IN THE SUPREME COURT OF FLORIDA

JUDY A. BUENOANO,

Appellant,

v.

CASE NO. 76150

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE SECOND DENIAL OF POST CONVICTION RELIEF IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On August 31, 1984, Judias Buenoano was indicted for first degree murder for the September 16, 1971 death by suspected arsenic poison ng of her husband, Sergeant James E. Goodyear. Evidence at trial revealed that, shortly after Sergeant Goodyear returned to Orlando from a tour of duty in South Vietnam, he began suffering from nausea, vomiting and diarrhea. When hospitalized at the naval hospital in Orlando on September 13, 1971, Goodyear reported to Dr. R. C. Auchenbach that he had been ill with these symptoms for two weeks. When Dr. Auchenbach could find no explanation for these symptoms, he attempted to stabilize Goodyear's condition but these attempts failed. Goodyear suffered fluid overload and pulmonary congestion and died as a consequence of cardiovascular collapse and renal failure.

No toxicological assay was performed at the time of Goodyear's death because there was no reason to suspect toxic poisoning. However, Dr. Auchenbach testified that, had he known in 1971 arsenic was present in Goodyear's body, his medical opinion would be that Goodyear could have died as a result of acute arsenic toxication because circulatory collapse and the other symptoms Goodyear exhibited are manifestations of acute arsenic poisoning.

Forensic toxicologist Dr. Lenard Bednarczyk analyzed tissue samples from the exhumed body of Goodyear. He testified that the level of arsenic found in the liver, kidneys, hair and nails of Goodyear indicated chronic exposure to arsenic poison. The opinion of Dr. Bednarczyk and Dr. Thomas Hegert, the Orange

County medical examiner who autopsied Goodyear's remains in **1984**, was that Goodyear's death was the result of chronic arsenic poisoning occurring over a period of time.

In addition to the medical evidence regarding Goodyear's condition, Debra Sims, who lived with Buenoano and Goodyear shortly before Goodyear's death, testified that Goodyear became sick gradually and that she witnessed him having hallucinations about a rabbit on his bed as he picked at the bed linens. She also testified that Buenoano hesitated to take Goodyear to the hospital when he became ill. Two of Buenoano's acquaintances, Constance Lang and Mary Beverly Owens, both testified that Buenoano discussed with each of them on separate occasions the subject of killing a person by adding arsenic to his food. Owens and Lodell Morris each testified that Buenoano admitted she killed Goodyear.

Evidence was also presented at trial that Bobby Joe Morris, with whom Buenoano lived after Goodyear's death, became ill and died after exhibiting the same symptoms of vomiting, nausea, fever and hallucinations that Goodyear exhibited before his death. When Morris' remains were exhumed in **1984**, the tissue analysis revealed acute arsenic poisoning.

After Morris' death Buenoano and John Gentry began living together and later became engaged. Gentry testified at trial that Buenoano told him Goodyear died in a plane crash in Vietnam and Morris died of alcoholism. In November of **1982**, Gentry caught a cold, and Buenoano began giving him the vitamin C capsule Vicon C to treat it. Because he was experiencing extreme

nausea and vomiting, Gentry checked into a hospital on December 15, 1982. After a full recovery he returned home, and on that same day Buenoano gave him Vicon C capsules again. The nausea and vomiting returned. Gentry had the capsules chemically analyzed, and the capsules were found to contain paraformaldehyde, a class III poison. Testimony at trial was that Buenoano had been telling her associates Gentry was suffering from terminal cancer.

Following Goodyear's death in 1971, Buenoano collected the benefits from various life insurance policies on her husband's life totalling approximately $33,000. She also received $62,000 in dependency indemnity compensation from the Veterans Administration. When Bobby Joe Morris died, Buenoano again received insurance from three separate policies on Morris' life totalling approximately $23,000. The house mortgage was also paid off. Buenoano owned life insurance on Gentry's life totalling $510,000 in benefits, and she was a 50% beneficiary under his will.

