

No. 18-8651

18-8651

ORIGINAL

In the

Supreme Court of the United States

ROBERT BUTRIM,

Petitioner,

v.

ADMINISTRATOR, EAST JERSEY STATE PRISON;
ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals,
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. Robert Butrim, Pro-Se
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QUESTIONS PRESENTED

Mr. Butrim make leave to appeal the following issues:

- 1) Whether the District Court's failure to address all the issues presented in the Habeas Corpus Petition deprived the Movant of a full review by the Circuit Court of all the issues
- 2) Whether the Circuit Court's conclusion that the State Court determination of Appellant's Claim that Counsel was ineffective in not properly advising him of his right to testify was not contrary to nor an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984)?
- 3) Whether the District Court decision with respect to the multiple ineffective assistance of counsel claims under Claim XIV was unreasonable and/or contrary to establish federal law.
- 4) Whether the District Court applied the correct federal law for the actual innocence ground and whether the District Court erred in its decision **(1)** Whether the District Court's decision on Petitioner's Actual Innocence Ground unreasonable and/or contrary to establish federal law **(2)** Whether the Petitioner has shown that he is factually, actually, and scientifically innocent of the crimes and whether the District Court erred in stating that the Ground is more akin to a sufficieny of the evidence test.
- 5) Whether the District Court erred in agreeing with the State Court that defense counsel's failure to call Petitioner's biological daughter was not an unreasonable application of *Strickland*
- 7) Whether the Petitioner had proved that there was "insufficient evidence" to convict him of sexual assault against T.H. and L.H. and whether the District Court erred in relying solely on the State Court last reasoned opinion?
- 8) Whether the Detectives' impermissible opinion on Petitioner's Guilt at trial were proper and whether the District Court erred in stating it did not violate Petitioners' Federal Rights to a fair trial?

- 9) Whether the Prosecutor committed misconduct by shifting the burden of proof to Petitioner and whether the District Court erred in affirming the State Court's last reasoned decision.
- 10) Whether the sentence imposed upon Petitioner "cruel and unusual" under the Eighth Amendment?
- 11) Whether the Petitioner was subjected to Ineffective Assistance of Trial Counsel by calling two officers as witnesses who did not help but rather hurt the defense and whether the District Court erred in affirming the State Court's decision
- 12) Whether Petitioner's Federal Rights were violated by the Prosecutor's eliciting testimony showing that Petitioner's wife refused to cooperate with Authorities and making improper statements during summations.

LIST OF PARTIES

[] All Parties appear in the caption of the case on the cover page

[X] All Parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Appendix A: The Order of the United States Court of Appeals for the Third Circuit Denying Request for a Certificate of Appealability filed December 13, 2018, Butrim v. Administrator New Jersey State Prison, et. al (C.A. 18-2179) (3d Cir.)

Appendix B: The Order and Opinion of the United States District Court for the District of New Jersey filed March 28, 2018, Butrim v. D'Ilio, No: 14-cv-04628 (U.S.D.N.J.)

Appendix C: The Unpublished Opinion of the New Jersey Superior Court, Appellate Division in State v. R.B., App. Div. Docket No. A-6177-10T4 and A-1729-11T3; decided October 22, 2013.

Appendix D: The Unpublished Opinion of the New Jersey Superior Court, Law Division, Burlington County in State v. Butrim, Indictment No: 07-02-0002-I; Filed Feb., 25, 2011.

TABLE OF AUTHORITIES

Cases Cited

Butrim v. Administrator New Jersey State Prison, et. al (C.A. 18-2179) (3d Cir. Dec. 13, 2018)

Butrim v. D'Ilio, No: 14-cv-04628 (U.S.D.N.J. Mar. 28, 2018))

Eley v. Erickson, 712 F.3d 837 (3d Cir. 2013)

Fox v. Baltimore City Police Dep't, 201 F.3d 526 (4th Cir. 2000)

Harris v. N.Y., 401 U.S. 222 (1971)

In re Winship, 397 U.S. 358 (1970)

Jackson v. Virginia, 443 U.S. 307 (1979)

Jones v. Barnes, 463 U.S. 745 (1983)

Nix v. Whiteside, 475 U.S. 157 (1986)

Percey v. Powers, 51 NJL 432, 17 A. 969 (Sup. Ct. 1859)

Porter v. Zook, 803 F.3d 694 (4th Cir. 2015)

Prelwitz v. Sisto, 657 F.3d 1035 (9th Cir. 2011)

Rock v. Arkansas, 483 U.S. 44 (1987)

State v. R.B., App. Div. Dkt No's. A-6177-10T4 and A-1729-11T3; decided October 22, 2013.

