IN THE FLORIDA SUPREME COURT
CASE NO. SC02-2021

ANTHONY FLOYD WAINWRIGHT, *Petitioner*

v.

JAMES V. CROSBY, JR., *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James V. Crosby, Jr., by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

The facts of the case are recited in this Court's direct appeal opinion, *Wainwright v. State*, 704 So.2d 511, 512-513 (Fla. 1997):

> Anthony Wainwright and Richard Hamilton escaped from prison in North Carolina, stole a Cadillac and guns, and drove to Florida. In Lake City, the two decided to steal another car and on April 27, 1994, accosted Carmen Gayheart, a young mother of two, at gunpoint as she loaded groceries into her Ford Bronco in a Winn-Dixie parking lot. They stole the Bronco and headed north on I-75. They raped, strangled, and executed Gayheart by shooting her twice in the back of the head, and were arrested the next day in Mississippi following a shootout with police.

> Upon arrest, Wainwright revealed to officers that he had AIDS and in subsequent statements admitted to raping Mrs. Gayheart despite his illness after kidnapping and robbing her. He claimed, however, that it was Hamilton who strangled and shot her.
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> 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; and (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 had sexually assaulted Gayheart, and refused to take the lie detector test. Police had no further contact with Wainwright after that point.

At trial, the State introduced DNA evidence that the sperm sample from the back seat of the victim's Bronco that showed "the odds now against the donor being anyone but Wainwright were astronomical." *Wainwright*, 704 So.2d at 514.

Wainwright was charged and convicted of with first-degree murder, robbery, kidnapping, and sexual battery, all with a firearm. The jury unanimously recommended death after the penalty phase at which Wainwright's mother testified. The judge imposed death based on six aggravating circumstances: 1)

Wainwright committed the murder while under sentence of imprisonment; 2) Wainwright had been convicted of a prior violent felony; 3) the murder was committed during the course of a robbery, kidnapping, and sexual battery; 4) the murder was committed to effect an escape; 5) the murder was especially heinous, atrocious, or cruel; 6) the murder was committed in a cold, calculated, and premeditated manner. The trial court found no statutory mitigating circumstances but did find several nonstatutory mitigating circumstances: difficulties in school and his social adjustment problems, due in part to his problems associated with bed-wetting do provide some measure of mitigation. *Wainwright*, 704 So.2d at 512-513.

On appeal, Hamilton raised nine issues: (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.

Wainwright, 704 So.2d at 513 & n.4

Wainwright sought certiorari review in the United States Supreme Court which was denied on May 18,1998. *Wainwright v. Florida*, 523 U.S. 1127, 118 S.Ct. 1814, 140 L.Ed.2d 952 (1998).

Wainwright filed a post-conviction motion which the trial court denied after conducting an evidentiary hearing. The appeal from the trial court's denial of Wainwright's 3.851 motion is also currently pending before this Court.

HABEAS PETITIONS

Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla.2000). However, a habeas petition may not be used as a second direct appeal or a second appeal of a post-conviction motion. *Randolph v. State*, 2003 WL 1922772, *12 (Fla. 2003)(observing that a habeas petitioner may not use a habeas petition as a substitute or an additional appeal of his postconviction motion). A habeas petition should not be used as a vehicle for relitigating claims that were raised and rejected in prior proceedings. *Thompson v. State*, 759 So.2d 650, 657 n. 6 (Fla.2000). A capital habeas corpus petition must be brought at the same time as the appeal of the trial court's denial of a defendant's rule 3.850 motion. Fla. R.App. P. 9.140(b)(6)(E).

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the ineffectiveness assistance of trial counsel standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellate counsel's performance will not be deficient

if the legal issue that appellate counsel failed to raise was meritless. The criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffectiveness of trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. *Shere v. Moore*, 830 So.2d 56,60(Fla. 2002)(quoting *Johnson v. Wainwright*, 463 So.2d 207 (Fla.1985) and *Wilson v. Wainwright*, 474 So.2d 1162, 1163 (Fla.1985)). In the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000)(noting that in the appellate context, the prejudice prong requires a showing that we would have afforded relief on appeal). A habeas petitioner cannot establish prejudice unless the issue was a dead bang winner. *Moore v. Gibson*, 195 F.3d 1152, 1180 (10th Cir. 1999), *cert. denied*, 530 U.S. 1208, 120 S.Ct. 2206, 147 L.Ed.2d 239 (2000)(explaining that appellate counsel's performance is only deficient and prejudicial if counsel fails to argue a "dead-bang

winner”). Petitioner must show that he would have won a reversal from this Court had the omitted issues been raised to establish prejudice.

Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue on appeal. *Downs v. Moore*, 801 So.2d 906, 916 (Fla.2001); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla.2000). Nor can appellate counsel cannot be deemed ineffective for failing to raise an unpreserved error that is not fundamental error. *Roberts v. State*, 568 So.2d 1255 (Fla.1990)(holding that appellate counsel's failure to raise a claim which was not preserved for review and which does not present a question of fundamental error does not constitute ineffective assistance). Issues that would have been nonmeritorious in the direct appeal are not the basis for ineffective assistance of appellate counsel claims. *Freeman v. State*, 761 So.2d 1055, 1070-71 (Fla.2000).

STANDARD OF REVIEW

Ineffective assistance of appellate counsel claims, like ineffective assistance of trial counsel claims, are reviewed *de novo.* Of course, in a habeas proceedings, there is no ruling from the trial court to give any deference to because a habeas petition is an original action in this Court.

