IN THE SUPREME COURT OF FLORIDA

HARRY BUTLER,

Petitioner,

v. **CASE NO. SC10-2458**
L.T. No. CR 85-07084-CFANO-D

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ETC.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF LAW

COME NOW, Respondents, Secretary, Florida Department of Corrections, etc., by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondents respectfully submit that the petition should be denied, and state as grounds therefore:

FACTS AND PROCEDURAL HISTORY

Harry Butler was arrested on March 14, 1997 for the first degree murder of Leslie (Bay) Fleming. On April 7, 1997, the Grand Jury indicted Butler on one count of first degree murder. (DA V1/6-7). Butler's jury trial was held on June 23-27, 1998; the jury returned a guilty verdict on June 26, 1998. (DA V17/1232). The penalty phase was held on June 27, 1998. The jury recommended a sentence of death by a vote of eleven to one.

(DA V17/1321). On January 11, 1999, Butler was sentenced to death. (DA V10/1763).

In *Butler v. State*, FSC Case No. 95,158, Butler's appellate counsel, Assistant Public Defender Kevin Briggs, filed an 89-page initial brief asserting the following issues on direct appeal:

ISSUE ONE

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY CONCERNING PRIOR ACTS OF VIOLENCE ALLEGEDLY COMMITTED BY MR. BUTLER.

ISSUE TWO

THE TRIAL COURT ERRED IN PERMITTING AN UNQUALIFIED EXPERT WITNESS TO TESTIFY CONCERNING DNA EVIDENCE.

ISSUE THREE

THE TRIAL COURT ERRED IN DENYING THE DEFENSE'S MOTION FOR A NEW TRIAL FOLLOWING THE DEFENSE'S DISCOVERY OF A PROBATION VIOLATION REPORT THAT WAS UNDISCLOSED BY THE STATE.

ISSUE FOUR

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THE ONLY PROPOSED STATUTORY AGGRAVATOR HAD BEEN ESTABLISHED BY THE EVIDENCE.

ISSUE FIVE

THE TRIAL COURT ERRED IN FAILING TO CONSIDER A STATUTORY MITIGATING CIRCUMSTANCE PROPOSED BY THE DEFENSE DURING THE PENALTY PHASE OF THE TRIAL BELOW.

ISSUE SIX

> MR. BUTLER'S DEATH SENTENCE IS EXCESSIVE, DISPROPORTIONATE, AND IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE FEDERAL AND FLORIDA CONSTITUTIONS.

(Initial Brief of Appellant, Case No. 95,158).

On May 9, 2002, this Court affirmed Butler's conviction and sentence but issued a revised opinion in *Butler v. Sta*te, 842 So. 2d 817 (Fla. 2003) upon the denial of Butler's motion for rehearing. The mandate issued April 24, 2003.

Butler did not file a petition for writ of certiorari in the United States Supreme Court.

Post-conviction Proceedings:

On July 13, 2004, Butler's collateral counsel, CCRC-M, filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend raising the following eleven issues:

CLAIM I

> MR. BUTLER IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. BUTLER'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT. MR. BUTLER CANNOT PREPARE AN ADEQUATE 3.851 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND HAS BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

CLAIM II

MR. BUTLER IS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO HIRE THE NECESSARY EXPERTS TO CHALLENGE AND OBJECT TO THE SCIENTIFIC FINDINGS, CONCLUSIONS, AND TESTIMONY OF THE WITNESSES FROM THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REGARDING THE PURPORTED DNA EVIDENCE

CLAIM III

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE THROUGH FAILURE TO CHALLENGE THE TESTIMONY OF STATE WITNESS LASHARA BUTLER.

CLAIM IV

MR. BUTLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSELS' FAILURE TO INVESTIGATE AND PERFORM ANY MEANINGFUL CROSS-EXAMINATION OF WITNESS TERRY JACKSON WHO WAS A KEY WITNESS AGAINST HARRY BUTLER.

