IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2417

WILLIAM K. TAYLOR,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "R." followed by the appropriate volume and page numbers. References to the postconviction record on appeal shall be referred to as "PC-R." followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Taylor respectfully requests oral argument.

JURISDICTIONAL STATEMENT

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See, Art. l, Sec. 13, Florida Constitution. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Taylor's death sentence.

This Court heard and denied Mr. Taylor's direct appeal. *Taylor v. State*, 937 So. 2d 590 (Fla. 2006). A petition for a writ of habeas corpus is the proper means

for Mr. Taylor 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 v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985).

STATEMENT OF THE CASE AND THE FACTS

The episode from which this case arose occurred on the night of Friday, May 25, 2001. *Taylor v. State*, 937 So. 2d 590, 593 (Fla. 2006). The evidence presented at trial was summarized in *Taylor v. State*, 937 So. 2d at 592-97. On June 9, 2004 Mr. Taylor was found guilty as charged of one count of first-degree premeditated murder for the murder of Sandra Kushmer, one count of attempted first-degree murder for the attempted murder of her brother, William Maddox, one count of robbery with a deadly weapon, one count of robbery with a firearm, and one count of armed burglary of a dwelling. R. Vol. VIII, 1212; R. Vol. XXV, 2477. The penalty phase was conducted on June 11 and 14, 2004, ending with a 12-0 death recommendation. R. Vol. VIII, 1285. The trial court imposed a death sentence on September 29, 2004. R. Vol. XXX, 3222. The written sentencing order and judgment and sentence are located at R. Vol. VII, 1314-26 and 1330-46.

This Court's docket (Appendix A) reflects that the Public Defender for the Tenth Judicial Circuit was designated to represent Mr. Taylor on appeal. Special

Assistant Public Defender Andrea M. Norgard filed the Initial Brief of Appellant on May 2, 2005. Assistant Attorney General Carol M. Dittmar filed the Answer Brief of Appellee on August 3, 2005. Ms. Norgard filed the Reply Brief of Appellant on December 5, 2005. The claims raised on direct appeal were:

1. The trial court erred in denying the Defendant's Motion to Suppress.
2. The sentence of death in this case is disproportionate.
3. The United States Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) invalidates Florida's capital sentencing procedures.
4. Florida's standard jury instructions unconstitutionally shift the burden of proof to the defendant.
5. Florida's standard jury instructions unconstitutionally minimize and denigrate the role of the jury in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985).

This Court denied the first three claims on the merits after discussion. The instructional error claims were denied on the merits after the Court quoted an excerpt from the record showing that the trial court actually gave the nonstandard instructions that the defense requested.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for writ of habeas corpus, Mr. Taylor asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY RAISING BOILER PLATE ISSUES THAT DID NOT APPLY IN MR. TAYLOR'S CASE.

Appellate counsel raised six issues in Mr. Taylor's direct appeal. Four of the six issues were essentially boiler-plate claims. They comprised approximately twenty pages of Mr. Taylor's initial brief, as compared to the two remaining issues, which comprised only fourteen pages.

In Issues V and VI, appellate counsel asserted boiler-plate claims that Florida's standard penalty phase jury instructions are unconstitutional for two reasons. In Issue V, appellate counsel argued that the standard "penalty phase jury instructions unconstitutionally shift the burden of proof to the defendant to establish mitigating factors and to show that the mitigating factors outweigh the aggravating factors." Initial Brief of Appellant at 94-97. However, as this Court explained in its opinion

on direct appeal, this claim is without merit because the judge at trial did not read the standard jury instructions that appellate counsel argued are unconstitutional:

> Further, despite this challenge to the standard jury instruction, the trial judge in this case did not use the standard instruction. The trial court in preliminary proceedings informed the parties that she was going to use a modified instruction which informed the jury that only if the jury finds that the aggravating circumstances outweigh the mitigating circumstances could a sentence of death be recommended:
>
> > Court: I would intend to read an instruction that indicates only if the aggravators outweigh. In other words, it does away with the possibility of shifting the burden. You understand what I'm saying?
> >
> > State: I understand. But that's the standard instruction that I go off of.
> >
> > Court: The standard isn't going to get it, okay. This is a death penalty case. As far as I'm concerned, the standard is …it's extreme due process. So if there is a doubt as to which way – what harm is it? That's really what you are asking them to do. The burden really is on the State.
>
> Since the judge at trial did not read the standard jury instruction that Taylor asserts to be erroneous, but read an instruction that required the jurors to determine if the aggravators found outweighed the mitigators in rendering the advisory sentence, we conclude that Taylor's claim is without merit on this issue.