At trial the jury found Buenoano guilty of first degree murder for the death of James Goodyear and recommended imposition of the death penalty. The trial court found four aggravating circumstances and no mitigating factors and sentenced Buenoano to death. The aggravating factors were that (1) the murder was committed for pecuniary gain (2) was heinous, atrocious and cruel (3) was committed in a cold, calculated and premeditated manner (4) by a person previously convicted of a felony involving the use or threat of violence. Buenoano's conviction and sentence

were affirmed on appeal to the Supreme Court of Florida. *Buenoano v. State,* 527 So.2d 194 (Fla. 1988). Her application for clemency was denied on November 9, 1989, when Governor Martinez signed a death warrant. On or about December 21, 1989, Buenoano filed an emergency motion to vacate judgment and sentence, leave to amend, and request for stay of execution in the circuit court and a petition for writ of habeas corpus in the Supreme Court of Florida. The motion to vacate judgment and sentence was summarily denied by the circuit court on January 23, 1990. On April 5, 1990, the summary denial was affirmed by the Supreme Court of Florida and the petition for writ of habeas corpus was denied as well. *Buenoano v. State,* 15 F.L.W. S196 (Fla. April 5, 1990). A second death warrant was signed on March 17, 1990. Execution is presently scheduled for June 19, 1990. On June 6, 1990 Buenoano filed a successive motion to vacate judgment and sentence alleging that the use of electrocution by the Florida Department of Corrections as a means of execution constitutes cruel and unusual punishment. The claim was predicated solely upon the circumstances alleged to have attended the recent execution of Jesse Tafero. According to Buenoano because Mr. Tafero's execution was technically imperfect, her own execution should be prohibited. On June 13, 1990, prior to any ruling, Buenoano filed a motion for rehearing and/or if the court has not entered an order denying relief, supplement to motion for Florida Rule of Criminal Procedure 3.850 relief. In this motion Buenoano proffered as newly discovered evidence hearsay affidavits alleging that prison officials secured a bid to have a defective

head and leg electrode repaired but then elected to instead fabricate their own army boot electrode and that as of May 5, 1990, the problems in the Tafero execution had not been corrected. Both this motion and the motion to vacate were summarily denied on June 13, 1990. Buenoano then filed a motion for rehearing asking the judge to reconsider his order since the Department of Corrections has control over such information and such information was not revealed to anyone prior to June 12, 1990. On June _____, 1990 the judge entered an order denying rehearing. Notice of appeal was filed on June _____, 1990.

SUMMARY OF ARGUMENT

1. The execution of a death sentence is solely an executive function and the lower court was without jurisdiction to entertain the claim that death by electrocution in Florida constitutes cruel and unusual punishment.

2. The motion to vacate judgment and sentence raises a ground for relief which has long been the subject of litigation, Tafero's execution notwithstanding, and the failure to raise the claim in the previous Florida Rule of Criminal Procedure 3.850 motion constitutes an abuse of procedure, so that if the lower court did have jurisdiction, it properly determined that Buenoano had abused the post conviction process.

3. The underlying basis for the claim has been litigated on numerous occasions and the claim should have been raised at trial and on direct appeal.

4. The execution of the death penalty has been found to be constitutional by all state and federal courts, glitches notwithstanding, and Buenoano has failed to make a *prima facie* showing that she is entitled to relief.

I.

THE TRIAL COURT DOES NOT HAVE JURISDICTION OVER THE EXECUTION OF A DEATH SENTENCE WHICH IS SOLELY AN EXECUTIVE FUNCTION AND THE NINTH JUDICIAL CIRCUIT WAS AN IMPROPER FORUM IN WHICH TO RAISE THE CLAIM THAT DEATH BY ELECTROCUTION IN FLORIDA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

At the outset, the State of Florida asserts that Buenoano's claim that death by electrocution in Florida constitutes cruel and unusual punishment is *improperly raised in a motion for post-conviction relief.* The gist of Buenoano's claim is that the use of electrocution by the Florida Department of Corrections as a means of execution constitutes cruel and unusual punishment in violation of both state and federal law. Such a claim is predicated solely upon the alleged circumstances attending the execution of Jesse Tafero. According to Buenoano, because Mr. Tafero's execution was less than perfect her own execution should have been prohibited by the circuit court.