CLAIM V

MR. BUTLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSELS' CONFLICTS OF INTEREST, SPECIFICALLY, ANNE BORGHETTI REPRESENTED AN ESSENTIAL STATE WITNESS, TERRY JACKSON, JUST PRIOR TO HER REPRESENTATION OF THE DEFENDANT, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM VI

EXCULPATORY EVIDENCE OF AN UNIDENTIFIED BLOODY FINGERPRINT AT THE CRIME SCENE WAS WITHHELD FROM THE COURT THROUGH EITHER INEFFECTIVE ASSISTANCE OF COUNSEL OR SUPPRESSION BY THE STATE IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER BRADY, STRICKLAND, AND THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES

CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM VII

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INFLAMMATORY AND IMPROPER CHARACTERIZATION OF SOME OF THE VICTIM'S WOUNDS BY ASSOCIATE MEDICAL EXAMINER MARIE HANSEN AS TORTUOUS WOUNDS DURING THE GUILT/INNOCENCE PHASE OF MR. BUTLER'S TRIAL RENDERING MR. BUTLER'S CONVICTION AND SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM VIII

TRIAL COUNSEL WAS INEFFECTIVE FOR MISCHARACTERIZING THE PHYSICAL EVIDENCE TO THE JURY IN HIS OPENING STATEMENT BY TELLING THEM THAT THE DNA OF AN UNKNOWN INDIVIDUAL WAS FOUND ON A GLASS DOOR AT THE CRIME SCENE WHEN IN FACT, THAT DNA WAS LOCATED AT A COMPLETELY DIFFERENT LOCATION ON THE OTHER SIDE OF TOWN. THIS MISREPRESENTATION COMPLETELY UNDERMINED THE CREDIBILITY OF THE DEFENDANT'S ATTORNEYS WITH THE JURY DENYING THE DEFENDANT ANY MEANINGFUL REPRESENTATION OF COUNSEL.

CLAIM IX

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PREPARE THE DEFENDANT TO TESTIFY IN HIS OWN BEHALF DURING HIS TRIAL, CAUSING HIM TO GIVE FALSE TESTIMONY ABOUT THE NUMBER OF FELONY CONVICTIONS AND SERIOUSLY UNDERMINING HIS CREDIBILITY WITH THE JURY.

CLAIM X

MR. BUTLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XI

> MR. BUTLER'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(V2/263-310).

The State filed its response on September 10, 2004. (V3/453-71). On December 14, 2004, Butler filed a Motion for DNA Testing. (V3/482-85). On April 8, 2005, the circuit court entered an Order on DNA Testing. (V4/581-84). On February 4, 2005, CCRC filed an Amended Motion to Vacate, which clarified claims one, three and seven. (V4/519-69). The State filed its response on April 6, 2005. (V4/575-80). Following evidentiary hearings in May and November of 2008 and September of 2009, the circuit court denied relief on May 13, 2010. (V11/1784-1810).

Butler's appeal from the denial of his post-conviction motion is currently pending before this Court in *Butler v. State*, Case No. SC10-1133. Butler's habeas petition was filed contemporaneously with his initial brief in the appeal of the denial of his motion for post-conviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Preliminary Legal Principles and Standards of Review

The Fourteenth Amendment's Due Process Clause guarantees a criminal defendant the right to the effective assistance of counsel on his first appeal. *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S.Ct. 2582 (2005); *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, "the right to effective assistance of counsel is dependent on the right to counsel itself." *Evitts,* 469 U.S. at 396 n. 7, 105 S.Ct. 830.

Although the United States Supreme Court has interpreted the Constitution to provide criminal defendants the right to appointed counsel on first-tier appeals, including permissive ones, *Halbert*, 545 U.S. at 610, 125 S.Ct. 2582, the Court has not found the right to exist with respect to certiorari review and other discretionary appeals. *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, (1989) (post-conviction proceedings by death row inmates); *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990 (1987) (collateral attacks); *Ross v. Moffitt*, 417 U.S. 600, 610, 617-18, 94 S.Ct. 2437 (1974) (discretionary appeals to the Supreme Court and a state's highest court). Thus, because there is no constitutional right to the assistance of counsel in the pursuit of appeals beyond first-tier ones, there is no corresponding right to the effective assistance of

counsel for such appeals. See *Wainwright v. Torna*, 455 U.S. 586, 587-88 & n. 4, 102 S.Ct. 1300 (1982) (per curiam) (concluding that without a constitutional right to counsel in pursuit of state supreme court review, a state habeas petitioner "could not be deprived of the effective assistance of counsel by his . . . counsel's failure to file the application [for certiorari] timely"); *Coleman v. Thompson*, 501 U.S. 722, 757, 111 S.Ct. 2546 (1991) ("Because [the petitioner] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas.")

