IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Petitioner,

v.

CASE NO. SC09-814
L.T. No. 85-5667
DEATH PENALTY CASE

WALTER A. McNEIL,
Secretary, 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 herein, pursuant to this Court's Order of May 18, 2009. Respondent respectfully submits that the petition should be denied as meritless.

**FACTS AND PROCEDURAL HISTORY**

The facts of this case are recited in this Court's opinion on direct appeal of Petitioner's convictions and sentence, Stewart v. State, 558, So. 2d 416 (Fla. 1990):

> Daniel Clark heard two gunshots on December 6, 1984, at about 12:15 a.m., "just a split second or two" apart. He got out of bed, walked outside, looked down the road in both directions, but saw nothing. At approximately 1:00 that same morning, Linda Drayne

> spotted a body lying alongside the road and reported it to the police. Investigation revealed that the body was that of Ruben Diaz, who had been shot twice from a distance of a foot or less, once in the front of the head, and once behind the right ear. Sometime after midnight, police also discovered Diaz's car, which had been set on fire in a mall parking lot. Several months later, Stewart was arrested in connection with another crime and while in custody was charged with first-degree murder and second-degree arson for the instant offenses. During the guilt phase of the trial, Randall Bilbrey, who shared a trailer with Stewart from December 9 to December 19, 1984, testified that Stewart told him that he and another man were looking for someone to rob when they spotted a big, expensive-looking car outside a bar. They went in and engaged the car's owner, Diaz, in conversation, convincing him to give them a ride. Once in the car, Stewart, who sat in the back seat, pulled a gun and ordered Diaz to drive to a wooded area where he ordered Diaz to get out of the car, lie on the ground, and place his hands on his head. He took Diaz's wallet, which contained fifty dollars, and a small vial of cocaine, and then, at the urging of the second man, shot Diaz twice in the head. Stewart and the second man later burned the car to destroy fingerprints.
>
> The state's second key witness was Terry Smith, a friend with whom Stewart shared an apartment. Smith testified that Stewart told him that a man picked him up hitchhiking and that he pulled a gun, ordered the man to drive to a certain location where Stewart ordered the man out of the car, made him lie on the ground, robbed him, and shot him twice. Stewart was convicted of both crimes. He was sentenced to fifteen years in prison for arson, and, consistent with the jury recommendation, death for first-degree murder.

Stewart, 558 So. 2d at 418. This Court remanded for a new sentencing proceeding because the trial court had declined to give a requested jury instruction on the statutory mitigating

factor of substantial impairment. Stewart, 558 So. 2d at 421-22.

The death penalty was imposed again at resentencing, and this Court affirmed the sentence on May 13, 1993. Stewart v. State, 620 So. 2d 177 (Fla. 1993). During subsequent post conviction proceedings, the State agreed to conduct a new sentencing hearing. The new sentencing was conducted on March 20-21, 2001 (V1/57).[1]

The jury returned a recommendation of death by a vote of seven to five (V1/57; 2RS-V4/629). A Spencer[2] hearing was conducted on May 31, 2001, and on August 6, 2001, Judge Barbara Fleischer sentenced Stewart to death again for the Diaz murder (V1/57-68; 2RS. V4/766-777, V11/1071-1100, 1101-1136). In her sentencing order, the judge found three aggravating circumstances: prior violent felony convictions (a prior first degree murder, two prior attempted murders, a prior aggravated assault, and two prior robbery convictions); under a sentence of imprisonment; and murder committed for pecuniary gain (V1/58-59). The court determined that the statutory mental mitigation

[1] References to the postconviction record in Stewart v. State, Florida Supreme Court Case No. SC08-2075, will be designated by volume and page number; references to the record on appeal from the 2001 resentencing proceeding in Stewart v. State, Florida Supreme Court Case No. SC01-1998, will be designated as "2RS." followed by volume and page number.

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

factors had been proven, and provided "some" weight to both factors even though the judge concluded that Stewart's disturbance was not extreme and his impairment was not substantial (V1/60-63). The court grouped and weighed other nonstatutory mitigation, including Stewart's childhood abuse and exposure to brutality (some weight), the lack of an acceptable father figure in childhood (modest weight); also weighed in conjunction with other mitigation, his mother's abandonment (little weight in addition to some weight given to same facts as nonstatutory mental mitigation), alcohol abuse and intoxication at the time of the crime (modest additional weight), low-normal intelligence (little weight), homeless (little weight), family history of mental illness and suicide attempts (already weighed, no additional weight), remorse (modest weight), compassion for others (modest weight), spiritual development during incarceration (modest weight), totality of other sentences (130 years in prison) on unrelated charges (modest weight), and good prison record (little weight) (V1/63-68). The court concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (V1/68).

