IN THE SUPREME COURT OF FLORIDA

JUAN CARLOS CHAVEZ,

Petitioner,

v. **CASE NO. SC08-970**
L.T. No. F95-037867

WALTER A. McNEIL,
Secreatry, Florida
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, WALTER A. MCNEIL, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The State's answer brief on appeal from the denial of post-conviction relief in case no. SCO7-952, contains a detailed summary of facts and procedural history and is being submitted along with the instant response. On direct appeal, appellate counsel generally raised the following issues:

1. The police arrested Juan Carlos Chavez without probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12, of the Florida Constitution, and the subsequent statements of the defendant should have been suppressed.

2. The Appellant's confession was involuntary and was obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Constitution of the State of Florida.

a. The extraordinary length of Mr. Chavez' interrogation (over 54 hours) is a significant factor the Court should consider in determining whether the statements made by Mr. Chavez were voluntary and not improperly coerced.

b. The police on at least two occasions subjected Mr. Chavez to the "Christian burial" ploy in order to induce a confession.

c. Law enforcement officers failed to properly advise the Appellant of his Miranda rights, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

d. The Appellant's confession was obtained in violation of Miranda because law enforcement officers failed to scrupulously honor the unequivocal invocation of the right to remain silent by the Appellant.

e. The Appellant's alienage, lack of prior experience with the United States criminal justice system, and limited understanding of English led to the involuntary confession.

3. The delay of the first appearance for Juan Carlos Chavez deprived the defendant of his constitutional right to counsel.

a. The delay in presenting Mr. Chavez to a magistrate was unconstitutional and was exploited by agents of the state to extend questioning without counsel in violation of Fla.R.Crim.P. 3.130.

b. The denial of a prompt judicial determination of probable cause in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9 and 12, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.133.

c. The failure to provide Mr. Chavez a timely probable cause determination requires suppression of his confession.

d. The right to counsel enjoyed by all persons taken into custody was violated by keeping Mr. Chavez out of court so his right to counsel could affix and be asserted.

4. Permitting the media to photograph the jurors and jurors' faces deprived the defendant of his right to a fair trial.

a. The trial court erred when it reversed its earlier ruling, which prohibited photography of the jurors in the courtroom, without first affording defense counsel the opportunity to present evidence to support continuation of the initial court order.

b. The trial court abused its discretion and improperly restricted the questioning of defense counsel during jury selection voir dire, thus denying the Appellant his right to a fair and impartial jury.

5. The trial court erred in admitting over timely objection a blood-stained mattress, which blood was from an unidentified source and was specifically neither from the Appellant nor Jimmy Ryce; the evidence was not relevant, and any probative value was far outweighed by its prejudicial impact.

6. The trial court erred in denying defendant's motion for judgment of acquittal as to the capital sexual battery charge, Count II.

7. The trial court erred by admitting, over defense objection, numerous cumulative gruesome photographs depicting the decomposed body of the victim re-assembled at the office of the medical examiner

8. The capital sentencing process imposed on the Defendant was both flawed and unconstitutional.

a. The trial court erred in denying the defense requested instruction on “doubling” regarding the “in-the-course-of-a kidnapping” aggravator, resulting in the reliance by the jury upon the same factual circumstances of the offense to double the aggravating circumstanced for the sentence.

b. The trial court erred in considering as an aggravating factor, and in instructing the jury that it could consider as an aggravating factor, that the murder was committed for the purpose of avoiding or preventing lawful arrest.

c. The trial court erred in giving the standard jury instruction, over timely defense objection, regarding the “heinous, atrocious, or cruel” aggravating circumstance because insufficient evidence was presented at trial to support its finding and the definition of the aggravating circumstance is unconstitutionally vague as applied to the case.

d. The prosecutor improperly diminished the role of the jury during the jury voir dire and the penalty phase of the Appellant’s trial; as a result, the death sentence should be reversed and the case remanded for a new sentencing proceeding.

e. The imposition of the death penalty violates the prohibition against cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

f. Section 921.141(7), Florida Statutes, which permits introduction of victim impact evidence in a capital sentencing proceeding, is unconstitutional.

(1) Section 921.141(7) is unconstitutional as it leaves judge and jury with unguided discretion allowing for imposition of the

> death penalty in an arbitrary and capricious manner.
> (2) Section 921.141(7), Florida Statutes, is vague and overbroad and therefore violative of the due process guarantees of the Florida and United States constitutions.
> (3) The Florida Constitution prohibits use of victim impact evidence.
> (4) Section 921.141(7), Florida Statutes, infringes upon the exclusive right of the Florida Supreme Court to regulate practice and procedure pursuant to Article V, Section 2, Florida Constitution.

This Court affirmed Petitioner's conviction and death sentence on November 21, 2002, in Chavez v. State, 832 So.2d 730 (Fla. 2002).

Petitioner filed a petition for writ of certiorari in the United States Supreme Court on April 19, 2003 in Chavez v. Florida, Case No. 02-10297, after having been granted an extension of time. The United States Supreme Court denied certiorari review on June 23, 2003. See Chavez v. Florida, 539 U.S. 947 (2003).

Petitioner's habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for post-conviction relief.

ARGUMENT

CLAIM I

WHETHER 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. [Stated by Respondent]

Preliminary Statement On Legal Standards Applicable To Ineffective Assistance of Appellate Counsel Claims

The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's argument is based on appellate counsel's alleged failure to raise an issue that would not have been successful if argued in Petitioner's direct appeal. Therefore,

counsel was not ineffective for failing to present this claim. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). The United States Supreme Court has recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002).