The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the two-part *Strickland v. Washington*, 466 U.S. 668 (1984) standard for claims of trial counsel ineffectiveness. *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002). To prevail on a claim of ineffective assistance of appellate counsel, a criminal defendant must show (1) specific errors or omissions by appellate counsel that "constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance," and (2) that the "deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Dufour v. State*, 905 So. 2d 42,

70 (Fla. 2005) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986). Moreover, the appellate court must presume that counsel's performance falls within the wide range of reasonable professional assistance.

"If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000); *Spencer v. State*, 842 So. 2d 52, 74 (Fla. 2003) ("[A]ppellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success").

In sum, counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record. See, *Medina v. Dugger*, 586 So. 2d 317, 318 (Fla. 1991). And, habeas corpus "is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal." *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992).

CLAIM I

THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM (Failure to File Certiorari Petition with the United States Supreme Court)

On direct appeal, Butler's experienced appellate counsel, Kevin Briggs,[1] raised six substantive claims for review. Appellate counsel demonstrated his obvious familiarity with the record in his comprehensive statement of the facts. (See, Initial Brief, Case No. 95,158 at pages 5-35). Butler does not challenge the issues that were raised by his appellate counsel on direct appeal. Nor does Butler fault his appellate counsel for asserting, on rehearing, an alleged violation of *Ring v. Arizona*, 122 S. Ct. 2428 (2002), which this Court denied under *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), cert denied, 123 S. Ct. 662 (2002) and *King v. Moore*, 831 So. 2d 143 (Fla.) cert. denied, 123 S. Ct. 657 (2002). Instead, Butler alleges that his appellate counsel was ineffective in failing to file a petition for writ of certiorari with the United States Supreme Court following this Court's decision on direct appeal. However, because defendants are not constitutionally entitled to the

[1]Assistant Public Defender Kevin Briggs submitted the initial brief on Butler's direct appeal (Case No. 95,158) in 2000. By that time, Mr. Briggs had handled criminal appeals for the Public Defender's Office for more than a dozen years. See, e.g., *Krajnak v. State*, 509 So. 2d 970 (Fla. 2d DCA 1987) [Criminal appeal where the Defendant/Appellant was represented by Assistant Public Defender Kevin Briggs].

assistance of counsel in preparing petitions for certiorari, *Ross v. Moffitt*, 417 U.S. 600, 617, 94 S.Ct. 2437 (1974), Butler cannot attribute any prejudice to an alleged constitutionally deficient performance by his counsel. In short, because Butler had no constitutional right to counsel in connection with the filing of a certiorari petition, see *Ross*, he could not be deprived of the effective assistance of counsel by counsel's failure to file such a petition.

Moreover, even if Butler's IAC claim were cognizable, which the State strenuously disputes, Butler cannot demonstrate any deficiency of counsel and resulting prejudice under *Strickland*. Butler's rehearing claim, based on *Ring*, was denied by this Court under *Bottoson* and *King*. Prejudice is demonstrated by showing that the appellate process was compromised to the degree that confidence in the correctness of the appellate result is undermined. *Nixon v. State,* 932 So. 2d 1009, 1023 (Fla. 2006), citing *Rutherford*, 774 So.2d at 643. Butler concedes that he cannot demonstrate any prejudice under *Strickland.* Indeed, Butler admits "[r]emanding the case only to permit the filing of a certiorari petition would be pointless," and admits that he cannot meet the *Strickland* standard of a "reasonable probability of a different outcome." (Petition at page 6). Accordingly, Butler admittedly cannot establish any basis for habeas relief.

Furthermore, habeas corpus petitions are not to be used for additional appeals on questions which could have been or were raised on appeal or in a rule 3.850 motion. *Rodriguez v. State*, 919 So. 2d 1252, 1281, fn. 16 (Fla. 2005). Butler's attempt to relitigate his direct appeal anew in this habeas proceeding is procedurally barred. "Claims raised in a habeas petition which petitioner has raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition." *Zack v. State*, 911 So. 2d 1190, 1207 (Fla. 2005), quoting *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003).