Stewart appealed his conviction and sentence to this Court, raising five issues in his 101-page brief:

> ISSUE I: THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURORS AS TO THE NONSTATUTORY AGGRAVATORS PROPOSED BY DEFENSE COUNSEL.
>
> ISSUE II: KENNETH STEWART IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATED HIS DUE PROCESS RIGHT AND HIS RIGHT TO A JURY TRIAL WHICH REQUIRE THAT A DEATH QUALIFYING AGGRAVATING CIRCUMSTANCE BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY BEYOND A REASONABLE DOUBT.
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> ISSUE III: THE COURT ERRED BY DENYING STEWART'S MOTION TO DECLARE THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT PERMITS A JURY TO RETURN A DEATH RECOMMENDATION BY A BARE MAJORITY VOTE.
>
> ISSUE IV: THE TRIAL COURT GAVE LITTLE WEIGHT TO A MYRIAD OF REASONABLY ESTABLISHED EVIDENCE BY DR. MAHER AND DR. SULTAN, INSTEAD RELYING ALMOST SOLELY ON THE TESTIMONY OF DR. MERIN WHO SAW STEWART FOR ONLY ONE HOUR IN 1986 (2 YEARS AFTER THE HOMICIDE), AND WHOSE DIAGNOSIS WAS UNRELIABLE; AND ACCORDED INSUFFICIENT WEIGHT TO THE TWO STATUTORY MENTAL MITIGATORS AND TO MANY OF THE NONSTATUTORY MITIGATORS.
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> ISSUE V: THE DEATH PENALTY IS DISPROPORTIONAL COMPARED WITH OTHER CAPITAL CASES BECAUSE OF THE SUBSTANTIAL MITIGATION IN THIS CASE.
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> Initial Brief of Appellant, Florida Supreme Court Case No. SC01-1998.

On appeal, this Court affirmed the sentence on September 11, 2003. Stewart v. State, 872 So. 2d 226 (Fla. 2003). Rehearing was denied on April 20, 2004. Stewart v. State, 2004 Fla. LEXIS 647 (Fla. Apr 20, 2004).

On July 25, 2005, Stewart filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.851 (V1/72-111). An amended motion was filed on February 6, 2006 (V1/131-172). An

evidentiary hearing was granted on six claims, all alleging ineffective assistance of counsel at the 2001 resentencing (V1/178-184).

Relief was denied on October 8, 2008, and the appeal is pending before this Court in Stewart v. State, Case No. SC08-2075. (V2/228-66). Petitioner's instant habeas petition in this Court was timely filed along with his initial brief in the appeal of the denial of his motion for postconviction relief.

## ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. 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 arguments are based on appellate counsel's alleged failure to raise three issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. 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 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). Habeas relief is not warranted on Petitioner's meritless claims.

## ARGUMENT

## CLAIM I

**WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE CONSTITUTIONALITY OF LETHAL INJECTION. (Restated)**

Petitioner's argument that his direct appeal counsel was ineffective for failing to challenge lethal injection is without merit.[3] While Petitioner maintains that counsel should have

[3] Petitioner challenged the constitutionality of lethal injection during postconviction proceedings. (V1/170). Same was denied by the trial court:

> In Claim XI, Defendant alleges that execution by lethal injection is cruel and/or unusual punishment. However, in *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000), the Florida Supreme Court held that "the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." *See also Lightbourne v. McCollum*, 969 So.2d 326, 353 (Ha. 2007) ("Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution."); *Lebron*, 982 So.2d at 666 (denying defendant's claim that execution by lethal injection, as currently performed in Florida, constitutes cruel and unusual punishment in violation of the United States Constitution); *Diaz v. State*, 945 So. 2d 1136, 1143-45 (Fla. 2006) (affirming summary denial of claim that lethal injection constituted cruel and unusual punishment); *Hill v. State*, 921 So. 2d 579, 582-83 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla. 2006). Furthermore, in *Schwab v. State*, 2008 WL 2553999 (Fla. June 27, 2008), Judge Holcomb notes in his opinion, which was adopted by the Florida Supreme Court, "[I]t is clear that the Florida

challenged the 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. See Sims v. State, 754 So. 2d 657 (Fla. 2000) and cases following where this Court has applied Sims to consistently deny claims that lethal injection is unconstitutional *e.g.* Hill v. State, 921 So. 2d 579 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006).