Taylor, 937 So. 2d at 599-600.

In Issue VI, appellate counsel argued that the standard "penalty phase jury instructions improperly minimize and denigrate the role of the jury in violation of *Caldwell v. Mississippi*." Initial Brief of Appellant at 97-98. However, as with

Issue V, this Court explained that this issue is also meritless because the trial judge did not read the standard jury instruction:

> Further, as with Taylor's first jury instruction challenge, the judge in this case did not give the standard jury instruction. Rather, at the beginning of the trial and in the actual jury instruction, the judge repeatedly informed the jury that great weight would be given to its recommended sentence. Even before voir dire, the court told the prospective jurors:
>
> > Now, it is the judge's responsibility to impose a sentence in any case, including a case involving murder in the first degree. However, however – and this is important, I want you to hear me very carefully – in a case where a jury makes a recommendation of a sentence of either life or death, it is only under very, very rare circumstances where a Court would impose a sentence other than the one recommended by the jury.
> >
> > I'm going to repeat that. Although it's the judge's job, in any case, to sentence a defendant, in any case, in a case involving the charge of murder in the first degree where a jury is called upon to make a recommendation as far as sentencing is concerned, it is only under the very rarest of circumstances when a judge would not follow the jury's recommendation.
>
> During the penalty phase, the judge instructed the jurors as follows:
>
> > As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.
> >
> > However, your advisory sentence must be given great weight by the Court in determining what sentence to impose upon the defendant. And it is only under very rare circumstances that the Court could impose a different sentence.
> >
> > The argument Taylor presents has been rejected by this Court, *see Brown*, 721 So. 2d at 283, and the trial judge did not use the

> standard jury instruction; therefore, we conclude that this claim is similarly without merit.

Taylor, 937 So. 2d at 600. Additionally, in a concurring opinion, Justice Pariente "commend[ed] the trial judge for using special instructions that gave jurors a better and more complete picture of their roles in the capital sentencing process than the standard instructions." *Taylor*, 937 So. 2d at 604 (Pariente, J., concurring).

A claim of ineffective assistance of appellate counsel is cognizable in a petition for habeas corpus. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). The *Strickland* test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *Orazio v. Dugger*, 876 F.2d 1508 (11th Cir. 1989).

In the case at hand, appellate counsel rendered deficient performance under *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). At a minimum, appellate counsel should read the entire record on appeal before filing an initial brief. It is apparent from the claims raised in Mr. Taylor's direct appeal that appellate counsel did not read the entire record on appeal, because if she had done so she would have known that the trial judge did not read the standard jury instructions that she challenged in Issues V and VI.

As to prejudice, the usual formulation is that the prejudice prong of an ineffective assistance claim mirrors that of *Strickland*, namely a reasonable probability of a different outcome. *Strickland v. Washington*, 466 U.S. 668 (1984).

If that standard is applied here relief would never be granted. Instead, the Petitioner claims entitlement to relief without a showing of prejudice under the doctrine of *United States v. Cronic*, 466 U.S. 648 (1984). *Cronic* is a companion case to *Strickland*, which was filed on the same day. The *Cronic* opinion explicates and expands on the statement in *Strickland* that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual of constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice . . . Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.

Strickland, 466 U.S. at 692. If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself unreliable. *Cronic*, 466 U.S. at 659. Similarly, raising a collection of boiler plate issues without considering the uniqueness of the client's case does not constitute a meaningful direct appeal. The prejudice standard applicable here should "mirror" the *Strickland/Cronic* doctrine, and this Court should apply *Cronic*.1

1 At oral argument, counsel responded to an innocuous query about which issue or issues she wanted to address by saying that her first claim was, in her "personal opinion," unsupported by the facts. She did not have to say that. This Court adjudicated the claim on the merits anyway.

