IN THE SUPREME COURT OF FLORIDA

NO.

ANDREW RICHARD LUKEHART,

Petitioner,

v.

WALTER McNEIL,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Andrew Lukehart's first habeas corpus petition in this Court. Art. 1, Sec. 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, claims demonstrating that Mr. Lukehart was deprived of the right to a fair, reliable, 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 original jury trial proceedings shall be referred to as "R" for the record. The postconviction record on appeal shall be referred to as "PCR."

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, omitted facts, as well as correcting error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Lukehart is entitled to habeas relief.

PROCEDURAL HISTORY

Mr. Lukehart was tried in Duval County, Florida, and convicted of first-degree felony murder and aggravated child abuse. Jury trial commenced on February 24, 1997 (R. 330). On February 27, 1997, the jury found Mr. Lukehart guilty as charged (R. 1324), and recommended death by a vote of 9-3 (R. 1639). On April 4, 1997, the Court imposed the death sentence. On direct appeal Lukehart raised twelve issues. The Court affirmed Mr. Lukehart's conviction and death sentence on direct appeal, but remanded for a re-sentencing on his aggravated child abuse conviction. Lukehart v. State, 776 So.2d 906 (Fla. 2000), *rehearing denied* (January 23, 2001). Petition for Writ of Certiorari was denied on June 25, 2001. Lukehart v. Florida, 533 U.S. 934 (2001). On September 27, 2001, Lukehart filed a "shell" Motion to Vacate Judgment and Sentence. On

November 28, 2001, which was dismissed with leave to amend. On June 20, 2002, Lukehart filed a Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend. On September 23, 2003, Lukhehart filed a First Amended Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend. On October 11, 2004, the trial court conducted a Huff hearing and granted Lukehart an evidentiary hearing on Claim Three (ineffectiveness of trial counsel at guilt and penalty phases).

On May 9-10, 2007, an evidentiary hearing was conducted. On June 1, 2007, the Defendant filed the Defendant's Evidentiary Hearing Closing Arguments and Memorandum in Support of a New Trial and or New Penalty Phase, and the Defendant's Motion to Amend Pleading to Conform with Evidence. The State filed a Proposed Order on June 20, 2007. On March 27, 2009, the trial court entered its order denying Appellant's postconviction motion. On April 13, 2009, the Petitioner filed his Notice of Appeal.

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 Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Lukehart's convictions and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental errors challenged herein arise in the context of a capital case in which this Court heard and denied petitioner's direct appeal. See Wilson, 474 So.2d at 1163; Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Lukehart to raise the claims presented herein. See, e.g., 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 end of justice begs the Court to grant the relief sought in this case, because the Court has done so in past, similar cases. This petition pleads claims involving fundamental

constitutional error. See 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 these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Lukehart's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Lukehart 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.

ISSUE I

THIS COURT SHOULD REVISIT PETITIONER'S PROPORTIONALITY REVIEW IN LIGHT OF THE TESTIMONY OF BRENDA PAGE AT THE EVIDENTIARY HEARING.

Petitioner is filing his initial brief for denial of his postconviction motion currently with this Petition. As part of his initial brief, Petitioner has alleged that trial counsel was ineffective for failing to investigate and present witnesses at the penalty phase that would establish that Petitioner was, in fact, not guilty of the prior violent felony, and therefore, little if any weight should have been assigned to the prior violent felony aggravator. Inasmuch as this court may find that counsel was not ineffective in this instance, hence the above issue is being presented herein.

It is the obligation of this Court to conduct a fair and proper proportionality review in all death cases.

> We have described the "proportionality review" conducted by this Court as follows:
>
> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the **totality of circumstances in a case, and to compare it with other capital cases.** It is not a comparison between the number of aggravating and mitigating circumstances. Porter v. State, 564 So.2d 1060, 1064 (Fla.1990). The requirement that death be administered proportionately has a

> variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.
>
> ... Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. Id. at 169 (alterations in original) (citations and footnote omitted). As we recently reaffirmed, proportionality review involves consideration of **"the totality of the circumstances in a case" in comparison with other death penalty cases.** Sliney v. State, 699 So.2d 662, 672 (Fla.1997) (citing Terry, 668 So.2d at 965).

Urbin v. State, 714 So.2d 411 (Fla. 1998)(emphasis added).

In affirming the death sentence for Petitioner on direct appeal this Court stated:

> This case is significantly aggravated by the existence of the prior conviction for felony child abuse.
>
> * * *
>
> Thus, Lukehart's prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case.

Lukehart v. State, 778 So.2d 906, 926 (Fla. 2001).

If Petitioner did not commit the prior violent felony, then this Court's findings above would be wrong. Petitioner

will establish by the believable and uncontroverted facts below that Petitioner did not, in fact, commit the prior violent felony.