State v. Butrim, Indictment No: 07-02-0002-I; Filed Feb., 25, 2011

State v. Gonzales, 223 N.J. Super. 377 (App. Div.), certif den, 111 N.J. 589 (1988)

State v. Kremens, 57 N.J. 309 (1970)

State v. Levine, 109 NJL 503, 162 A. 909 (Sup. Ct. 1932)

State v. Vigilante, 194 N.J. Super. 560 (Law Div. 1983)

Strickland v. Washington, 466 U.S. 668 (1984)

New Jersey Statutes and Rules

N.J.S.A. 2A:81-8
N.J.S.A. 2C:14-2a(1)
N.J.S.A. 2C:14-2b
N.J.S.A. 2C:24-4a

Federal Statutes

28 U.S.C. §1254(1)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Butrim respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Third Circuit denying his Application for a Certificate of Appealability.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit Denying Request for a Certificate of Appealability filed December 13, 2018, Butrim v. Administrator New Jersey State Prison, et. al (C.A. 18-2179) (3d Cir.) is attached herein as **Appendix A.**

The Order and Opinion of the United States District Court for the District of New Jersey filed May 11, 2018, Butrim v. D'Ilio, No: 14-cv-04628 (U.S.D.N.J.) is attached herein as **Appendix B.**

The Unpublished Consolidated Opinion of the New Jersey Superior Court, Appellate Division in State v. R.B., App. Div. Docket No. A-6177-10T4 and A-1729-11T3; decided October 22, 2013 is attached as **Appendix C.**

The Unpublished Opinion of the New Jersey Superior Court, Law Division, Burlington County, in State v. Butrim, Indictment No. 07-02-0002-I; Filed February 25, 2011, is attached as **Appendix D.**

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The decision of the United States Court of Appeal for the Third Circuit denying the application for a certificate of appealability was denied on December 13, 2018.

CONSTITUTIONAL PROVISIONS

The relevant parts of the Fifth Amendment provides, in pertinent part, that: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law."

The relevant parts of the Sixth Amendment is: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence."

The relevant part of the Eighth Amendment is: "Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted."

The relevant part of the Fourteenth Amendment (Section 1) is: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

It cannot be overemphasized that the United States Court of Appeals for the Third Circuit found that Petitioner's claims were not debatable amongst juries and that the State Courts determination that counsel was not ineffective in not properly advising him as to his right to testify was not contrary to nor an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

The Court of Appeals decision was erroneous and was contrary to clearly established federal law.

The Decision of the United States District Court for the District of New Jersey was also erroneous and clearly contrary to establish federal law.

The District Courts' lack of proper review of all the issues raised in Petitioner's Habeas Corpus was also in error and it deprived the Petitioner of a full review by the Federal Court.

PROCEDURAL HISTORY

This Appeal stems from the December 13, 2018 Order of the United States Court of Appeals for the Third Circuit denying an application for a Certificate of Appealability and from the March 27, 2018 Order of the United States District Court for the District of New Jersey, denying Petitioner's Habeas Corpus Petition on its Merits. Petitioner argues that the Court of Appeals was in error when it agreed with the District Court.

Robert Butrim was originally charged in a Burlington County Indictment Number 2007-01-0002-I, with violating the following N.J. offenses: Five Counts of First-degree Aggravated Sexual Assault, contrary to N.J.S.A. 2C:14-2a(1) (Counts I, II, III, VII, XI); Five Counts of Second-degree Sexual Assault, contrary to N.J.S.A. 2C:14-2b (Counts IV, V, VIII, XII, XIII); and Four Counts of Second-degree Endangering the Welfare of a Child, contrary to N.J.S.A. 2C:24-4a (Counts VI, IX, X, XIV).

Prior to trial, upon Motion by the State, the Honorable Thomas S. Smith, J.S.C., dismissed Counts Eleven, Twelve, Thirteen, and Fourteen of the Indictment as these counts dealt with the victim, R.H., who did not testify.

A jury trial was then conducted on the remaining counts of the Indictment from May 5th to May 7, 2009. Upon the conclusion of the State's case, defense counsel moved to dismiss Count Ten of the Indictment (Endangering the Welfare of a Child). The trial court granted the motion. The defense also moved for a judgment of acquittal as to all remaining counts. The Court denied the motion. Additionally, at the close of the State's case, the State agreed to Dimiss Count Two, charging aggravated sexual assault, specifically, anal penetration of L.H.

On May 7, 2009, the jury returned a verdict of not guilty as to Count Three (first-degree aggravated sexual assault by having L.H. perform fellatio upon him) and guilty as to Counts One, and Four through Nine (Counts 2, 5, and 10-14 were dismissed).

On February 19, 2010, Mr. Butrim appeared before the Honorable Jeanne Covert, P.J.Cr., for a hearing on Mr. Butrim's motion for a new trial and for sentencing. The trial court denied the motion for a new trial and proceeded to sentencing. Judge Covert indicated that Counts Four and Eight, charging sexual assault, would be merged into Counts One and Seven, charging aggravated sexual assault, respectively, Judge Covert also found that the two charges for Endangering the Welfare of a Child, Counts Six and Nine, would not be merged into the sexual assault charges. The Judge then sentenced Mr. Butrim to a term of 14 years imprisonment with regards to Count One; a term of 12 years imprisonment with regards to Count Seven, to run consecutive to the sentence imposed for Counts One and Seven. Mr. Butrim's aggregate sentence is 26 years imprisonment, subjected to the No Early Release Act under which he must serve 85% of his sentence; the requirement that Mr. Butrim comply with all Megans Law Requirements, including parole supervision for life.

