IN THE SUPREME COURT OF FLORIDA
CASE NO. SC0-___

JUAN CARLOS CHAVEZ,
Petitioner,

V.

WALT McNEIL, Secretary
Department of Corrections,
State of Florida,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This Petition is being filed in order to preserve Mr. Chavez's federal claims arising under the United States Constitution, including the Fifth, Sixth, Eighth, and Fourteenth Amendments, and to address claims of error under Florida law. Mr. Chavez has filed concurrently with this Petition, an appeal from the denial of his 3.851 Motion for Post-Conviction Relief. Mr. Chavez moves, as additional grounds for relief, that this Court issue a writ of habeas corpus on the grounds that he was denied effective assistance of appellate counsel where appellate counsel failed to present issues to this Court in the Initial Brief.

Citations to the record from the 3.850 hearing shall be referenced as "R.page number". References to the trial transcripts and original clerk's documents will be referenced as "T.page number".

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure

9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(8), of the Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, of the Florida Constitution. This petition presents issues which directly concern the constitutionality of Mr. Chavez's convictions and sentence of death. This Court previously heard and denied the direct appeal in this case. See, e.g., Smith v. State, 400 So.2d 956, 960 (1981); Chavez v. State, 832 So.2d 730 (Fla. 2002),

Jurisdiction lies in this Court because the fundamental constitutional errors alleged herein occurred in a capital case in which this Court heard and denied the direct appeal. The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Chavez does not request oral argument on this petition.

STATEMENT OF THE CASE AND FACTS

Mr. Chavez was indicted by the Grand Jury for the

Eleventh Judicial Circuit on December 20, 1995 for the first-degree murder of Samuel James Ryce on or about September 11, 1995.(T1-6). Mr. Chavez was also charged with Sexual Battery-Victim Under 12 and Kidnapping.(T1-6) Mr. Chavez was convicted as charged by a jury on September 18, 1998.(T8572-73) The jury returned a unanimous recommendation of death on October 27, 1998.(T9086) The trial court sentenced Mr. Chavez to death on November 28, 1998.(T11134-37).

Mr. Chavez appealed the judgment and sentence to this Court in April 2000. [Amended Initial Brief of Petitioner]. The State's Answer Brief was filed on November 3, 2000. Following receipt of the Reply Brief and oral argument, this Court issued an opinion affirming the judgment and sentence in Chavez v. State, 832 So.2d 730 (Fla. 2002).

The Petitioner relies upon the facts presented in the briefs of the parties and as summarized by this Court's opinion from the direct appeal and as adduced at the evidentiary hearing. This petition is being filed simultaneously with the Initial Brief from the denial of Mr. Chavez's post-conviction relief motions by the trial court after an evidentiary hearing.

STANDARD OF REVIEW

Claims of ineffective assistance of appellate counsel are reviewed consistent with the standard of Strickland v. Washington, 466 U.S. 668 (1984). This Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. State v. Larzelere, ---So. 2d ---, 2008 WL 516424, 33 Fla. Law Weekly S135 (Fla. February 28, 2008)quoting, Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986). The defendant has the burden of alleging a specific serious omission or overt act upon which the claim of ineffective assistance can be based. Issues which have no merit on direct appeal do generally not rise to the level of ineffective assistance of appellate counsel. This standard governs each of the claims presented below.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE CONSTITUTIONALITY OF LETHAL INJECTION WHERE THE METHOD AND EXECUTION PROTOCOL IN FLORIDA VIOLATES THE

EIGHTH AMENDMENT'S PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

At the time of sentencing in this case, Florida used the electrocution as the sole means of execution. Appellate counsel argued in the Amended Initial Brief that electrocution violated the Eighth Amendment to the United State's Constitution's ban on cruel and unusual punishment. However, during the pendency of the direct appeal in this case, Florida adopted a new method of execution which would apply to Mr. Chavez. On January 7, 2000, the Legislature sent a bill to then-Governor Bush to replace lethal injection as the method of execution. Governor Bush signed the bill into law on January 14, 2007. See, Sims v. State, 754 So.2d 657 (Fla. 2000). The Amended Initial Brief was filed in this case on April 19, 2000, yet inexplicably failed to challenge the use of lethal injection as a means of execution. No motions were filed by appellate counsel at any point prior to this Court's opinion in 2002 that sought to present arguments to this Court regarding lethal injection. Appellate counsel was ineffective in failing to timely challenge lethal injection under the Eighth Amendment despite continuing litigation in this area.