In regard to the 2006 Angel Diaz execution, and Florida's current protocols adopted in 2007 which Petitioner heavily relies upon, counsel cannot be deemed ineffective for failing to predict or foresee future developments in the law. See Derrick v. Sec'y, Dep't of Corr., 2009 LEXIS U.S. App. LEXIS 14226, *63

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> Supreme Court, post-*Baze* [fn10], has considered the constitutionality of the Florida lethal injection protocol and found it constitutional under the Eighth Amendment." *See also Henyard v. State*, 2008 WL 4148992 p.7 (Fla. September 10, 2008) (noting that in *Lightbourne*, the court concluded "no matter what test is utilized, Florida's procedure is constitutional."). As such, no relief is warranted on Claim XI.
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> [fn10] *Baze v. Rees*, 128 S. Ct. 1520 (2008).

(V2/264-65).

(11th Cir. Fla. June 30, 2009) ("Just as counsel are not required to anticipate changes in the law, neither are they required to anticipate changes in science."). Furthermore, 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.), cert. denied, 128 S. Ct 2486 (2008) in light of Baze. Petitioner fails to acknowledge that, in Lightbourne v. McCollum, 969 So. 2d 326 (Fla.), cert. denied, 128 S. Ct 2485 (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," 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 Lightbourne, 969 So. 2d at 352; Baze, 128 S. Ct. at 1531.

Since this Court decided Lightbourne, it has repeatedly rejected similar challenges to lethal injection, and expressly reconsidered the issue under Baze. See Ventura v. State, 2 So. 3d 194, 198-201 (Fla. 2009); Chavez v. State, 2009 LEXIS 977, *32-34 (Fla. June 29, 2009) (rejecting claim that appellate counsel was ineffective for failing to raise this issue in case decided by this Court in 2002); Schwab v. State, 995 So. 2d 922, 923 (Fla. 2008), petition for cert. filed, No. 08-5020 (U.S. June 30, 2008); Woodel v. State, 985 So. 2d 524, 533-34 (Fla.), cert. denied, 129 S. Ct. 607, 172 L. Ed. 2d 465 (2008); Lebron v. State, 982 So. 2d 649, 666 (Fla. 2008); Griffin v. State, 992 So. 2d 819 (Fla. 2008). Since appellate counsel had no legitimate basis to challenge lethal injection on direct appeal, his claim must be rejected. Moreover, since the issue in light of Baze would be meritless, appellate counsel can not be deemed ineffective. Groover, 656 So. 2d at 425; Chandler, 634 So. 2d at 1068.

## CLAIM II

**WHETHER THE PENALTY PHASE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT TO ESTABLISH MITIGATING FACTORS AND TO SHOW THAT MITIGATING FACTORS OUTWEIGH THE AGGRAVATING CIRCUMSTANCES. (Restated)**

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, 982 So. 2d at 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). Indeed, Petitioner recognizes that this Court has rejected the instant argument. Petition for Writ of Habeas Corpus at p. 12. 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 stronger points on appeal. Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Moreover, appellate

counsel can not be deemed ineffective for failing to raise a meritless issue. Groover, 656 So. 2d at 425; Chandler, 634 So. 2d at 1068.

## CLAIM III

**WHETHER THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY MINIMIZED AND DENIGRATED THE ROLE OF THE JURY IN THE FLORIDA CAPITAL SENTENCING PROCESS IN VIOLATION OF *CALDWELL V. MISSISSIPPI*. (Restated)**

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. Indeed, Petitioner recognizes that this Court has rejected the instant argument. Petition for Writ of Habeas Corpus at p. 15. 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, 982 So. 2d at 666. 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). Again, appellate counsel cannot be deemed ineffective for failing to raise a meritless issue. Groover, 656 So. 2d at 425; Chandler, 634 So. 2d at 1068.

## CLAIM IV

**WHETHER PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT ON DIRECT APPEAL. (Restated)**

Under Claim IV Petitioner simply states the general proposition that he was entitled to effective assistance of counsel on direct appeal. Respondent does not disagree with this general contention, however, the three specific claims made by Petitioner above do not come close to meeting his burden of showing either deficient performance or resulting prejudice. See Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000); Groover, 656 So. 2d at 425. Further, Petitioner has recognized that this Court had rejected the challenges he raises and offers no basis for this Court to retreat from its previous holdings. Petitioner is not entitled to any relief from this Court.

## 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, P.O. Box 811, Bartow, Florida 33830-0811, this 10th day of August, 2009.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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