IN THE SUPREME COURT OF FLORIDA

Case Number: SCO2-1342
Lower Tribunal: 94-150-CF-2

ANTHONY FLOYD WAINWRIGHT
Appellant

vs

STATE OF FLORIDA
Appellee

_____/

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT.)

TABLE OF CONTENTS (CONT.)

RECORD REFERENCES

Parties will be referred to either by title, or by name, i.e. the prosecutor will generally be referred to as “The State”, or as “the prosecutor” or “Appellee”, while the defendant will either be referred to by name, or as “the defendant” or “Appellant”.

The record on direct appeal consists of some twenty-nine volumes, and will simply be referred to as “R”, followed by the page number, for example, R-1234 references the record on direct appeal, at page 1234.

The Record on Appeal following the evidentiary hearing consists of three volumes, and will be referred to as “R” followed by volume number and page number, i.e. R-I-23 will refer to volume one, page twenty three.

The Supplemental Record, consisting of one volume which contains the exhibits introduced during the evidentiary hearing, will be referred to by Exhibit Number and page number, i.e., Ex-2-33 will refer to exhibit two, located at page thirty-three within the supplemental record volume.

For simplification, and within each issue raised on appeal, counsel will refer to each claim number identified by counsel in the written arguments, and as identified by the Trial Court in the Orders denying relief.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant does not request oral argument.

STATEMENT OF THE CASE AND FACTS

NATURE OF THE CASE:

The Appellant has been sentenced to death, among other things, is incarcerated, and this is an appeal from the denial of Appellant's First Amended Post Conviction Motion to Vacate Judgments of Conviction and Sentences, which was filed July 27, 2000. (R-I-3)

COURSE OF PROCEEDINGS AND DISPOSITION BELOW:

The Appellant was initially indicted on July 15, 1994, (R-1) as follows: Count One- First Degree Murder, in violation of F.S. 782.04(1)(a); Count Two- Armed Robbery, in violation of F.S. 812.13; Count Three- Armed Kidnapping, in violation of F.S. 775.087; and Count Four- Armed Sexual Battery, in violation of F.S. 794.011(3).

Following trial by jury, verdicts of guilty as charged in the Indictment were returned on May 30, 1995. (R-3652) On June 1, 1995, the jury, following penalty phase, returned a twelve to zero advisory opinion recommending the death sentence as to Count One. Thereafter, and on June 12, 1995, the Trial Court entered its Judgment and Sentence of Death. (R-1170 as written, and R-3776 as read)

The decision on Appellant's Direct Appeal to the Florida Supreme Court is found at Wainwright v. State, 704 So.2d 511 (Fla. 1997), reh. den. (Fla. 1998),

cert. den. 118 S.Ct. 1814, 523 U.S. 1127, 140 L.Ed.2d 952 (1998).

It is noted that Wainwright alleged nine issues on direct appeal (Wainwright, page 513, FN 4): it was argued that the trial court erred by (1) allowing pre-trial statements to be introduced, (2) in allowing the final three DNA loci to be introduced, (3) in allowing the case to be tried jointly with separate juries, (4) in allowing introduction of other crimes (Williams Rule), (5) in removing a juror on the 10th day of trial, (6) in allowing testimony concerning Gayheart routinely picking up her kids, (7) in overlooking the State's failure to establish corpus delicti of sexual assault, (8) in allowing Wainwright's statement about having AIDS, (9) in imposing the mandatory minimum portions of noncapital sentences and retaining jurisdiction.

Following the Huff hearing, and pursuant to the trial court's Amended Order of April 9, 2001, (R-I-34) Wainwright was allowed an evidentiary hearing on Claim Four (trial counsel's ineffectiveness regarding the microphone incident), on Claim Seven (trial counsel's ineffectiveness for not maintaining a proper attorney-client relationship, failing to assure that Wainwright received adequate mental health evaluations, failing to investigate and to present more mitigating evidence), on Claim Ten (Attorney Africano was ineffective in his pretrial representation of Wainwright), on Claim Twelve (trial counsel was ineffective for allowing introduction of co-defendant's statements and confessions, regarding admissions made by

Wainwright), on Claim Fourteen (whether trial counsel's illness during trial rendered him ineffective).

Note: Claim One (alleging trial counsel ineffectiveness for failing to preserve for appeal an issue concerning three additional DNA loci being admitted at trial, Claim Two (alleging trial counsel ineffectiveness for failing to preserve issues for appeal pertaining to admissions made by Wainwright), Claim Three (alleging trial counsel ineffectiveness for failing to preserve issues regarding collateral crimes becoming feature of trial), Claims Five, Six, Eight, and Nine (alleging trial counsel ineffectiveness for failure to preserve for appeal issues pertaining to guilt phase instructions, penalty phase instructions, prosecutorial misconduct, and improper aggravators) were all summarily denied at the Huff hearing, (R-I-41 thru 47) and again following the evidentiary hearing. (R-I-107 thru 115)

Following the evidentiary hearing held on January 23, 2002 (R-III-1), the Trial Court directed both counsel to file written arguments as to the claims presented during the evidentiary hearing. (R-III-157) The Trial Court also directed counsel for the Appellant to file a written argument as to the claims previously summarily denied at the Huff hearing, but which were renewed at the commencement of the evidentiary hearing.

Appellant's written argument as to claims denied at the evidentiary hearing

were filed on March 25, 2002. (R-I-48) Appellant's written argument as to claims summarily denied was also filed March 25, 2002. (R-I-66)

Appellant then filed a supplemental argument, with authority attached, for a new trial on April 15, 2002. (R-I-87) The Trial Court never addressed it.

The Appellee filed its written argument on April 15, 2002. (R-I-116) Thereafter, and on the same day, the Trial Court entered its Order denying any post conviction relief on April 15, 2002. (R-I-107)

The Appellee filed a response to Appellant's supplemental argument on April 24, 2002. (R-I-135)

Notice of Appeal was filed May 8, 2002. (R-I-144)

SUMMARY OF THE ARGUMENT

The Trial Court committed error when it summarily denied claims as being procedurally barred, that trial counsel was ineffective for failing to preserve various issues for appeal. The Trial Court also committed error when it denied post conviction relief because the initial lawyer appointed abandoned the defendant, allowing him to make statements to police alone, and denying him an opportunity to plead to a life sentence. Trial counsel was also ineffective for his failure to properly move for mistrial during the guilt phase, and for his failure to present mitigation evidence during the penalty phase, and for admitting the defendant's guilt during the guilt phase trial without the consent of the defendant.

ISSUES

ISSUE ONE: Did the Trial Court commit error by summarily denying Wainwright's claim that trial counsel was ineffective for failing to preserve for appeal the issue pertaining to three DNA loci?

ISSUE TWO: Did the Trial Court commit error by summarily denying Wainwright's claim that trial counsel was ineffective for failing to preserve for appeal the issues pertaining to his statements and admissions?

ISSUE THREE: Did the Trial Court commit error by summarily denying Wainwright's claim that trial counsel was ineffective for failing to preserve for appeal the issue pertaining to collateral crimes becoming the feature of the trial?

ISSUE FOUR: Was trial counsel ineffective at trial, for failing to move for mistrial when a secret microphone was discovered in his jail cell, and for failing to preserve the matter for appeal?

ISSUE FIVE: Did the Trial Court commit error by summarily denying Wainwright's claims that trial counsel was ineffective for failing to preserve for appeal issues pertaining to jury instructions, prosecutorial misconduct, and improper aggravators?

ISSUE SIX: Was trial counsel ineffective for failing to maintain a proper attorney-client relationship, failing to investigate, and failing to present sufficient mitigation during the penalty phase?

ISSUE SEVEN: Was the initial trial counsel ineffective for abandoning Wainwright, and for failing to properly represent Wainwright during the initial stages of the arrest and investigation?

ISSUE EIGHT: Was trial counsel ineffective for conceding Wainwright's guilt without consent, when the co-defendant's statement incriminating Wainwright was introduced at trial?

ARGUMENT

ISSUE ONE:

DID THE TRIAL COURT COMMIT ERROR BY SUMMARILY DENYING WAINWRIGHT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPEAL THE ISSUE PERTAINING TO THREE DNA LOCI?

CLAIM ONE

The trial court, at the Huff Hearing held December 14, 2000, first dealt with defendant's claim alleging that trial counsel was ineffective for failing to preserve for appeal the issue concerning three additional DNA loci being admitted at trial. The trial court's ruling following the Huff Hearing, was by Amended Order on April 9, 2001, and was that the claim would be summarily denied because it was procedurally barred, having been raised on appeal. The trial court ruled further that the allegation of ineffectiveness of trial counsel was insufficient to overcome the procedural bar.