CLAIM II

APPELLATE COUNSEL'S PERFORMANCE WAS DEFICIENT AS SHE FAILED TO RAISE IN THE INITIAL BREIF MERITORIOUS ISSUES WHICH WARRANTED REVERSAL OF MR. TAYLOR'S CONVICTIONS AND SENTENCES.

Defense counsel filed a renewed motion for judgment of acquittal motion and for a new trial and/or penalty proceeding. ROA Vol. VIII 1274-80. In it, he argued that, as to Counts 1 and 2, the Court should have granted the Defendant a judgment of acquittal as to the charges of premeditated first degree murder and premeditated attempted first degree murder, motions for which were made at the end of the State's case and again at the close of all of the evidence, due to the State presenting insufficient evidence of premeditation. The defense cited *Norton v. State*, 709 So.2d 87 (Fla. 1997), *Mungin v. State*, 689 So.2d 1026 (Fla. 1995) and *Carpenter v. State*, 758 So.2d 1182,1196 (Fla. 2001). In particular, the defense cited *Mungin* to the effect that:

> In a case such as this one involving circumstantial evidence, a conviction cannot be sustained—no matter how strongly the evidence suggests guilt—unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State*, 351 So. 2d 972, 976 (Fla. 1977). A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989).

> The State presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; *Mungin* procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that *Mungin* intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Although the jury heard evidence of collateral crimes, the jury was instructed that this evidence was admitted for the limited purpose of establishing the shooter's identity.
>
> Although the trial judge erred in denying the motion for judgment of acquittal as to premeditation, we do not reverse Mungin's first-degree murder conviction because the judge correctly denied the motion as to felony murder.

Mungin, id. At argument on his motion on August 16, 2004, defense counsel conceded that the defendant provided several different versions of what had happened. Nevertheless, he argued that, although the jury can believe whichever version they find credible (or none), premeditation requires reflection before the actual killing. Citing *Mungin*, he argued that premeditation had not been proved because the State failed to exclude every reasonable hypothesis of lack of premeditation, i.e. that the forensic evidence with respect to the killing was consistent with that being a killing on the spur of the moment. ROA Vol. 30, 3146-49.

Defense counsel argued that the convictions for first degree murder and attempted first degree murder could not be sustained on a felony murder theory

because the attempted first degree murder of William Maddox was neither charged nor prosecuted as an attempted felony murder and the jury was instructed only on attempted premeditated murder. Counsel further argued that the first degree felony murder of Sandra Kushmer was not proved beyond a reasonable doubt to have occurred during a robbery or burglary in which the defendant knowingly participated. Counsel further argued that the killing of Sandra Kushmer had not been shown to be other than the independent act of another. The defense cited *Pittman v. State*, 841 So,2d 690 (Fla. 2d DCA 2003) and *Rodriguez v. State*, 571 So.2d 1356 (Fla. 2d DCA 1990) for those propositions. ROA Vol. VIII 1276.

As to counts two and three, defense counsel argued that there was a "fatal variance between the allegation of William Maddox in the indictment and then the proof at trial of Bill or Billy Maddox." ROA Vol. 30, 3149. The defense argued that:

> This Court should grant the Defendant a judgment of acquittal as to the charges of attempted first degree murder and robbery with a deadly weapon, motions for which were made at the end of the State's case and again at the close of all of the evidence, because there was a fatal variance between the allegation of the identity of the victim (William Maddox) in the Indictment and the actual victim as testified to at trial: "Bill Maddox" or "Billy Maddox." The State also presented no evidence that "Billy Douglas Maddox," the victim/witness who testified at trial, was usually or commonly known as "William Maddox," as alleged in the Indictment.

ROA Vol. VIII, 1276, citing *Raulerson v. State*, 358 So.2d 826 (Fla. 1978).