The United States Supreme Court has recently

determined that in order to constitute cruel and unusual punishment under the Eighth Amendment, an execution method must present a substantial or objectively intolerable risk of serious harm in the case Baze v. Rees, ---S.Ct.---, 2008 WL 1733259(U.S.)(April 16, 2008). The United States Supreme Court further held that a State's refusal to adopt a proffered alternative means of execution may only violate the Eighth Amendment if the alternative is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. In this case from Kentucky, a plurality of the justices upheld the Kentucky method of execution by lethal injection because, if performed properly, the execution method using the same three drug protocol as Florida would be humane. Kentucky has not carried out a lethal injection execution using the protocol approved in Baze. Further, the Kentucky protocol differs from that utilized in Florida.

The United States Supreme Court also specifically found that the failure to administer a proper dose of the first drug in the lethal injection procedure, sodium thiopental, creates a substantial, constitutionally unacceptable risk of suffocation from the administration of the remaining drugs, pancuronium bromide [a paralytic] and

potassium chloride. Sodium thiopental is used to render unconsciousness. If not properly anesthetized, the inmate will face excruciating pain from the administration of the remaining two drugs.

Justice Ginsberg and Justice Souter dissented from the plurality. The dissent noted that the constitutionality of the Kentucky protocol turns on whether or not the inmate is properly anesthetized by the first drug. The dissent argued that the Kentucky protocol has insufficient safeguards to confirm that the inmate is unconscious. The dissent was correctly concerned that absent sufficient and reliable monitoring of the anesthetic plane, it is difficult, if not impossible, to determine that the inmate is properly anesthetized.

The Kentucky execution protocol requires that an individual with at least one year relevant professional experience insert the IV line, that the executioner follows precisely the manufacturer's package insert in the mixing and injection of the sodium thiopental, and requires the actual presence of the warden and deputy warden in the execution chamber in order to guard against IV problems and to ensure that the inmate is unconscious.

The most current Florida protocol, adopted on August

1, 2007, fails to provide sufficient safeguards to ensure that the execution does not present a substantial or objectively intolerable risk of serious harm to the inmate. There is proof of a sufficiently imminent danger that an inmate in Florida will suffer a constitutionally unacceptable risk of suffocation during an execution due to the lack of medical training of the team by creating a substantial and intolerable risk that the IV line will not be inserted properly in the vein as opposed to skin tissue, that the inmate will suffer a constitutionally unacceptable risk or suffocation due to the failure adequately monitor the anesthetic plane to ensure that the inmate is sufficiently anesthetized prior to the injection of the second paralytic drug and ultimately, the third drug. Unlike Kentucky, Florida has a history of botched executions, including the botched lethal injection execution of Angel Diaz on December 5, 2006 which demonstrates that the Florida protocol remains inadequate despite revision after the botched Diaz execution.

According to testimony presented during the Governor's Commission on Lethal Injection, convened after the Dias execution, errors occurred at two critical points. First, the IV lines inserted in Diaz's veins punctured the vein,

causing the first drug to flow into skin tissue. The result was that Diaz was not properly sedated and the subsequent drug deliveries did not enter the circulatory system in a timely manner, resulting in a death that lasted at least 34 minutes.

The second critical error in the Diaz execution, per testimony from the hearing, was the failure of the execution team to adequately monitor the consciousness of the victim. Despite purported visual monitoring, the second set of chemicals was injected into Diaz 24 minutes after the first set. Witnesses described Diaz as continuing to move and talk, obvious signs that he was not properly anesthetized. In response to the conclusions of the Commission, several protocols were revised.

This Court, prior to the issuance of Baze, reviewed the current protocols in Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007), *petition for writ of certiorari filed* April 3, 2008. Lightbourne set forth the conclusions of the Commission and the changes made in response to the Diaz execution. The opinion further summarizes testimony presented at lower court proceedings held after the Diaz execution, including the testimony of defense expert Dr. Heath regarding the necessity of ensuring proper IV

insertion and the necessity of requiring that the inmate reaches an appropriate anesthetic plane. In light of Baze, this Court should reconsider the holding in Lightbourne. First, the Court should reexamine this issue applying the standard of substantial risk or objectively intolerable risk of pain standard.