In Wainwright v. State, 704 So.2d 511 (Fla. 1998), the Supreme Court, at page 514, considered Wainwright's second claim on appeal, as follows: At the time of trial, the State had provided the defense with three genetic loci of the sperm sample from the back seat of the Bronco. During opening statements, the defense

counsel argued to the jury that the testimony of the State's DNA experts would leave more questions, than answers. Trial counsel further argued that since, under RFLP testing processes there were six or seven probes available for examination, why was the State only presenting evidence of three probes in the case against Wainwright. Counsel further argued that the jury would not hear more from the State's experts, and would only hear evidence of the three genetic loci. Following opening arguments, and at the end of the day, the State told defense counsel that tests revealed three additional genetic loci, making a total of six. Defense counsel later sought to exclude the additional evidence, whereupon the trial court ruled that everybody was on prior notice that the State was continuing with the DNA testings, then denied defense counsel's motion. The trial court further ordered that the defense would have a 24 hour continuance to further prepare. (Wainwright, supra, 514.

The Supreme Court, at page 515, held that the admission of the evidence was within the trial court's discretion. In so holding, the court noted that "Wainwright does not allege that the State deliberately withheld the evidence or committed some other discovery violation, but simply that the State was dilatory in conducting the DNA tests....Defense counsel made no subsequent objection. We find no abuse of discretion." (Wainwright, 515)

On March 20, 1995, a written motion for a continuance was filed by defense counsel. (R-735) The motion asserted that on March 13, 1995, the defense asked the trial court for a continuance of the trial scheduled for March 27th, and at that time informed the trial court that the DNA evidence from the Bronco in question had been sent to the lab in Jacksonville. Further, trial counsel informed the court that as of March 20th, no reports concerning the DNA had been received. Trial counsel further asserted in the motion for continuance, that the State had indicated one of its options to be, cease further DNA testing, and proceed with what they had, which was unacceptable to the defense. (R-737) On March 22, 1995, the motion for continuance was denied. (R-804)

On March 27, 1995, defense counsel filed a motion renewing his motion for continuance, based upon discovery problems associated with the DNA reports. (R-812) Counsel indicated within the motion that State witness Pollock, under oath, testified that he had received the DNA submissions in November, 1994, (R-812) but he had not been requested by the State to begin DNA testing until February, 1995. (R-813) Defense counsel further argued that the DNA testing was not complete, and that of the six probes utilized in the RFLP process, only two had been completed. (R-813) Thereafter, counsel argued that the only reason the DNA testing had not been completed was due to the delay by the prosecution. (R-814)

Counsel concluded by arguing that Wainwright's Constitutional Right to effective counsel was being denied, as well as his ability to confront and cross-examine witnesses. (R-815) The trial court denied the renewed motion for continuance on March 27, 1995. (R-817) The hearing held on trial counsel's motion for continuance is found at R-1481 thru 1503.

On May 24, 1995, defense counsel filed a motion in limine regarding DNA evidence. (R-1092) Within the motion, counsel asserted, among other things, that jury selection began May 16th, and opening statements began at 9:00 am, on May 18th. Counsel argued that his own opening for Wainwright commenced about 10:30 am and concluded at 10:48 am. Counsel further alleged that throughout, from jury selection, up to and prior to opening statements, and thereafter, and not until 4:45 pm, as court was ending, did the State provide him with discovery information concerning the additional DNA evidence. (R-1093) Defense counsel further argued in the motion that, despite his reliance on the prior information, and without knowledge of the new evidence, he had made opening statements (as described previously herein), and at no time did the State object or provide him with information about the new DNA evidence. (R-1093) Thereafter, counsel argued that the State's conduct had essentially denied Wainwright the effective assistance of counsel, and had denied him a fair trial. Counsel argued further that the conduct by

the State was a violation of discovery rules. (R-1094) The trial court denied the motion, and gave counsel a 24-hour continuance, as previously stated. (R-1098)

Defense counsel, as noted by the Supreme Court, did not make any subsequent motion concerning the DNA evidence, nor did trial counsel make any objection at the time the evidence was offered at trial, nor at any other time during trial. In other words, and not withstanding the fact that he had previously asserted in motions and during hearings that the State had improperly delayed discovery, and had failed to properly provide discovery in accord with the Rules, and under the case law, trial counsel failed to preserve the issue for proper appellate review. This was ineffective assistance of counsel.

The issue as to the admissibility of the DNA evidence was considered by the Supreme Court. However, had the issue of prosecutorial misconduct, or the discovery violations by the State, been properly preserved for appeal by trial counsel, the probability is that the defendant would have been granted a new trial.

The Defendant recited the above facts in his Amended Motion for Post-conviction Relief, and asserted that Attorney Taylor's failure to preserve the issue regarding the admissibility of the DNA evidence, and his failure to raise a Richardson issue, thereby properly preserving it for appeal, was deficient conduct and denied the Defendant the effective assistance of counsel. These allegations are

not conclusively refuted in the record. Nevertheless, this claim was summarily denied.

In Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999) the Court stated that "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief....Upon review of a trial court's summary denial of postconviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record."

In Bruno v. State, 2001 WL 1547933, 26 Fla. L. Weekly S 803 (Fla. 2001), the Court made the following statements, at 2: "Whereas the main question on direct appeal is whether the trial court erred, the main question in a Strickland claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and–of necessity–have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that

Bruno's claim was procedurally barred." At 5, the Court, while discussing the difference between claims on direct appeal which were denied either due to merit, or which were denied as being barred because they were not preserved, also stated at 5, "If, however, the claim was denied due to counsel's failure to preserve the issue for appellate review, then a postconviction motion would be the proper vehicle to raise such a claim."

In Floyd v. State, 2002 WL 58547, 27 Fla. L. Weekly S75 (Fla. 2002) the Court dealt with similar issues. One of Floyd's claims was that he had asserted within his 3.850 motion a claim that the State had withheld Brady evidence. The trial court summarily denied the motion. The Supreme Court agreed with Floyd, that the trial court erred by not allowing an evidentiary hearing on the claim. The Court concluded that Floyd was entitled to a hearing because the record did not conclusively refute his claim. (Floyd, 3) The same is true in the instant case. Wainwright is entitled to a new trial, alternatively, he is entitled to an evidentiary hearing on the issue regarding Taylor's failure to properly raise and to preserve the DNA issue for appeal. Further, his failure to properly raise the issue of prosecutorial misconduct and discovery violations, which would have affected the admissibility of the DNA evidence, was also deficient conduct.

ISSUE TWO:

DID THE TRIAL COURT COMMIT ERROR BY SUMMARILY DENYING WAINWRIGHT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPEAL THE ISSUE PERTAINING TO HIS STATEMENTS AND ADMISSIONS?

CLAIM TWO

On direct appeal the Supreme Court addressed a claim by Wainwright, which asserted as error the fact that the trial court admitted into evidence his post-arrest statements to police. The Supreme Court's recital of the facts is as follows:

> (Wainwright, Page 513) He was arrested in Mississippi and voluntarily returned to Florida. On his return, officers reached an agreement with Wainwright and his lawyer whereby the State would not seek the death penalty if Wainwright met three conditions: (1) He did not contribute to Gayheart's death; (2) he was truthful in his conversations with police; (3) he passed a lie detector test. Pursuant to this agreement, Wainwright made a number of incriminating statements from May 9 to May 20, 1994, and assisted officers in recovering evidence of the crime. When he was transported to the State Attorney's office on May 20, however, he conferred with his lawyer, admitted for the first time that he had sexually assaulted Gayheart, and refused to take the lie detector test. Police had no further contact with Wainwright after that point...

In his Amended Motion for Postconviction Relief, Wainwright asserted, among other things, the following facts: Notwithstanding the fact that the order appointing Attorney Africano was entered by the Court on May 10th, Wainwright

was actually interviewed by police on May 9th, commencing at 7:15pm, and was adjourned at 7:55pm. According to Sheriff Reid's testimony, he and other officers were allowed by Africano to interview Wainwright on May 9th, after Africano spent approximately 45 minutes with Wainwright. (Apparently Africano had been called by the officers to assist Wainwright, but had not been appointed by the Court.) (R-2582) It was during that time that the infamous "plea agreement" was said to have been entered into.

In the Amended Motion, Wainwright also asserts that during the May 9th interview, he made incriminating statements, and on May 10th, the Sheriff contacted Africano, and informed him that officers intended to again speak with Wainwright, and were going on another trip to seek evidence. The attorney was said to have stated that Wainwright had been fully advised of his rights, and wished to cooperate.

