IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
Capital Postconviction Case

HARRY BUTLER,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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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. Butler's death sentence.

This Court heard and denied Mr. Butler's direct appeal of his conviction and sentence of death. *Butler v. State*, 842 So. 2d 817 (Fla. 2003). A petition for a writ of habeas corpus is the proper means for Mr. Butler 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

Harry Butler was arrested on March 14, 1997 for the first degree murder of Leslie Fleming. A Pinellas County grand jury indicted Mr. Butler on one count of first degree murder on April 7, 1997. R. Vol. I, 6-7. The case was tried to a jury which returned a guilty verdict. On January 11, 1999, the trial court sentenced Mr.

Butler to death. R. Vol. X, 1763. The judgment and sentence were affirmed at *Butler v. State*, 842 So. 2d 817 (Fla. 2003).

Mr. Butler filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on July 13, 2004, wherein he raised eleven claims. PC-R. Vol. II, 293-310; PC-R. Vol. III, 311-447. On May 13, 2010, the circuit court filed an Order Denying Defendant's Amended Motion to Vacate Judgment of Conviction and Sentence. PC-R. Vol. XI, 1784-1810. A notice of appeal was timely filed on June 4, 2010. PC-R. Vol. XII, 1813-40.

CLAIM I

APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO FILE A CERTIORARI PETITION WITH THE SUPREME COURT AND FAILING TO ADVISE HIS CLIENT APPROPRIATELY.

A claim of ineffective assistance of appellate counsel is cognizable in a petition for a writ of habeas corpus. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). The standard applicable to a claim of ineffective assistance of appellate counsel raised in a habeas petition mirrors the *Strickland v. Washington* standard for trial counsel ineffectiveness. *See Jones v. Moore*, 794 So. 2d 579, 583 (Fla. 2001); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (applying *Strickland* test to challenge of counsel's effectiveness on appeal).

The direct appeal in this case resulted in 4-3 split over whether to affirm the death sentence. Justices Wells, Lewis, Quince and Harding concurred with the majority decision. Justices Pariente, Anstead and Shaw dissented from the affirmance of the death sentence. Altogether four opinions were published. The dissenting opinion written by Justice Pariente asserted two bases for reversing the death sentence and remanding for a life sentence, proportionality and *Ring v. Arizona*, 122 S.Ct. 2428 (2002). These circumstances show that the appeal raised serious issues regarding the constitutionality of the death sentence in this case.

As reflected by the attached correspondence (Appendix A) Butler's direct appeal attorney intended to file a petition for a writ of certiorari in the United States Supreme Court, but ultimately, and at the last minute, declined to do so because he had not received a notarized financial statement from his client. This, despite the fact that Butler had already filled out and signed such an affidavit, thus indicating his desire to have the petition filed, but had to execute another one because he had difficulty negotiating the prison's notarization procedures.

The opinion on direct appeal was dated April 3, 2003, thus starting a ninety day clock, until July 2, for filing a petition in the Supreme Court (if the time for filing a motion for rehearing is not counted). In correspondence dated April 28, 2003, appellate counsel advised Mr. Butler of the denial of his appeal, told him that

he intended to file a certiorari petition, and requested that Butler execute an enclosed indigency form. Appellate counsel's correspondence of May 9, 2003 shows that Butler tried to do so, but failed to get it notarized. The letter contains the statement, "I need as much time as possible to complete the petition. If I do not receive the form by the end of this month, I will assume you do not want to proceed with the Supreme Court petition." The next correspondence from appellate counsel is dated July 14, either close to the last day that a petition could be filed or well past it depending on whether the fifteen days for filing a motion for rehearing is counted. It informs Butler that a petition had not been filed, blames Butler for not providing the notarized affidavit and wishes him luck with his postconviction proceedings. These records do not reflect that appellate counsel ever met with Butler face to face. Union Correctional Institution does not permit prisoner initiated telephone calls.

