IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON
Appellant,

vs. **CASE NO: SC02-2409**
Lower Tribunal No.: 94-150-CF-1

STATE OF FLORIDA
Appellee.
_____/

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

THE PETITIONER, RICHARD HAMILTON, by and through the undersigned attorney hereby petitions this Honorable Court for extraordinary relief pursuant to Article I, Section 13 of the Florida Constitution, FlaRCrimP § 3.851, FlaRAppP § 9.030(a)(3) as well as each and every basis for relief stated herein and, in support thereof, would show:

JURISDICTIONAL ALLEGATIONS

1. The Petitioner is presently held at the Union Correctional Institution in Union County, Florida. Petitioner is held pending a sentence of death and has been so held there or at another institution controlled by the State of Florida since June 12, 1995.

2. Petitioner was convicted by a jury on May 30, 1995, and the jury did by a purported majority recommendation of 10 of 12 recommend the petitioner be

sentenced to death on June 1, 1995. The jury was not asked nor did they render a unanimous verdict with respect to any particular aggravating factor pursuant to FS section 921.141.

3. Petitioner appealed this matter to this Honorable Court and appeal was denied. Nine grounds were stated on appeal.

4. Petitioner sought a writ of certiorari from the United States Supreme Court. Such writ was denied on June 26, 1998.

5. Petitioner was without effective counsel for the purposes of post-conviction relief until April of 1999. At such time petitioner began to prepare and participate in postconviction proceedings. Petitioner requested additional time which was granted by order of June 26, 1999. A preliminary petition was filed on November 8, 1999. An amended petition was filed on June 28, 2000. A second amended petition was filed on February 12, 2001.

6. Petitioner was granted a hearing regarding the need for an evidentiary hearing in April, 2001. The order resulting from said hearing is part of the record of Petitioner's contemporaneous appeal from the denial of relief pursuant to proceedings conducted pursuant to FlaRCrimP § 3.850 by order of May 29, 2002..

7. This petition is being filed contemporaneously with the Appellant's appeal of his postconviction remedies pursuant to the rules of this Honorable Court at FlaRAppP § 9.140(b)(6)(E). Appellant respectfully requests that exhibits from the trial

and postconviction record may be incorporated by reference into this petition. Additionally, petitioner acknowledges that there may be some overlap or duplication between the issues of each action. Petitioner would rather state the same claim twice than run the risk of losing the right to assert a claim because it has been brought in the wrong action. Accordingly, petitioner expresses his desire to adjudicate each separate issue of both the contemporaneous appeal and this petition only one time and in the forum or proceeding which is most likely to insure that said issue is fully and fairly heard. Petitioner further hereby incorporates all arguments, exhibits, pleadings, and authorities from the contemporaneously filed appeal as well as from the records of his trial and postconviction proceedings as though such were fully and independently set forth herein.

8. Petitioner has, through all prior proceedings in this case and in the related postconviction and his direct appeals, exhausted all other remedies and requires that this Honorable Court issue the writ of habeas corpus in order to prevent the petitioner from being subjected to the loss of his life or continued loss of his liberty as a result of the violation of his constitutional rights. This Honorable Court has jurisdiction pursuant to the Constitution of Florida, at Article V, Section 3(b)(7)-(9).

COUNT I

9. Paragraphs one through eight are realleged.

10. The petitioner was charged in a four count indictment. Each count alleged

that the relevant offense was committed in "Columbia and/or or Hamilton" County, Florida. This language provided petitioner the absolute right to elect venue with respect to each count. Pursuant to Article I, section 16 of the Florida Constitution and FS section 901.03 together with the decisions construed in such provisions, this further would have allowed petitioner to have his trial separate from that of his codefendant and would have further allowed him to have his murder count separated from the other counts. Petitioner hereby asserts that the recognition of the venue requirements, as it arises from the Florida Constitution, and since it is clearly defined by the statutes, and since it goes to the heart of the persons who will decide his fate, is and was a fundamental right.

11. Petitioner instead was required to stand a joint trial in a venue in which no offense was alleged to have been committed. His trial was prejudiced by the improper forum, from the evidence relating to the case of his codefendant, and from the evidence relating to the related offenses from which he could have had his murder trial severed had his constitutional rights been recognized.