Prior to Sheriff Reid's testimony at trial, Attorney Taylor moved to prevent the conversations and statements of Wainwright, made during May 9th, 10th, and 11th, which were later ruled to be part of the performance stage plea agreement, from being introduced. (R-2577)

Following some argument, Sheriff Reid's testimony was proffered outside of the presence of the jury. (R-2581) During that proffered testimony, as alleged in the

Amended Motion, Sheriff Reid testified that while on the May 10th trip, (during the absence of Africano), Wainwright also stated, "We planned to kill her and we didn't want anything to be found, any jewelry to be found on her body." (R-2588)

Sheriff Reid also testified during the proffer, that on May 20th, at the State Attorney's Office, Wainwright admitted to him that he had sex with Gayheart, had raped her, and prior to that time Wainwright had maintained that he in no manner touched Gayheart. (R-2589), (R-2596 thru 2597)

Following the proffered testimony of the Sheriff, on the 7th day of trial, the State Attorney, Blair, informed the trial court that the statement alleged by the Sheriff to have been made by Wainwright on May 10th, had not previously been disclosed during discovery. The State also informed the trial court and trial counsel that another statement by Wainwright, according to Sheriff Reid to also have occurred during the May 10th trip, (during the absence of Africano), had not been provided during discovery. (R-2602) According to the Sheriff, Wainwright told him on May 10th, that while he and the co-defendant Hamilton were traveling from the store where the kidnaping occurred, to the location where Gayheart was eventually killed, Hamilton commented, "You know what we have to do?", whereupon Wainwright is said to have answered, "Yes, I know what we have to do." Further, according to the Sheriff, Wainwright admitted that he understood the conversation

to mean they had to kill Gayheart. (R-2602) Blair then informed the trial court that perhaps a Richardson hearing would be appropriate, to address the discovery violations. (R-2603)

Notwithstanding the disclosures of discovery violations by State Attorney Blair, and notwithstanding Blair's comments to the Court that perhaps it would be appropriate to conduct a Richardson hearing, Attorney Taylor did not move for such a hearing.

Attorney Taylor did argue to the trial court that the matter constituted a discovery violation, and he did inform the trial court that he had taken the deposition of Sheriff Reid, and he had examined the Sheriff's notes. Within the deposition, and within the notes, according to Taylor, there was no mention by the Sheriff of any conversations between himself and Wainwright on May 10th, or on May 20th. Instead, the testimony and notes reflected the dates of May 9th, and May 11th. Other than this, Taylor objected to the May 10th testimony only, and he did nothing to move for a Richardson hearing, or to otherwise preserve the issue for appellate review.

Later, Sheriff Reid took the stand as a witness in the presence of the jury. His testimony is reported at R-2648 thru 2669) During his testimony, and without objection from Taylor, the Sheriff testified about the alleged statement by Hamilton

"You know what we got to do?" as having occurred on May 10th. (R-2652 thru 2654) Then the Sheriff's attention was directed to May 11th, whereupon he testified, without objection by Taylor, that Wainwright made the statement "We had already planned to kill her, and we didn't want any articles of jewelry to be found on her body." (R-2654 thru 2655) Thereafter, the Sheriff testified, without objection, that on May 20th, at the State Attorney's office, Wainwright admitted having sex with Gayheart. (R-2656)

The failure by trial counsel to properly preserve these issues pertaining to the May 10th, and May 11th, and May 20th statements for appeal was deficient, and resulted in ineffective assistance of counsel. Not only did Taylor fail to properly preserve the issues for appeal by objecting, he then also failed to cross examine the Sheriff, and failed to impeach the Sheriff concerning the difference in the dates upon which he claimed Wainwright made the various statements.

At the evidentiary hearing, Wainwright testified that upon being brought back to Florida from Mississippi, he was introduced to Attorney Africano at the jail conference room. (R-III-41) Thereafter, he spent approximately 25-30 minutes with Africano, where they talked about him cooperating with authorities. (R-III-42) According to Wainwright's testimony, the agreement dealt with by the Supreme Court on direct appeal was not made in Florida, but was made verbally in

Mississippi, following his arrest there. (R-III-45) The deal was essentially that he would get life if he fully cooperated, took a polygraph, and did not actually commit the murder, and if he did not rape the victim. (R-III-43)

Wainwright then testified that nothing was ever said to him about any written agreement, and Africano never requested any written agreement, nor did he make any effort to determine exactly what the agreement was before he allowed Wainwright to speak with the law enforcement officers. (R-III-45 thru 47) The only thing Africano told him was "to fully cooperate." (R-III-45)

Wainwright testified that he refused the polygraph until he received his written agreement, which was never forthcoming, (R-III-47) and that he would have taken the polygraph if they had provided the written agreement. (R-III-48) Wainwright never saw Attorney Africano again after that. (R-III-48) Wainwright testified that he did not kill Gayheart, and that he did not rape her. He also testified, contrary to Sheriff Reid's testimony, that he did not tell the Sheriff that he had raped her. (R-III-54)

Sheriff Reid testified at the evidentiary hearing that State Attorney Blair told him to inform Wainwright that if he passed a polygraph that he did not actually kill Gayheart, he would get a plea for life, (R-III-66) (No mention of rape of the victim in the deal) and the information was passed on to Africano. (R-III-67) Sheriff Reid

also testified that Wainwright told him he had raped Gayheart, (R-III-69) and he did not recall Wainwright asking for a written agreement before taking the polygraph. (R-III-69, 70)

On cross examination Sheriff Reid testified that he believed he had the authority from State Attorney Blair to offer Wainwright life if he could prove he did not kill Gayheart, (R-III-72,73) but he did not know who conveyed the information to Wainwright in Mississippi. (R-III-73) Reid also testified that "cooperation" was not the issue, Wainwright simply had to show that he did not kill Gayheart. (R-III-73) Again, nothing involving the rape was included.

The Sheriff testified that neither he nor any of his deputies used tape recorders, (R-III-73) and he did not ever sit down with Africano and make any notes concerning what the agreement was. (R-III-74) The Sheriff reiterated the so-called deal, (R-III-74), but could not testify when or who conveyed the deal to Wainwright. (R-III-74) To his knowledge, he believed Africano conveyed the deal. (R-III-74, 75) The Sheriff also testified that during the various times he was with Wainwright, including the times when the admissions and statements were made, Africano was never with them when Wainwright was present. (R-III-77)

State Attorney Blair testified, and he basically said that initially, after co-defendant Hamilton and Wainwright were arrested, he wanted to offer one the

opportunity to testify against the other, provided he was not the trigger man. (R-III-142 thru 145) Of note is the fact that Hamilton took the polygraph, and he was asked if he was the trigger man. Hamilton failed the polygraph. (R-III-154)

Blair also testified that the matter concerning rape would not have affected his decision. He would have agreed to a plea for life by Wainwright had he taken the polygraph concerning whether he was the trigger man. (R-III-147 thru 149) Blair, however, testified that he had no direct contact with Wainwright, and he did not convey the message concerning the polygraph to him, and he would have agreed to a written agreement if it had been mentioned. (R-III-150)

Wainwright has claimed that Africano failed to inform him, failed to investigate before allowing him to talk with police officers, failed to obtain a written plea agreement, and Africano abandoned him. These claims are not refuted by the record, or by the testimony, In fact, it appears clear that Africano only spoke to Wainwright for 25-30 minutes immediately upon his return to Florida from Mississippi, then departed. In a capital murder case, and without knowing any facts about the case, such is ineffective counsel, as was his failure to make clear the terms of the agreement.

In fact, Attorney Taylor testified that after Africano withdrew, he spoke to Africano, and to the best of his belief, when he asked Africano about the polygraph

deal, that Africano said he didn't think he was going to be on the case long, he was just trying to help out, and he had other things on his mind, such as being the school board attorney. (R-III-98)

Sufficient facts were alleged within Wainwright's Amended Motion for Postconviction relief, and the record contains support for the claims. This claim was summarily denied by the trial court following the Huff Hearing. Pursuant to the provisions of Gaskin, Bruno, and Floyd, previously cited, the Defendant's allegations within his Amended Motion, to the extent they are not conclusively refuted by the record, must be accepted as true. Further, the alleged facts constitute a claim of ineffective assistance of counsel, not dealt with on direct appeal, and an evidentiary hearing must be had when the alleged facts are not conclusively refuted by the record. Floyd, Bruno, Gaskin, supra.

Had Africano simply explained the deal to Wainwright clearly, or had he simply reduced the deal to writing, Wainwright would have been in a position for a plea to a life sentence, rather than being sentenced to death. He was prejudiced by Africano's conduct, and he was prejudiced when the matters were not preserved for appeal by trial counsel.

The defendant should be granted a new trial. Alternatively, the defendant is entitled to an evidentiary hearing on this claim.

ISSUE THREE:

DID THE TRIAL COURT COMMIT ERROR BY SUMMARILY DENYING WAINWRIGHT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPEAL THE ISSUE PERTAINING TO COLLATERAL CRIMES BECOMING THE FEATURE OF THE TRIAL?

CLAIM THREE

Wainwright alleged in his sworn Amended Motion for Postconviction Relief that at least two entire days of trial were consumed by testimony concerning collateral crimes committed by the defendant in other states. The defendant further alleged in his Amended Motion that the testimony concerning the collateral matters were such that they became the feature of the trial, and the Amended Motion alleged ineffective counsel because trial counsel made no proper objections concerning said matters becoming the feature of the trial, and otherwise failed to properly preserve the issues for appeal.

The trial court's order entered April 9, 2001, summarily denied the claim as being procedurally barred, and stated that the matter had been considered on direct appeal, and was denied by the Supreme Court as having no merit, citing FN 9, Wainwright, Page 516. The trial court further stated in its order that the allegations of ineffective counsel were insufficient to overcome the procedural bar.