ISSUE ONE

Wainwright asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Respondent respectfully disagrees. Habeas is not proper vehicle to raise a *Ring* claim. Nor may a *Ring* claim be raise in collateral proceedings unless and until this Court holds that *Ring* is retroactive. *Ring* is not retroactive. Moreover, the claim is meritless. This Court has repeatedly rejecting *Ring* challenges to Florida's death penalty statute.

First, a habeas petition is not the proper vehicle to raise a *Ring* claim. The proper vehicle to raise such an issue would be a successive 3.850 motion.[1] Wainwright may not raise this issue in a habeas petition.

RETROACTIVITY[2]

[1] Wainwright may only file a successive motion after a decision from this Court holding that *Ring* is retroactive. The rule of criminal procedure governing post-conviction relief in capital case contains an exception to the 1 year time limit for claims that have been held to be retroactive. Rule 3.851(d)(2)(b).

[2] Florida uses the old constitutional test for retroactivity rather that the new *Teague* test. *Teague v. Lane*, 489 U.S. 288, 299-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Witt v. State*, 387 So.2d 922 (Fla.1980). The *Witt* test of retroactivity was based on two United States Supreme Court cases dealing with retroactivity, *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). The United States Supreme Court no longer uses these tests for determining retroactivity

Neither *Ring*, nor *Apprendi v. New Jersey*, 530 U.S. 466 (2000), upon which it was based, are retroactive. Both *Apprendi* and *Ring* are rules of procedure, not substantive law. They both concern who decides a fact, *i.e.,* the jury or the judge, which is procedural. *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002) (holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" - who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt) and explaining that *Apprendi* did not alter which facts have what legal significance). Nor do any of the exceptions in *Teague* apply. *Ring* did not make certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to

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on collateral review, but rather has adopted a new test. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Florida Courts should also adopt the *Teague* test for retroactivity. While some commentators think the *Teague* test is too stringent, they are ignoring the second wing of United States Supreme Court's retroactivity jurisprudence. *Teague* only applies to new rules of procedure. New rules of substantive criminal law that change any element of the crime, by contrast, are retroactive under this second wing established in *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). see also *Fiore v. White*, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999)(applying a due process insufficiency of the evidence analysis when the element of the crime change in a habeas petition from a state conviction).

proscribe, nor does *Ring* involve the accuracy of the conviction or a bedrock procedural element essential to the fundamental fairness of a proceeding.

Only those rules that seriously enhance accuracy are applied retroactively. *Graham v. Collins*, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (explaining that the exception is limited to a small core of rules which seriously enhance accuracy). Jury involvement in capital sentencing does not enhance accuracy. Indeed, the *Ring* Court did not require jury involvement because juries were more rational or fair; rather, it was required regardless of fairness. The *Ring* Court explained that even if judicial factfinding were more efficient or fairer, the Sixth Amendment requires juries. Jury sentencing does not increase accuracy. A jury is comprised of people who have never made a sentencing decision before. Furthermore, even if one views jury sentencing as equally accurate to judicial sentencing, jury involvement does not "seriously" enhance accuracy. Judicial sentencing is at least as accurate.

In *Colwell v. State*, 59 P.3d 463 (Nev. 2002), the Nevada Supreme Court held that *Ring* was not retroactive. In his state post-conviction petition, Colwell contended that his sentencing by a three-judge panel violated his Sixth Amendment right to a jury trial established in *Ring*. The *Colwell* Court explained,

that in *Ring*, the United States Supreme Court, held that it was impermissible for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. However, the Court declined to apply *Ring* retroactively on collateral review. *Colwell*, 59 P.3d at 469-472.[3] The *Colwell* Court reasoned that *Ring* does effect the accuracy of the sentence. The *Colwell* Court explained that the United States Supreme Court in *Ring* did not determine that factfinding by the jury was superior to factfinding by a judge; rather, the United States Supreme Court stated that "the superiority of judicial factfinding in capital cases is far from evident". The *Colwell* Court explained that *Ring* was based simply on the Sixth Amendment right to a jury trial, not on enhanced accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences decided by three-judge panels. They concluded that the likelihood of an accurate sentence was not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence. *Colwell*, 59 P.3d at 473.

In *State v. Towery*, 64 P.2d 828 (Ariz. 2003), the Arizona

[3] The Nevada Supreme Court used an expanded *Teague* test to determine retroactivity.

Supreme Court also held that *Ring* is not retroactive. Following a *Teague* analysis, the Arizona Supreme Court first determined that *Ring* was a new rule but that the new rule was procedural, not substantive. The *Towery* Court reasoned that *Ring* did not determine the meaning of a statute, nor address the criminal significance of certain facts, nor the underlying prohibited conduct; rather, *Ring* set forth a fact-finding procedure designed to ensure a fair trial. *Ring* altered who decided whether aggravating circumstances existed. The *Towery* Court noted that the *Apprendi* Court itself described the issue as procedural. *Apprendi*, 530 U.S. at 475, 120 S.Ct. 2348 (stating that: "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is."). Because *Ring* was merely an extension of *Apprendi*, logic dictates that if *Apprendi* announced a new procedural rule, then so did *Ring*. Therefore, *Ring* was procedural. Nor did *Ring* announce a watershed rule because it did not seriously enhance accuracy nor alter bedrock principles necessary to fairness. It did not seriously enhance accuracy because *Ring* merely shifted the duty from an impartial judge to an impartial jury. Nor is allowing an impartial jury to determine aggravating circumstances, rather than an impartial judge, implicit in the

concept of ordered liberty. The *Towery* Court found *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), which held that the right to a jury trial was not to be applied retroactively, "particularly persuasive".[4]