12. Because the petitioner was denied a fundamental right arising from the state Constitution and because there is no basis from which it can be said that the appellant knowingly and intelligently waived that right, petitioner's incarceration and the sentence of death are unconstitutional and petitioner must be released from the custody of the said Michael Moore, as agent of the state of Florida.

COUNT II

13. Paragraphs one through eight are realleged.

14. Petitioner, as a citizen of the state of Florida pursuant to Article I, Section 21of the Constitution of Florida and as a citizen of the United States of America, pursuant to the Sixth Amendment of the United States Constitution is entitled to access to the courts of the State as well as to the effective assistance of counsel, to confront the witnesses him, to have his jury instructed as to the correct application of the law, to be tried in accordance with the accepted rules of evidence, procedure, and in the correct venue; to have counsel perform in a reasonably effective manner by preparing his case for trial and acting as his zealous advocate, and by making reasonably competent trial decisions and giving Petitioner reasonably competent advice.

15. Petitioner is being held in violation of Article I, Section 21 of the Florida Constitution and the Sixth Amendment of the United States Constitution since he was denied such rights in the following manner:

a. He was not advised of his rights to trial venue and decisions were made resulting in a joint trial in an improper venue that could have been avoided;

b. He was required to face improper evidence because his trial counsel failed to protect his jury from inappropriate evidence which he was further not afforded an opportunity to confront and his jury was allowed to engage in improper deliberations;

c. His case, particularly the penalty phase, was not reasonably prepared or presented; and

d. His trial was marred by numerous irregularities and breaches of duty which, either singularly or cumulatively, resulted in his being convicted of a capital felony and other major felonies and sentenced to death in violation of the Sixth Amendment of the Constitution of the United States and Article I, Section 21, of the Constitution of Florida.

16. The Sixth Amendment violations described above are described and documented in great detail in the contemporaneously filed appeal from the Petitioner's denial of relief pursuant to FlaRCrimP § 3.850 in this same case. Petitioner hereby adopts and incorporates all allegations, pleadings, exhibits, record references, and legal authorities as may be proper to support so much of each said claim which is most appropriately considered in this proceeding rather than the referenced appeal. To the extent that any such issue is more appropriately heard in the appeal proceeding, Petitioner hereby withdraws such claim, but only to the extent it may be fully heard and considered in said appeal according to the same or a more lenient standard for relief.

COUNT III

17. Paragraphs 1 through 8 are realleged.

18. The Sixth Amendment prevents Petitioner from having to confront out of court statements of a codefendant when such codefendant is not called as a witness

and the petitioner has no means of cross-examining or confronting or otherwise testing the validity, competency, reliability, and accuracy of such evidence. Such also protects Petitioner from being prejudiced from a joint trial with one whose interests are both unfairly prejudicial and when such prejudice cannot be reasonably avoided.

19. Petitioner was also denied this right by having to have his case tried together with that of his codefendant, Anthony Wainright. The Defendant objected to this proceeding but the trial court overruled the objection and proceeded to conduct a joint trial in which separate juries would hear each case. It was intended that each jury would be protected from hearing or being exposed to evidence in violation of the Bruton rule but Defendant respectfully submits that this impossible task was not accomplished and the petitioner suffered prejudice. Despite contemporaneous and appropriate trial objections this matter was not appealed in the original appeal of this case. Accordingly, petitioner's continued incarceration under a sentence of death is unconstitutional and petitioner requires this Honorable Court to issue and appropriate writ.

20. During its rebuttal case the State offered testimony from inmate Robert Murphy. Such testimony concerned out of court statements made by Petitioner's co-defendant which implicated him in the crimes. Petitioner had, from the very beginning stages following his arrest, truthfully stated that he had no role in the killing of the victim and his co-defendant had acknowledged to numerous persons, including those

with whom he encountered during incarceration, that he had acted alone in the killings. He had even disparaged Petitioner for not joining him in killing the victim. The state offered the testimony of Robert Murphy, which was ambiguous at best, and eventually had to impeach him with a deposition comment he had made months earlier in order to present a comment he had made which allowed them to argue that Wainwright had, at one time, said that "we" strangled the victim. The State had earlier sought to establish that no strangling of the victim (who died of gunshot wounds) had even occurred. Such clearly denied Petitioner the right of confrontation and to cross-examine such evidence. Petitioner's defense attorney did object, but appellate attorney made no mention of this violation on appeal. Since this is such a clear violation of the Bruton rule, such an appeal would have resulted in a new trial. The failure to appeal this matter falls well below the standard of reasonable appellate representation and there is a substantial likelihood that the result of an appeal would have been favorable if this basis had been included.