Justice Anstead, in his dissenting opinion on direct appeal in this case, pointed out: "The bottom line is that our approval of the death sentence here is dramatically inconsistent with our case law involving other child murders." Lukehart, 776 So.2d at 930. The only logical explanation for the majority upholding Petitioner's death sentence as compared to previous cases must be the prior violent felony. However, at the time of the direct appeal, this Court had no record establishing that Petitioner did not commit the prior violent felony.

This Court has clearly required lower courts to consider all record evidence before it in the mitigation process. This Court should do no less.

> Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

Farr v. State, 621 So.2d 368, 369 (Fla. 1993).

The undisputed and unrefuted record testimony of Brenda Page and Andrew Lukehart is before this Court and establishes the following:

Brenda Page testified at the evidentiary hearing about the events leading up to Jillian French's injuries. Ms. Page testified that she, her two kids, Lukehart, her boyfriend Bobby Nye, Monica Plummer, and Jillian French (Plummer's eight-month-old child) lived together in Baldwin, Florida (PCR 1265-1266). Plummer relocated from Maine because her mother was attempting to gain custody of Jillian (PCR 1267). Lukehart, not Plummer, took responsibility for feeding and bathing Jillian (PCR 1268; PCR 1346). Lukehart was very loving, kind, caring, and responsible for Jillian (PCR 1268; PCR 1346). Plummer was jealous of the relationship Lukehart had with Jillian because he paid more attention to the child than he did to her (PCR 1268). Page observed Plummer slapping and pinching Jillian (PCR 1269). On several occasions, when Page and Lukehart returned home from work, they observed burn marks, cuts, and black-and-blue marks on Jillian while she was in Plummer's care (PCR 1269; PCR 1347). Once, Lukehart suspected Jillian's leg might be broken. He urged Plummer to take Jillian to the hospital, but Plummer refused (PCR 1270; PCR 1347). Plummer, a drug-user, had

struck Page when Plummer attempted to commit suicide (PCR 1270-1271). Bobby Nye, Page's boyfriend, reported to her on several occasions that Plummer had hit Jillian (PRC 1271). Prior to the day Jillian was admitted to the hospital, Plummer tossed Jillian across the room where she landed on the bed, then bounced onto the floor with a thump (PCR 1271-1273; (PCR 1348). At first, the child did not make a sound, then, they heard Jillian start screaming and crying (PCR 1272; PCR 1349).

On April 14, 1997, Lukehart was giving Jillian a bath. He left her for a moment; when he returned he found Jillian lying in a tub of running water, and she was not moving. Lukehart thought she was drowning so he yanked Jillian from the tub and started CPR (PCR 1350). He snatched her up and ran next door, called 911, and went to the hospital with Jillian (PCR 1271-1272; PCR 1349-1352). When he was told about her broken arm and leg, Lukehart thought he might have hurt Jillian when he grabbed her from the tub (PCR 1353). However, he was wrong because Dr. Capella testified that the broken arm and leg were older injuries (R 1353).

At the evidentiary hearing, the State had the opportunity to cross-examine Page and Lukehart, call rebuttal witnesses, or introduce contradictory evidence.

They didn't. As a result, the testimony of Page and Lukehart went unrebutted and uncontradicted.

Now that believable and uncontroverted evidence is before this Court mitigating the "weightiness" of the prior violent felony aggravator, that evidence cannot and should not be ignored. Through Page's and Lukehart's testimonies, Justice Anstead's finding that this case is no different than other cases where death was found disproportionate is substantially supported.

Petitioner respectfully requests this Court reapply proportionality review in light of the new record evidence.

ISSUE II

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner is cognizant that this issue was raised and denied before this Court in Hill and Rutherford. The argument below has been adopted from Rutherford's petition.

In light of new scientific evidence it is now clear that the existing procedure for lethal injection adopted by the State of Florida for its executions violates the Eighth Amendment to the United States Constitution, as it

will inflict upon Mr. Lukehart cruel and unusual punishment.

In denying a lethal injection challenge, this Court in Sims, 754 So. 2d at 668, determined that the possibility of mishaps during the lethal injection process was insufficient to support a finding of cruel and unusual punishment:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. n20

(note omitted). Subsequent to the opinion in Sims, recent empirical evidence has established that the infliction of cruel and unusual punishment is no longer speculative.

A study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration is attached to the pleading) and three co-authors detailed the results of their research on the

effects of chemicals in lethal injections.[1] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[2] The authors determined from the toxicology reports they studied, that postmortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. So, in almost half of the cases, the prisoner suffered the effects of suffocation from pancuronium bromide, as well as the burning sensation in the veins followed by the heart attack caused by the potassium chloride.

[1]The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars.

[2]Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty.

The chemical process utilized for Florida executions is identical to that identified in the study:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal,[3] an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims, 754 So.2d at 666 (footnote added).

