

IN THE SUPREME COURT OF FLORIDA
Case No SC 02-2409

RICHARD EUGENE HAMILTON
Appellant,

vs.

STATE OF FLORIDA
Appellee.

**APPELLANT'S REPLY TO STATE'S RESPONSE TO PETITION FOR
WRIT OF HABEAS CORPUS**

The Petitioner, by and through the undersigned attorney, hereby responds to the response by the State of Florida to the petition in the above style case and, in support thereof, would show:

1. The State of Florida represents that the Petitioner's appellate counsel specifically appealed the issue of the Bruton rule violation inherent in the testimony of Mr. Robert Murphy. Mr. Murphy eventually testified that the Petitioner's co-defendant, Mr. Anthony Wainwright, had told Mr. Murphy that "we killed" the decedent victim in the present case. Appellant respectfully submits that this is in error. It is clear from the third footnote of the opinion rendered by this Honorable Court in said appeal (Hamilton v State, 703 So.2d 1038 (Fla., 1997)) that this matter and this theory was not questioned on appeal. The prejudice to the Petitioner from the joint trial is clear from this and other events at his trial. While it may be true that the Petitioner may have been able to avoid the joint trial had his counsel taken advantage

of the venue option afforded by the “and/or” language of the indictment or upon the opportunities offered during certain circumstances of juror misconduct, such does not excuse or cure the failure to appeal this point.

2. The State of Florida represents that the Petitioner’s appellate counsel specifically appealed the impropriety of the prosecutor’s argument which inferred or intimated that the Petitioner was potentially guilty under a theory that he had failed to satisfy a duty to affirmatively save the life of the decedent. While this comment was the subject of appeal, this specific argument was not made.

3. The Petitioner notes that the State of Florida has, just as the Petitioner has, liberally referred to issues raised in the postconviction proceeding in the contemporaneous appeal with respect to that postconviction proceeding. As stated in the original petition, the Petitioner does not seek to argue any issue in both forums, but is desirous of ensuring that each claim or issue is heard in at least one forum. To the extent that the State of Florida has deferred the discussion of any issue to the contemporaneous appeal of the postconviction proceeding, the Petitioner respectfully submits and prays that this Honorable Court accept such as an agreement by the State of Florida that such issue is proper in the postconviction appeal proceeding.

4. Petitioner respectfully submits that jury instructions are of such fundamental importance to the conduct of a trial that they may be appealed in the absence of appropriate record preservation. In the present case it is clear from the record of trial

and it is also at least inferentially discussed in the appeal opinion of this Honorable Court of this case that, while the withdrawal instruction may not have been appropriate, the evidence did support the proposition that the Petitioner had made an adequate showing that he had never shared the desire of his co-defendant to bring about the death of the decedent and that such killing of the decedent was an independent act of the co-defendant Wainwright.

5. The Petitioner has raised or sought to raise both in his postconviction proceedings and in this habeas corpus proceeding that his death sentence is unconstitutional either pursuant to the case of Arizona v Ring or as a violation of the ex post facto clause of both the federal and state constitutions. Petitioner understands that the honorable trial court refused to continue the postconviction proceeding until the rain case was resolved. Petitioner has, in fact, appealed this determination in the contemporaneous postconviction appeal proceeding. Additionally, since the time of the Ring decision, there has been a constitutional amendment enacted with respect to the death penalty which gives rise to an argument that the prior decisions of this Honorable Court in which it was assumed that the Legislature intended certain actions to have retroactive application may have been erroneous. This is because the Legislature has recently adopted the practice of stating when the provisions are to be given retroactive application and the absence of such prior retroactive designation indicates that none was intended. These issues would seem to have some place in

either proceeding. Petitioner respectfully represents that the continuing development of the Ring decision and other decisions of this Honorable Court as well as the Constitution render it more appropriately heard in this habeas corpus proceeding. Accordingly, Petitioner looks to this Honorable Court to determine which, if any, of these proceedings are best used for resolving this issue.

6. Petitioner respectfully represents that the issues either separately stated in this habeas corpus proceeding or incorporated by reference from the postconviction proceeding and properly considered in this habeas corpus proceeding are appropriate for consideration of the cumulative effect argument. The State of Florida is well aware both the nature of each of the Petitioner's complaints and that such complaints may be considered for their cumulative effect is both well settled law and common sense.

7. Petitioner understands that this habeas corpus proceeding is a matter of original jurisdiction in this Honorable Court and has stated such claims within the form of a petition alleging the facts supporting each claim and the relief requested. It appears to Petitioner that the response of the State is more in the nature of a legal memorandum and one which does not put the factual disputes at issue by admitting or denying certain facts. Petitioner prays this Honorable Court request additional legal argument and briefing of any habeas corpus issues in which the response of the State may give this Honorable Court cause to consider disposing of any claim without further development of the facts or law applicable to such claim.

Wherefore, Petitioner prays this Honorable Court set aside the conviction and sentence of the Petitioner or, alternatively, remand the case to the trial court for a new trial in which the matters complained of are cured, or, alternatively, to remand in the case for a new sentencing hearing.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this REPLY BRIEF OF APPELLANT is printed in 14 point proportional (New Times Roman) type.

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

CERTIFICATE OF SERVICE

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

Charles J. Crist, Jr.
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
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