It is again noted that Wainwright alleged nine issues on direct appeal (Wainwright, page 513, FN 4): it was argued that the trial court erred by (1) allowing pre-trial statements to be introduced, (2) in allowing the final three DNA loci to be introduced, (3) in allowing the case to be tried jointly with separate juries, (4) in allowing introduction of other crimes (Williams Rule), (5) in removing a juror on the 10th day of trial, (6) in allowing testimony concerning Gayheart routinely picking up her kids, (7) in overlooking the State's failure to establish corpus delicti of sexual assault, (8) in allowing Wainwright's statement about having AIDS, (9) in imposing the mandatory minimum portions of noncapital sentences and retaining jurisdiction.

The issue as to the collateral, out of state crimes becoming a feature of the trial was not raised on direct appeal, and Wainwright is entitled to an evidentiary hearing on the claim. Furthermore, even had the issue been raised on direct appeal, the Supreme Court clearly dealt with issues (1), (2), (7), and (9), during the direct appeal, but there is not any indication within the Court's decision to tell us why the other five claims were so disposed of. In other words, the appellate court disposed of the claim without discussion, and it is not clear how the Court disposed of the matter. As stated in Bruno, supra, at 7, "The trial court incorrectly concluded that these claims were procedurally barred, as they were included in the direct appeal

opinion's laundry list."

The defendant is entitled to a new trial. Alternatively, the defendant is entitled to an evidentiary hearing on this claim.

ISSUE FOUR:

WAS TRIAL COUNSEL INEFFECTIVE AT TRIAL FOR FAILING TO MOVE FOR MISTRIAL WHEN A SECRET MICROPHONE WAS DISCOVERED IN HIS JAIL CELL, AND FOR FAILING TO PRESERVE THE MATTER FOR APPEAL?

CLAIM FOUR

During the trial, on approximately the sixth day, Wainwright wrote a note to the trial judge, and asked for an in camera hearing. (R-2393) Wainwright reported to the trial judge that, following a note from another inmate informing him of a hidden microphone in his cell, where he and trial counsel met and talked about the trial issues, he had looked about and did in fact discover a hidden microphone at the top of his cell, around the vents. Wainwright informed his trial counsel of the microphone on Thursday, by telephone, and counsel did not come to the jail, and then on Friday, after being removed from his cell for a while, the microphone was gone. (R-2394)

The defendant drew a sketch of the microphone, which was placed into the

record by the trial judge. (R-2395) Attorney Taylor was sworn by the court, and testified. (R-2395 thru 2397) Essentially, Taylor testified that when he went to the jail on Friday, Wainwright was upset, and he believed that Taylor had told the authorities about the microphone, resulting in its removal. This, Taylor testified, caused problems between himself and Wainwright, including the fact that Wainwright thereafter mistrusted him, and refused to talk with him more. Taylor also testified that he had no other knowledge of the microphone, and had not received any information from it. (R-2397)

Wainwright testified that two inmates also informed him that they overheard Wainwright and Hamilton talking over a speaker in the jail control room. (R-2398)

Witness Tompkins, jail personnel, was sworn and asked if he had knowledge of the microphone. The officer testified that others had heard about Wainwright's comments about a possible escape, and that was the reason the microphone was placed in the cell. (R-2399) The officer also testified that he had not shared any information heard over the microphone with the State or anybody else. (R-2401) The officer also testified that when Wainwright's attorney was with him at the cell, the device was turned off, and he was not aware of any other officer overhearing conversation between Wainwright and his trial counsel. (R-2402 thru 2403) The State Attorney and his Assistant were both sworn, and both testified that they had

no prior knowledge of the microphone. (R-2405) There was no court authorization for the device. (R-2406)

Of even more interest is the fact that the trial judge stated that he had learned of the microphone in Wainwright's cell "one day at lunch last week" and he had ordered the removal of the device. (R-2404) This would have been prior to Wainwright's discovery of the device, and apparent evidence that the jail personnel had disregarded the court's order.

At the Evidentiary Hearing, Wainwright decided against giving testimony concerning the microphone incident, and stood by the record and his allegations set forth within his sworn Amended Motion, all of which stands not refuted.

Trial counsel Taylor testified at the evidentiary hearing concerning this matter, and stated that Wainwright was extremely upset with him over the microphone incident, and blamed him for leaking the information to someone before the culprit who placed the microphone in the cell could be discovered. Then, counsel stated that it was at that point in time that Wainwright's frustration was the highest. (R-III-84)

Following the incident, according to Taylor, counsel made a motion for mistrial, claiming that Wainwright's conduct was bizarre, and he was out of reach, and it was affecting his own effectiveness. (R-III-85) Trial counsel did not,

however, even though the matter concerning the microphone, when added to the other incidents which had occurred during trial, all of which had virtually caused a breakdown in the attorney-client relationship, raise the issue with the Trial Court that the cumulative effect had deteriorated the attorney-client relationship.

Had counsel again moved for mistrial, or otherwise preserved the record because of the cumulative problems caused by the State, the Trial Court could have addressed the matter. Further, the Appellate Court could also have addressed it. (R-III-89, 90)

Counsel also testified during the evidentiary hearing that his belief was that, at the time, he and Wainwright had been held downstairs in the jail for 20-30 minutes so that the officers could remove the microphone before he could see it and bring it to the attention of authorities. (R-III-129)

Whether or not the Trial Court conducted an evidentiary hearing of sorts at trial regarding the concealment of the microphone in Wainwright's cell, and whether or not the State Attorney claimed not to have received information from the microphone, the simple truth is that we will never know what attorney-client information law enforcement officers may have overheard. Further, to place the microphone in the cell without a warrant, and to place it in a location where attorney-client information is being discussed by trial counsel with his client,

especially during the pendency of a capital murder trial, would appear to be a matter of gross fundamental violations of the Constitutions of both the State of Florida, and the United States.

Additionally, it is clear that ex parte communications existed between the Trial Judge and somebody within the Sheriff's Department, because the Judge stated on the record that he had heard about the microphone "one day last week" and had "ordered its removal". (R-2404) Trial Counsel failed to raise this ex parte communication as an issue, and failed to raise as an issue the fact that such information had not been passed on to counsel during the trial of a capital murder case.

It was deficient conduct and ineffectiveness for trial counsel not to have made an objection, and not to have made a proper motion for mistrial, so that the issue could have been preserved for appeal. It was also improper for the Trial Judge to have participated in ex parte communications concerning such conduct, and not to have informed trial counsel about it.

It is this type of conduct which causes a client such emotional distress that he or she cannot participate in the trial or assist counsel, and such was a denial of Wainwright's Sixth Amendment Right to confer with trial counsel and to be present and to participate in his own trial. See United States v. Durham, 2002 WL 523094

(11th Cir. 2002) where a defendant was required to wear a stun belt during trial. Even though the stun belt was never used on him, the Court ruled that because he wore it and was upset about it, the defendant's conviction was unconstitutionally tainted, and reversal was required unless the State could prove the error was harmless beyond a reasonable doubt.

Wainwright's active assistance at trial would have been a key to Trial Counsel's effective representation during trial, and because of the microphone incident, trial counsel failed to maintain the attorney-client relationship, and Wainwright's Sixth Amendment Right to be present and to assist in his own defense was lost. New Trial is required.

ISSUE FIVE: DID THE TRIAL COURT COMMIT ERROR BY SUMMARILY DENYING WAINWRIGHT'S CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR APPEAL ISSUES PERTAINING TO JURY INSTRUCTIONS, PROSECUTORIAL MISCONDUCT, AND IMPROPER AGGRAVATORS?

CLAIMS FIVE, SIX, EIGHT AND NINE

In his Amended Motion, Wainwright alleged ineffective assistance of counsel within claims five, six, eight, and nine, alleging among other things, that trial counsel was ineffective by failing to object to guilt phase jury instructions, by failing to

object to penalty phase instructions, by failing to object to improper prosecutorial argument during both the guilt and penalty phase, by failing to object to improper aggravators, and by failing to object to the trial court's sentencing order. Without such objections, the issues were not preserved for appeal. Further, Wainwright provided fact-specific allegations of trial counsel's deficient conduct in each of several paragraphs of the Amended Motion (See R-I-3, paragraphs 41 thru 70, and paragraphs 79 thru 83).

Claims five, six, eight, and nine were summarily denied by the trial court, on the grounds, among other things, that the claims were procedurally barred, and the claims of ineffective counsel were insufficient to overcome the procedural bar.

The types of claims raised by Wainwright in his Amended Motion are exactly the types of claims dealt with by the Supreme Court in Bruno, supra. In Bruno, at 7, the Court observed that Bruno had raised issues and claims concerning such matters as (1) the jury being misinformed, without objection, as to its sentencing responsibility, ala Caldwell v. Mississippi, claim, (3) counsel failed to object to the state's remark about Bruno's tatoo, (4) counsel failed to object to state's argument that it could find a contemporaneous robbery as a prior felony, (5) counsel failed to object to the state's argument that the jury could count three aggravators, etc.