The problem with handling all communication by mail in this case is shown by the postconviction record. Although he balked at taking a formal IQ test, Mr. Butler's school records suggest that the score would be a low one if he did. In one of Butler's school reports from the fifth grade, shortly after his grandmother passed away, a teacher's comment was "slow, slow, slow." PC-R. Vol. VII at 1059-60. He received D's and F's throughout high school. *Id*. at 1090. He had a significant number of absences. *Id*. at 1160. In 1972, another teacher wrote, "Harry showed

little interest in his work. He is quite slow in all areas." *Id*. at 1159. He dropped out of school in eleventh grade after he broke his leg and could not play football anymore. Standardized testing that was conducted in Pinellas County revealed that Mr. Butler was performing below normal levels. *Id*. at 1160. Likewise, testing and educational status reports from the Department of Corrections records revealed that Mr. Butler was underperforming intellectually. *Id*. The attached documents also indicate that the prison may have been undergoing personnel and procedural changes in how it arranged for notary services for inmates, thus making the process more confusing.

Under these circumstances counsel had a duty to be more proactive. Simply advising his client that he would "presume" he did not want a petition filed if the client did not successfully negotiate a confusing bureaucratic process on his own makes no sense when the client had already attempted to complete the required affidavit. Appellate counsel's actions are especially problematic here, where he advised both his client and CCRC co-counsel that he would be filing a petition, and then waited until after the time for doing so had expired to advise them otherwise. Under Sup.Ct.R.13 counsel could have asked for a sixty day extension of the ninety day period for filing a petition if he had a good faith basis for doing so, such as logistical difficulties in obtaining the necessary paperwork through the prison

system, but he would have had to make the request at least ten days prior to the expiration of the time period. He obviously did not do so.

Prejudice and Remedies

Admittedly there are some logical problems here. Remanding the case only to permit the filing of a certiorari petition would be pointless. The usual remedy for a finding of ineffective assistance of appellate counsel is a new appeal de novo. That is the remedy sought here. Such a remedy would permit a timely certiorari petition to be filed should this Court deny relief.

As to prejudice, the usual formulation is that the prejudice prong of an ineffective assistance of appellate counsel 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 could 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*, 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 or 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. With regard to what had been identified as a part of the direct appeal process, namely certiorari proceedings, Butler was altogether denied the assistance of counsel. Similarly, 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 presumptively unreliable. *Cronic*, 466 U.S. at 659. The prejudice standard applicable here should "mirror" the *Strickland/Cronic* doctrine, and this Court should apply *Cronic*.

In the alternative, the Petitioner urges adoption of an adverse effect standard of prejudice similar to that applied where there is a conflict of interest. The adverse effect here is Butler's inability to secure timely review of his case in the Supreme Court, regardless of the probability or otherwise of receiving relief. Because a finding of adverse effect would satisfy the prejudice component, Butler is entitled to a new appeal *de novo*.

CLAIM II

APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY ABANDONING THE CLAIM THAT LASHARA BUTLER WAS INCOMPETENT TO TESTIFY

The trial testimony of LaShara Butler (LaShara), the six-year old daughter of Butler and the victim, was summarized by this Court on direct appeal:

> According to LaShara's trial testimony, on the night before the body was discovered, she had been sleeping with her mother when her father entered the bedroom, picked her up, and took her to her own room. LaShara testified that she saw his face during this process. LaShara also stated she heard her mother say, "Stop," saw her father's leg pinning down her mother's leg, and heard her mother screaming as though she were being hurt. Officer Scott Ballard, one of the first officers on the scene, testified that on the way to the police station, LaShara said, "My daddy hurt mommy. I heard him yelling at her."

Butler v. State, 842 So. 2d 817, 820 (Fla. 2003). Defense counsel failed to seek expert assistance in challenging this key component of the State's case, a fact which forms the basis for one of the claims in Butler's Rule 3.851 motion for postconviction relief. Nevertheless, as described below, trial counsel did file a motion challenging Lashara's legal competency to testify (ROA Vol. IV, 688), which was heard and denied just prior to trial. Counsel renewed his objection when she was called to testify, and again in a motion for new trial. ROA Vol. IV 759-60. Appellate counsel rendered ineffective assistance by abandoning the issue.[1]

[1]The initial brief was 88 pages long, so page limit considerations did not require counsel to omit a viable claim.