Regarding Buenoano's request for injunctive and/or declaratory relief with respect to this claim, the State of Florida asserts that the circuit court was without jurisdiction to grant such relief. A proper Florida Rule of Criminal Procedure 3.850 motion challenges the validity of a judgment and sentence, *not* the execution thereof or incidents thereto. The execution of a sentence of death is exclusively an executive function and authority over carrying out such ministerial function rests solely in the executive branch. *Goode v. Wainwright,* 448 So.2d 999 (Fla. 1984); *Blitch v. Buchanan,* 131 So. 151 (Fla. 1930); Sections 922.09, 922.10, 922.11, Fla. Stats. (1989).

Buenoano's challenge concerning the technical functioning of the equipment by which electrocution is effectuated in no way affects the validity of the trial court's sentence. ***Blitch v. Buchanan,*** 131 So. at 157 (possibility of abuse does not invalidate authority which is legally conferred). Inasmuch as Buenoano's challenge to the actual execution of the sentence imposed by the trial court does not represent a challenge to the validity of the sentence itself, this claim is not properly raised in a Rule 3.850 proceeding. ***See, Sawyer v. Wainwright,*** 422 So.2d 1027 (Fla. 1st DCA 1982); ***Graham v. Vann,*** 394 So.2d 180 (Fla. 1st DCA 1981).

Even assuming ***arguendo*** that the instant claim of error was properly cognizable in a Rule 3.850 motion, the trial court was still without jurisdiction over the parties which is necessary to the granting of the relief sought. Fla. Const. Art. V, Section 20. Moreover, inasmuch as Buenoano is actually seeking relief against an official of the State of Florida who resides in Tallahassee, Florida, venue does not lie in the Ninth Judicial Circuit to entertain such claim. ***Florida Public Service Commission v. Triple A Enterprises, Inc.,*** 387 So.2d 940 (Fla. 1960); ***Smith v. Williams,*** 160 Fla. 580, 35 So.2d 844 (1948); Section 47.011, Fla. Stat. (1989). Accordingly, the motion should have been dismissed by the trial court upon the grounds of lack of jurisdiction and improper forum and venue.

II.

THE MOTION TO VACATE IS A SUCCESSIVE MOTION AND ITS FILING CONSTITUTED AN ABUSE OF PROCESS.

Even if the instant claim of error was cognizable in a Rule 3.850 motion, venue proper, and the trial court not without jurisdiction to grant the relief sought, Buenoano's *second* motion for post-conviction relief should nevertheless be dismissed because it is *successive* in nature. Buenoano filed her *first* motion for post-conviction relief containing twenty-one claims on or about January 18, 1990. This motion was summarily denied by the trial court by order dated January 23, 1990, and such decision was subsequently affirmed by this court. *Buenoano v. State*, 15 F.L.W. 196 (Fla. April 5, 1990). Florida Rule of Criminal Procedure 3.850 provides that a second or successive motion for post-conviction relief may be dismissed in the event that it fails to allege new or different grounds for relief and the prior determination was on the merits *or*, if new and different grounds are alleged, that the failure to raise those grounds in the previous motion constitutes an abuse of procedure.

The State of Florida asserts that the instant motion raises a new or different ground for relief which was available to counsel prior to the filing of Buenoano's original motion. Although Buenoano argues that her failure to raise this issue in her previous motion for post-conviction relief should be excused because the facts upon which the motion is based were unknown to counsel prior to the filing of the original motion, review of the abundance of decisional authority addressing this claim which antedates Buenoano's previous motion refutes Buenoano's contention that her failure to raise this claim in her prior motion should be excused.