Secondly, this Court must consider the dissent of Justices Ginsburg and Souter regarding the necessity of ensuring adequate IV insertion and adequate anesthetization of the inmate. The current protocol continues to be insufficient in this regard as it requires the warden only to maintain direct visual contact with the IV site as opposed to a member of the medical team whom it is presumed has some medical training that would permit them to determine if the IV was properly inserted or later developed problems once the administration of the drugs was begun.

The current protocol continues to be deficient because it fails to provide adequate safeguards to ensure the inmate reaches the proper anesthetic plane prior to the injection of the second and third drugs. The existence of the pause after the administration of the first drug that was added after the botched Diaz execution is not

sufficient to ensure the inmate has reached a constitutionally acceptable level of unconsciousness. Obviously the presence of a pause between the administration of the second and third drugs alone is insufficient. The Diaz execution demonstrates that a pause, even of significant length will not ensure a proper plane of anesthesia has been reached. In Diaz a *de facto* pause of almost 24 minutes occurred between the administration of the first round of drugs and the beginning of the second round of the second and third drugs. Despite a pause of 24 minutes, no one determined that Diaz has not unconscious or that the IV lines had not functioned correctly. A pause alone is insufficient. A substantial risk of pain is present absent adequate medical training and medical monitoring of the inmate after the injection of the fist drug. The Florida protocol provides for neither. The continued lack of medical expertise of the warden and the lack of reliable medical procedures to monitor the blood pressure of the inmate or the use of other less subjective monitoring devices such as an EKG or the BIS device are minimally necessary in order to dissipate the substantial or objectively intolerable risk that the inmate will be subjected to an unconstitutionally level of pain. According

to the Lightbourne opinion, DOC admitted that it has no set protocol which delineates what actions will be taken to ensure the inmate is unconscious. The only testimony regarding what might be done came from the warden, who testified he would shake the inmate, call his name, or administer an "eyelash" test. The warden admitted he had no idea what to look for in the eyelash test and had no medical training beyond CPR. The testimony of defense expert Dr. Heath, as summarized in Lightbourne, illuminated the inadequacies of such tests. Since DOC has not proven to be trustworthy in following the prior protocols related to execution procedures, there is no reasonable guarantee that sufficient safeguards will be maintained under the August 2007 protocol. See, Jones v. State, 701 So.2d 76 (Fla. 1997); Provezano v. State, 739 So.2d 1150 (Fla. 1999).

This Court should reconsider the holding of Lightbourne in conjunction with the ruling in Baze. The lethal injection protocol adopted by DOC is unconstitutional in that it fails to ensure that there is not a substantial or objectively intolerable risk that in inmate will be subjected to a constitutionally intolerable level of pain during execution.

CLAIM II

THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT MITIGATIONG FACTORS OUWEIGH THE AGGRAVATING CIRCUMSTANCES.

Appellate counsel failed to challenge the standard jury instructions in this case. It is recognized that this court has previously rejected challenges to the standard jury instructions based on the argument that the standard jury instructions impermissibly shift the burden of proof from the State to the defendant during the penalty phase. Israel v. State, ---So.2d.---, 2008 WL 731602, 33 Fla. Law Weekly S211 (Fla. March 20, 2008).

The Florida death penalty sentencing scheme is constitutionally infirm because it permits a sentence of death to be predicated upon unconstitutional jury instructions which shift the burden of proof to the defendant to establish mitigating factors and to then establish that those mitigating factors outweigh the aggravating factors.

Under Florida law a capital sentencing jury must be told that:

> "…the State must establish the existence of one or more aggravating circumstances before

> the death penalty could be imposed…[S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances."

State v. Dixon, 283 So.2d 1 (Fla. 1973); Mullaney v. Wilbur, 421 U.S. 684 (1975). This straight forward standard was never applied to the sentencing phase of Mr. Chavez's trial. The standard jury instructions given in this case were inaccurate and provided misleading information as to whether a death recommendation or life recommendation should be returned.

The jury instruction as given shifted to Mr. Chavez the burden of proving whether he should live or die by directing the jury that it is their duty to render an opinion on life or death by "deciding whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." In Hamblen v. State, 546 So.2d 1039 (Fla. 1989), a capital post-conviction case, this Court addressed the question of whether the standard jury instructions shifted the burden to the defendant as to the question of whether he should live or die. The Hamblen opinion reflects that this issue should be decided on a case by case basis.