Prior to filing a Direct Appeal, Sentencing Counsel filed a Petition for Post-Conviction Relief on March 5, 2010. Counsel raised several claims, of which were technically barred because they were issues that should have been raised on Direct Appeal. However, the Judge ruled upon the merits of those issues and denied them.

On February 25, 2011, the Honorable Michael J. Hass, J.S.C., denied Mr. Butrim's Petition in its totality.

A Notice of Appeal from the Denial of PCR was filed on Butrim's behalf. (A-1729-11T3).

Mr. Butrim filed a Notice of Appeal and subsequently filed an Amended Notice of Appeal as to his Direct Appeal (A-6177-10T4).

On October 22, 2013, the Appellate Division affirmed Mr. Butrim's conviction and sentence, A-6177-10T4. The Appellate Division also affirmed the denial of PCR. State v. R.B., Dkt. #A-1729-11T3. Certification was denied on December 18, 2013. The Appellate Division written opinion consolidated Butrim's Direct appeal with the appeal of the denial of PCR, which PCR was filed prior to the Direct Appeal being filed.

Mr. Butrim filed a timely Petition for a Writ of Habeas Corpus with the U.S. District Court for the District Court of New Jersey. Butrim v. D'Ilio, #14-cv-04628. The State filed their Answer and Butrim filed a Reply.

On March 27, 2018 (filed March 28, 2018), Honorable Robert B. Kugler denied the Petition in a 51-page Opinion.

A Notice of Appeal was then filed with the District Court appealing Judge Kugler's decision.

On December 13, 2018, the United States Court of Appeals for the Third Circuit declined to issue a Certificate of Appealability and denied Petitioner's Motion for a Remand back to the District Court.

This Application now follows.

STATEMENT OF FACTS

At trial, the State contended that Mr. Butrim sexually assaulted his two step-daughters, L.H. and T.H., from March 2000 to November 2005.

Testimony of L.H.

L.H. was the first witness to testify for the State. At the time of her testimony, L.H. was 14 years old and lived in Gloucester City with her father, her sister L.H. and her brother R.H.

L.H. testified that when she was about four years old, her mother married and moved in with Robert Butrim. L.H. also testified that her mother and Mr. Butrim had a daughter, A.W. L.H. testified that eventually her mother and Mr. Butrim moved to Kings Grant Condominium Complex in Evesham, where they lived with L.H.'s younger sister, A.W. L.H. described the condo as having two bedrooms, and that when she stayed at the condo, she shared a room with her sisters; her brother stayed in the living room. L.H. stated that she and her sister T.H. slept in bunk beds and her sister A.W. slept in a regular bed in the same room. L.H. testified that T.H. slept on the bottom bunk and she slept on the top, and once in a while they would switch.

L.H. testified that when the family was living in the Kings Grant Condo, Mr. Butrim began coming into her bedroom at night and touching her. L.H. stated that Mr. Butrim would enter her bedroom, stand on the bottom bunk and would kiss her on the mouth. Though

L.H. stated that she "did not open her eyes" or "wake up" when this happened, she believed it was Mr. Butrim because she could feel his beard.

L.H. testified that while she was sleeping, Mr. Butrim would lift up her shirt and touch her. L.H. stated that Mr. Butrim would also touch her below her waist, "either" with his hands or his "private spot." L.H. further stated that Mr. Butrim never touched her on the "inside of her private area." L.H. elaborated that Mr. Butrim put his hand on her "private spots," sometimes he would move it and other times he would not. L.H. clarified that Mr. Butrim only touched her front "private area" and did not touch her backside.

L.H. also testified that on the occasions that she slept on the bottom bunk, Mr. Butrim would touch his "privates" to her "privates." However, L.H. later stated that while she was sleeping on the top bunk, he would stand on the bottom bunk and touch her with his "privates." L.H. also stated that Mr. Butrim put his "private" into her "private" while she was sleeping on the top bunk then later stated that he only did this on the bottom bunk. L.H. stated that Mr. Butrim would pull her underwear down, but not off, put his "private area," both inside and outside or her "private area." On cross-examination, L.H. stated that while it hurt when Mr. Butrim put his penis in her vagina, she never saw any blood on her clothes or on the sheets, nor did she ever wipe any liquid off of herself.

L.H. states that she did not open her eyes and did not see Mr. Butrim's private parts. She stated that she, "didn't really know" that it was Mr. Butrim's private part but assumed it was. L.H. further agreed that if it was someone else who had come into her room and touched her, she would not know because she never saw him. Later in her testimony, when L.H. was asked if anything ever came out of Mr. Butrim's private parts, she said, no, once Mr. Butrim was done, he would leave and she would turn over and go back to sleep. L.H. testified that this happened almost every night that she stayed at that apartment.

L.H. further testified that sometimes when she was sleeping, she would feel something go in her mouth, which she assumed to be Mr. Butrim's private parts, though she never opened her eyes. L.H. stated that this lasted a few minutes and that Mr. Butrim "just sat there" and did not move. L.H. also claimed that she had never seen a man's private area before and did not know what it looked like. Later, during cross-examination, L.H. stated that she did not recall telling a Detective that Mr. Butrim's "private was shaped weird."

