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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 14-1332

CLEMENTE JAVIER AGUIRRE-JARQUIN.,
Petitioner,
v.

MICHAEL D. CREWS
SECRETARY, DEPARTMENT OF CORRECTIONS
Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Any claims not addressed in this Reply are not waived. Petitioner stands on the merits as raised in his Habeas Petition.

Citations shall be as follows: The record on appeal from Mr. Aguirre's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The post-conviction record on appeal shall be referred to as "R" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

CLAIM I

SENTENCING TO DEATH AND EXECUTING SOMEONE WHO IS ACUTALLY INNOCENT VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Respondent asserts that this Court need not "manufacture whole cloth a free standing claim of innocence" because Mr. Aguirre already has a mechanism for the relief he seeks, by pursuing a remedy based on newly discovered evidence. (Resp. p. 8-9). While Mr. Aguirre concedes that he does have this remedy available, and is actively pursuing it, he nonetheless urges this Court to recede from its precedent and recognize a freestanding innocence claim.

Habeas corpus is not "a static, narrow, formalistic remedy". *Murray v. Carrier*, 477 U.S. 478, 501, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)(J. Stevens

concurring), citing *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963). It is "one which must retain the 'ability to cut through barriers of form and procedural mazes.'" *Id.*, citing *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969). See *Frank v. Mangum*, 237 U.S. 309, 346, 35 S.Ct. 582, 594, 59 L.Ed. 969 (1915) (Holmes, J., dissenting). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Id.*, citing *Harris v. Nelson*, supra, 394 U.S., at 291, 89 S.Ct., at 1086. "[T]he object of habeas corpus is to search records to prevent illegal imprisonments." *Id*. at 508. Recognizing such rights is not a judicial "power grab" invading the provenance of the Legislature as Respondent argues (Resp. p. 12), but instead an essential mechanism of the Judiciary to redress violations of fundamental fairness.

There can be no greater violation of fundamental fairness than executing an innocent man. "Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. See Garrett, Judging Innocence, 108 Colum. L.Rev. 55 (2008); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J.Crim. L. & C. 761 (2007)." *Baze v. Rees*, 553 U.S. 35, 85-86 (2008) (Stevens, J., concurring).

In *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005), this Court was called upon to address whether a death-sentenced inmate could properly petition this Court for a writ of habeas corpus seeking retroactive relief based on the Supreme Court's opinion in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). In his concurring opinion, Justice Anstead stated that, "Although the right, 'like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right,' the limitations must not be 'applied harshly or contrary to fundamental principles of fairness.'" *Chandler*, 916 So.2d at 735-36, quoting *Haag*, 591 So. 2d at 616 Anstead, J., with whom Pariente, J. joins, concurring).

This Court has "always been willing to entertain constitutional issues raised via application for a writ of habeas corpus, access to which is guaranteed by the Florida Constitution, especially in a death penalty context where our obligation for review is heightened." *Chandler*, 916 So.2d at 736 (Anstead, J., with whom Pariente, J. joins, concurring). This is not a "power grab", as Respondents assert, but an exercise of natural judicial authority. The evidence presented in post-conviction proceedings, detailed fully in his Initial Brief in SC13-2092 and in his Initial Habeas Petition, points strongly to Mr. Aguirre's actual innocence. As such, allowing his death sentence to stand and allowing his execution to go forward is at odds with the "evolving standards of decency that mark the progress of a maturing

society." Upholding Mr. Aguirre's death sentence and allowing his execution to go forward violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. This Court should grant the Writ.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL A MERITORIOUS ISSUE WHICH WARRANTS REVERSAL OF MR. AGUIRRE'S CONVICTIONS AND SENTENCES.

The bulk of Respondent's argument sets out facts that were developed in post-conviction. (Resp. 14-17). These facts were not apparent on the face of the direct appeal record and thus would not have been available to direct appeal counsel. As such, they are not proper for consideration of Mr. Aguirre's shackling claim in this Habeas Petition.[1] What was apparent on the face of the record and thus what is proper to consider is the undisputed fact that Mr. Aguirre was routinely shackled throughout his trial without any pre-trial hearing to determine whether there was "an essential state interest" to justify shackling him - such as a "security [concern] specific to [Mr. Aguirre]." *Holbrook v. Flynn*, 475 U.S 560, 568-569, 106 S.Ct. 1340, 89 L.Ed.2d. 525. (1986).

[1] However, in case SC13-2092, Mr. Aguirre has raised an ineffective assistance of counsel claim for failure to object to the routine shackling, and the facts developed in post-conviction are relevant in assessing that claim.

Respondent also misapprehends the nature of Mr. Aguirre's argument by asserting that the prohibition against routine shackling applies only if the shackles are *visible* to the jury. (Resp. 13). This is too narrow a reading of the holdings in *Holbrook* and *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007 (2005). One of the reasons supporting the prohibition of routine shackling announced in *Deck* is that having a defendant physically restrained interferes with his Sixth Amendment right to counsel. *Deck*, 125 S.Ct. at 631, 2013. Shackling will "interfere with the accused's ability to communicate with his lawyer" and "ability to participate in his own defense…" *Id*. (internal citations and quotations omitted).

Additionally, the *Deck* Court reasoned that the judicial process is supposed to be a dignified one.

> The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.
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> ****
>
> [t]he use of shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Id. at 631, 2013. (Internal quotations and citations omitted). Respondent wholly fails to address these constitutional violations that arose from the routine shackling independent of whether the shackles were in fact visible.

Regardless of whether Mr. Aguirre's jury saw his shackles (which they ultimately did), the routine shackling of Mr. Aguirre without a hearing to determine his individual specific security risk, was a violation of his due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the Florida Constitution. Shackling a defendant before the jury is considered an "'inherently prejudicial practice' [that] must not be done absent some showing of necessity." *Bell v. State*, 965 So. 2d 48, 66 (Fla. 2007), citing *Bello v. State*, 547 So. 2d 914, 918 (Fla. 1989) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340 (1986)). The requisite showing of necessity was not demonstrated in this case. Because it is an inherently prejudicial practice, there is no requirement to show actual prejudice. *Deck v. Missouri*, 544 U.S. 622, 635 (U.S. 2005).

The issue is not solely whether the shackles were visible, but whether the trial court made the proper inquiry and findings to justify the restraint. Mr. Aguirre's right to the presumption of innocence and to freely participate in his defense was unconstitutionally compromised by the trial court's unreasonable practice of routine shackling. The shackling in this case inhibited Mr. Aguirre's ability to freely communicate with counsel and actively participate in the trial without the worry that the jury would see or hear his shackles. It was apparent on the face of the trial record that Mr. Aguirre was shackled and, separately, that the jury became aware of it when

the shackled Mr. Aguirre was dragged from the courtroom, in front of the jury, during the penalty phase. Appellate counsel should have raised this meritorious claim on appeal.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Aguirre respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been electronically filed with the Clerk of the Florida Supreme Court and electronically served upon Mitchell Bishop, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 on this 3rd day of November, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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