The jury instructions in this required that the jury

impose death unless Mr. Chavez could produce mitigation and could prove that the mitigation outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Chavez to death. This standard obviously shifted the burden to Mr. Chavez to establish that life was the appropriate sentence. The standard jury instructions further limited consideration of the mitigating evidence to only those factors which Mr. Chavez proved were sufficient to outweigh aggravations. Because the standard jury instructions conflict with the straight forward standard established in Dixon and Mullaney, they violate Florida law.

The jury in this case was precluded from "fully considering' and "giving full effect to" mitigating evidence. Penty v. Lynaugh, 109 S.Ct. 2934, 2952 (1989). This burden shifting resulted in an unconstitutional restriction upon the jury's consideration of any relevant circumstance that could be used to decline the death penalty. McCoy v. North Carolina, 110 S.Ct. 1227, 1239 (1990)[Kennedy, J., concurring]. The effect of these jury instructions is that the jury can conclude that they need not consider mitigating factors unless they are sufficient to outweigh the aggravating factors and from evaluating the

totality of the circumstances as required under Dixon. Mr. Chavez was forced to prove to the jury that he should live. This violated the Eighth Amendment to the United States Constitution under Mullaney.

The standard jury instructions are further flawed because the jury is instructed that mitigating evidence can be found only if the juror is reasonably convinced that the mitigating factor has been established. The "reasonably convinced" standard is contrary to the constitutional requirement that all mitigating evidence must be considered.

Continued use of the standard jury instructions and the use of them in this case violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 17 of the Florida Constitution.

CLAIM III

THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY MINIMIZE AND DENIGRATE THE ROLE OF THE JURY IN THE FLORIDA CAPTIAL SENTENCING PROCESS IN VIOLATION OF CALDWELL V. MISSISSIPPI.

Appellate counsel failed to challenge the constitutionality of standard Florida jury instructions on

the grounds that the instructions violate Caldwell v. Mississippi, 472 U.S. 320 (1985) by improperly denigrating the role of the jury in capital sentencing. The trial court rejected this issue as having been raised on direct appeal. (II,R354) A review of the Amended Initial Brief and Amended Reply Brief demonstrate that this issue was not raised by appellate counsel; in fact Caldwell is not cited in either brief. It is recognized that this Court has previously rejected this argument. Israel v. State, ---So.2d---. 2008 WL 731602, 33 Fla. Law Weekly S211 (Fla. March 20, 2008).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held that unconstitutional any jury instruction which improperly denigrates the role of the jury in the capital sentencing process. The standard jury instruction utilized in Florida and given in this case violate not only Caldwell, but also violate Article I, Sections 6, 16, and 17 of the Florida Constitution.

By repeatedly advising the jury that their verdict is merely advisory, a solely a recommendation, and that the ultimate sentencing decision would rest with the trial court the jury is no adequately and correctly informed as

to their role in the Florida sentencing process. These instructions minimize the jury's sense of responsibility for determining the appropriateness of a death sentence.

CLAIM IV

MR. CHAVEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT ON DIRECT APPEAL.

Mr. Chavez had the constitutional right to effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984); see also, Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel." Evitts v. Lucey, 469 U.S. 387, 396 (1985).

Because constitutional violations which occurred during the trial were obvious, especially as related to the jury instructions, it cannot be said that the adversarial testing process worked in this direct appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The appellate claims omitted from the Initial Brief demonstrate that confidence in the correctness and fairness of the proceedings has been undermined. The burden is on the

State to show beyond a reasonable doubt that the error did not contribute to the affirmance, verdict, or sentence. Chapman v. Georgia, 386 U.S. 18 (1967).

Appellate counsel failed to challenge jury instructions and the constitutionality of lethal injection, the facts of which are contained within this pleading. In light of the serious errors that appellate counsel did not raise, there is a reasonable probability that the result in this case will be deemed unreliable and ultimately, unconstitutional.

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Chavez respectfully requests that the court grant habeas corpus relief.

Respectfully submitted,

_____	_____
ROBERT A. NORGARD	ANDREA M. NORGARD

CERTIFICATE OF SERVICE

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

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the style and type of font used in the preparation of this Petition for Writ of Habeas Corpus is Courier New, 12 point, in compliance with Fla. R. App. P. 9.210.

_____ _____

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