L.H. stated that this type of touching began when she was approximately 6 years old and that she never told her mother, father, sisters, or brother because she did not think anyone would believe her. L.H. also stated that she specifically did not tell her sister T.H. because she believed T.H. was a "tattletale." L.H.

agreed that she wanted her mother and (biological) father to get back together.

L.H. testified that Mr. Butrim touched her for about three or four years and that she eventually told her friend., J.V., that she was being "sexually assaulted." L.H. stated that she understood what that term meant because she had heard about it at school. L.H. testified that her father overheard J.V. telling her to tell her father about the assault and she eventually told him about what was happening; she was nine or ten years old at the time. On cross-examination, L.H. said that prior to telling anyone about Mr. Butrim, her friend J.V., had told her first that she had been sexually abused. Later, on redirect and recross, L.H. went back and forth in her recollections of when she told J.V.

L.H. stated that after she told father, she did not tell anyone else about what had happened and that she remembered talking to someone from the Division of Youth and Family Services. L.H. said that she told her sister T.H. once about what had happened, but that she told her sister T.H. once about what had happened, but that was a few days after she had told her father. Similarly, L.H. said that her sister never told her that Mr. Butrim had also touched her. L.H. testified that she never saw Mr. Butrim touch her sister T.H. or heard him with her when he came into their room.

L.H. testified that she did not think her mother and father would believe her because she lied to them in the past. She stated

that she had lied to them to the point that they could not trust her anymore. On cross-examination, L.H. also admitted that in 2008 she was charged with criminal mischief for spray painting the side of a building, which was handled in juvenile court.

Testimony of T.H.

T.H. also testified for the State. T.H. recalled that she was five years when her mother moved in with Mr. Butrim and that she and her siblings would visit their Buttonwood apartment. T.H. stated that she and L.H. would sleep on the pull-out couch, their brother R.H. would sleep on the floor next to the couch, and A.W. would sleep in her own bed near the dining room. T.H. stated that she thinks that Mr. Butrim may have touched her inappropriately while they were at that apartment, however, she could not remember.

T.H. testified that her mother and Mr. Butrim later moved to a two-bedroom apartment in Marlton where she shared a room with her sisters, L.H. and A.W. T.H. stated that Mr. Butrim would come into her room at night when she was asleep and that she was afraid, so she would not open her eyes. T.H. stated that Mr. Butrim would lift her shirt but did not touch her above the waist. Mr. Butrim would also pull down her shorts and underwear. Later, in her testimony, T.H. denied that she told an investigator at the Child Advocacy Center that Mr. Butrim took her clothes off to touch her. T.H. stated that she never called out to her sisters or

to her mother when this happened because she was afraid, though she did not know what she was afraid of.

T.H. stated that she did not remember if Mr. Butrim touched her outside or inside of her vagina, though she remembered him touching her. T.H. indicated that he did not touch her backside or her chest and he did not kiss her. T.H. testified that Mr. Butrim would lean on her bed, but not get on it and that he touched her with his finger. She recalled that it would only last about five minutes. According to T.H., when Mr. Butrim was done touching her, he would go to her sister or leave the room. T.H. went on to state that Mr. Butrim would step up on her bed and lean over to L.H. who was on the top bunk. At times, T.H. opened her eyes to see that it was Mr. Butrim stepping on the bunk.

When asked by the prosecutor if Mr. Butrim ever touched her mouth with his penis, T.H. stated that she thought that one time, while they were in the Buttonwood apartment, Mr. Butrim brought the children (but not A.W.) one at a time into the kitchen, blindfolded them and put syrup on his penis and made them taste it, though she later stated that she did not see him do this to the other children. During cross-examination, T.H. stated that she didn't see what was being put in her mouth and that she was guessing what it was. T.H. was later showed a copy of her statement to an investigator and acknowledged that she did not tell the investigator about this incident and that her testimony that day at trial was the first time she told anyone about it.

T.H. also stated that she told the investigator that Mr. Butrim did not use any other body parts to touch her other than his hand.

T.H. testified that when she was sharing a room with her sisters, she always slept on the bottom bunk and did not switch beds with her sister L.H. T.H. stated that the touching began when she was five and ended when she was ten or eleven, after she told her father.

When T.H. was asked to described the circumstances that led to her telling her father about Mr. Butrim, T.H. gave a different account of what happened than what L.H. had stated in her testimony. T.H. stated that both she and her sister L.H. were in their room with their friend J.V. T.H. stated that J.V. had told her and L.H. that she had been sexually abused. L.H. then told J.V. about what had happened to them. T.H. stated that she and her sister were arguing over which one of them should tell their father about the touching, when their father walked past them and asked what they wanted to tell him. L.H. then told their father what had happened to them. T.H. stated that she never discussed her allegation that Mr. Butrim had also been touching her. T.H. stated that L.H. already knew and that they had been talking about it with each other from the time they were 8 years old. T.H. stated that neither of them told their mother because they did not think she would believe them. T.H. claimed that neither of the girls told anyone else in the family or anyone at school. However, on cross-examination, T.H. stated that L.H. also told another friend, J.R.

T.H. was also showed the statement she made to Det. Weisbrot, where she stated that the first person she told was J.R.

