IN THE SUPREME COURT OF
THE STATE OF FLORIDA

JAMES A. CARD,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Secretary, Dept. of Corrections, State of Florida,

Respondent.
_____/

CASE NO. 68,846

RESPONSE TO AND MOTION TO DISMISS
APPLICATION FOR EXTRAORDINARY RELIEF,
AND WRIT OF HABEAS CORPUS,
AND STAY OF EXECUTION

Comes now Respondent Louie L. Wainwright, pursuant to Fla.R.App.P. 9.100(h) and moves this Court summarily dismiss without argument Petitioner's Application for Writ of Habeas Corpus and deny all prayers for relief and in support thereof would say the following:

I. Petitioner admits that the issue presented was not raised prior to trial, at trial, properly preserved or on direct appeal of the judgment and sentence but is raised here and now for the sole purpose of delaying an execution set for Wednesday 7:00 A.M. June 4, 1986. Respondent also denies Petitioner's statement that this claim is cognizable in 3.850. This question is clearly one which could have and should have been presented at trial or on direct appeal. State v. Matera, 266 So.2d 661 (Fla. 1972); Witt v. State, 387 So.2d 922 (Fla. 1980).

This claim would be no different than that presented in Haddock v. State, 129 Fla. 701 176 So. 782 (1937) where this court said:

> After the defendant and counsel appeared in the criminal court of record and participated in each step of the trial until a verdict was filed by the jury on Feb. 22, 1936 with a complete and full knowledge of the entry of the order of the circuit court on Feb. 6, 1936, and thereafter by motion an arrest of judgment contention that the criminal court of record was without jurisdiction comes too late. We think this defense should have been presented by plea and abatement by the defendant and his counsel prior to the

> filing of a plea of not guilty, and for this reason such error, if any, was waived by defendant by proceeding with the trial of the cause. Id. at 783. See also King v. State 426 So.2d 12 (Fla. 1983).

Respondent can only ask whether this claim would come at all had Circuit Judge Turner granted Petitioner's motion for judgment of acquital at the end of the state's case saying Judge Turner was without jurisdiction to grant said motion. We think not.

Moreover, Respondent disputes Petitioner's assertion that jurisdiction can be raised at anytime. In Cochran v. State, 476 So.2d 207 (Fla. 1985), the defendant argued that trial court lacked jurisdiction to revoke his probation because the state filed the amended affidavit of probation by elation after the expiration of his probationary period. This court denied relief noting that Cochran failed to raise this point before the District Court of Appeal and for purposes of this Petition stated:

> We decline to consider this issue, which has been presented for the first time at a very late stage in this case. Cochran at 208.

Likewise, the cases cited by Petitioner Ellard v. State, 280 So.2d 459 (Fla. 1st DCA 1973) in actuality Cole v. State, 280 So.2d 44 (Fla. 4th DCA 1973) and Talbott v. State, 283 So.2d 47 (Fla. 4th DCA 1973) stand for the limited proposition that if a defendant is convicted in a criminal court of record for Polk County then jurisdiction vests in the Second District Court of Appeal rather than the Fourth District Court of Appeal. In capital cases, Appellate jurisdiction in the state court vests solely in this court.

Criminal defendants cannot be allowed to take full benefit of a motion for a change of venue and then some four and one-half (4 1/2) years later raise so spurious a claim without any showing of prejudice. The undersigned counsel is also counsel of record

for Respondent in Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986) and notes for the benefit of this court that the exact same factual situation outlined here exists in Kennedy. A trial judge of the Fourth Judicial Circuit for Duval County transferred the trial of that cause to Volusia County of the Seventh Judicial Circuit. There is no order in that file from the Chief Justice of this Court assigning the trial judge as a temporary judge.

Therefore, Appellant counsel Steven L. Bolotin who has not filed an affidavit in support of this motion was not ineffective for failing to raise such a meritless claim. See Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). Counsel for Petitioner also happens to represent John Earl Bush and Respondent would ask this court to take note of the timeliness of this Petition and the similarly late filed petition in Bush. See Bush v. Wainwright, Case No. 68,617 (Fla. 1986).

CONCLUSION

Respondent moves this Court to summarily dismiss the "Application for Extraordinary Relief, for Writ of Habeas Corpus and for Stay of Execution."

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by U.S. Mail to Larry Helm Spalding, Office of Capital Collateral Representative, University of South Florida-Bayboro, 140 7th Avenue So. Coquina Hall Room 216, St. Petersburg, Florida 33701, on this 2nd day of June, 1986.

GARY L. PRINTY
Assistant Attorney General