In addition, any purported disagreement with the manner in which his appellate counsel previously raised the issue is also an insufficient ground to be heard in a habeas corpus petition. See, *Branch v. State*, 952 So. 2d 470, 482 (Fla. 2006), citing *Brown v. State*, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised."); see also *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990) ("After appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance.")

Butler's attempt to relitigate his direct appeal is both procedurally barred and also without merit. In 2005, this Court noted that in over fifty cases decided since *Ring's* release, this Court has rejected *Ring* claims. *Marshall v. Crosby,* 911 So. 2d 1129, 1134, fn. 5 (Fla. 2005) (collecting cases). And, although the State recognizes that the denial of certiorari by the United States Supreme Court does not carry any precedential value, the State notes that the Supreme Court has denied certiorari in numerous Florida cases raising a constitutional attack to Florida's capital sentencing scheme based on *Ring*. See e.g., *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002); *Cox v. State*, 819 So. 2d 705 (Fla. 2002), cert. denied, 537 U.S. 1120 (2003); *Pagan v. State*, 830 So. 2d 792 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). The denial of Butler's *Ring* claim was consistent with precedent from this Court and the United States Supreme Court. See also *Coday v. State*, 946 So. 2d 988 (Fla. 2006) (rejecting Ring claim in single aggravator case, HAC, and non-unanimous jury recommendation, but reversing death sentence for other reasons) (plurality opinion); *Abdool v. State*, 53 So. 3d 208, 228 (Fla. 2010) (rejecting *Ring* claim in case with two aggravating factors [HAC and CCP] and stating that this Court

has "repeatedly rejected the argument that the jury must reach a unanimous decision on the aggravating circumstances. See, e.g., *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Hodges v. State*, 885 So. 2d 338, 359 (Fla. 2004); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003). This Court has also rejected [the defendant's] argument that this Court should revisit its opinions in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002)." *Id*. at 228, citing *Guardado v. State*, 965 So. 2d 108, 118 (Fla. 2007).

This Court has repeatedly held that under Florida law, a defendant becomes death eligible once he is convicted of first degree murder. *Mills v. Moore*, 786 So. 2d 532, 538 (Fla. 2001) (holding that "when section 775.082 (1) is read in *pari materia* with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death"); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003) ("we have repeatedly held that the maximum penalty under the statute is death"); *Shere v. Moore*, 830 So. 2d 56 (Fla. 2002) (stating that a Florida defendant is eligible for a sentence of death if convicted of a capital felony); *Mann v. Moore*, 794 So. 2d 595, 599 (Fla. 2001) (finding the plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death).

Because a jury must unanimously vote to find a defendant guilty of first degree murder beyond a reasonable doubt, every person on death row has been placed there by a unanimous vote. Under Florida law, the sentencing phase is for the judge and jury to consider the possible sentences for which the defendant has already been found eligible and is not to make factual findings that enhance a sentence. Thus, because *Ring* does not apply to Florida's capital sentencing scheme, any attempt to raise a renewed challenge to Butler's death sentence, under the guise of ineffective assistance of appellate counsel, is both procedurally barred and also without merit.

Finally, rather than applying *Strickland*, Butler asserts that his IAC claim should be evaluated under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). In *Cronic*, the Supreme Court explained that "a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659, 104 S.Ct. at 2047. However, Butler has not demonstrated any denial of a constitutional right to counsel at a critical stage of the proceeding. Moreover, "a petitioner claiming that he was denied counsel at a critical stage must show that he was 'actually or constructively . . . denied counsel by government action.'" *Hunter v. Moore*, 304 F.3d 1066, 1071 (11th Cir. 2002) (quoting *Bell v. Cone*, 535 U.S. 685, 696 n. 3, 122 S.Ct. 1843,

1851 n. 3 (2002)). Thus, even if Butler arguably had a constitutional right to counsel for seeking discretionary review via a petition for writ of certiorari, which he did not have, Butler admits that his appellate counsel did not seek an extension of time to do so. This was a strategic choice that is subject to *Strickland's* performance and prejudice prongs. See *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (quotation marks omitted)). Butler's attempt to relitigate his direct appeal must be denied.