T.H. also acknowledged that in the beginning of 2008, she was charged with criminal mischief and that the case was handled in juvenile court, where she was ordered to be on probation for 3 months.

At the end of the State's case, the Court read into the record two stipulations. The stipulations stated that both L.H. and T.H. were examined by Dr. Marita Lind, a pediatrician who specializes in the examination of alleged child abuse victims. The complete examination of both girls did not reveal any physical evidence or indications of trauma or injury indicating sexual abuse.

Testimony of Det. Thomas Cranston

The defense called Mr. Thomas J. Cranston, a former Detective with the Burlington County Prosecutor's Office. Mr. Cranston testified that on January 17, 2006, he was assigned to this case and was designated the lead investigator.

Mr. Cranston stated that he interviewed L.H. in connection with this case. Mr. Cranston was questioned about specific statement L.H. made during the interview. Specifically, Mr. Cranston stated that L.H. told him that sometimes her mother was home when Mr. Butrim touched her; she was sometimes on the computer or sleeping. Mr. Cranston testified that L.H. told him that on one occasion, in the Buttonwood apartment, all four

children were sleeping in one bed and Mr. Butrim came into the room and put his penis in her mouth and was moving it around. However, when L.H. testified she stated that nothing ever happened at the Buttonwood apartment. Additionally, Mr. Cranston stated that L.H. told him that she knew that it was Mr. Butrim's "private" in her mouth because "it was shaped weird."

Mr. Cranston testified that when Mr. Butrim was arrested, he was five feet, six inches tall and weighed 280 lbs. Mr. Cranston also stated that upon his arrest, Mr. Butrim agreed to submit to a buccal swab for DNA testing.

Mr. Cranston testified he executed a search warrant on the home of Mr. Butrim in an effort to gather DNA evidence on items such as bed sheets and mattresses. Mr. Cranston stated that in the course of the investigation, he learned that one of the children's bunk bed set had been traded for another and the mattress was no longer present in the home. Mr. Cranston stated that DNA tests were conducted and there was no link to Mr. Butrim.

Testimony of Det. Brian Weisbrot

The defense also called Brian Weisbrot, a Detective at the Burlington County Prosecutors Office. Det. Weisbrot testified that during the course of the investigation, he was assigned to interview T.H. and her biological mother, M.B.

Det. Weisbrot stated that he interviewed T.H. at the Child Advocacy Center and reviewed several statements T.H. made. Specifically, Det. Weisbrot testified that T.H. told him that she

never heard Mr. Butrim on the top bunk with her sister L.H.; T.H. thought that this was because he was too big to go to the top. Det. Weisbrot also stated that T.H. told him that Mr. Butrim only touched her vaginal area, her butt and would touch her arm and leg to move them out of the way to access her body. In her statement, T.H. indicated that Mr. Butrim only used his hand to touch her.

Det. Weisbrot testified that T.H. never told him during her statement that Mr. Butrim took her into the kitchen blindfolded and put his penis in her mouth with chocolate syrup.

Testimony of Mrs. Butrim (ex-wife)

The defense also called as a witness Mr. Butrim's wife and the mother of both T.H. and L.H. Mrs. Butrim began her testimony by stating that Mr. Butrim has had several surgeries on his knee, which prevents him from climbing. She stated that in the past, his knee had given out while he was walking and he had needed assistance.

Mrs. Butrim began dating Mr. Butrim in 1997 and in later 1998, she moved in with Mr. Butrim in a one-bedroom apartment in Maple Shade. At that time, Mrs. Butrim also had a child with Mr. Butrim, A.W., who lived with them in the apartment.

Mrs. Butrim stated that, prior to and after the allegations of abuse, her children, particularly T.H., expressed a desire for Mrs. Butrim and her ex-husband to get back together. In this regard, Mrs. Butrim stated that on August 16, 2007, she had a telephone conversation with T.H. who stated that she did not

understand why the case was taking so long, "nothing had happened anyway." Mrs. Butrim further testified that on February 7, 2008, T.H. again mentioned that nothing had happened and could not understand why the case was still going on. Specifically with regard to the latter conversation, Mrs. Butrim testified that T.H. asked her what would happen if it was not Mr. Butrim who had touched her.

Mrs. Butrim testified that she never witnessed her husband touch the children inappropriately. She also stated that in changing sheets and doing the children's laundry, she never come across semen or blood stains.

Mrs. Butrim stated that on the night she learned of the girls allegations, she spoke with L.H. who said that Mr. Butrim had had sex with her. Mrs. Butrim stated that L.H. did not specify what exactly had happened and that she took L.H. into her room and physically examined her genital area; she did not notice any damage, swelling or redness. Mrs. Butrim stated that she discussed the matter with her mother and her ex-husband, and they decided to take L.H. to a therapist to see if L.H. would give more specific information and to see if she was telling the truth. Later, Mrs. Butrim stated that on the night that L.H. made her allegations, T.H. and R.H. denied that anything had been done to them. It was not until a week later that Mrs. Butrim learned of T.H.'s allegations.