The transcript of the hearing on the motion to determine competency appears at ROA Vol. XI, trial transcript pp. 61-102. Counsel cited Fla. Stat. §90.603, which provides that:

> A person is disqualified to testify as a witness when the court determines that the person is:
> (1) Incapable of expressing himself or herself concerning the matter in such a manner as to be understood, either directly or through interpretation by one who can understand him or her.
> (2) Incapable of understanding the duty of a witness to tell the truth.

Out of the presence of the jury, the court asked her general questions about going to school, where she lived, who her friends were and so on. She gave mostly age appropriate answers those questions. However, when asked "how long are you in school? Do you even know how many hours or when you get out?" she shook her head in the negative, showing difficulty with regard to the concept of time. *Id*. 67. Likewise, when asked "Do you remember what you were doing when you were 6 years old?" she again responded in the negative. Her repeated definition of telling the truth was " "It means when you do something and somebody see it and they said who did it and you said I did it." Not telling the truth means "when you do something, somebody sees it, and they–and you say not me." On that basis the court found her to be competent and swore her in, although counsel argued that such a finding required a further inquiry into her ability to recall past events. *Id*. 75.

In response to counsel's argument, the court then asked a series of questions about what she had done on her birthday, who her teachers had been the past year, what her last residence was like and so on. Defense counsel was then permitted to inquire. The following exchange took place:

> Q. Now, do you know day your mommy died?
> A. Uh-huh.
> Q. What day is that?
> A. March the 14th.
> Q. And you know that because your grandma told you that's the day; isn't that right?
> A. Yes.

Id. 84. And,

> Q. How many times has she told you that your daddy killed your mommy?
> A. A lot.
> Q. A lot?
> A. It was, like, five times.

Id. 85. And finally:

> Q. Has your grandmother told you that you need to come in and tell people that your daddy killed your mommy?
> A..Yes.
> Q. Did she tell you that a lot?
> A. Yes.

Id. 90. The judge excused her with an explanation about what she would see when she came back to testify before the jury. She responded by volunteering that, "My grandma told me that there was – people in those chairs are going to decide if he is guilty or not guilty." *Id*. 91. The judge explained that that "was exactly what their job is, all right." *Id*.

The court concluded the hearing by agreeing to review the deposition of one of the officers who witnessed the interaction between LaShara and her grandmother. Defense counsel argued that the police interview demonstrated bias on the part of the interviewer. The court also supplemented the record with the a video interview of LaShara by another officer. The court agreed that the bias on the police officer was obvious. "[T]he officer probably has little or no training in dealing with children witnesses, not only the leading questions but also the constant reinforcement . . . he was always telling her how smart she was and how bright she was." *Id*. 95-96. But the court ruled that "it doesn't taint the witness." The Court identified Court's composite exhibit number 1 as the tape, the deposition and transcript of the interview, and directed the clerk to seal it for review by the appellate court. "It is not going to the jury. It is going to the Appellate Court." *Id*. 101. When Lashara was called to testify defense counsel renewed his motion that she should have been deemed incompetent to testify because her testimony was unduly tainted. The court allowed him a continuing objection. Vol. XII, trial transcript page 220.

Appellate counsel also could have made use of the deposition of Dr. Crum, a pediatric psychologist who examined Lashara at the request of the State Attorney's office. Although Dr. Crum did not testify either at the competency hearing or at trial, his deposition was included in the record on appeal. ROA Vol. VII, 1025-53.

He was asked whether he had a "problem" with "interviewers leading six year old witnesses." *Id*. 1032. He said he had "a lot of problems with leading questions in situations like this."

The Court's reasoning was as follows:

> [W]hat I have heard in the record is grandma has told her somewhere between five times and daily that daddy killed mama. Grandma told her that she's got to come into Court. There's a trial to see whether . . . whether daddy killed mama. And she, of course, mentions her mother's name in her prayer every night
>
> The matters can be disclosed to the jury. They are not going to rise to the level of [excluding the witness].

Vol. XI, trial transcript page 92-93. The judge indicated that he would only exclude the witness if the "taint" were comparable to a witness identification that was so tainted that it would be excluded.