COUNT IV

21. Paragraphs one through eight are realleged. Petitioner seeks habeas relief from having been convicted and sentenced at a trial wherein the jury was not properly advised of the law. Such denied Petitioner a jury trial in violation of the Sixth Amendment of the United States Constitution and Article I, § 21 of the Constitution of Florida.

22. The State Attorney was allowed to present evidence and argue that Petitioner had not taken affirmative action to prevent the killing of the victim. It is clear that this was a serious misstatement of the law. Such evidence was irrelevant unless Petitioner had stated that he had tried to save the victim and the State's intent to use such evidence was not noticed as required by the Williams rule. Petitioner's attorney did finally object to the second or third witness who offered such testimony, but did not request a curative inastruction nor ask for a mistrial. Such fell below the standard of reasonable representation and there is a substantial likelihood that the outcome of the trial would have been more favorable if Petitioner's trial had not been tainted with this testimony.

23. Petitioner's attorney did make an objection to the State arguing the evidence that he had failed to affirmatively act to prevent the killing of the victim, but the appropriate curative measures were not taken. On appeal Petitioner's appellate counsel never made mention of this error. Misstatement of the law is always a significant matter. This was a particularly significant issue in this case since the whole point of Petitioner's defense was Petitioner's dissociation from the killing of the victim, a fact which was well documented from the statements Petitioner had made as well as the statements co-defendant Wainwright had made to his fellow inmates while awaiting trial, as more fully discussed above. The failure to have appealed this error fell well below the standard of representation expected of appellate counsel. Had this

argument been made there is a substantial likelihood that the appeal would have been successful and Petitioner would have had the opportunity for a new trial free from misstatements about the law.

24. Petitioner realleges that his trial counsel failed to accept the "independent acts" instruction offered by the State after his proposed withdrawal defense was denied. His jury deliberated without a full understanding of the Petitioner's defense and in the belief that Petitioner had an affirmative duty to protect the victim.

COUNT V

25. Paragraphs one through eight are realleged. Additionally, Petitioner incorporates all arguments and references to his record set forth in that provision of his appeal brief regarding the recent cases of Arizona v Ring, Apprendi v New Jersey, and State v Bottoson as such were alleged herein.

26. Further, with respect to the Trial Court's imposition of the death penalty, the Trial Court sentenced Petitioner as follows:

> "It is further ordered, that you, Richard Eugene Hamilton, be taken by the proper authority to the Florida State prison and there be kept and closely confined until the date of your execution is set. It is further ordered that on such scheduled date that you be put to death by a current of electricity sufficient to cause your immediate death and such current of electricity shall continue to pass through your body until you are dead, or that you be put to death by any other lawful means which shall be in effect at the time of your execution."

At the time of pronouncing such sentence the only lawful means of execution in the

State of Florida was electrcocution. There was no statute authorizing any other means of execution. At the present time electrcocution is no longer the means of execution in the State of Florida. The State of Florida has adopted lethal injection as the manner of execution. The Trial Court, at best, pronounced an ambiguous sentence. At worst, the Trial Court pronounced an illegal sentence. Under either analysis, the sentence pronounced by the Trial Court is unlawful. Petitioner's trial defense attorney did not object to such ambiguous sentence. Such failure falls below the standard of reasonable representation applicable to this case. Had Petitioner's trial defense attorney requested the court to properly correct the ambiguous sentence the only result would have been that the specific sentence to the electric chair, being the only lawful matter of execution, would have been imposed. The State of Florida, acting out of justifiable apprehension that the United States Supreme Court will declare the use of the electric chair unconstitutional, has subsequently legislated the manner of execution in the State of Florida to the use of a lethal injection. Since no such statute existed at the time of Petitioner's sentencing, and since the use of the electric chair violates the Eighth Amendment of the United States Constitution which prescribes cruel and unusual punishment, any intent to execute me by lethal injection or to resentence me to die by lethal injection would additionally violate the *ex post facto* clause of both the Florida and United States constitutions.