Mrs. Butrim testified that after the allegations were made, the children nonetheless wanted to go Thanksgiving dinner at Mr. Butrim's mothers' house. Mrs. Butrim stated that the children did not appear to be afraid or upset, but rather were interacting with everyone. Subsequently, the children were given the option to omit Mr. Butrim from their Christmas plans, however, they said that Mr. Butrim could join them at Mrs. Butrim's mothers' house. Mrs. Butrim stated that, again, she observed the children interacting with Mr. Butrim in a normal way.

Statements by the Court - Stipulations

At the end of the State's case, the Court read into the record two stipulations. These stipulations were actually read to the jury. The stipulations stated that both L.H. and T.H. were examined by Dr. Marita Lind, a pediatrician who specializes in the examination of alleged child abuse victims. The complete examination of both girls did not reveal any physical evidence or indications or trauma or injury indicating sexual abuse.

The court also read two additional stipulations to the jury. The first indicated that forensic investigations conducted at Mr. Butrim's apartment which included tests of the carpenting surrounding the beds and the mattress tops of both the top and bottom bunk beds, did not reveal any seminal fluid from male ejaculate. The second indicated that forensic testing of the full size mattress and bunk bed that had been traded to another

individual did not locate any seminal fluid in or on the mattress cover.

REASONS FOR GRANTING THE WRIT

I.

Whether the District Court's failure to address all the issues presented in the Habeas Corpus Petition, deprived the Movant of a full review by the Circuit Court of all the issues

After Movant filed his Notice of Appeal with the Third Circuit Court of Appeals in the within matter, it was belatedly pointed out that the District Court had failed to address all issues raised in his Habeas Petition, and requested the Circuit Court to Remand the matter back to the District Court to issue an amended opinion which discusses the missed issue. This missed issued prevented the Movant from being able to properly raised on Appeal all possible issues to be looked at.

The District Court failed to address the "Right to Testify" ground raised in the Habeas Petition. Specifically, Mr. Butrim raised as Ground Seven in the Petition the following Ground:

THE TRIAL COURT ERRED IN DENYING MR. BUTRIM'S PETITION FOR PCR BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT WAS SHOWN THAT COUNSEL FAILED TO PREPARE WITNESSES AND DID NOT PROPERLY ADVISE MR. BUTRIM AS TO HIS RIGHT TO TESTIFY ("Claim VII") (District Court Opinion at 6, Cf to op. at 31-38)

When the Court's opinion is looked at, (pages 6, 31-38) the District Court Judge never specifically address the "Right to testify" portion of the Ground.

The Circuit Court has denied the request for a remand for the District Court. See, Appendix A.

In Porter v. Zook, 803 F.3d 694 (4th Cir. 2015) the Court of Appeals remanded the case to the District Court for a decision on all issues presented in the habeas petition. The Court stated "ordinarily, a district court order is not 'final' until it has resolved all claims". See also, Fox v. Baltimore City Police Dep't, 201 F.3d 526, 530 (4th Cir. 2000). The Court stated that labels do not matter. The District Court may label the order final, but the label does not make it final. If it appears from the record that the district court did not address all issues, then there is no final order. This Rule applies to all cases including federal habeas. Prelwitz v. Sisto, 657 F.3d 1035, 1038 (9th Cir. 2011) (dismissing habeas appeal for lack of jurisdiction where district court failed to adjudicate all claims).

Therefore, the Movant respectfully request that this Honorable Court grant the Petition to resolve this issue and provide guidance to the lower Federal Courts for all future cases. Additionally, the failure of the District Court to review all the issues raised denied the Movant the right to adequately have his issues properly considered by the Circuit Court.

II.

Whether the Circuit Court's conclusion that the State Court determination of Appellant's Claim that Counsel was ineffective in not properly advising him of his right to testify was not contrary to nor an unreasonable application of *Strickland v. Washington*, 46 U.S. 668 (1984)?

The Movant raised in State Court (on Appeal from a Denial of PCR) and in the lower Federal Courts the issues of not being advised of his right to Testify. Specifically during the Habeas proceedings, Mr. Butrim raised:

THE TRIAL COURT ERRED IN DENYING MR. BUTRIM's PETITION FOR PCR BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE IT WAS SHOWN THAT COUNSEL FAILED TO PREPARE WITNESSES AND DID NOT PROPERLY ADVISE MR. BUTRIM AS TO HIS RIGHT TO TESTIFY (emphasis added.) ("Claim VII", District Court Opinion at 6, Cf to op. at 31-38)

In this case, the Appellate Division relied on the written opinion by Judge Haas, J.S.C., instead of conducting a de novo review of issue by stating that "defendant did not provide a certification attesting that he wanted to testify at his trial or stating what his testimony would have been." (See, State v. R.B., A-6171-10T4/A-1729-11T3 at *25; Appendix C-25). It was imperative for the Post Conviction Relief Counsel to obtained a Certification from Mr. Butrim, however, counsel failed to.

Judge Haas, in denying Mr. Butrim's PCR, stated: "he points to nothing in the record to support his claim. For example, he does not assert that the trial judge failed to voir dire him concerning his right to testify. Indeed, the transcripts confirm

that defendant was advised of his right to testify and that he did not indicate to the court that he wished to testify. He also received the benefit of a jury instruction concerning his election, as Judge Smith indicated would be provided when he questioned defendant." (See, PCR Court Written Opinion of February 25, 2011 at *25; Appendix D-25).