During closing arguments at Wainwright's penalty phase, the prosecutor

made the following statement: “This is a solemn obligation. I have no less a solemn obligation and responsibility as State Attorney to argue to you on behalf of the people of the State of Florida that death is the only appropriate recommendation, that death is the only appropriate penalty to be imposed in this case. I do not approach my obligation in anything other than the most serious of manners. And I am sure you approach your responsibilities in the same fashion....Not every murder case calls for the application of the death penalty. But some murders are so egregious, so aggravated that the death penalty is the only appropriate penalty, and this is such a case.” (R-3687 thru 3688)

This was an improper effort by the elected official, Jerry Blair, to inject, or to invoke his personal status as State Attorney, or as an arm of the State of Florida, as the basis for a death sentence. The argument also implies to the jury that if the defendant did not deserve the death penalty, he would not have been tried. It was fundamental error. There were no objections to this argument by trial counsel. See Ruiz v. State, 743 So.2d 1, 5 (Fla. 1999) where the Court commented “By arguing that the prosecutors as representatives of the State have no interest in convicting anyone other than the guilty...prosecutor Cox was implying, ‘If the defendant wasn’t guilty, he wouldn’t be here.’” The Court thereafter cited a quotation from Hall v. United States, 419 F.2d 582 (5th Cir. 1969) wherein that Court reflected that

the prosecutor's effort was to lead the jury to believe that the whole government had already decided that the defendant was guilty.

In the instant case it was an effort by State Attorney Blair to seek to invoke his personal status as the government's attorney as a basis for conviction, and as a basis for the death penalty. Again, in Ruiz, at *4, the Court stated "It is particularly, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant."

The same is true in Wainwright's case. The prosecutor was doing nothing more than invoking his own position as the head of the State Attorney's Office which brought the charges against Wainwright, in an effort to show the jury that he and everybody else believed in Wainwright's guilt, and that Wainwright deserved the death penalty.

Additionally, as recognized in Ruiz, at *7, the blatant appeal to the jury personalized the prosecutor in the eyes of the jury, and placed improper evidence before the jury. Further, and as recognized in Hall, the remarks may be construed to mean that as a pretrial administrative matter the defendant had been found guilty and deserved the death penalty, else he would not have been prosecuted, and he would not be subject to the death penalty.

The State Attorney next argued aggravating circumstances, including the following: The murder was committed during flight and to effect escape, the murder was committed to eliminate the witness or to avoid arrest, the murder was committed for pecuniary or financial gain, the murder was heinous, atrocious, and cruel because in all probability the victim knew she would die, and the murder was committed in a cold, calculated and premeditated manner. (R-3692 thru 3701) There was no objection by trial counsel.

A contemporaneous conviction for a violent crime involving one victim cannot generally be used to support the aggravating circumstances set forth at F.S. 921.141(5)(b). See Elledge v. State, 434 So.2d 613 (Fla. 1993), Bruno v. State, 574 So.2d 76 (Fla. 1991), Holton v. State, 573 So.2d 284 (Fla. 1990) Although the trial court acknowledged that such was the law at sentencing (R-3778), it was deficient conduct, and it was ineffective counsel for trial counsel not to have objected, both to the argument, and to the jury instruction.

Further, with regard to the prosecutor's argument concerning F.S. 921.141(5)(e), that the murder was committed to avoid arrest or to effect an escape, there exists no presumption for this aggravator, and the supporting evidence is required to be very strong when the victim is not a law enforcement officer. In fact, when the victim is not a law enforcement officer, the State is

required to prove that the sole or dominant reason for the murder was the elimination of the witness. See Preston v. State, 607 So.2d 404 (Fla. 1992) and Urbin v. State, 714 So.2d 411 (Fla. 1998). Even if witness elimination "may have been" one of the reasons for the murder, it is not sufficient to argue or find this aggravator. See Davis v. State, 604 So.2d 794 (Fla. 1992) Trial counsel was deficient when he failed to object to this aggravator, both during argument, and in the jury instructions.

Regarding the statutory aggravator pertaining to pecuniary gain, etc., found at F.S. 921.141(5)(f), which the State also argued, it was similarly deficient conduct for trial counsel not to have objected to the argument, and to the jury instruction. Per Hardwick v. State, 521 So.2d 1071 (Fla. 1988) this aggravator only applies where the murder is an integral step in obtaining some specific sought after gain. There must be a pecuniary motive for the murder itself, Simmons v. State, 419 So.2d 316 (Fla. 1982).

As to the State's argument on HAC, F.S. 921.141(5)(h), we find the following: This aggravator only applies in torturous murders- those evincing extreme and outrageous depravity, as exemplified by the desire to inflict a high degree of pain, or utter indifference to either the enjoyment or suffering of another. Cheshire v. State, 568 So.2d 908 (Fla. 1990) The aggravator likewise does not

apply unless the crime is both conscienceless or pitiless, and unnecessarily tortuous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992) and Hartley v. State, 686 So.2d 1316 (Fla. 1996).

It is noted that HAC has been held to apply to strangulation deaths Orme v. State, 677 So.2d 258 (Fla. 1996) but, in the instant case, the medical examiner testified that he could not rule in or rule out strangulation as the cause of death (R-2491), and in fact, the medical examiner gave his opinion that the victim died of gunshot wounds to the head. (R-2487 & 2488). HAC has been held not to apply to gunshot killings in the ordinary sense. Lewis v. State, 398 So.2d 432 (Fla. 1981), Robertson v. State, 611 So.2d 1228 (Fla. 1993), Kearse v. State, 662 So.2d 677 (Fla. 1995). Trial counsel was ineffective when he failed to object to the argument, and when he failed to object to the penalty phase jury instructions. Similarly, the finding of the HAC aggravator cannot be applied vicariously. Omelus v. State, 584 So.2d 563 (Fla. 1991) and Archer v. State, 613 So.2d 446 (Fla. 1993) In the instant murder, there existed no clear evidence regarding which of the defendants actually killed the victim, and in fact, Hamilton, the co-defendant, failed the polygraph when he denied that he killed Gayheart. (R-III-154) Each accused the other, and there were no eye witnesses. Trial counsel was ineffective for not objecting to the argument of the prosecutor, and in not objecting to the jury instructions.

During penalty phase argument, the prosecutor also made the following argument in support of the HAC aggravator: (Commencing at R-3696 thru 3697) "In all probability, based on the evidence in the case, Carmen Gayheart was still alive in some fashion after the strangulation, and hence, that's why she was shot twice in the back of the head. But Carmen Gayheart obviously was not conscious, based on the testimony. So for Carmen Gayheart, the last thirty seconds of consciousness of her life was a realization on her part that she had breathed her last breath. One of the most horrifying deaths imaginable for just about anybody is to be strangled to death or to be deprived of oxygen and an ability to breath. It is horrifying, terrifying experience and it was a horrifying and terrifying, a cruel and heinous and atrocious experience for Carmen Gayheart. Not only do we have the strangulation, but we have the evidence of Carmen Gayheart being told to lie down. Carmen Gayheart was no fool. Carmern Gayheart was a nursing student. All of the evidence would indicate that she was a bright, intelligent young lady. Carmen Gayheart had to know what lay ahead. She knew why she was being told to lie down on the ground there. Again, this adds to the terror. This adds to the heinous, the attrocious and the cruel nature of this crime."

There were no objections to this argument by trial counsel, and this was ineffectiveness. It was prosecutorial misconduct to make such an argument, and it

violated the "golden rule", in that, it in essence caused the jury to place themselves in the place of the victim, and caused them to imagine their own agony and pain during such an event. The argument was also improper because was intended to inject or create emotion, fear, and terror into the jury's deliberations, and to arouse the sympathy, prejudice and passions of the jury. See Urbin v. State, 714 So.2d 411, 419 (Fla. 1998).

Further, and as stated in Brooks v. State, 762 So.2d 879, 899 (Fla. 2000) the sole exception to the general rule that there must be a contemporaneous objection to improper argument is when that unobjected to argument rises to the level of fundamental error. Regardless, it was ineffectiveness for counsel not to have objected, so as to preserve it for appeal.

In the instant matter, it was also fundamental error, because the prosecutor's several comments all must be viewed cumulatively in light of the record, and the improprieties reached the critical mass of fundamental error, as in Brooks, supra, at 899. Not only did the prosecutor in the instant matter present a narrative describing Gayheart's death, which was an improper emotional portrayal, he also impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear. All of this, when combined with the prosecutor's efforts to inject his own personal status as the State Attorney, rises to the level of fundamental

error. Brooks, supra, 904.