27. When Petitioner's jury returned its recommendation with respect to

Petitioner's sentence the Deputy Clerk announced that the recommendation to the death penalty was by a vote of "10 to 12". Such a vote count is clearly incorrect and potentially amounted to, or at least inferred, a recommendation of life imprisonment with no possibility of parole for 25 years The State Attorney noticed this mistake. The Trial Court also noticed this mistake. Petitioner's defense attorney did not object to this recommendation and, without objection, agreed to the Trial Court's attempted cure of this by polling the jury. The question asked each juror in the poll of the jury was whether or not a majority of the jury had voted for the death penalty recommendation. It is clear that this is a meaningless inquiry since the vote with respect to the death penalty is by secret ballot and no juror would have any reason to know how each and every other juror voted and certainly would not know which, if any, aggravating factors each other juror may have considered to have been established, if any. Accordingly, with the exception of the jury foreman, each juror would only have knowledge of his or her own vote and would not be capable of answering such question unless the secret ballot rule had been violated. It is clear that a vote of "10 to 12" could have only been the accurate description of an unlawful or improper vote. The failure to make a proper and adequate objection to this recommendation and immediately request rendition of a life sentence, or to otherwise seek a satisfactory means of resolving what the true vote was falls below the standard of reasonable representation in this matter. The only remedy available to Petitioner at

this point is to have the sentence of death commuted to a sentence of life imprisonment as was appropriate at the time of Petitioner's alleged offense.

28. Because the procedures used for application of the death penalty in Florida are vague, uncertain, and violative of Constitutional law, such penalty, particularly as applied in this case, is cruel and unusual punishment and must be immediately set aside. It was additionally cruel and unusual to render an advisory verdict to the Petitioner indicating that his life could not be constitutionally taken from him and then to place him back under the pall of the death penalty. This is particularly so when the inquiry relating to the improperly rendered verdict was wholly inadequate.

COUNT VI

29. Paragraphs one through eight, all allegations of the Petitioner's petition pursuant to FlaRCrimP § 3.850, and all arguments, authorities, and pleadings of the contemporaneous appeal are realleged and incorporated herein.

30. The right to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution applies to the Petitioner's appeal of right.

31. Petitioner's appellate counsel did not address the matters of venue and the "independent acts" jury instruction. While these matters had not been technically and formally preserved, such are fundamental issues which were apparent from the record and which ought to have been addressed on appeal. In the event that this Honorable

Court shall entertain these issues fully in either the previous allegations of this petition or in the contemporaneous appeal, this claim may be withdrawn.

32. Appellant's appellate attorney on direct appeal did not raise or argue any appellate issues regarding the failure of the trial court to sever the trials of the defendants, the testimony of Robert Murphy, the arguments by the State to the jury requiring affirmative action by the Appellant to prevent crime, the unconstitutionality of the death penalty and the procedures used in penalty phase sentencing, or any other fundamental error of the trial. In the event that this Honorable Court shall entertain these issues fully in either the previous allegations of this petition or in the contemporaneous appeal, this claim may be withdrawn.

COUNT VII

33. Paragraphs one through eight are realleged.

34. Petitioner specifically prays that this Honorable Court note that, in the event that no one specifically pled ground for relief is deemed to afford the requested relief, the cumulative effect of all of the errors, omissions, and violations of the spirit and scope of the state and federal constitutions certainly warrant relief and that such cumulative effect be considered as grounds for relief.

35. Petitioner further prays this Honorable Court permit him to amend this petition or any other pleading or allegation of this matter through which relief is sought to correct an inadvertant omission or error, to react to a change in the controlling law

or precedent, or in the event that new evidence is discovered which may afford a basis for relief.

WHEREFOR, Petitioner prays this Honorable Court enter an order causing the State of Florida to deliver the person of Petitioner from confinement and discharge him from all manner of restraint, or, alternatively, to enter an order prohibiting the State of Florida from continuing to pursue execution of a conviction and sentence procured in violation of the federal and state constitutions, or, alternatively, requiring the State of Florida to accord Petitioner all such federal and state constitutional rights in future proceedings, or, alternatively, to grant such other relief as may be required or is proper under the circumstances of the case.

Respectfully submitted.

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copy of the foregoing was served upon:

Carolyn M. Snurkowski
Deputy Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

by ( ) regular United States mail ( ) by hand delivery and/or by ( )_____ _____.

this ____day of _____200__.

_____
Charles E. Lykes, Jr., Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this AMENDED PETITION FOR WRIT OF HABEAS CORPUS brief is printed in 14 point proportional (New Times Roman) type.

_____

Charles E. Lykes, Jr., Esquire
FBN: 291341