CLAIM II

THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM (Failure To Challenge Trial Court's Ruling that Child Witness Was Competent to Testify)

As previously noted, appellate counsel raised six substantive claims for review on direct appeal. "[T]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). In this habeas claim, Butler argues that his appellate counsel was ineffective in failing to challenge the trial court's discretionary ruling on the admissibility of LaShara Butler's testimony. Under Florida law, whether a child

witness is competent to testify is based on "his or her intelligence, rather than his or her age, and, in addition, whether the child possesses a sense of obligation to tell the truth." *Lloyd v. State*, 524 So. 2d 396, 400 (Fla. 1988). The trial judge has the discretion to decide whether a witness of tender age is competent to testify. *Lloyd,* 524 So. 2d at 400.

In this case, the trial court conducted a hearing at the time of trial, saw the then seven-year-old LaShara, personally questioned her, observed her demeanor, and found the child is "bright, articulate [and] well able to express the things she has observed." (DA V11/105). The trial court questioned LaShara directly and evaluated her ability to distinguish a truth from a lie, reality from fantasy or make believe, and her understanding of an oath. (DA V11/66-75). The trial court also asked LaShara questions about the events occurring around the time of her mother's death to evaluate her memory of that time period. (DA V11/77-83). Based on this questioning, the trial court found LaShara competent to testify. (DA V11/83). In addition, the trial court found that LaShara's testimony was not so tainted as to render it inadmissible, specifically finding that there was no indication of suggestion or taint during initial police questioning, but that the defense would be permitted to cross-examine her regarding suggestibility so that the jury could

consider it when weighing her credibility. At the time of trial, the court further concluded, in pertinent part:

> [THE COURT]: **The long of the short of it is I don't see anything that's going to taint her testimony as a matter of law where it should be excluded from the jury**. I will indicate to you that everything I have heard, everything I saw on that tape may go - will probably go into evidence if you all choose so that the jury can give it all proper weight. **But this child is bright, articulate, well able to express the things she has observed back then and now, and she is going to be on her own when you start asking her questions about what was said, what was discussed, what was asked, whether that suggested something.** But that's where we are.
>
> There's that first real interview which is - the first interview I assume she had. That might have been a spontaneous declaration to some officer or something of that nature, but that first interview certainly I didn't see a single thing about it that clearly suggested the way this child should testify.
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> (DA V11/96-97) (e.s.)

"Appellate counsel is expected to raise those claims which are deemed to have the most merit, and is not ineffective for failing to raise meritless issues." *Anderson v. State,* 18 So. 3d 501, 522 (Fla. 2009) (citations omitted). In light of the record confirming the trial court's focused inquiry of the child in this case, her responses to the inquiry, and the broad discretion afforded the trial court, Butler cannot demonstrate any deficiency of counsel and resulting prejudice in failing to challenge the trial court's ruling on direct appeal. See, *Floyd*

v. State, 18 So. 3d 432 (Fla. 2009) (finding no prejudice under *Strickland* by counsel's failure to object to child witness's competency where court sufficiently examined and properly qualified child witness).

In *Floyd*, this Court rejected a claim of ineffective assistance of trial counsel in failing to challenge the competency of child witnesses and explained, in pertinent part:

> We further conclude that Floyd has failed to establish that he was prejudiced by a failure to object. **The two child witnesses were sufficiently examined and properly qualified by the court.** Specifically, LaJade proved her intelligence level by correctly counting numbers and reciting the alphabet. She also understood her obligation to tell the truth "no matter what." Likewise, J.J. established his intelligence in that he stated his education level and the subjects he studied in school, and he made an earnest effort to pass the judge's "quiz" on mathematics. J.J. also understood the concept of lying, the consequence of lying, and his obligation to tell the truth. Finally, J.J. promised to answer each question truthfully. **Based on their answers, the trial court properly concluded that LaJade and J.J. were competent witnesses, and any objection presented by trial counsel would have been meritless. See *Baker,* 674 So. 2d at 200-01 (finding no abuse of discretion where the trial court qualified a six-year-old child after the child demonstrated that she knew her age, where she went to school, where she went to church, and the colors of clothing; the child established that she possessed a sense to tell the truth; and the child stated that she knew it was wrong to lie).**
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> * * *
>
> . . . Floyd also suggests that the allegedly contradictory statements of LaJade and J.J. create

> doubts with regard to the competency of the children to testify. We disagree. **Most of these statements are mere imperfect expressions attributable to the witnesses' tender age and do not affect the material portions of the children's testimony. See *Lloyd*, 524 So.2d at 400 (holding that the inconsistencies in various statements were nothing more than what one could expect from a child of five or six years of age and were not so egregious as to require the total rejection of the testimony).** Further, although there was a discrepancy between the testimony of the children with regard to the physical location of Floyd when the third gunshot was fired, [FN7] this discrepancy can be explained by the location of the witnesses, each of whom had a different view from which to observe the shooting. Accordingly, the failure to challenge the competency of the child witnesses did not render trial counsel ineffective.
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> *Floyd*, 18 So. 3d at 444-445 (e.s.)