Appellate Counsel Was Not Ineffective In Failing To Challenge Lethal Injection On Direct Appeal

Petitioner's argument that his direct appeal counsel was ineffective for failing to challenge lethal injection is without merit. While petitioner maintains that counsel should have

challenged the newly enacted lethal injection statute, he fails to recognize that counsel had no precedent to rely upon to show that lethal injection, which was touted as the humane alternative to electrocution, constituted cruel and unusual punishment. Counsel cannot be deemed ineffective for failing to predict or forsee future developments in the law. Indeed, even now, such a claim would be rejected by this Court. Consequently, appellate counsel cannot be faulted for failing to raise this issue on direct appeal.

On April 16, 2008, the United States Supreme Court issued its opinion in Baze v. Rees, 128 S. Ct. 1520 (2008), upholding the constitutionality of lethal injection under a system similar to Florida's. Petitioner correctly recognizes precedent from this Court rejecting the lethal injection challenge, but, contends that this Court should somehow revisit its ruling in Schwab v. State, 969 So. 2d 318 (Fla. 2007), cert. denied, 2008 LEXIS 4273 (May 19, 2008) in light of Baze. Petitioner fails to acknowledge that, in Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 2008 LEXIS 4194 (May 19, 2008), this Court expressly considered and rejected the argument that the adoption of a different standard in Baze would affect this Court's ruling to uphold the constitutionality of Florida's execution procedures. This Court's comment in Lightbourne, that

"[a]lternatively, even if the Court did review this claim under a 'foreseeable risk' standard as Lightbourne proposes or 'an unnecessary' risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation," [Lightbourne, 969 So. 2d at 352], has now been proven gratuitous, as the United States Supreme Court did not adopt the lesser, "unnecessary risk" standard sought by the Baze petitioners. See Baze, 128 S. Ct. at 1531.

Since this Court decided Lightbourne, it has repeatedly rejected similar challenges to lethal injection. See Schwab v. State, 2008 Fla. LEXIS 1113 (Fla. June 27, 2008); Lebron v. State, 982 So. 2d 649 (Fla. 2008); Woodel v. State, 2008 Fla. LEXIS 754, 33 Fla. L. Weekly S290 (Fla. May 01, 2008); and Griffin v. State, No. SC06-1055, 2008 Fla. LEXIS 1086, 2008 WL 2415856 (Fla. June 2, 2008). Since appellate counsel had no legitimate basis to challenge lethal injection on direct appeal, his claim must be rejected.

CLAIM II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE PENALTY PHASE JURY INSTRUCTIONS FOR UNCONSTITUTIONALLY SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT MITIGATIONG FACTORS OUWEIGH THE AGGRAVATING CIRCUMSTANCES. [Stated by Respondent]

Appellate counsel cannot be faulted for failing to raise a claim that Florida's standard jury instruction unconstitutionally shifts the burden to the defendant when this Court has repeatedly rejected such challenges. "This Court has repeatedly rejected the claim that these instructions improperly shift the burden of proof to the defendant." Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008)(citing Rodriguez v. State, 919 So. 2d 1252, 1280 (Fla. 2005); Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Carroll v. State, 815 So. 2d 601, 622-23 (Fla. 2002); San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997). Obviously, it cannot be said appellate counsel rendered deficient performance where the argument petitioner offers "would not have succeeded." Engle v. Dugger, 576 So. 2d 696, 704 (Fla. 1991). Indeed, raising such meritless challenges is counter-productive and dilutes the stronger points on appeal. Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

CLAIM III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE PENALTY PHASE JURY INSTRUCTIONS FOR IMPROPERLY MINIMIZING AND DENIGRATING THE ROLE OF THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI. [Stated by Respondent]

Petitioner next contends that appellate counsel was ineffective for failing to challenge Florida's standard penalty phase instructions because they denigrated the role of the jury in capital sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellate counsel cannot be considered ineffective for failing to raise an issue that has repeatedly been rejected by this Court. Consequently, petitioner's claim should be summarily rejected.

"[T]his Court has repeatedly rejected the claim that these instructions denigrate the jury's role in capital sentencing proceedings (or a similar claim of this nature) in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008)(citing Perez v. State, 919 So. 2d 347, 368 (Fla. 2005)); Globe v. State, 877 So. 2d 663, 674 (Fla. 2004); Thomas v. State, 838 So. 2d 535, 542 (Fla. 2003); Brown v. State, 721 So. 2d 274, 283 (Fla. 1998). Appellate counsel wisely chose not to dilute his stronger points on appeal with such a meritless challenge. This Court has repeatedly determined that challenges to "the standard jury instructions

that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate Caldwell v. Mississippi, 472 U.S. 320 (1985) are without merit." Card v. State, 803 So. 2d 613, 628 (Fla. 2001)); see also Globe v. State, 877 So. 2d 663, 673 (Fla. 2004)(rejecting the defendant's argument on direct appeal that "the trial court erred by instructing the jury that it was giving an 'advisory sentence,' in violation of" Caldwell and Ring).

CLAIM IV

WHETHER MR. CHAVEZ WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT ON DIRECT APPEAL. [Stated by Respondent]

Under Claim IV petitioner simply states the general proposition that he was entitled to effective assistance of counsel on direct appeal. The Respondent does not disagree with this general contention, but, notes that the three specific claims made by the petitioner above do not come close to meeting his burden of showing either deficient performance or resulting prejudice. See Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995). Consequently, petitioner is not entitled to relief from this Court.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW has been furnished by U.S. mail to Andrea M. Norgard, Esq., Norgard and Norgard, Post Office Box 811, Bartow, Florida 33831 and to Penny Brill, Assistant State Attorney, Dade County State Attorney's Office, 1350 N.W. 12th Avenue, Miami, Florida 33136-2111, this 26th day of August, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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