Two Florida District Courts have held that *Apprendi* is not retroactive. *Figarola v. State*, 2003 WL 1239911 (Fla. 4th DCA March 19, 2003)(concluding that *Apprendi* would not be retroactive under either *Witt* or *Teague* but certifying the question as one of great public importance); *Hughes v. State*, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that *Apprendi* did not apply retroactively to a claim being raised under rule 3.800 based a *Witt* analysis). Every federal circuit court that has addressed the issue has held that *Apprendi* is not retroactive.[5]

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[4] The Arizona Supreme Court analyzed the retroactivity of *Ring* using a *Teague* test but also analyzed the issue using the test of *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Under the *Allen* framework, the court weighed three factors:(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. The Arizona Supreme Court concluded that *Ring* was not retroactive under *Allen* either. The *Allen* test is similar to Florida's *Witt* test.

[5] *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001), *cert. denied*, 535 U.S. 1032, 122 S.Ct. 573, 151 L.Ed.2d 445 (2001)(explaining that because *Apprendi* is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); *United States v. Brown*, 305 F. 3d 304

The few State Supreme Courts that have addressed the issue have held that *Apprendi* is not retroactive.[6]

(5th Cir. 2002)(holding *Apprendi* is not retroactive because it is a new rule of criminal procedure, not a new substantive rule and is not a "watershed" rule that improved the accuracy of determining the guilt or innocence of a defendant); *Goode v. United States*, 305 F. 3d 378 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 711 (2002)(holding *Apprendi* is not a watershed rule citing *Neder v. United States*, 527 U.S. 1, 15 (1999)); *Curtis v. United States*, 294 F.3d 841 (7th Cir. 2002), *cert. denied*, 123 S.Ct 541 (2002) (holding *Apprendi* is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); *United States v. Moss*, 252 F.3d 993, 1000-1001 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002)(holding that *Apprendi* is not of watershed magnitude and that *Teague* bars petitioners from raising *Apprendi* claims on collateral review); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)(holding *Apprendi* does not meet either prong of *Teague* because it does not criminalize conduct and does not involve the accuracy of the conviction and therefore, *Apprendi* is not to be retroactively applied);*United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.2002), *cert. denied*, 123 S.Ct. 388 (2002)(concluding *Apprendi* is not a watershed decision and hence is not retroactively applicable to initial habeas petitions); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 2362 (2002)(holding that the new constitutional rule of procedure announced in *Apprendi* does not apply retroactively on collateral review).

[6] *State v. Tallard*, 816 A.2d 977 (N.H. 2003)(reasoning that *Apprendi* is not retroactive because it is not a watershed rule of criminal procedure that increases the reliability of the conviction and using a *Teague* analysis because retroactivity is complex enough without requiring counsel and trial judges to apply different retroactivity rules); *Whisler v. State*, 36 P.3d 290 (Kan. 2001)(holding that *Apprendi* is not retroactive because it is procedural rather than substantive and is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial), *cert. denied*, 122 S.Ct. 1936 (2002); *State*

Moreover, the United States Supreme Court has refused to apply right to jury trial cases retroactively in prior cases. *DeStefano v. Woods*, 392 U.S. 631, 633, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application."). The United States Supreme Court recently held that an *Apprendi* claim is not plain error. *United States v. Cotton*, 122 S.Ct. 1781 (2002)(holding an indictment's failure to include the quantity of drugs was an *Apprendi* error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to the level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. *United States v. Sanders*, 247 F.3d 139, 150-151 (4th Cir. 2001)(emphasizing that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague* and because *Apprendi* claims have been found to be subject to harmless error, a necessary corollary is that *Apprendi* is not

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ex rel. Nixon v. Sprick, 59 S.W.3d 515, 520 (Mo. 2001)(holding in *Apprendi* is not applied retrospectively to cases on collateral review relying on *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir. 2001)).

retroactive). *Ring* was merely an extension of *Apprendi* to capital cases. If *Apprendi* is not retroactive, then neither is *Ring*. *Cf. Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir.2002) (holding that existing precedent that *Apprendi* announced rule of criminal procedure forecloses argument that subsequent case of *Ring* announced rule of substantive criminal law because "*Ring* is simply an extension of *Apprendi* to the death penalty context."); *Ring v. Arizona*, 122 S.Ct. 2428, 2449-2450 (2002)(O'Connor, J., dissenting)(noting that capital defendants will be barred from taking advantage of the holding on federal collateral review citing 28 U.S.C. §§ 2244(b)(2)(A), 2254(d)(1) and *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Thus, *Ring* is not retroactive and Wainwright may not raise a *Ring* claim collaterally.

MERITS

This Court rejected a *Ring* challenge to Florida death penalty statute in *Bottoson v. Moore*, 813 So. 2d 27 (Fla. 2002), *cert. denied*, 122 S. Ct. 2670 (2002), reasoning that the United States Supreme Court had not receded from its prior precedent upholding the constitutionality of Florida's death penalty scheme. Furthermore, this Court has repeatedly rejected *Ring*

challenges to Florida's death penalty statute in the wake of *Bottoson*. *Porter v. Crosby*, 28 Fla. L. Weekly S33, 34 (Fla. January 9, 2003)(stating: "we have repeatedly held that maximum penalty under the statute is death and have rejected the other *Apprendi* arguments). *See also Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Conahan v. State*, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); *Spencer v. State*, 28 Fla. L. Weekly S35 (Fla. January 9, 2003); *Fotopoulos v. State*, 27 Fla. L. Weekly S1 (Fla. December 19, 2002); *Bruno v. Moore*, 27 Fla. L. Weekly S1026 (Fla. December 5, 2002). Moreover, this Court has also recently rejecting an ineffective assistance of appellate counsel claim for failing to raise a *Ring* claim in a habeas petition. *State v. Coney*, 2003 WL 838149, *14, n.25 (Fla. March 6, 2003).

Regardless of the view this Court takes of *Ring* and its requirements, *Ring* does not apply to this case. Wainwright had a prior violent felony and was under sentence of imprisonment. *Wainwright*, 704 So.2d at n.2. Recidivist aggravators may be found by the judge alone. The fact of prior convictions are exempt from the holding in *Apprendi* and *Ring*. Additionally, the jury made a finding of the felony murder aggravator in the guilt phase by convicting Wainwright of armed robbery, armed

kidnapping, and armed sexual battery. *Wainwright*, 704 So.2d at 513. Three of the six aggravators were found by juries - either previous juries or by this jury at the guilt phase. Nor does Wainwright, whose jury unanimously recommended death have standing to raise a unanimity argument. *Burch v. Louisiana*, 441 U.S. 130, 132, n.4, 99 S.Ct. 1623, 1624, n.4, 60 L.Ed.2d 96 (1979)(holding that one of the defendants who was convicted by a unanimous six-person jury lacked standing to raise a non-unanimous challenge to his conviction). Hence, Wainwright's death sentence does not violate *Ring*.

ISSUE TWO

Wainwright contends that appellate counsel was ineffective for failing to argue that the State may not present a felony murder theory when a defendant is indicted solely for premeditated murder and failing to assert the failure to conduct a *Koon* colloquy[7] was fundamental error. Respondent respectfully disagrees. The first issue is meritless and appellate counsel is not ineffective for declining to present an argument with a string cite of controlling precedent against it. The second issue is not fundamental error. Indeed, under the facts of this case, no *Koon* colloquy was required. Thus, appellate counsel was not ineffective.

ALTERNATIVE THEORIES OF FIRST DEGREE MURDER

Wainwright argues that because he was indicted solely for premeditated murder, the felony murder theory became a non-statutory aggravator. This Court has repeatedly rejected this claim as meritless.[8] Moreover, this Court has also rejected a

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[7] *Koon v. Dugger*, 619 So.2d 246 (Fla.1993)

[8] *Woodel v. State*, 804 So.2d 316, 322 (Fla. 2001) (rejecting an argument that the trial court impermissibly allowed constructive amendment of the indictment when the trial court gave the jury both premeditated and felony-murder instructions, even though the indictment only alleged premeditated first-degree murder as having "no merit" because we

claim of ineffective assistance of appellate counsel for failing to raise this exact issue. *Freeman v. State*, 761 So.2d 1055, 1071 (Fla. 2000)(rejecting, in a habeas petition, an ineffectiveness of appellate counsel claim for failing to argue that the trial court erred in denying the pretrial motion to dismiss the indictment because it did not specifically charge felony murder and reasoning that appellate counsel cannot be ineffective for failing to raise issues that are without merit).

Furthermore, regardless of whether the felony murder theory was a valid theory of guilt, this does not change statutory aggravation into non-statutory aggravation. Felony murder is, and remains, a proper statutory aggravator, regardless of the wording of the indictment. A prosecutor could chose to limit

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have repeatedly rejected claims that it is error for a trial court to allow the State to pursue a felony murder theory when the indictment gave no notice of the theory citing *Gudinas v. State*, 693 So.2d 953, 964 (Fla.1997)); *Kearse v. State*,662 So.2d 677, 682 (Fla. 1995)(noting that a defendant has actual notice through discovery and also statutory notice of the possible underlying felonies that the State can rely upon to prove felony murder); *Lovette v. State*, 636 So.2d 1304 (Fla.1994)(concluding that an indictment charging only premeditated murder is sufficient to allow the State to proceed on either premeditated or felony murder); *O'Callaghan v. State*, 429 So.2d 691, 695 (Fla.1983)(concluding that the defendant was not prejudiced by the lack of a felony murder charge in his indictment or by the instructions given to the jury); *Knight v. State*, 338 So.2d 201, 204 (Fla.1976).

his theory of murder to premeditated murder in the guilt phase and then proceed to prove the felony murder aggravator in the penalty phase. This would not be error or turning statutory aggravation into non-statutory aggravation. This aggravator is proper regardless of the indictment. Thus, appellate counsel was not ineffective in failing to raise an issue that has been rejected by the Court again and again since 1976. *Knight v. State*, 338 So.2d 201, 204 (Fla.1976).

KOON

No *Koon* inquiry was required. Here, the defendant did not really waive his right to present mitigating evidence. His mother, in fact, testified at some length exploring several areas of mitigation at the penalty phase.

During the penalty phase, the State introduced certified copies of prior convictions but no other evidence. Defense counsel presented the testimony of the defendant's mother, Kay Wainwright. (R. 3666-3687). She testified extensively about his background. She testified about his childhood including his learning disability. (R. 3673-3674). She testified regarding his bed wetting until he was fourteen years old. She testified that she repeatedly took him to numerous doctors and psychiatrists. (R. 3676). She testified about his incarceration

on auto larceny charges. (R. 3680). She testified about his immaturity and his being a follower who got involved with the wrong crowd. (R. 3682-3683). At the end of her testimony, she referred to a letter in which she speculated that he was sexually molested. (R. 3686-3687) It is clear from trial counsel's testimony at the evidentiary hearing, that the sole witness the defense intended to present mitigating evidence through was Wainwright's mother. (PCR I 110,123-124).[9] It was only the one area of sexual molestation that the defendant prohibited counsel from presenting. So, Wainwright actually did present mitigating evidence. Such a situation does not even require a *Koon* colloquy.

Furthermore, even a "partial" *Koon* colloquy should be held under these circumstances, the failure to conduct a *Koon* inquiry is not fundamental error. A *Koon* colloquy is a prophylactic procedure designed to ensure that the defendant's waiver of his right to present mitigation is knowing.[10] A *Koon* colloquy, just

[9] The mental health expert trial counsel retained, Dr. Errico, diagnosed Wainwright with anti-social personality. (PCR 117-118). Because of this trial counsel wanted to limit the mitigation testimony to his mother who could testify to most of this evidence without being cross-examined on this diagnosis.

[10] *Koon* is an odd prophylactic procedure. Most colloquies, such as a plea colloquy and *Miranda* warnings, are designed to inform a defendant of his legal rights. The *Koon* colloquy, by contrast, informs a defendant of his own character and history

as the federal plea colloquies required by rule 11, is not a constitutional issue. The failure to conduct a *Koon* colloquy when the waiver is actually voluntary is harmless error.[11] It is

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since that is what mitigating evidence is. The defendant already has knowledge of his own character. So, *Koon* is probably actually designed to prevent further post-conviction litigation by the defendant by obtaining an on-the-record detailed waiver, not to increasing the knowingly part of a waiver. *Koon*, itself involved a defendant who was raising an ineffective assistance of counsel claim for failing to present mitigating evidence but who had instructed his attorney not to present any mitigating evidence in post-conviction litigation. While understandable in terms of decreasing post-conviction litigation, it is not a constitutional issue. Cf. *Ocha v. State*, 826 So.2d 956, 961-962 (Fla. 2002).

[11] Cf. *United States v. Savinon-Acosta*, 232 F.3d 265, 268 (1st Cir. 2000)(noting that mere technical failures to comply with Rule 11 are often found harmless); *United States v. Johnson*, 1 F.3d 296, 299 (5th Cir. 1993)(en banc)(holding that an omission in a rule 11 colloquy would be analyzed for harmless error and that even under prior precedent partial omission that did not implicate the core constitutional concerns of voluntariness was harmless error); *United States v. Cross*, 57 F.3d 588, 590 (7th Cir. 1995)(holding that the district court failed to comply with the plea colloquy required by Federal Rule of Criminal Procedure 11(d), did not render plea involuntary and therefore, error was harmless); *United States v. Mitchell*, 58 F.3d 1221, 1224 (7th Cir. 1995)(explaining that in reviewing Rule 11 colloquy proceedings, "matters of reality, and not mere ritual should control," and we will not find reversible error when we satisfy ourselves, by considering the total circumstances surrounding the plea, that the defendant was informed of his rights and understood the consequences of his plea); *United States v. Hernandez-Fraire*,208 F.3d 945, 950 (11th Cir. 2000)(explaining that any variances or deviations from the procedures mandated by Rule 11 that do not affect a defendant's substantial rights constitute harmless error and this circuit will uphold a plea colloquy that technically violates Rule 11, but adequately addresses the core concerns); *United States v. Jones*, 143 F.3d 1417, 1420 (11th Cir.1998)(observing that if the

the underlying issue of the voluntariness of the waiver that is the real constitutional right. The failure to conduct a *Koon* is merely a technical violation, which may or may not implicate the actual voluntariness of the waiver, and certainly is not fundamental error, in and of itself.

Furthermore, any claim that the defendant's waiver of the right to present mitigating actually was not voluntary is rebutted by the record. At trial, the defendant presented the testimony of his mother at the penalty phase. When she testified to matter he did not want explored, he stopped her testimony. He clearly knew he had the right to present mitigating evidence and the right not to present such evidence from his actions at trial. Additionally, at the evidentiary hearing, trial counsel testified that defendant would not permit him to present certain areas of mitigation. (PCR III 102).

Hence, appellate counsel could not really raise the true, underlying issue of the voluntariness. Appellate counsel could only raise a technical violations for failing to conduct a *Koon* inquiry which is not sufficient to amount to fundamental error.

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defendant understands the plea and its consequences, then the plea colloquy did not violate the defendant's substantial rights and any technical errors are harmless).

Appellate counsel cannot be deemed ineffective for failing to raise an unpreserved error that is not fundamental error. *Roberts v. State*, 568 So.2d 1255 (Fla.1990) (holding that appellate counsel's failure to raise a claim which was not preserved for review and which does not present a question of fundamental error does not constitute ineffective assistance).

ISSUE THREE

Wainwrights asserts that the trial court erred by failing to make the required findings prior to permitting the defendant to be tried wearing a stun belt which violated due process and his Sixth Amendment rights. Respondents respectfully disagree. Florida does not require special findings. Moreover, requiring the defendant to wear a stun belt is not fundamental error.

The stun belt Wainwright was wearing was activated by Officer Beck when Wainwright become verbal, refused to put the chains back on and went towards the officer. (T. XXVI 3511-3512). However, the incident occurred in a holding cell outside the presence of the jury. The jury was not aware of the incident because they had been excused for the day. (T. XXVI 3510). The defendant addressed the court objecting to the use of the stun belt. (T. XXVI 3512-3513). The officer informed the court that the stun belt had not immobilized the defendant. (T. XXVI 3511). The trial court then conducted the charge conference with the defendant present. (T. XXVI 3514).[12]

This is a direct appeal issue which is not properly

[12] At the evidentiary hearing, trial court testified that the reason the officer activated the stun belt was that Wainwright become verbally abusive towards his attorney. (PCR III 84, 89, 130). Trial counsel noted that the officer made a statement expressing dissatisfaction with the effectiveness of the stun belt because it did not knock Wainwright down.

litigated in habeas proceedings. The incident was in the direct appeal record and, therefore, should have been raised on direct appeal.[13]

In *Israel v. State*, 837 So.2d 381, 389-390 (Fla. 2002), this Court found that the trial court did not abuse its discretion in requiring Israel to wear restraints during his capital trial. This Court described shackling as "a permissible tool" to be exercised in the sound discretion of the trial judge when circumstances involving security and safety warrant it. This Court noted that Israel had injured a bailiff during a physical altercation in his holding cell. Israel demonstrated, in this Court's words: "a complete lack of respect for the trial court." The bailiff indicated that if Israel remained seated, it would not be obvious that he was wearing restraints to the jury which would "ensure the least amount of prejudice" to the defendant. This Court concluded the shackles were necessary to prevent the defendant from disrupting the proceedings.

While this Court has addressed the use of restraints in general, this Court has not directly addressed the use of

[13] On occasion, the use of the restraints is not obvious from the trial record and, in those cases, it may be properly litigated in post-conviction. However, in those case, an evidentiary hearing must be held to establish the use of the restraints. Even in those cases, the issue is properly raised in the 3.851 motion, not a habeas petition.

concealed stun belts. *Overton v. State*, 801 So.2d 877 (Fla. 2001)(addressing the related issue of a juror who was informed that the defendant was being tried wearing a stun belt but finding no error in not removing the juror for cause). Many federal circuits have permitted the use of stun belts. *Chavez v. Cockrell*, 310 F.3d 805 (5th Cir. 2002)(holding inadvertent activation of otherwise inconspicuous stun belt in presence of jury did not impair the presumption of innocence); *United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000)(allowing use of hidden stun belt to prevent disruption of the trial of gang members was permissible); *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997)(approving use of hidden stun belts on defendants who posed a significant risk of violence or escape).

In *United States v. O'Driscoll*, 2002 WL 32063830 (M.D.Pa. 2002), the Middle District of Pennsylvania held use of a stun belt and shackles would not impose a substantial burden upon defendant's constitutional rights. O'Driscoll was charged with first-degree murder in an inmate murder and faced the death penalty. The government filed a motion to placed the defendant in shackles and a stun belt during trial and the trial court held a hearing on that motion. O'Driscoll was currently incarcerated for life for kidnapping and an armed bank robbery during which he struck a pregnant woman in the abdomen.

O'Driscoll had attempted to escape prior to the earlier trial. During the escape attempt, O'Driscoll stated, "What did you expect? I have nothing to lose. Go ahead and shoot me" to the Marshals. The Court considered and rejected restraining the defendant with leg shackles bolted to the courtroom floor as an alternative because would not prevent O'Driscoll from having a violent outburst at counsel table or attacking his counsel. The Court observed that a stun belt will not be visible to the jury because it will be worn under his clothing. The Court reasoned that in light of defendant's history of violence and escape attempts, defendant posed an extreme security risk and a serious escape risk which justified the use of a stun belt and shackles.

Here, as in *O'Driscoll*, Wainwright was charged with first degree murder (in addition to armed kidnapping, armed robbery, armed rape of a woman) and faced the death penalty. He had successfully escaped from his prior incarceration. During that escape, he went on a crime spree which included this kidnapping, rape and murder. Moreover, he was apprehended after a high speed chase and shoot out with an officer. And, just as in *O'Driscoll*, Wainwright, when caught, stated: go ahead and shoot me I have nothing to loose.

In *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997), the Seventh Circuit approved use of hidden stun belts on

defendants who posed a significant risk of violence or escape. One of the defendant already had been convicted of attempting to escape. The Seventh Circuit observed that the trial judge has wide discretion in determining what is necessary to maintain the security of the courtroom. The fact the belts were hidden under the defendants' clothing minimized the risk of prejudice. The Court also noted that even with these security measures, Mr. Brooks assaulted his court-appointed attorney at the sentencing hearing.

Here, as in *Brooks*, the defendant verbally assaulted his attorney. Here, as in *Israel*, the defendant had an alternations with the officer in the holding cell and refused to comply with the officer's orders during the trial. Here, as in *Israel*, *Brooks*, *O'Driscoll*, the stun belt was worn under the defendant's clothing and therefore not visible to the jury minimizing any prejudice to the defendant. Here, as in *Israel*, the jury was not aware of the stun belt being activated because the incident occurred in a holding cell after they had been excused.

Wainwright's reliance upon *United States v. Durham*, 287 F.3d 1297, 1005 (11th Cir. 2002), is misplaced. In *Durham*, the Eleventh Circuit reversed the conviction for bank robbery because the trial court had not made the required findings prior to permitting the use of the stun belt on the defendant at

trial. The holding was a trial court should make findings and consider any less restrictive alternatives prior to authorizing the use of such a device. Florida law does not have the same requirement of findings. Furthermore, on remand for the retrial, the Northern District Court held that use of stun belt was warranted. *United States v. Durham*, 219 F.Supp.2d 1234 (N.D. 2002). The district judge noted that the accidental activations rate was "so exceedingly low to be of no realistic concern". The district judge rejecting any argument that a stunbelt would interfere with consultations between the defendant and his attorney and therefore, interfere with the Sixth Amendment right to counsel because the defendant was he was able to, and did, intelligently and meaningfully participate in his defense and with his counsel in the first trial. The district judge noted that: "[n]o credible evidence was produced to suggest that the defendant was unable to participate in his defense because of this security measure" and concluded based on personal observations of other defendants who have worn the stun belt in his courtroom, "that the so-called anxiety factor is either greatly exaggerated or is simply non-existent." Durham was retried wearing a stun-belt again.