Defense counsel relied on *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994), which was recently rejected by the Fifth District in *State v. Karelas*, 28 So.3d 913 (Fla.App. 5 Dist.2010). It does not appear that this Court or other district courts of appeal in Florida have addressed *Michaels*. *See Karelas. Michaels* held that a child witness's testimony should be excluded unless the state can establish that the suggestive interview did not affect the witness's ability to testify truthfully. As noted above, the trial court here found that the police interviewer was obviously biased and suggestive. "Within the mainstream scientific community, scholars

agree that young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others." Stephen J. Ceci & Richard D. Friedman, The Suggestibility of Children: Scientific and Legal Implications, 86 Cornell L. Rev. 33, 34 (2000). Interview techniques that might not be suggestive to an adult, such as repeating a question multiple times, may be highly suggestive to a child who is more likely to try to please the interviewer by changing her story until she finds the "right" answer. *State v. Michaels, supra*, 642 A.2d 1372, 1378 (citing Debra A. Poole & Lawrence T. White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Developmental Psychology 975 (1991)). Exposing a child witness to suggestive questioning - whether by police or in counseling or therapy - can therefore create a significant risk that the child's trial testimony will be inaccurate and taint the proceedings. *See, e.g.*, *Michaels*, 642 A.2d at 1382 (child sex abuse conviction reversed where suggestive interviews of child witnesses, including "vilification of defendant," created "substantial risk" that children's testimony would be unreliable). Moreover, cross-examination of a child witness could be ineffectual if the child sincerely takes his or her recollections to be grounded in facts and does not remember the improper interview procedures which may have suggested them.

Generally, it is reasonable to assume that cross-examination and the opportunity to observe witness demeanor puts jurors in an adequate position to evaluate witness reliability. Because of the effect on children to suggestive or coercive questioning, however, cross-examination and observing witness demeanor will not help jurors evaluate the reliability problems associated with statements and testimony elicited by these methods. Social science research supports a similar finding. "Leading, suggestive, or coercive questioning can not only result in a child making inaccurate statements, it can cause the child to develop a subjectively real memory for an event that never happened." (Wakefield, Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community? (2006) 23(3) Am. J. of Forensic Psychology 57.) Once tainted, the distortion of the child's memory can be permanent. "Once this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other." *State v. Wright* (1989) 116 Idaho 382, 775 P.2d 1224, 1228. The corrupting influence of improper interrogation has an even more pronounced effect on young children. (King & Yuille, Suggestibility and the Child Witness in Children's Eyewitness Memory (Ceci et al. edits., 1987) p. 29; Ceci, et al. Age Differences in Suggestibility: Narrowing the Uncertainties in Children's Eyewitness Memory (1987) p. 82.)

> Careful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable. A number of studies have shown that children will lie when they have a motivation to lie, that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe, and that inappropriate post-event questioning can actually change a child's cognitive memory of an event. Even the studies that concluded that children are resistant to suggestion found a small percentage of children who were not.

(Younts, Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions (1991) 41 Duke L.J. 691, 692, footnotes omitted. The United States Supreme Court cited the intractable nature of memories created by suggestive questioning in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), modified on denial of reh'g, 129 S. Ct. 1 (2008) in support of its finding of "serious systemic concerns" in child rape cases. (Kennedy, supra, 128 S.Ct. at p. 2663, citing Quas et al., Repeated Questions, Deception, and Children's True and False Reports of Body Touch (2007) 12 Child Maltreatment 60, 61-66 [finding that 4-to 7-year-olds "were able to maintain [a] lie about body touch fairly effectively when asked repeated, direct questions during a mock forensic interview"].)

The point was preserved by trial counsel and appellate counsel provided prejudicial ineffective assistance by failing to argue it.

CLAIM III

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. BUTLER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.[2]

[2]Counsel acknowledges that this claim is not supported by current case law.

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F. 3d 1029, 1033 (9th Cir. 2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890), are not permitted.

Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U. S. Constitution and the Florida Constitution prohibition against cruel and unusual punishment. This claim is evidenced by the botched execution in Florida of Angel Diaz on December 13, 2006. As such, the defendant requests that the death sentence be vacated or that this Court order that any execution be stayed.

CLAIM IV

MR. BUTLER'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

A prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399 (1986). The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. *Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time).

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition.

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 December _____, 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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SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
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Respondent.

APPENDIX TO PETITION FOR WRIT OF HABEAS CORPUS

Exhibit "A" Correspondence from appellate counsel regarding the filing of a petition for writ of certiorari

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