As to counts three and four (charging robbery), the defense counsel argued that the State failed to prove that the items stolen specifically alleged in those counts of the indictment (checks and credit cards) were in fact taken as a result of the use of force, violence, assault, or putting in fear. The evidence is that the defendant later took the checks and credit cards out of his car. The testimony with respect to Sandra Kushmer's credit cards and checks was that the defendant took them out of her purse after someone else hit her. Essentially, the argument was that the evidence failed to establish anything beyond *post hoc* looting.

Defense counsel further argued that:

a. The court denied his motion to suppress any and all evidence obtained from, or as a result of, the search of his motel room in Memphis, Tennessee, on May 29-30, 2001, and permitted the State to argue and use such evidence at the trial;

b. The court denied his motion in limine 4 requesting that the State not be permitted to argue or present any evidence of the Defendant's attempted or actual use of the victim's checks and/or credit cards, and permitted the State to argue and use such evidence at the trial;

c. The court overruled his objection to the admission in evidence of the pawn receipt for the shotgun, State's Exhibit number 17, through witness Benjamin Linsky, who was not
shown to be the records custodian or otherwise a qualified witness under section 90.803(6);

d. The court sustained the State's objection and refused to allow defense counsel to refresh the recollection of witness "Billy Maddox," as to his true and legal name, with a copy of his birth certificate;

e. The court refused to provide the jury with an interrogatory form of verdict specifying whether the jury found the Defendant guilty of premeditated or felony first degree murder, or both, as requested by defense counsel;

ROA Vol. VIII, 1277-78. At the hearing on August 16, 2004 defense counsel reminded the court that the defendant testified at the motion hearing that he was under the impression that he was giving consent to search his truck, rather the hotel room in Tennessee where he was captured. The consent to search form he signed was blank and didn't say hotel room on it. ROA Vol. XXX, 3152 *et seq*. Another reason for a new trial is the overruling of defense counsel's objection to the testimony of Mr. Linsky, the former owner of the pawn shop where the victim's stolen property was recovered. He had been permitted to testify by referring to business records from the shop. As defense counsel argued, he did not qualify as the records custodian because he sold the business to a Ms. Logan months before the event occurred. Finally, he reasserted his objection to the Court's refusal to provide an interrogatorial form of verdict so the jury could report whether or not they found Taylor guilty of felony murder or premeditated murder.

Defense counsel requested a new penalty phase because the court denied the defense request to advise the jury that they must find unanimously and beyond a reasonable doubt each aggravating circumstance. Another ground for new penalty phase was the Court's denial of the defense's constitutional challenge to

Fla.R.Crim.P. 3.202, which allowed the State's expert, Dr. Taylor, to have access to the defendant before he testified.

Defense counsel reasserted his objection to the Court's denial of the defense challenge to the entire victim impact concept and the court's denial of the motion attacking the constitutionality of Florida's death penalty scheme. ROA Vol. XXX, 3156.

The trial court denied these motions and objections. They could have and should have been raised on direct appeal. Instead, appellate counsel simply abandoned them. The Petitioner herein asserts them as components of his claim that appellate counsel provided ineffective assistance of counsel.

Appellate counsel has the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." *Strickland*, 466 U.S. 668. To establish that counsel was ineffective, *Strickland* requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

Petitioner recognizes that both this Court and the United States Supreme Court have held that appellate counsel need not file every available colorable claim and that space considerations may require counsel to winnow down his or her arguments. *Wilson*, 474 So. 2d at 1164; *Darden v. State*, 475 So. 2d 214, 217 (Fla. 1985); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986). This is not a case where, because of space considerations, appellate counsel was forced to winnow down her arguments. Counsel wasted much of the initial brief arguing boilerplate instructional error claims that did not even apply to this case, because the instructions complained of were not given in the first place.

CONCLUSION AND RELIEF SOUGHT

To the extent that further fact finding is necessary to determine the issues raised herein or to the extent that an objection is raised to the effect that the allegations asserted herein must be based only on the record as it stands and that additional facts should not be considered, Petitioner moves that jurisdiction be relinquished to the trial court to hear and decide the facts at issue. Otherwise, Petitioner moves that he be afforded a new trial, a new direct appeal, or for such relief as this Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on November 5, 2010.

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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. 9.210.

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