Butler cannot establish any deficiency of counsel and resulting prejudice in failing to raise a challenge, on direct appeal, to the child's competency to testify under *Lloyd v. State,* 524 So. 2d 396, 400 (Fla. 1988) *or Baker v. State,* 674 So. 2d 199, 200 (Fla. 4th DCA 1996). Furthermore, on post-conviction, the trial court denied the intertwined IAC claim involving LaShara's competency to testify and explained:

> It is within the discretion of the trial court to determine whether a child is competent to testify. Lloyd v. State, 524 So. 2d 396, 400 (Fla. 1988). **The court questioned LaShara directly, assessing her ability to distinguish a truth from a lie, reality from fantasy or make believe, and her understanding of an oath. (Trial Transcript, pp. 66-75). The court then asked her questions about events occurring around the time of her mother's death to evaluate her memory of that time period. (Trial Transcript, pp. 77-83).**

Based on this questioning, the court found her competent to testify. (Trial Transcript, p. 83). The court also found that her testimony was not so tainted as to render it inadmissible, specifically finding that there was no indication of suggestion or taint during initial police questioning, but that the defense would be permitted to cross-examine her regarding suggestibility so that the jury could consider it when weighing her credibility. (Trial Transcript, pp. 84-97). Specifically, it noted LaShara's testimony that her grandmother told her between five times and daily that her daddy had killed her mommy and that there would be a trial to determine whether he had killed her. (Trial Transcript, p. 93). The court also acknowledged that, in viewing the videotape of the police interview of LaShara, the interviewer's bias and suggestion to LaShara was obvious. (Trial Transcript, p. 95).

Despite all of this, however, the court concluded that LaShara was competent to testify and that these facts went to the weight of the evidence, not its admissibility, and could be disclosed to the jury. (Trial Transcript, pp. 96-97). **First, as noted above, there has been nothing presented that establishes LaShara Butler was suffering from trauma, post-traumatic stress, or other psycho1ogica1 phenomena to such a degree that it would have rendered her trial testimony inadmissible or unreliable. Although Dr. Stevenson speculated that LaShara may have experienced one or more of these issues based on her trial testimony and the results of her evaluation by Dr. Crum, her testimony was nothing more than speculation. Even assuming this speculation was correct, Dr. Stevenson was unable to say whether LaShara was affected to such an extent that it altered her testimony in any material way.**

Additionally, based on the lengthy in-court evaluation of LaShara and the findings made by the court as to her competency, it is unlikely that additional testimony — even expert testimony — as to taint or general incompetence would have altered the court's decision to permit her testimony at trial. Accordingly, counsel's failure to present expert

testimony to support this position cannot be said to have prejudiced Butler. Floyd v. State, 18 So. 3d 432 (Fla. 2009) (finding no prejudice under Strickland by counsel's failure to object to child witness's competency where court sufficiently examined and properly qualified child witness).

Finally, during cross-examination of LaShara at trial, Schwartzberg had the opportunity to establish for the jury that her grandmother told her "a lot" that her father killed her mother. (Trial Transcript p. 241). Schwartzberg also cross-examined LaShara about details of her direct testimony that were inconsistent with her earlier statements or which conflicted with other evidence and issues regarding her police statements that indicated interviewer bias. (Trial Transcript, p. 242-57). **In sum, defense counsel was able to raise the issues of taint and witness credibility with the jury through the use of cross-examination.** Therefore, although an expert may have been able to provide more direct testimony with regard to these issues, counsel was able to clearly make these points to the jury without the use of an expert. Accordingly, there is no reasonable probability that an expert witness's testimony as to the issues of her credibility would have changed the outcome of the trial. This claim is therefore denied.

fn6. LaShara Butler is the daughter of Defendant Butler and the victim, Leslie Fleming.

