less experience both in capital litigation and as an attorney that Georgi, Harper, or Nally. He did not bother to read any of the available materials available to assist attorneys in capital litigation while working on this case.(IX,T435)

The overwhelmingly flawed decision making exercised by Koch, coupled with his dictatorial control of the case and his strained relationship with his employer, Mr. Brummer, resulted in a *per se* conflict of interest which caused a deficient delivery of legal services, including misadvice to the client over the role of penalty phase investigation and the presentation of mitigation evidence. This *per se* conflict requires reversal in this case.

CONCLUSION

Based upon the forgoing citations of law and arguments, the Appellant, Mr. Chavez, through undersigned counsel, respectfully requests that the order denying relief be set aside, and the proceedings be reversed for

either a new evidentiary hearing, a new penalty phase, or new trial.

Respectfully submitted,

_____
ANDREA M. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U.S. Mail to the Office of the Attorney General, ASA Scott Browne, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 this ____ day of October, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

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