The Circuit Court's conclusion that the State Court determination of Appellant's Claim that Counsel was ineffective in not properly advising him of his right to testify was not contrary to nor an unreasonable application of *Strickland v. Washington*, 46 U.S. 668 (1984) is in error and must be reversed. (See Appendix A).

Only the defendant, after a careful review and discussion with his [or her] trial counsel, can make the decision on whether or not to testify. The Trial Court cannot do this.

The United States Supreme Court explicitly recognized that defendants have a constitutional right to testify, finding its roots firmly established in several provisions of the federal Constitution. See, e.g., Rock v. Arkansas, 483 U.S. 44, 51, 107 S.Ct. 2704, 2709 (1987). The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor." Id. 483 U.S. at 52, 107 S.Ct. at 2709. Moreover, the Court reasoned that the opportunity to testify is also a necessary corollary to the Fifth Amendment's privilege against self-incrimination. Id.

The Rock decision synthesizes prior decisional law, in which the Supreme Court had implicitly recognized the Constitutionally-protected right to testify. See, e.g. Nix v. Whiteside, 475 U.S. 157, 164, 106 S.Ct. 988, 993 (1986) ("Although this Court has never explicitly held that a criminal defendant has a due process right to testify .. the right has long been assumed"); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983) (the "ultimate authority to make certain fundamental decisions ... [including] whether to testify" rests with the defendant); Harris v. N.Y., 401 U.S. 222, 225, 91 S.Ct. 643, 645 (1971) ("every criminal defendant is privileged to testify in his own defense, or to refuse to do so").

In New Jersey, the right to testify is guaranteed by statute, N.J.S.A. 2A:81-8. Early Courts in N.J., however, also viewed it as a 'civil right,' protected under the Fourteenth Amendment to the federal constitution:

It may be suggested that the civil rights protected by this clause of the constitution are only those which were recognized when the constitution was framed, and that, therefore, the right of the litigant to be a witness for himself having been created since that time, it is not among those thus secured. But it would, I think be unreasonably cramping this provision thus to confine it. [Percey v. Powers, 51 NJL 432, 425, 17 A. 969 (Sup. Ct. 1859)].

Percey involved the right of a party to testify in a civil proceeding. Subsequently, in State v. Levine, 109 NJL 503, 162 A. 909 (Sup. Ct. 1932), the Court extended the reasoning of Percey to a criminal trial, holding that a State could not bar a criminal

defendant from testifying on the basis of his or her religious beliefs. *Id.* at 512, 162 A. 909. Thus, the right to testify, though statutory in origin, was afforded additional constitutional protection by early New Jersey Courts.

Although New Jersey Courts have not expressly recognized a right to testify emanating from our state constitution, they, like the pre-Rock federal courts, have implicitly assumed its existence. See, e.g., State v. Kremens, 57 N.J. 309, 313 (1970) (defendant's failure to testify resulted from a "knowledgable waiver of that right"); State v. Gonzales, 223 N.J. Super. 377 (App. Div.) (considering whether the right to testify is "absolute"), certif den, 111 N.J. 589 (1988); State v. Vigilante, 194 N.J. Super. 560 (Law Div. 1983) (right to testify is of a "constitutional dimension").

Therefore, it is respectfully requested that this Honorable Court grant the Petition and remand back to the District Court to review and issue an amended opinion surrounding this issue that was clearly raised in the Habeas Petition.

Additionally, the Circuit Court's conclusion is contrary to Strickland v. Washington, and must be reversed.

III.

Whether the District Court applied the correct federal law for the actual innocence ground and whether the District Court erred in its decision (1) Whether the District Court's decision on Petitioner's Actual Innocence Ground unreasonable and/or contrary to establish federal law (2) Whether the Petitioner has shown that he is factually, actually, and scientifically innocent of the crimes and whether the District Court erred in stating that the Ground is more akin to a sufficieny of the evidence test.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), the Court held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, the Court emphasized:

"[T]his inquiry does not require a Court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' Instead, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id at 318-19.

The Jackson inquiry is aimed at determining whether there has been an independant constitutional violation - i.e., a conviction based on evidence that fails to meet the [In re Winship, 397 U.S. 358 (1970)] standard. Thus, federal habeas courts act in their historic capacity - to assure that the habeas petitioner is not being held in violation of his or her federal constitutional

rights. Second, the sufficiency of the evidence review authorized by Jackson is limited to record evidence." 443 U.S. at 318. Finally, the Jackson inquiry made the correct guilt or innocence determination but rather it made a rational decision to convict or acquit. The Third Circuit has found Jackson to be clearly established federal law. Eley v. Erickson, 712 F.3d 837, 847 (3d Cir. 2013), therefore, Jackson is valid in this instant case.

In this instant matter, there is "record evidence" in which the Court can gleam from, exactly what the Jackson court has limited the inquiry to. As the following facts shows, no rational trier of facts could have found the defendant guilty of the crimes.