(V11/1790-93).

At trial, LaShara testified that she was sleeping in her mother's bedroom and her dad picked her up and took her to her room. She saw his face. (DA V12/229-230). When LaShara woke up, she was in her bedroom; she was awakened by her mother screaming loud "Stop." (DA V12/231-232). LaShara went to the bathroom, went by the door of the bedroom and saw her mother's

and father's legs. One of the mother's legs was on the floor and "my daddy had his leg on her leg." (DA V12/232). He was wearing short pants and it sounded like her mother was being hurt. (DA V12/233-234). She heard the screen door close and steps on the outside. She went back to bed and later that morning opened the door when there was a knocking by her aunt. (DA V12/235). LaShara identified Harry Butler in court. (DA V12/236). In January, her grandmother told her that her mother died on March 14th. (DA V12/258). Officer Scott Ballard responded as a backup officer, found the victim laying inside the doorway on the ground with a shirt covered in blood and naked from the waist down. While transporting LaShara to the police department, LaShara stated out of the blue "My daddy hurt my mommy. I heard him yelling at her." (DA V12/260-263).

On cross-examination, LaShara admitted that she wanted to make her grandmother, Vivian Harris, happy. (V12/241-42). LaShara did not tell Officer Terence Kelly, the first police officer on the scene, that her father was involved in her mother's death, even though Officer Kelly asked her what she had heard and seen. (V12/238-239). Defense counsel also established that Ms. Harris told LaShara, "a lot," that her "daddy" killed her "mommy." (V12/241). And, LaShara got angry about her mother's death, just as her grandmother got angry. (V12/241).

Butler acknowledges that the case relied upon by the defense at the time of trial, *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994) was rejected by the Fifth District Court in *State v. Karelas*, 28 So. 3d 913 (Fla. 5th DCA 2010). In *Karelas*, the trial court found that the questioning of a 13-year old molestation victim was "improper" and "unnecessarily suggestive;" and based on the opinion testimony of a forensic psychologist who concluded that the victim's recollection had been "irreparably polluted," the trial court ruled that the victim was not competent to testify. The State sought certiorari review of the order precluding 13-year-old molestation victim from testifying at trial. The State maintained that the issue involves credibility, not competence, and was properly reserved for determination by the trier of fact. The District Court in *Karelas* agreed and explained:

> Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth. It is a test of intellectual capacity, not veracity. *Harrold v. Schluep*, 264 So. 2d 431, 435 (Fla. 4th DCA 1972). Competency should be determined at the time a witness testifies based on the witness's capacity at the time the testimony is offered. *Griffin v. State*, 526 So. 2d 752, 754 (Fla. 1st DCA 1988).
>
> Here, the trial court never considered the intellectual capacity of the victim. In fact, the trial judge did not hear from the proposed witness. His sole basis for disqualification of the witness was the opinion of an expert who, likewise, never met or

> interviewed the witness, and offered no opinion about issues of intellectual capacity. **The sum and substance of the trial court's finding was that the witness's reliability was suspect because of the tainted interview. This was not a finding of lack of testimonial competency, but instead, a preemptive determination of the credibility of the testimony, a determination that should have been left for the jury as the trier of fact**.
>
> In holding as we have, we have carefully considered *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994), upon which the trial court placed significant reliance. There, the court established a procedure for excluding a child witness's testimony unless the state can establish that the suggestive interview did not affect the witness's ability to testify truthfully. **Like the majority of jurisdictions that have considered *Michaels*, we reject its conclusion.** See, e.g., *People v. Montoya*, 149 Cal. App. 4th 1139, 57 Cal.Rptr.3d 770, 778 (2007) (rejecting *Michaels*); *State v. Michael H.,* 291 Conn. 754, 970 A.2d 113 (2009) (noting that a majority of jurisdictions have rejected *Michaels*); *State v. Ruiz*, 141 N.M. 53, 150 P.3d 1003, 1008 (2006) (rejecting Michaels' "novel approach"); *State v. Olah*, 146 Ohio App.3d 586, 767 N.E.2d 755, 760 (2001) (rejecting Michaels and requirement for pretrial "taint hearing"); *State v. Bumgarner*, 219 Or.App. 617, 184 P.3d 1143 (2008) (rejecting *Michaels* "approach"). **The fact that suggestive questions might have been posited is only one factor that bears on the reliability of the testimony. We conclude that the reliability of the victim's testimony can only be properly assessed after a trial on the merits during which the trier of fact may consider all of the facts and circumstances.**

State v. Karelas, 28 So.3d at 914-915 (e.s.)