While framed as a straight claim of trial error, to the extent that Wainwright means to present this as an ineffective

assistance of appellate counsel claim, there is no ineffectiveness because restraint claims are not fundamental error. *Gore v. State*, 2003 WL 1883690, *8 (Fla. April 17, 2003)(finding no ineffectiveness appellate counsel was not ineffective for failing to raise a shackling issue on appeal where the issue was not preserved and was not fundamental error); *Sireci v. Moore*, 825 So.2d 882 (Fla.2002)(holding that appellate counsel was not ineffective for failing to argue on direct appeal that the defendant's shackling in the presence of the jury violated the defendant's constitutional rights because there was nothing in the record to establish that the jury ever saw the defendant in restraints and explaining that based on the longstanding principle that trial judges must have discretion to properly manage their courtrooms, in combination with a complete absence of evidence indicating any prejudice to the petitioner, requires this Court to deem this argument without merit). Here, likewise, there is no evidence that the jury ever saw the stun belt. Stun belts are worn underneath the defendant's clothing and are not visible to the jury. Therefore, there was no ineffectiveness of appellate counsel because any capital appeals attorney familiar with existing precedent in this area would know that the stun belt issue was nonmeritious.

CLAIM FOUR

Wainwright contends that the trial court improperly failed to conduct a *Koon*[14] colloquy prior to allowing the defendant to not present any further mitigating evidence. During the penalty phase, the State introduced certified copies of prior convictions but no other evidence. Defense counsel presented the testimony of the defendant's mother, Kay Wainwright. (R. 3666-3687). She testified extensively about his background. She testified about his childhood including his learning disability. (R. 3673-3674). She testified that she repeatedly took him to numerous doctors and psychiatrists. (R. 3676). She testified about his incarceration on auto larceny charges. (R. 3680). She testified about his immaturity and his being a follower who got involved with the wrong crowd. (R. 3682-3683). At the end of her testimony, she referred to a letter in which she speculated that he was sexually molested. (R. 3686-3687). At the evidentiary hearing, trial counsel testified that defendant would not permit him to present certain areas of mitigation. (PCR III 102).

First, the trial court's failure to conduct a *Koon* colloquy is a issue that should have been raised in the direct appeal.

[14] *Koon v. Dugger*, 619 So.2d 246, 249 (Fla.1993)

The omission was obvious from the trial record. Habeas proceeding should not be used as a second direct appeal and that is what the claim amounts to.

No *Koon* inquiry was required. Here, the defendant did not really waive his right to present mitigating evidence. His mother, in fact, testified at some length exploring several areas of mitigation at the penalty phase. It was only the one area of sexual molestation that the defendant prohibited counsel from presenting. So, Wainwright actually did present mitigating evidence. Such a situation does not even require a *Koon* colloquy.

Furthermore, even a "partial" *Koon* colloquy should be held under these circumstances, the failure to conduct a *Koon* inquiry is not fundamental error. A *Koon* colloquy is a prophylactic procedure designed to ensure that the defendant's waiver of his right to present mitigation is knowing.[15] A *Koon* colloquy, just

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[15] *Koon* is an odd prophylactic procedure. Most colloquies, such as a plea colloquy and *Miranda* warnings, are designed to inform a defendant of his legal rights. The *Koon* colloquy, by contrast, informs a defendant of his own character and history since that is what mitigating evidence is. The defendant already has knowledge of his own character. So, *Koon* is probably actually designed to prevent further post-conviction litigation by obtaining a personal, on-the-record, detailed waiver from the defendant, not to increasing the knowingly part of a waiver. While understandable in terms of decreasing post-conviction litigation, it is not a constitutional issue.

as the federal plea colloquies required by rule 11, is not a constitutional issue. The failure to conduct a *Koon* colloquy when the waiver is actually voluntary is harmless error.[16] It is the underlying issue of the voluntariness of the waiver that is the real constitutional right. The failure to conduct a *Koon* is merely a technical violation, which may or may not implicate the actual voluntariness of the waiver, and certainly is not fundamental error, in and of itself.

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[16] *Cf. United States v. Savinon-Acosta*, 232 F.3d 265, 268 (1st Cir. 2000)(noting that mere technical failures to comply with Rule 11 are often found harmless); *United States v. Johnson*, 1 F.3d 296, 299 (5th Cir. 1993)(en banc)(holding that an omission in a rule 11 colloquy would be analyzed for harmless error and that even under prior precedent partial omission that did not implicate the core constitutional concerns of voluntariness was harmless error); *United States v. Cross*, 57 F.3d 588, 590 (7th Cir. 1995)(holding that the district court failed to comply with the plea colloquy required by Federal Rule of Criminal Procedure 11(d), did not render plea involuntary and therefore, error was harmless); *United States v. Mitchell*, 58 F.3d 1221, 1224 (7th Cir. 1995)(explaining that in reviewing Rule 11 colloquy proceedings, "matters of reality, and not mere ritual should control," and we will not find reversible error when we satisfy ourselves, by considering the total circumstances surrounding the plea, that the defendant was informed of his rights and understood the consequences of his plea); *United States v. Hernandez-Fraire*,208 F.3d 945, 950 (11th Cir. 2000)(explaining that any variances or deviations from the procedures mandated by Rule 11 that do not affect a defendant's substantial rights constitute harmless error and this circuit will uphold a plea colloquy that technically violates Rule 11, but adequately addresses the core concerns); *United States v. Jones*, 143 F.3d 1417, 1420 (11th Cir.1998)(observing that if the defendant understands the plea and its consequences, then the plea colloquy did not violate the defendant's substantial rights and any technical errors are harmless).