At the end of the State's case, the court read into the record two stipulations. The stipulations stated that both L.H. and T.H. were examined by Dr. Marita Lind, a pediatrician who specializes in the examination of alleged child abuse victims. The complete examination of both girls did not reveal any physical evidence or indications of trauma or injury indicating sexual abuse. (Direct Appeal Brief at page 13, under the Statement of Facts; Supplemental Brief on Appeal from a Denial of PCR at page 4, footnote 7, under Concise Statement of Facts).

Mr. Cranston, a former Detective with the Burlington County Prosecutor's Office, testified that he executed a search warrant on the home of Mr. Butrim in an effort to gather DNA evidence on items such as bed sheets and mattresses. Mr. Cranston stated that

in the course of the investigation, he learned that one of the children's bunk bed set had been traded for another and the mattress was no longer present in the home. Mr. Cranston stated that DNA tests were conducted and there was no link to Mr. Butrim.

(Direct Appeal Brief at page 15, under the Statement of Facts).

The court read two additional stipulations to the jury. **The first indicated that Forensic Investigations conducted at Mr. Butrim's apartment, which included tests of the carpenting surrounding the beds and the mattress tops of both the top and bottom bunk beds, did not reveal any seminal fluid from male ejaculate.** (Direct Appeal Brief at page 20, under the Statement of Facts; Supplemental Brief on Appeal from a Denial of PCR at page 4, footnote 7, under Concise Statement of Facts).

Additionally, and even more contradictory to L.H.'s claim that Mr. Butrim put his penis in her vagina, was the fact that, as stipulated by the parties, a medical examination performed on L.H., by a pediatrician who specializes in child abuse victims, revealed no physical evidence or indication of trauma or injury indicative of sexual abuse (Direct Appeal Brief at page 13, under Point 1(A)).

Even viewing the State's evidence in its most favorable light, it defies logic that an adult man could have had vaginal intercourse with a child, over a period of approximately three or four years beginning when she was about six years old, and the child would not have any evidence of physical trauma indicative of

sexual abuse. (Direct Appeal Brief at apges 25-26 under Point 1 (A).

The evidence against the finding of guilt on this charge (Count One) is further supported by the testimony of T.H., who stated that L.H. never slept on the bottom bunk, plus the fact that no DNA evidence was recovered. Again, it goes against all reason that Mr. Butrim could have been sexually assaulting L.H. every night she slept at this house, for a period of 3 or 4 years and there would be no DNA evidence found on the girls beds or mattresses. (Id.)

Even the PCR Judge stated in its written opinion of February 25, 2011, "Trial Counsel and the State entered into a stipulation. The parties agreed that the girls were seen by a doctor through the N.J. Cares Institute. The doctor examined L.H. and T.H. and did not find any signs of trauma. There was no physical evidence of any kind to support a claim of sexual abuse." (PCR Court written opinion on PCR at pages 9-10 under Finding of Facts).

Even the Appellate Division in their October 22, 2013 Opinion noted in Footnote 6: "The mattress was disposed of between the time the children disclosed the alleged sexual abuse to their mother and Ted, and the time the police were called. The parties stipulated that the police tracked down the mattress, tested it, and found no sexual DNA."

On PCR, the Attorney argued, *inter alia*, that "one of the main defenses in a sexual abuse case, especially for a case that

was supposed to have lasted for 2 years, is the lack of physical evidence. If an examination is done and no physical evidence of damage or physical trauma is present, it is important to get an expert on the stand to emphasize the importance of that fact. However, here, defense counsel actually stipulated to the findings of the physician for both girls and does not mention at anythime while testimony is being provided. Also defense counsel agreed to stipulate to the physical examinations of both of the alleged victims. This was a missed opportunity to question an expert concerning the significance of the doctors findings that there was no trauma present to either of the alleged victims who claimed that they were sexually abused for years by a large man. This is an extremely important point in this case and it needed to be emphasized at every possible moment in the trial. It was an egregious error to simply stipulate to that fact. As such, defense counsel conduct fell below a reasonable standard of conduct for defense attorneys." (Brief on PCR at pages 16-17, under Legal Argument (A) (4).

For the foregoing reasons and for the "record-evidence" there was no way that the defendant committed these crimes and that the State failed to meet the standards in *Winship*, *supra*, and that this Court should grant the Petition and vacate the conviction and sentence.

CONCLUSION

For the foregoing reasons, the Petitioner Robert Butrim respectfully requests this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: X March 25th 2019

*X Robert Butrim by
Robert Butrim, Pro-Se.
Kathryn Vanderryt P.O.A.*

CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P. 5; 28 U.S.C. §1746, I, Robert Butrim declare that I am over the age of 18 and a party to this action. I am a resident of New Jersey, and I currently reside at East Jersey State Prison, LockBag R, Rahway, New Jersey 07065. My inmate numbers are #653150 / 214701-C.

I, Robert Butrim, hereby certify that on X 3-25-2019, as required by Supreme Court Rule 29, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding by handing the envelopes to the Corrections Officer for processing and forwarding to the prison's mailroom for proper postage and mailing. The name and address of those served is:

Mrs. Jennifer Bentzel, Esq.
Burlington County Prosecutor's Office
49 Rancocas Road
P.O. Box 6000
Mt. Holly, New Jersey 08060
(2 Copies)