In this case, Butler did not argue that the then seven-year-old LaShara lacked the capacity to see and recollect what happened. Instead, the defense repeatedly claimed that her

testimony was potentially the product of suggestive and leading questioning. Thus, in reality, the defense claim was not one of whether the child was competent to testify; rather, the issue was whether her testimony was reliable. That issue involved a matter of credibility of the witness and credibility determinations are made by the jury. Accordingly, Butler cannot demonstrate any deficiency of counsel and resulting prejudice under *Strickland* in failing to challenge the trial court's discretionary ruling on the admissibility of the child's testimony at trial.

CLAIM III

THE LETHAL INJECTION CLAIM

Next, Butler asserts a procedurally-barred and meritless challenge to lethal injection as a method of execution. During January of 2000, the Legislature adopted legislation which created lethal injection as a method of execution in Florida. At that time, Butler's direct appeal was pending and his direct appeal was not decided until 2003. Butler's initial post-conviction motion was filed in 2004 and post-conviction relief was denied in 2010. Butler's lethal injection claim is based on the execution of Angel Diaz on December 13, 2006 (Petition at page 17); however, Butler's post-conviction evidentiary hearings were conducted in 2008 and 2009, long after the Diaz execution

inquiry. Butler did not seek to amend his Rule 3.851 motion to include a lethal injection claim based on the 2006 execution of Angel Diaz, and Butler did not assert any challenge to lethal injection until the instant habeas petition.

Butler's challenge to lethal injection as a method of execution is procedurally barred. Habeas corpus is not to be used for additional appeals of issues that could have been or were raised on appeal or in other post-conviction motions. *Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008), citing *Mills v. Dugger*, 559 So. 2d 578, 579 (Fla. 1990).

Furthermore, Butler's collateral counsel admits that his lethal injection "claim is not supported by current case law." (Petition at page 16, e.s.) As this Court recently reiterated in *Everett v. State,* 2010 WL 4007643, 20 (Fla. 2010)

> Everett claims that the use of lethal injection as a method of carrying out the death penalty is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. Everett bases this claim on the botched execution of Angel Diaz and the 2007 Report of the Governor's Commission on the Administration of Lethal Injection in Florida, both of which arose several years after Everett's convictions. The postconviction court did not err in denying Everett's claim without an evidentiary hearing, as this Court has repeatedly rejected similar lethal injection arguments. See, e.g., *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008), cert. denied, --- U.S. ----, 129 S.Ct. 1305, --- L.Ed.2d ---- (2009); *Power v. State*, 992 So. 2d 218, 220-21 (Fla.2008); *Sexton v. State*, 997 So. 2d 1073, 1089 (Fla.2008). Additionally, this Court has held the

> procedures constitutional under the requirements of *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). See *Ventura v. State*, 2 So. 3d 194, 200 (Fla.) ("Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court (and would also easily satisfy the intent-based standard advocated by Justices Thomas and Scalia).") cert. denied, --- U.S. ----, 129 S.Ct. 2839, 174 L.Ed.2d 562 (2009); *Henyard v. State*, 992 So. 2d 120, 130 (Fla.), cert. denied, --- U.S. ----, 129 S.Ct. 28, 171 L.Ed.2d 930 (2008).

Butler's lethal injection claim is procedurally barred and without merit.

CLAIM IV

THE CLAIM THAT BUTLER MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

Butler's final claim -- that he may be incompetent at the time of execution -- is not ripe for review; and, as Butler correctly admits, it is being raised only for preservation purposes. (Petition at pages 17-18). Therefore, this claim must be denied. See, *Nelson v. State,* 43 So. 3d 20, 34 (Fla. 2010) (denying a similar claim -- that defendant may be incompetent at the time of execution -- as not ripe for review), citing *State v. Coney*, 845 So.2d 120, 137 n. 19 (Fla. 2003) (rejecting claim that defendant was incompetent to be executed where he acknowledged that the claim was not yet ripe and was being raised only for preservation purposes).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to Mark S. Gruber, Assistant CCRC-Middle, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 on this 4th day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENTS