IN THE FLORIDA SUPREME COURT

ANTHONY FLOYD WAINWRIGHT
Petitioner

vs

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections
Respondent

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

_____/

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner, Anthony Floyd Wainwright, by and through his undersigned attorney, and moves the Court for the entry of a Writ of Habeas Corpus directing the Florida Department of Corrections to immediately release the Petitioner from unlawful detention and custody, and for cause says:

1. The Court has jurisdiction pursuant to the provisions of Article V, Section 3(b)(1), Florida Constitution, and pursuant to F.S. 79.01, and Fla.R.App.P. 9.140(b)(6)(E).

2. The Petitioner has been denied his right to a fair and impartial trial by jury, and has been denied Due Process of Law, all in violation of the 5th, 6th, and 14th Amendments to the United States Constitution, and Petitioner is being unlawfully detained as an inmate by the Florida

Department of Corrections.

3. The Petitioner has previously filed a Direct Appeal, and his convictions and sentences have been upheld by the Florida Supreme Court, in 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).

4. The Petitioner has no other adequate remedy at law.

5. The Record on Appeal from the Direct Appeal consists of twenty-nine volumes, pages 01 through 3809, and in this Petition, references to the said record will be referred to as "R" followed by the appropriate page number.

6. The Petitioner has also filed previously a Motion for Post-conviction Relief, pursuant to Fla.R.Crim.P.3.850, and 3.851, and an evidentiary hearing has been held. The record from the denial of Petitioner's motions for post-conviction relief are also designated by the Clerk as the "Record on Appeal." Said record consists of three volumes, I through III, and for clarity, counsel will refer to said record as "R-I, R-II, or R-III", as the case may be, referring to the record on appeal from the evidentiary hearing, specific volume number, followed by the appropriate page number. Exhibits will be referred to by number.

7. The Petitioner was convicted after trial by jury, and was sentenced, among other things, to death. The said convictions and sentences were obtained by the State of Florida in an unconstitutional manner, and as a result of the Petitioner's Constitutional Rights being violated.

8. The Petitioner is presently incarcerated, and is entitled to immediate release from the said detention and incarceration.

9. Filed simultaneously herewith, as required by Fla.R.App.P.9.140(b)(6)(E), is the Petitioner's Appeal from the denial of his post-conviction motion. The Case Number of the appeal is SCO2-1342.

CLAIM ONE

10. The Petitioner was initially Indicted on July 15, 1994, for (Count One) First Degree Premeditated 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). (R-1)

11. The matter proceeded to trial by jury, and at the guilt phase of the trial, among other jury instructions, the Trial Judge instructed the jury on premeditated murder under F.S. 782.04(1)(a), (R-1108, Copy of

instruction) (R-3627, instruction as given to jury) and also instructed the jury on felony murder under F.S. 782.04(1)(a) (R-1108, Copy of instruction) (R-3628, instruction as given to jury), despite the fact that the Indictment only charged Premeditated Murder, and did not include felony murder. (R-1)

12. The Judge also instructed the jury that "It is the judge's job to determine what a proper sentence would be if the defendant is guilty." (R-3647) There were no corrections, additions, or objections by counsel to the jury instructions as given. (R-3649)

13. Pursuant to the 1994 version of F.S. 782.04(1)(a)(1) murder by premeditation, or murder when committed during the perpetration or attempt to perpetrate certain other offenses, including sexual battery, robbery, or kidnapping, under 782.04(1)(a)(2), constituted the capital felony of murder in the first degree, punishable as provided in F.S. 775.082.

14. Under the 1994 version of F.S.775.082(1) a person convicted of a capital felony shall be punished by life imprisonment, and shall serve no less than 25 years before parole eligibility, unless a proceeding held under F.S. 921.141 results in findings by the court that such person shall be punished by death, and then, the punishment is death.

15. The 1994 version of F.S. 775.082(2) provided that in the event the death penalty in a capital case is held to be unconstitutional by either the Florida Supreme Court, or by the United States Supreme Court, such person sentenced to death shall be brought before the court having jurisdiction, and shall be sentenced to life imprisonment.

16. The 1994 version of F.S.921.141(2) provided for an advisory sentence by the jury, while 921.141(3) provided that "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death..." The statute continues, and provides that if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts, specifically whether sufficient aggravating circumstances exist, and whether there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

17. The current provisions of F.S.921.141(2) and (3) remain essentially as they were during 1994.

18. Following the trial by jury in Petitioner's case, the jury returned a verdict of guilty as charged in the Indictment, as to each of the four Counts, on May 30, 1995. (R-1136, actual verdict form) (R-3652,

Verdict as read in court)

19. Following the verdict, and on June 1, 1995, the Trial Court read Penalty Phase Jury Instructions to the jury as follows: “Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five (25) years. The final decision as to what punishment shall be imposed rests solely with the judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant. The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.” (R-1141, 1142, actual copy of the instruction) (R-

3663, 3664, as read to the jury)

20. Following the Court's reading of the penalty phase instruction set forth in the paragraph immediately above, the State offered into evidence a certified copy of Petitioner's conviction and sentence for aggravated assault on a police officer in Mississippi (R-3665); then the State and the Defense stipulated that the Petitioner was one and the same person in the Mississippi conviction (R-3665); and the State asked the Trial court to take judicial notice of the convictions for armed robbery, armed kidnapping, and sexual battery previously found by the jury. (R-3665) Once the Trial Court took judicial notice as requested, the State rested in the penalty phase without presenting any testimony or other evidence. (R-3666) Thereafter, the Defense presented some mitigation evidence, then rested. (R-3731)

21. Following the defense resting, the Trial Court gave the jury additional penalty phase jury instructions, (R-3731) wherein the Judge informed the jury again that the final decision regarding punishment to be imposed rested with him (R-3731), then asked the jury to render an advisory opinion as to whether sufficient aggravating circumstances existed to justify the death penalty, and whether sufficient mitigating circumstances existed to outweigh the aggravating circumstances. (R-

3731, 3732) Thereafter, the Trial Court proceeded to instruct the jury as to eight possible aggravating circumstances which they could consider. (R-3732, 3733)

22. On June 1, 1995, the jury returned an advisory recommendation as follows: “A majority of the jury, by a vote of 12-0, advise and recommend to the court that it impose the death penalty upon Anthony Floyd Wainwright.” (R-1143, copy of recommendation)(R-3739, as read in court)

23. Thereafter, and on June 12, 1995, the Trial Court entered its Judgment and Sentence of Death. (R-1170) At paragraph five of the said Judgment and Sentence, the Court, “independent of the jury”, considered the aggravating and mitigating circumstances in the case. Then, the Trial Court made findings as to the existence of seven statutory aggravating circumstances, and found specifically that the murder was committed in a cold, calculated, and premeditated manner. (R-1173, copy of the judgment and sentence)(R-3776, as read to the defendant)

24. F.S.775.082(1), 1994, and F.S.921.141, 1994 were unconstitutional on their face, as is Florida’s death penalty sentencing scheme in general, and the Petitioner was convicted and sentenced to death pursuant to

the provisions of said statutes. Further, the said statutes were and are unconstitutional as they were applied to the Petitioner herein, and as a consequence, he was unlawfully sentenced to death, and is unlawfully being incarcerated.

25. As previously noted, the 1994 version of F.S.775.082(1) provides that a person convicted of a capital felony shall serve no less than 25 years in prison before parole eligibility. It is only if a proceeding is held under F.S.921.141 that a defendant can be sentenced to death. This decision, of course, is not made by a jury. Furthermore, once the decision is made to proceed under F.S.921.141, pursuant to the clear and unambiguous language of 921.141(3), "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death...." This clearly leaves the fact finding determination up to the judge, as opposed to the jury, regarding whether to seek the death penalty, or whether to impose it.

26. In Ring v. Arizona, 122S.Ct.2428, 2436 (2002) the defendant argued that Arizona's sentencing scheme violated the 6th and 14th Amendments because it entrusted a judge the fact finding concerning the defendant's maximum penalty. In Florida, although considered a

"hybrid system" wherein the jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations, (Ring, 2442, FN6), it is clear that the judge must actually determine what aggravating circumstances were proven, then it must "weigh" the aggravating circumstances against the mitigating circumstances, and then the judge must spell out the facts he finds in a written order, specifically setting forth whether sufficient aggravating circumstances exist, and whether there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

27. In Ring, at 2443, the Court stated "the right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both."

28. F.S.921.141 is accordingly unconstitutional because it allows the judge, not the jury, to determine the facts necessary to impose the death sentence. See Justice Pariente's concurring opinion in Bottoson v. Moore, 2002 WL 1472231, at *4 (Fla.), where he discusses Florida's "hybrid system". "The Florida statute requires the jury to render an 'advisory sentence' based on a balancing of aggravating

factors and mitigating factors. The jury, however, is not required to specify what, if any, aggravators it found. Once the jury has rendered its recommendation, the trial judge *'notwithstanding the recommendation of a majority of the jury',* shall set forth in writing specific aggravators and mitigators, balance the aggravators and mitigators, and render a sentence." This, of course, is exactly what Ring and Apprendi speak to, i.e. the jury, and not the judge, must, in accord with the 6th Amendment, find the enumerating aggravating factors necessary to sentence one to death, and must find them beyond a reasonable doubt. Moreover, and again as Justice Pariente stated in his concurring opinion in Bottoson, at *5, "...Ring casts serious doubt on the constitutionality of our scheme to the extent that it permits a judge to override a jury recommendation of a life sentence."

29. Additionally, and as applied in this particular case, F.S.782.04(1)(a), F.S.775.082(1) and F.S.921.141(3), the Florida sentencing scheme, were unconstitutionally applied against the Petitioner. In this case, the Indictment charged only premeditated murder. (R-1) The Court, without objection, instructed the jury on both premeditated murder (R-3627) and also instructed the jury on felony murder. (R-3628) There is

no way to determine upon which basis the jury either determined guilt, or how they used the two instructions later in their advisory opinion. For all we know, the jury may have taken the felony murder instruction as an additional "non-statutory" aggravating circumstance for their consideration, wherein they could consider the charged robbery, sexual battery, and kidnapping as part of the death sentence recommendation. This, of course, would violate the Court's holdings that a contemporaneous conviction for a violent crime involving one victim cannot generally be used to support the aggravating circumstances. Elledge v. State, 434 So.2d 613 (Fla. 1993), Holton v. State, 573 So.2d 284 (Fla. 1990).

30. The Florida Supreme Court long ago ruled that it was not error to instruct a jury on felony murder when the Indictment charged only premeditated murder. Knight v. State, 338 So.2d 201 (Fla.1976). In Knight, at 204, the Court cited to and discussed prior decisions which basically held the same way, and which provided that premeditation may be presumed in certain felony murder cases. In none of the decisions, however, did the Court explain how such would not violate Article One, Section Sixteen of the Florida Constitution, where it is required that an accused be informed of the nature and cause of the

accusation. Nor did the Court discuss whether the Grand jury Indictment had actually been altered by giving a jury instruction on felony murder, when only premeditated murder is charged, which has generally been held to be per se reversible error. See for example, United States v. Peel, 837 F.2d 975 (11th Cir. 1988) where the simple fact that the Indictment charged the defendant with possession with intent to distribute aboard a vessel as a non-citizen, when the jury instruction provided for possession with intent to distribute aboard a vessel as a citizen was held to be reversible error because the instruction was deemed to have altered the terms of the Indictment. More importantly, since the Ring and Apprendi decisions, it would appear that perhaps our prior cases dealing with this issue may not be correct any longer, as stated previously herein, i.e. the jury must find beyond a reasonable doubt any fact which may increase the punishment.

31. To further complicate the matter, the same penalty phase jury instructions given by the trial judge in the instant matter again informed the jury that "It is the judge's job to determine what a proper sentence would be if the defendant is guilty." (R-3647) This instruction, when combined with the other murder instructions, leaves the entire fact

finding reason for imposing the death penalty to the trial judge, i.e, he had to have decided if the murder was premeditated, or if it was felony murder. On the other hand, the jury could have made their advisory recommendation on an impermissible aggravating circumstance. Pursuant to Ring, and Apprendi v. New Jersey, 530 U.S.466, 483, 120 S.Ct. 2348 (2000), such is unconstitutional. As stated in Apprendi, at 492, "even if the State characterizes the additional findings made by the judge as 'sentencing factors'", such is unconstitutional. In Ring, at 2432, the Court stated "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

32. In the instant matter, as previously stated, the Petitioner was unduly prejudiced by the manner in which the respective statutes were applied in his case. This is even more clear when one considers the fact that the State rested during the penalty phase without presenting evidence of the aggravating circumstances found by the judge. (R-3665, 3666) Thereafter, and following the defense resting, the trial judge instructed the jury on eight possible aggravating circumstances, but there was no evidence introduced by the State during penalty phase to demonstrate

any of the eight aggravating circumstances which they were directed to weigh. This means that the trial judge, alone, had to have decided not only which aggravating circumstances existed, but he then also had to weigh the aggravating circumstances he found, against the mitigating circumstances. There then existed no basis upon which the jury could have rendered the advisory opinion. In fact, the judge did later indicate within the written judgment and sentence to death, that he found the CCP aggravating circumstance to exist, (R-3776) meaning he alone determined that the murder was cold, calculated, and premeditated. He alone also made the factual findings concerning the existence of aggravating circumstances, and he alone weighed the aggravating circumstances against the mitigating circumstances, and he alone imposed the death sentence, in violation of the Constitution.

33. The jury, ala Ring, and Apprendi, must make such fact finding beyond a reasonable doubt, not the judge. The conviction and sentence imposed on Petitioner was done without due process of law, and in violation of the 6th and 14th Amendments to the United States Constitution.

CLAIM TWO

34. Following the filing of his Notice of Appeal, Attorney Steven L.

Seliger, of Quincy, Florida, represented the Petitioner on appeal. Mandate was issued February 16, 1998.

35. On appeal, the Petitioner alleged error in nine assignments: (1) in allowing Wainwright's 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 evidence of other crimes; (5) in removing a juror on the tenth day of trial; (6) in allowing introduction of testimony that Gayheart routinely picked her kids up from preschool; (7) in overlooking the State's failure to establish the corpus delicti of sexual assault; (8) in allowing introduction of Wainwright's statement to police that he had AIDS; and (9) in imposing the mandatory minimum portions of the noncapital sentences, and in retaining jurisdiction over the life sentences. (Wainright, supra, FN4)

36. The Court ruled on issues one, two, seven, and nine, and without further comment, indicated that claims three through six, and claim eight were without merit.

37. Appellate counsel was ineffective for not raising the issue concerning the felony murder jury instruction given to the jury following the guilt phase, when in fact the Petitioner was Indicted only for premeditated

murder. It became a non-statutory aggravator to be considered, and it altered the Indictment. In as much as this matter constitutes a fundamental issue, it was not required to be objected to by trial counsel to preserve it.

38. The appellate counsel was ineffective for his failure to raise the Koon v. Dugger issue set forth hereinafter. The trial court failed to examine the Petitioner during the penalty phase after Petitioner instructed his trial counsel against conducting further examination of his mother to place additional mitigation evidence into the record before the jury. This should have been raised as a fundamental error on appeal.

CLAIM THREE

39. During the trial, the Petitioner was required to wear a “stun belt”, and the instrument was actually applied to him, thereby causing him to be shocked with an electrical shock. Further, it is noted that at the commencement of the charge conference, immediately following the guilt phase trial, counsel informed the Trial Judge that “He just went to hell in a handbasket”. (R-3510) This followed a moment in time after the Petitioner commenced screaming. (R-3511) The defendant then commented to trial counsel “You think something is funny, don’t you, man?” (R-3513)Then the Petitioner informed the Trial Court that he

did not want to be present at the charge conference. (R-3513) Additionally, during the trial, the Petitioner and Trial Counsel did not have what can be called an attorney-client relationship. When asked at the evidentiary hearing about the relationship and Petitioner's conduct, the trial counsel testified that Petitioner was extremely upset about a number of things. (RIII-84) Trial counsel testified further "And I don't sequentially know what happened first or what was said, but they hit him with the stun belt, the gismo, snatched me out of the room. And only thing I remember about that is one of the officers saying, well, there goes $1400 piece of equipment that didn't knock him down." (RIII-84, 85)

40. The use of the stun belt on the Petitioner at trial denied the Petitioner his right to due process of law, and denied him his 6th Amendment Right to be present, to confer with counsel, and to participate in his own defense at trial. Further, the Trial Court failed to take the necessary steps to justify the use of the stun belt.

41. In United States v. Durham, 2002 WL 523094 (11th Cir. 2002) the defendant was on trial in Pensacola, Florida, in the Northern District Court, for bank robbery. The defendant had some history of escape, and at the commencement of the trial, over objection, and because the

defendant was considered a security risk, the stun belt was placed on him. (Durham, 1-3) The stun belt was never actually applied to Durham, so that he was in fact shocked. In the instant Petitioner's case, the stun belt was actually applied, and did shock him. (R-3510-3513)

42. The Court in Durham held that the trial judge abused his discretion and failed to make factual findings or consideration of alternative methods of restraint. (Durham, 8) The Court also stated "One of Durham's rights that was affected by the error is the right to be present at trial and to participate in his own defense. Once a violation of this right has been established, the defendant's conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt." (Durham, 8) In the instant matter, Petitioner was not only required to wear the stun belt during the entire trial, but the Court did not make any findings at all concerning the belt, and counsel never made any objections concerning it. Nevertheless, it is a fundamental error, and Petitioner was prejudiced thereby in that he was not able to participate in any meaningful way during his trial.

43. The Durham Court also cited from United States v. Novation, 271

F.3d 968, 1000 (11th Cir. 2001) regarding the State's claim that trial counsel was looking after the defendant, thereby making it unimportant if the defendant actively participated. "Such a claim ignores the fact that a client's active assistance at trial may be a key to an attorney's effective representation of his interests."

44. The entire trial was tainted in the Petitioner's case, the convictions obtained were unconstitutionally tainted, and must be reversed. The facts complained of concerning the stun belt are not harmless beyond a reasonable doubt, and Petitioner was prejudiced thereby.

CLAIM FOUR

45. During the course of the penalty phase, and during the defense examination of Kay Wainwright, Petitioner's mother, and the presentation of mitigation, the Petitioner instructed trial counsel to cease the examination of his mother. (R-3666 thru 3685) Thereafter, no additional mitigating evidence was offered.

46. The Trial Court then failed to conduct the inquiry established by Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993) where the Court stated that "When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel

must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence."

47. The only examination of the Petitioner in the instant case was by trial counsel, where the following occurred: (R-3708 thru 3709)

Taylor When I announced to the Court that I was terminating the communications with 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.

48. As the Court stated in Ocha v. State, 2002 WL 1378512 (Fla.), at *3, "Although a trial court may have discretion to comply with a competent defendant's decision to waive presentation of mitigating evidence, it is obligated to ensure that the defendant's waiver is knowing, uncoerced, and not due to defense counsel's failure to fully investigate penalty phase matters."

49. During the evidentiary hearing, trial counsel was asked regarding the time following Petitioner's demand that counsel cease questioning of his mother during the penalty phase. "In essence, what happened from that point on, though, was no other mitigation from the mother at all?" The answer of trial counsel was "That's true." (R-III-104) Thereafter, and later during the testimony, trial counsel was asked the following question: "If in fact he had not stopped you, isn't it true that you couldn't have gone anywhere with any of this psychological mitigation anyway?" The answer was "Other than what we had gotten in through the mother about what she had tried to do and what we now know is ADD and all of that. As far as scoring discrepancies, that's true." (R-III-137)

50. We have no way of knowing whether trial counsel fully investigated

penalty phase matters because the Court failed to make the inquiries required by Koon and Ocha.

51. The Petitioner should be entitled to a new penalty phase trial.

52. There were in fact, however, numerous medical records, from numerous childhood doctors, to establish that since childhood, many experts had recommended that Wainwright be placed into an "in house" facility, and undergo extensive treatment for mental and emotional instability. See all of the Exhibits introduced during the evidentiary hearing through Attorney Taylor.

CLAIM FIVE

53. The death penalty imposed in this matter is not proportional.

54. The Petitioner in this case, since childhood, had an extremely long-standing, chronic mental and emotional instability. See Exhibits One thru Five. Further, and although he was not declared incompetent, and no evidence was presented to determine if he was "mentally retarded", his mental and emotional instability cannot be said not to have resulted in his inability to meaningfully assist counsel at trial. In fact, he was denied the opportunity to assist at trial, and to be present and to confer with counsel, because of the numerous disruptions and occurrences during the trial. See trial counsel's testimony, R-III-82

thru 139.

55. In Florida, the Supreme Court has not established a minimum IQ score below which an execution would violate the Florida Constitution, or the Eighth Amendment to the United States Constitution. See Crook v. State, 813 So.2d 68, 76 (Fla. 2002)

56. Further, the United States Supreme Court, in Atkins v. Virginia, 122 S.Ct. 2242, 2247 (2002) stated "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail....Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.'"

57. In this case, the State Attorney, who in fact prosecuted the case, testified that he would have allowed Wainwright to plea for a life sentence if he took a polygraph exam regarding whether he killed the victim. (R-III-152, 153) In fact, the co-defendant took the polygraph, and when he was asked if he was the one who killed the victim, he failed the test. (R-III-154) Wainwright, for reasons explained in the Appellate Brief filed simultaneously herewith, did not take the polygraph, but surely, although we all know the status of polygraph

admissibility at trial, this is not a trial, and Hamilton flunked the test. Wainwright testified during the evidentiary hearing that he did not kill the victim, and that he did not rape her. (R-III-58)

58. Proportionality review should be conducted in every death case. Ocha v. State, 2002 WL 1378512, *8 (Fla.) Proportionality review is not a comparison of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." (Ocha, supra, *8)When all of the factors mentioned herein are considered, when one considers Wainwright's mental and emotional history, and when one considers the fact that the medical examiner cannot say whether the victim died from strangulation or not, (R-2491) and gave his opinion that she died from gunshot, (R-2487, 2488) the death penalty in this case is not proportional.

WHEREFORE, the Petitioner's Petition for Writ of Habeas Corpus should issue, and the Florida Department of Corrections should be Ordered to release him. Alternatively, Petitioner should be granted a new trial.

Respectfully submitted.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ

of Habeas Corpus 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, and 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.

_____

R. GLENN ARNOLD
Florida Bar Number: 0324868
210-A East Government Street
Pensacola, Florida 32501
Telephone: 850-429-9757
Fax: 850-429-9758