Furthermore, any claim that the defendant's waiver of the right to present mitigating actually was not voluntary is rebutted by the record. At trial, the defendant presented the testimony of his mother at the penalty phase. When she testified to matter he did not want explored, he stopped her testimony. He clearly knew he had the right to present mitigating evidence and the right not to present such evidence from his actions at trial. Additionally, at the evidentiary hearing, trial counsel testified that defendant would not permit him to present certain areas of mitigation. (PCR III 102). Thus, the trial court's failure to conduct a *Koon* colloquy is harmless error, if error at all, not fundamental error.

Wainwright's reliance on *Ocha v. State*, 826 So.2d 956, 961-962 (Fla. 2002) is misplaced. The *Ocha* Court explained that the *Koon* procedure creates a trial record that adequately reflects the defendant's knowing waiver of his right to present evidence in mitigation but did not hold that the failure to do so was fundamental error. Indeed, the *Ocha* Court rejected the notion that a trial court is compelled to order psychological testing of a defendant who waives presentation of mitigating evidence and concluded that the trial court gave proper consideration to the mental mitigation.

CLAIM FIVE

Wainwrights asserts that his death sentence is not proportionate. This issue was barred by the law of the case doctrine. As this Court explained in *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997), all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts. While *Wainwright* Court, in the direct appeal, did not discuss the issue at length, this Court found "that the death sentence is proportionate." *Wainwright*,704 So.2d at 516. Collateral counsel is attempting to relitigate an issue already raised and decided in the direct appeal in this habeas petition. *Porter v. Crosby*, 2003 WL 60972, *1 (Fla. 2003)(explaining that claims which petitioner has raised in prior proceedings and which have been previously decided on the merits are procedurally barred in the habeas petition); *Mann v. Moore*, 794 So.2d 595, 600 (Fla.2001)(explaining that where the Florida Supreme Court has already ruled on the merits in a prior appeal, the issue is procedurally barred); *Parker v. Dugger*, 550 So.2d 459, 460 (Fla. 1989)(observing that habeas corpus petitions are not to be used for additional appeals on questions which ... were raised on appeal). Thus, the proportionality of the sentence is a direct appeal issue not properly litigated in

habeas proceedings and one that has already been decided adversely to petitioner.

Even if the issue was not barred by the law of the case doctrine, Wainwright's sentence is proportionate. Wainwright asserts an *Atkins*[17] claim based not on mental retardation but rather on "mental instability". First, Wainwright is not mentally retarded. At the penalty phase, the defendant's mother, hardly an expert on mental retardation, testified that Dr. Charles Boyd of Greenville, North Carolina, told her that the defendant was borderline mentally retarded but this was the opposite of what the school officials told her based on their testing. (R. 3676). At the evidentiary hearing, numerous mental evaluations of the defendant were introduced. The evidence at the evidentiary hearing was that Wainwright is not mentally retarded. (PCR III 107). There is no evidentiary support for any straight *Atkins* claim. *Bottoson v. Moore*, 2002 WL 31386790, 27 Fla. L. Weekly S891, (Fla. Oct. 24, 2002)(rejecting an *Atkins* claim where the evidence did not support the claim).

Moreover, the Eighth Amendment bar to execution established in *Atkins* is limited to mental retardation. Defendants with "mental instability" are still eligible to be executed after

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[17] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Atkins. *Atkins* simply did not address "mental instability".

Wainwright also asserts that the fact that the co-defendant failed the polygraph test renders his death sentence disproportionate. However, the co-defendant, Hamilton, also received a death sentence. Both Wainwright and Hamilton received death sentences. Relative culpability analysis is limited to the situation where one defendant receives a death sentence and the co-defendant receives a life sentence. *Jennings v. State*, 718 So.2d 144, 153 (Fla.1998)(explaining that the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life). Equally culpable defendants receiving the same sentence does not present a proportionality problem. *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002)(explaining that, in cases where more than one defendant was involved in the commission of the crime, this Court performs an additional analysis of relative culpability and underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment).

Furthermore, the relevant polygraphs results for proportionality purposes would be Wainwright's, not just Hamilton's. Wainwright refused to take the polygraph even

though the prosecutor offered him a life sentence if the polygraph showed that Wainwright was not the triggerman. (PCR III 144-145).[18] Wainwright must establish that he is not the triggerman and did not attempt to strangle the victim, not merely that Hamilton may also have been one of the triggerman. Moreover, while each blamed the other for the actual murder, that State presented testimony that Wainwright told a fellow inmate, Robert Murphy, that he both strangled and shot the victim. *Hamilton v. State*, 703 So.2d 1038 (Fla. 1997)(noting that Hamilton gave several statements to police wherein he admitted kidnapping, robbing, and raping Gayheart, but he claimed Wainwright strangled and shot her; whereas, Wainwright, on the other hand, admitted participating in the kidnapping and robbery, but asserted that Hamilton raped and killed her)(R. 2704-2710). Wainwright is either equally culpable or more culpable than Hamilton. Wainwright's death sentence is proportionate both to the crime and to the co-defendant's sentence.

[18] The offer of life was based who was the triggerman, not on who raped the victim. (PCR III 148).

CONCLUSION

Respondent respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to R. GLENN ARNOLD, 210-A East Government Street Pensacola, FL 32501 this 6th day of May, 2003.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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