Similarly, during closing argument at the guilt phase, the prosecutor made the following argument: (R-3580) "Now, let's look at Gary Gunter. Again, why should you believe Gary Gunter? Gary Gunter is a career criminal, he's spent most of his life in prison. I submit to you that the reason that Gary Gunter is worthy of belief is that Gary Gunter is a dying man. Not only has he lived in prison most of his life, but in all probability he's going to die in prison. He's dying of AIDS. And Gary Gunter wants to leave one small final legacy of decency. He tried to do what was right for one time in his life. Do you remember the conversation that he had with Don Gutshall? He went to him and says, 'look, I'm dying. I'm not going to get anything out of this, but what they did to that girl was just not right.' Gary Gunter was telling the truth when he said that Anthony Wainwright admitted that he had raped Carmern Gayheart." This argument was improper in that the prosecutor expressed his own personal opinion on the merits, and upon the credibility of a witness. (Ruiz, supra, at page 5)

The combined effect of the various arguments by the prosecutor was as bad, if not worse, than those cases in which prosecutors used the Eberhart, and Gregg arguments. The arguments misled the jury, and were improper. See Wilson v. Kemp, 777 F.2d 621, 625 (11th Cir. 1986)

The role of a jury in capital penalty phase should not to be swayed or undermined by emotional pleas, emotional portrayals, fear, by bolstering of a State witness, or by pressure from a State figure. Such violates the Sixth, Eighth, and 14th Amendments.

The allegations in Wainwright's Amended Motion, as again identified and argued herein, were summarily denied, are not conclusively refuted in the record, and they must be accepted as true. Atwater v. State, 788 So.2d 223,229 (Fla. 2001), Peede v. State, 748 So.2d 253 (Fla. 1999)

The instant trial court incorrectly concluded that Wainwright's claims were procedurally barred, and Wainwright is entitled to a new trial, or to an evidentiary hearing on said claims. (Bruno, 7) At the very least, Wainwright is entitled to a new penalty phase, and a new sentence. Aside from being elevated to fundamental error, trial counsel failed to object, and failed to preserve any of the matters for appeal. This was ineffectiveness of trial counsel during the guilt phase, and during the penalty phase. A new trial is warranted.

ISSUE SIX:

WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO MAINTAIN A PROPER ATTORNEY-CLIENT RELATIONSHIP, FAILING TO INVESTIGATE, AND FAILING TO PRESENT SUFFICIENT MITIGATION DURING PENALTY PHASE?

CLAIM SEVEN

Wainwright alleged in this claim three issues of ineffectiveness: (1) trial counsel failed to maintain a proper attorney-client relationship with him, resulting in ineffective assistance, (2) trial counsel failed to assure that Wainwright received adequate mental health evaluations, and (3) trial counsel failed to investigate, and failed to present mitigation evidence, although significant mitigation existed.

As early as March 8, 1995, prior to trial, Wainwright wrote a letter to the clerk and to the trial court complaining that since his arrest on June 9, 1994, trial counsel had failed to speak to him for more than three or four hours. (R-637 thru 640) Also, within the letter, Wainwright complained that he had asked trial counsel to make arrangements for him to see a psychologist or psychiatrist, which was not done. (R-638) Wainwright asked the trial judge to appoint him another attorney. (R-640) Later, the trial court asked Wainwright if he had resolved the matters with trial counsel, whereupon Wainwright responded that he had. (R-1219) Again later, the

incident with the microphone occurred, and Taylor filed Wainwright's ex parte motion to see the trial judge. (R-1073) Within that motion Wainwright again stated that trial counsel was not acting in his best interest. (R-1073) Following all of this, and following the in camera hearing by the court on the microphone incident, trial counsel made a verbal motion for an order to show cause, and for mistrial, because members of the Sheriff's Department had made news releases concerning the in camera proceeding, in violation of the court's order. (R-2606 thru 2609) The trial court denied the motion for mistrial and sanctions. (R-2995 thru 2996) There were then additional matters which caused trial counsel to again move for mistrial on the grounds that he and his client had been distracted by all of the extra occurrences (R-3006 thru 3010), and that created paranoia in the client, and created problems with the attorney-client relationship. (R-3007) Recited in the verbal motion were facts such as Wainwright being denied the opportunity to call counsel as previously arranged with the jail (R-3006), the microphone in the cell incident (R-3007), the press conference related to the in camera proceeding (R-3008), and the late disclosure of DNA evidence by the State (R-3009) The trial court then, on its own motion, informed Taylor that Wainwright had been provided with medications by Dr. Mhatre (psychiatrist) and inquired of trial counsel if Wainwright was alert and able to assist counsel. Trial counsel told the court that he was. (R-3013)

Notwithstanding the assurances given to the trial court by counsel, a short time later, at the commencement of the charge conference, Wainwright had an experience with a stun belt, and commenced screaming, (R-3511) whereupon trial counsel stated to the court "He just went to hell in a handbasket." (R-3510) Wainwright ultimately informed the court that he did not want to be present at the charge conference (R-3513), and then he commented to his trial counsel, "You think something is funny, don't you, man?" (R-3513) Very clearly there existed animosity between trial counsel and his client.

When asked during the evidentiary hearing about Wainwright's lack of cooperation at trial, and whether suspicion played any part, Attorney Taylor answered as follows: (Page 128) "I am sure that was part of it. A lot of it had to do with the unique– what I would characterize as the unique circumstances that we had to go through pretrial and during the trial. I have never experienced anything like that."

All of the experiences at trial, when combined, resulted in the destruction of the attorney-client relationship, and resulted in trial counsel being ineffective. It also resulted in a denial of Wainwright's Sixth Amendment Right to confer with counsel, and to participate in his own trial. Durham, supra.

During the evidentiary hearing, trial counsel testified, and he was asked about

a motion he filed with the trial court during trial, wherein he complained about Wainwright's conduct being bizarre and out of reach. After acknowledging the filing of the motion, trial counsel was then asked why he did not file a motion to have Wainwright examined by a psychiatrist or psychologist. Basically, counsel responded that Wainwright received some medication, but "It id not occur to me to go any further." (R-III-85)

During the evidentiary hearing, trial counsel was also asked concerning his efforts to investigate, or to locate, and to present mitigation evidence through physicians who had treated Wainwright as a child, through puberty. Specifically, counsel was asked if he was aware Wainwright had mental problems as early as age four or five. Counsel admitted that he was aware of a number of incidents that occurred at an early age, and he had access to the records, but he did not recall having any conversations with any of the medical people, or with the treating facilities. (R-III-88)

During the evidentiary hearing, trial counsel was shown a number of Wainwright's medical records: The first record was from Tarbor Clinic P.A., (Exhibit One) and a report written by Doctor Coulthard. Counsel was asked, and admitted that at age 17, the psychiatric physician recommended "in-house treatment of Wainwright in a psychiatric or psychological unit." (R-III-105, 106) Exhibit Two

was identified as North Carolina Memorial Hospital, Chapel Hill, a psychological examination dated March 12th and April 1st, 1985. At age 14, Doctor Barbara Boat recommended Wainwright be placed in an in-house facility. (R-III- 106, 107) Exhibit Three was identified as a diagnostic evaluation dated April 2, 1985, from University of North Carolina, Chapel Hill, (R-III-108) Exhibit Four was identified as a Cumberland Hospital report, wherein Doctor Kathleen Radcliff's evaluation of Wainwright was that for his chronological age, he was below average or low average, and Doctor Robert Jackson indicated that the prognosis for Wainwright, at age 16, was not very promising. (R-III-111,112) Exhibit five was identified as a November 7, 1986 report and evaluation from Carolina Psychological Associates. (R-III-113) Trial counsel Taylor then admitted that the records reflect that Wainwright, at a very young age, had serious problems which followed him into adulthood. (R-III-113)

Trial counsel was then asked why he did not list any of the witnesses mentioned in any of the reports as defense witnesses, or for mitigation purposes. (R-III-118) Counsel stated that he was working under instructions from his client, and was going to use defendant's mother. But, the witness then admitted that the mother could not have testified about the reports, or gotten them admitted into evidence. Counsel also admitted that none of the medical information was offered

in mitigation. (R-III-119) Counsel also admitted during cross examination that Wainwright, during trial, never specifically told him to "don't ask this or do that." (R-III-126) Trial counsel also admitted that even if Wainwright had not stopped him during the examination of his mother during penalty phase, he (trial counsel) would not have been in a position to put any of the psychiatric or psychological mitigation into evidence anyway (R-III-137), because he did not have any of the witnesses present to testify concerning the matters. (R-III-138)

The only witness called by trial counsel during the penalty phase was Kay Wainwright, the defendant's mother. (R-3666 thru 3684) Mrs Wainwright testified about a Doctor Charles Boyd, in Greenville, N.C., who tested the defendant and informed her that Wainwright was borderline mentally retarded. (R-3676) Mrs Wainwright testified about several other childhood matters; then, during the testimony, trial counsel announced to the court that, based upon a communication from defendant Wainwright, he was terminating any further questioning of the witness. (R-3684)

Thereafter, trial counsel, in the absence of the jury, informed the court that Wainwright would not allow him to state what the issue was with Wainwright's mother, which the defendant did not want gone into. (R-3685) Attorney Blair, the prosecutor, told the court that he presumed the matter to be related to the fact that

Wainwright had previously been sexually molested. (R-3686) Whereupon, the court asked Taylor if that was the representation. (R-3686) Following the penalty phase closing argument by the State, Wainwright was brought before the court outside the presence of the jury, and the following dialogue, and inquiry of Wainwright, occurred: (R- 3708 thru 3709)

TAYLOR- When I announced to the Court that I was terminating the communications with the examination of your mother, I approached the bench, and advised that was as far as you wanted me to go. Is that your understanding?

WAINWRIGHT- Yes, sir.

TAYLOR- And even though there might have been another area or two that I could have gone into, you specifically did not want me to go into that; is that correct?

WAINWRIGHT- Yes, sir.

TAYLOR- And you do not want me to go into it right now?

WAINWRIGHT- No, sir.

TAYLOR- And you don't want me to discuss it with anybody?

WAINWRIGHT- No, sir.

Thereafter, the conference and the examination of Wainwright concerning the

matter of his mother's testimony was concluded. Trial counsel then presented no other witnesses.

In Stevens v. State, 552 So.2d 1082 (Fla. 1989) the Supreme Court examined a record wherein the record showed that substantial mitigation evidence existed, and trial attorney failed to present same. The Court, citing other authority, stated, "Thus, when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state." (Stevens, 1087)

In State v. Michael, 530 So.2d 929, 930 (Fla. 1988) a trial court, following an evidentiary hearing, found that trial counsel should have obtained, but did not, expert opinions on the applicability of statutory mental mitigating factors. According to the trial court, counsel correctly decided that there was not an insanity defense to pursue, but counsel admitted he was on notice of the defendant's disturbed condition. The trial court found counsel's failure to pursue the line of investigation to be unreasonable, and a violation of the Strickland test. The Supreme Court affirmed the trial court's order of a new sentencing procedure.

In State v. Lara, 581 So.2d 1288 (Fla. 1991) another trial court found that trial counsel failed to present significant and compelling mitigation evidence during the penalty phase. During the penalty phase, trial counsel called the defendant's

aunt as its sole witness. During the evidentiary hearing it became clear that expert testimony was available concerning the defendant's extreme emotional disturbance. The State argued that it was the defendant and his family who prevented trial counsel from developing and presenting more mitigation evidence during the penalty phase, the same as in the instant matter. The State's argument was rejected, and the Supreme Court upheld the trial court's decision. (Lara, 1289 thru 1290)

There existed substantial mitigation evidence in this case, and medical records and reports, as well as expert testimony were available. Trial counsel, by his own admission, did not talk to any of the doctors or the facilities, did not subpoena any witness to testify concerning the evidence of mitigation depicted within Wainwright's medical records, nor did he make any effort to introduce any of the mitigation evidence. Furthermore, by virtue of Mrs Wainwright's testimony, there was at least one psychiatrist who informed her that Wainwright was borderline mentally retarded, (R-3676) yet trial counsel made no effort to locate or develop the testimony of the said physician.

Trial counsel's failure to investigate and to develop, or to introduce substantial mitigation evidence which existed, and which he was aware of, was ineffectiveness, and the defendant is entitled to a new penalty phase, or re-sentencing. Counsel's failure to at least talk with the doctors, is inexcusable.

In Gaskin v. State, 737 So.2d 509, 514 (Fla. 1999) the Court reviewed a case wherein only the Aunt and a cousin were called as penalty phase witnesses. The testimony forthcoming from the witnesses amounted to little or nothing. In his motion, however, as in the instant case, Gaskin presented significant information which was available at trial, but was not obtained or used by counsel.

Although the Trial Court did grant an evidentiary hearing in the instant matter, unlike Gaskin, the Court denied the claim of ineffectiveness. In Wainwright, as clearly shown herein above, he suffered from extreme mental disabilities since early childhood. Even if these sufferings did not rise to the level of incompetency, it was deficient conduct not to at least provide the information to the jury at penalty phase, as mitigation. Wainwrights documented mental problems were worse than those of Gaskin. Additionally, by not placing the mental health information into evidence, or by not having the mental health witnesses present to testify, trial counsel was unable to argue such matters as mitigation. Consequently, very little was presented, or argued, when it did exist. Such was ineffectiveness.

Wainwright has shown the existence of sufficient mitigation evidence which was not used by trial counsel, notwithstanding the fact that it existed, and was available. This was deficient conduct, and by not using the evidence, trial counsel was not functioning as the “counsel” required by the Sixth Amendment. This deficient

conduct clearly prejudiced Wainwright, which is evident by the twelve to zero advisory opinion, and by the death sentence. There simply was no real mitigation evidence for the jury, or the Court, to weigh against the aggravating circumstances. See Ragsdsale v. State, 798 So.2d 713 (Fla. 2001)

Additionally, the Trial Court committed error when it denied Wainwright's Post Conviction claim of ineffectiveness on this issue. Wainwright, as was the defendant in Mahn v. State, 714 So.2d 391 (Fla. 1998) was far from a normal 19 year old boy at the time of the killings. To quote from Mahn, at 400, accurately describes Wainwright as well, "Rather, Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case."

The Trial Court never had an opportunity at trial to deal with Wainwright's chronic mental and emotional instability mitigation evidence, because it was not presented by trial counsel. Such was ineffectiveness, and Wainwright should be entitled to a new penalty phase trial. See Williams v. Taylor, 529 U.S. 362, 396, 126 S.Ct. 1495 (2000)

We know from Wainwright's mother's testimony, what little there was, that one of Wainwright's childhood physicians, Doctor Charles Boyd, of Greenville, N.C., told her that Wainwright was borderline mentally retarded as a child. (R-3676) This physician may have been available at the time of trial to testify, or at least certified records could have been obtained for the penalty phase. If not actually mentally retarded, the evidence could have been used as substantial mitigation evidence.

As stated in Atkins v. Virginia, 122 S.Ct. 2242, 2250 (2002) "...clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifests before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies

do not warrant an exemption from criminal sanctions, but they do diminish their culpability."

The Atkins Court continued, and stated that such persons are more likely to make false confessions, and present a less persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. They also may be less able to give meaningful assistance to trial counsel, and they make poor witnesses. (At 2252)

The Eighth Amendment succinctly prohibits "excessive" punishment. (Atkins, 2246) Further, and as stated by the Florida Supreme Court in Crook v. State, 813 So.2d 68, 76 (Fla. 2002) "This Court has not established a minimum IQ score below which an execution would violate the Florida Constitution." If this is true, then we should be concerning ourselves with such matters as the communication ability vs. operational or functional ability of defendants, and not basing mental retardation on a particular score of a standardized intelligence test. Clearly, from the Exhibits introduced in this case, Wainwright has a long-standing, chronic history of serious mental and emotional instability, such that all of his childhood physicians recommended in house, long term psychiatric treatment.

Without trial counsel exploring these available witnesses back during 1994 and 1995, who are not available eight or nine years later, we will never know exactly

how to "catagorize" Wainwright's mental or emotional instability, i.e. was he mentally retarded at the time of the crime, or at trial? If he is not mentally retarded as defined by the standard IQ scores today, is he, or was he sufficiently functional so as to be able to control his impulses, or to undertake logical reasoning? Does his mental or emotional instability rise to the level such that the Eighth Amendment prohibits him from being put to death? Certainly, per Adkins, the culpability should be diminished.

More importantly in Wainwright's case, was he able to perform in such a manner as to give meaningful assistance to his trial counsel? The answer after reviewing the record is clearly that he was not. His trial counsel called his conduct "bizarre", and "out of reach." (R-III-84, 85) Wainwright is entitled to a new guilt phase trial, his penalty phase sentence should be reversed for a new penalty phase, or his death sentence should be commuted to life.

ISSUE SEVEN:

WAS THE INITIAL TRIAL COUNSEL INEFFECTIVE FOR ABANDONING WAINWRIGHT, AND FOR FAILING TO PROPERLY REPRESENT WAINWRIGHT DURING THE BEGINNING STAGES OF THE ARREST AND INVESTIGATION?