As set forth in greater detail in the declaration of anesthesiologist, David A. Lubarsky, M.D., the use of this succession of chemicals (sodium pentothal, pancuronium bromide, and potassium chloride) in judicial executions by lethal injection creates a foreseeable risk of unnecessary infliction of pain and suffering. Sodium pentothal, also known as thiopental, is an ultra-short-acting substance, which produces shallow anesthesia. Health-care professionals use it as an initial anesthetic in preparation for surgery while they insert a breathing tube

[3]The authors of the study note that it is simplistic to assume that 2 to 3 grams of sodium thiopental will assure loss of sensation, especially considering that personnel administering it are unskilled, that the execution could last up to 10 minutes, and that people on death row are extremely anxious and their bodies are flooded with adrenaline, thus necessitating more of the drug to render them unconscious.

in the patient and use different drugs to bring the patient to a “surgical plane” of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is **supposed** to be able to wake up and signal the staff that something is wrong.[4] The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing process. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech.

Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. Its only relevant function is to prevent the media and the Department of Corrections’ staff from knowing when the sodium pentothal has worn off and the prisoner is suffering

[4]Sodium pentothal is unstable in liquid form, and must be mixed up and applied in a way that requires the expertise associated with licensed health-care professionals who cannot by law and professional ethics participate in executions.

from suffocation or from the administration of the third chemical.

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (App. C). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Lukehart will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise.

Significant is the fact that the American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness.

Because Florida’s practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those

jurisdictions that Mr. Lukehart will not be anesthetized at the time of his death.

It is no wonder that the chemicals used in lethal injection are inadequate and to a reasonable degree of medical certainty cause pain and torture to condemned inmates. When the chemicals were first suggested, they were merely a "recommendation" by a doctor in Oklahoma. There were no studies conducted about the proper use of the chemicals, the potential pain that an inmate might suffer, or what alternative chemicals could be used. Also, no testing was conducted prior to the adoption of the chemicals used in Florida execution; two of the chemicals were specifically contained in the original "recommendation" in Oklahoma.

Mr. Lukehart is not challenging the statutory provision that allows for lethal injection as a method of execution. Rather, he is challenging the use of the specific chemicals and the quantity of chemicals used, based upon recent scientific evidence, that the Department of Corrections uses to carry out executions. Under the present circumstances, the State will violate Mr. Lukehart's right to be free of cruel and unusual punishments secured to him by the Eighth Amendment to the U.S. Constitution, by executing him using the sequence of three chemicals (sodium pentothal a/k/a thiopental, pancuronium bromide, and potassium chloride) which they have admitted to be their practice, which is unnecessary as

a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain, contrary to contemporary standards of decency.

ISSUE III

THE ADMINISTRATION OF PANCURONIUM BROMIDE VIOLATES MR. LUKEHART'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

The Petitioner is cognizant that this issue was raised and denied before this Court in Hill and Rutherford. However, Petitioner raises this issue for preservations purposes. The argument below has been adopted from Rutherford's petition.

If Mr. Lukehart is executed in accordance with the chemical combination set out in Sims, he will be denied his first amendment right to free speech.

The administration of pancuronium bromide during the execution procedure will paralyze Mr. Lukehart's voluntary muscles, resulting in his inability to speak or move. In the event that he has not been properly anaesthetized, Mr. Lukehart wants to be able to communicate his awareness that he is experiencing excruciating pain.

Mr. Lukehart wants to communicate this information so that other defendants, the State, the judiciary, as well as the public, can evaluate whether Florida's execution

procedures violate the Eighth Amendment prohibition against cruel and unusual punishment.

The First Amendment to the United States Constitution prohibits laws "abridging the freedom of speech." The free-speech clause of the First Amendment applies to the states through the Due Process clause of the Fourteenth Amendment. Edwards v. South Carolina, 372 U.S. 229, 235 (1963), DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Saffley, 482 U.S. 78, 84 (1987). Nonetheless, because of the unique characteristics of the prison setting, restrictions on inmates' constitutional rights are not subject to strict scrutiny. A restriction to inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests" Id. at 89. A court must consider: 1) whether there is a valid rational connection between the regulation and the assertedly legitimate penological goal, 2) whether the inmate has alternate means of exercising the right at issue, 3) the impact that exercising that right has on the institution, and 4) the availability of alternatives to the restriction. Id. at 89-91. When First Amendment rights are restricted, the legitimacy of the government's stated objective depends on whether the restriction is content neutral. Id. at 90. A restriction will not be upheld if it is an "exaggerated

response” to the otherwise legitimate penological goals. Id. at 87, Pell v. Procunier, 417 U.S. 817, 827 (1974).

Here, no legitimate penological purpose can be served by paralyzing Mr. Lukehart and preventing him from communicating that the execution process has not functioned as stated and that he is being tortured. This restriction on Mr. Lukehart’s speech is impermissibly content based. If the execution protocol works properly, Mr. Lukehart will be unconscious for the duration of the execution and, obviously, will have nothing to bring to anyone’s attention. If the protocol does not work properly, Mr. Lukehart will want to communicate that fact but will not be able to do so. As a result, Mr. Lukehart’s First Amendment right to free speech will be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Charlemane Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050 on September 21, 2009.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

/s/ Michael Reiter
Michael Reiter