It has long been recognized that a single, unforeseeable accident attending the carrying out of an execution does *not* establish the method itself to be unconstitutional. *Glass v. Louisiana,* **471** U.S. **1080, 105** S.Ct. **2159, 85** L.Ed.2d **514 (1985)** (Brennan, J., dissenting from denial of certiorari). In recounting the problems which may attend an execution by electrocution, Justice Brennan in *Glass v. Louisiana, supra,* noted the execution of John Lewis Evans during which an electrode apparently exploded under the strap which was binding Mr. Evans' left leg. "A large puff of greyish smoke and sparks poured out from under the hood that covered Mr. Evans' face." **90** L.Ed.2d at **523**. Like Mr. Tafero, Mr. Evans also received three charges of electricity. *Id.; see also, Ingraham v. Wright,* **498** F.2d **248** (5th Cir. **1974)** (questionable whether the Eighth Amendment extends to encompass negligence). Inasmuch as technical difficulties similar to those attending Mr. Tafero's execution which have occasionally been encountered have been the subject of comment by the courts prior to the filing of Buenoano's original motion for post-conviction relief, Buenoano's failure to raise this claim in her previous motion should *not* be excused by this court. ***See,*** *Stewart v. State,* 495 So.2d **164** (Fla. **1986).** Eight executions have been carried out since **1986** with the only unforeseeable glitch occurring in the Tafero execution The affidavit to the motion for rehearing establishes only that the electric chair was routinely maintenanced by D.O.C.

III.

BUENOANO IS PROCEDURALLY BARRED FROM RAISING AN ISSUE WHICH COULD HAVE BEEN RAISED ON DIRECT APPEAL AND AT THE TRIAL LEVEL.

Furthermore, even if this claim were not procedurally barred as a result of Buenoano's failure to raise it in her previous motion for post-conviction relief, it is nevertheless procedurally barred from present consideration due to Buenoano's procedural default in the trial court and on direct appeal. The recognized possibility of glitches in the implementation of any method of execution notwithstanding, the claim that death by electrocution constitutes cruel and unusual punishment has repeatedly been summarily rejected by the courts. ***Porter u. Wainwright,*** 805 F.2d 930 (11th Cir. 1986); ***Sullivan u. Dugger,*** 721 F.2d 719 (11th Cir. 1983); ***Spinkellink u. Wainwright,*** 578 F.2d 582 (5th Cir. 1978), ***cert. denied,*** 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796; ***Gregg u. Georgia,*** 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); ***Louisiana ex rel. Francis v. Resweber,*** 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed.2d 422 (1947); ***In re Kemmler,*** 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed.2d 519 (1980); ***Booker u. State,*** 397 So.2d 910 (Fla.), ***cert. denied,*** 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981).

Inasmuch as the underlying basis of Buenoano's current claim has been litigated on numerous occasions prior to Buenoano's trial, the claim could have and should have been raised at trial and on direct appeal (as well as in Buenoano's previous motion). ***See,*** Section II, ***supra.*** Accordingly, this claim was properly summarily denied by the trial court as a result of

Buenoano's procedural default in failing to urge this claim until her execution under a second death warrant was imminent.

IV.

THE PENALTY IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Finally, even if consideration of this claim on the merits is proper, Buenoano cannot make a ***prima facie*** showing that she is entitled to relief, as the execution of the death penalty by electrocution has been found to be constitutional by all state and federal courts. ***See,*** Section 111, ***supra.***

V.

BUENOANO IS NOT ENTITLED TO HABEAS CORPUS RELIEF.

In the event Buenoano should ask this court to treat the instant appeal as a petition for writ of habeas corpus or for extraordinary relief or actually file the same, she is still entitled to no relief. Failure to preserve an issue at trial or raise it on direct appeal procedurally bars the habeas corpus court's consideration of the issue. ***Parker u. Dugger,*** 537 So.2d 969 (Fla. 1989). "Habeas Corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial." ***Blanco u. Wainwright,*** 507 So.2d 1377, 1384 (Fla. 1987). Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal or in a rule 3.850 motion, or on matters that were not objected to at trial. ***Parker u. Dugger,*** 537 So.2d 969 (Fla. 1989).

CONCLUSION

Based upon the foregoing arguments, the State of Florida respectfully requests that this honorable court affirm the summary denial of the motion to vacate and deny any and all other requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee/Response to Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to Billy H. Nolas, Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 15th day of June, 1990.

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