CLAIM TEN

Victor Africano was appointed to represent Wainwright upon Wainwright's arrival in Florida, following his arrest in Mississippi. (R- 2581 thru 2582) The Order appointing Africano was entered on May 10, 1994. (R-23) Upon his arrival in Florida, Africano spent approximately 45 minutes with Wainwright. (R-2583) Wainwright testified that it was more like 25-30 minutes. (R-III-42) Following that conversation on May 9, 1994, the meeting was adjourned, and it was announced that Wainwright would cooperate with authorities. (R-2583) Thereafter, Wainwright was questioned by authorities on several occasions, and incriminating statements were made by Wainwright, in the absence of Africano, and with Africano's permission, on May 10th, and May 11th. (R-2586 thru 2588) Then, on May 20th, another incriminating statement was alleged to have been made by Wainwright to Sheriff Reid. (R-2589) Notwithstanding the fact that on direct appeal it was upheld after the trial court found that statements made by Wainwright to Sheriff Reid and others were made during the performance stage, and therefore admissible, it is un-rebutted that Africano allowed Wainwright to talk with the authorities without making sure that any so-called plea agreement was in writing, or exactly what the terms of the agreement were. Clearly Wainwright was prejudiced by the statements, and he ended up being sentenced to death, when he had been promised a life sentence if he took a polygraph and passed it concerning whether

he killed Gayheart. (R-III-147 thru 149) The co-defendant took the polygraph, and failed. (R-III-154)

Victor Africano was unavailable at the evidentiary hearing, and Wainwright's sworn allegations within his Amended Motion for Postconviction Relief stand un-rebutted, and must be accepted as true. (R-I-5,6)

Trial counsel testified at the evidentiary hearing. He was appointed following Africano's brief appearance. (R-III-96) Trial counsel had a couple of conversations with Africano concerning the so-called plea agreement. One of the conversations was while counsel was in Mississippi, and he was concerned with what had occurred. (R-III-97,98) He called Africano. The gist of the conversation was that they would talk later. Finally, another conversation occurred. Africano explained to trial counsel concerning the "deal" as follows: Africano did not think he was going to be on the case for a long time. He was just trying to help out. When the thing broke down, he said "that's it". He had other things on his mind and was concerned about representing Wainwright and the school board. (R-III-98)

Wainwright testified at the evidentiary hearing. He met Africano on May 9th. (R-III-41) He talked to Africano 25 or 30 minutes. (R-III-42) He was told by Africano that if he cooperated, he would receive a life sentence. (R-III-42) He was told by Africano that if he took a polygraph that showed he wasn't involved in the

murder or rape, he would get a life sentence. (R-III-43) The actual deal was put together in Mississippi, not in Florida, and not by Africano. (R-III-44) The only thing Africano talked to him about was to cooperate fully, and Africano never discussed a written plea agreement. (R-III-45) On May 20th, he (Wainwright) asked the Sheriff for something in writing regarding the deal. The Sheriff said he didn't know about any deal. Thereafter, Wainwright refused to take the polygraph, the Sheriff walked out, and didn't come back. (R-III-47,48) He asked Africano about a written agreement, and Africano said nothing. (R-III-48) At that time the Sheriff and investigators walked out, and he never saw them again. (R-III-48) Africano walked out, and he never saw Africano again. (R-III-48) He was still willing to take the polygraph, all he wanted was something n writing. (R-III-48) Wainwright denied that he ever told Sheriff Reid on May 20th that he raped Carmen Gayheart. (R-III-54, 58) He testified that he did not rape her. (R-III-54 and 58) He also denied that he killed Gayheart. (R-III-54 and 58) Wainwright denied shooting or strangling Gayheart. (R-III-55)

Sheriff Reid testified at the evidentiary hearing. Sheriff Reid had no face to face conversation with Wainwright in Mississippi. (R-III-65) State Attorney Blair had informed Reid that if Wainwright took a polygraph on the issue of whether he killed Gayheart, there would be a plea for life. (R-III-66) Reid communicated this

understanding to Africano. (R-III-67) While at the State Attorney's office on May 20th, Africano came to the door and told Blair that Wainwright needed to talk to law enforcement. Once inside, this was the first time Reid heard about Wainwright raping Gayheart. (R-III-69) Reid does not recall if Wainwright told him he would not take the polygraph without a written agreement. (R-III-69 thru 70) Reid does not know who conveyed the plea offer information to Wainwright in Mississippi. (R-III-73) Reid is not sure when or by whom the plea offer was conveyed to Wainwright. (R-III-74) There never was a time when Reid discussed with Africano, with Blair's authority, any written plea agreement. (R-III-78 thru 79)

State Attorney Blair testified at the evidentiary hearing. Co-defendant Hamilton failed the polygraph in Mississippi. (R-III-146) Blair conveyed the plea offer to Wainwright's attorney, if he passed a polygraph concerning being the triggerman, he would get a life sentence. (R-III-146) He made arrangements to have Africano appointed in Florida. (R-III-147) He conveyed the deal directly to Africano. (R-III-147) Blair had no direct contact with Wainwright, and neither the Sheriff or anybody else mentioned to him any written plea agreement. (R-III-150) He, nor any other law enforcement officer, knew what deal Africano or the Mississippi lawyer informed Wainwright of. (R-III-151) He does not know if Africano told Wainwright all he had to do was to cooperate, and he would get life.

(R-III-154) Hamilton flunked the polygraph on the question if he shot Gayheart. (R-III-154)

Attorney Victor Africano abandoned his client, allowed his client to speak with law enforcement outside of his presence, failed to properly inform him, and failed to make sure his client and the State had a meaningful agreement. He also failed to make sure Wainwright knew what the agreement was. Because of his ineffectiveness, Wainwright lost his opportunity for a life sentence, and was sentenced to death.

Furthermore, there is no way in the world that an experienced trial attorney could meet with a client on such a significant murder case for some time between 25 minutes to 45 minutes and know enough about the case to make an informed decision concerning his client's ability to understand the consequences of making admissions or confessions to law enforcement. For certain, Africano could not have known about Wainwright's mental disability, or about his capability to make rational and informed decisions.

Africano's pre-trial representation of the defendant was ineffective, and resulted in a detriment to his client. Wainwright was denied effective representation initially, such that no meaningful assistance of counsel existed, and his Sixth Amendment Right was denied him. Wainwright is entitled to a new trial.

ISSUE EIGHT:

WAS TRIAL COUNSEL INEFFECTIVE FOR CONCEDING WAINWRIGHT'S GUILT WITHOUT CONSENT, WHEN THE CO-DEFENDANT'S STATEMENT INCRIMINATING OF WAINWRIGHT WAS INTRODUCED AT TRIAL?

CLAIM TWELVE

During the guilt phase of the trial, and after the State rested, trial counsel, through the testimony of Officer Kinsey, caused to be introduced into evidence the co-defendant, Hamilton's note, with statements made to law enforcement prior to trial.

The note evidence contained statements which were allegedly made by Wainwright directly, and the statements were extremely and directly incriminating. R-3471 thru 3484) This would, of course have been a Bruton error had the State introduced the defendant's statements through the witness, a co-defendant who did not testify, and pertaining to statements or admissions of the defendant, as told to law enforcement by the non-testifying co-defendant. (R-III-94) The statements were incriminating, and prejudiced the defendant. Further, the introduction of the testimony by trial counsel, without the defendant's consent, was ineffectiveness.

During the evidentiary hearing, trial counsel Taylor was asked if he talked to

Wainwright prior to placing the information into evidence and if he had obtained his consent. Counsel's answer was , "With specificity, I can't say that." (R-III-94)

Counsel went on to explain about his trial strategy, but unless he had his client's consent, the introduction of the evidence was ineffectiveness, and was a fundamental error. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995) and United States v. Gonzalez, 183 F.3rd 1315 (11th Cir. 1999) See also Nixon v. Singletary, 758 So.2d 618, 623 (Fla. 2000), United States v. Perez-Garcia, 904 F.2d 1534 (11th Cir. 1990)

Further, as in Gray v. Maryland, 523 U.S. 185, 189-190,118 S.Ct. 1151 (1998), when two defendants are tried jointly, and when one did not testify, but his confession was introduced into evidence, which confession stated that both defendants committed the crime, the defendant against whom the admission also incriminated has been denied his Sixth Amendment Right to cross examine the witness. Basically, Bruton v. United States, 391 U.S. 123 (1968), as interpreted by Richardson v. Marsh, 481 U.S. 200 (1987), holds that "powerfully incriminating extrajudicial statements of a codefendant"–those naming another codefendant–considered as a class, are so prejudicial that limiting instructions cannot work. (Gray, 192)

In this case, although the State did not introduce the statement, trial counsel

did introduce it without consulting Wainwright, and the same denied Wainwright the opportunity to cross examine Hamilton, in violation of the Sixth Amendment. Such conduct by trial counsel, was ineffectiveness, and Wainwright was prejudiced thereby.

Wainwright is entitled to a new trial. Alternatively, defendant is entitled to a new sentence.

CONCLUSION:

Appellant seeks an Order Vacating his judgments and sentences, and discharging him. Alternatively, Appellant seeks an Order vacating his convictions and sentences, and directing a new trial, both guilt phase and penalty phase.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing initial brief has been provided to Anthony Floyd Wainwright, #123847, Union Correctional Institution, P-7127, at 7819 N.W. 228th Street, Raiford, Florida 32026-4430, and to Curtis French, Assistant Attorney General, The Capital, Tallahassee, Florida 32399-1050, to George R. Dekle, Sr., Assistant State Attorney, PO Drawer 1546 Live Oak, Florida 32060, and to the Honorable Vernon Douglas, Circuit Judge, PO Box 2075, Lake City, Florida 32056, all by United States Mail on this the ___ day of _____, 2002.

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CERTIFICATE OF COMPLIANCE

I DO HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210(2), that the fonts used in this brief are Times Roman 14, and said fonts comply with the provisions of the Rule. I do further certify that this brief contains 14,883 words, and 73 pages.

_____

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