IN THE SUPREME COURT OF FLORIDA

CASE NO.SC07-2005

ANTHONY FLOYD WAINWRIGHT

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT FOR HAMILTON COUNTY,
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Wainwright's motion for post conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851.

The following symbols will be used to designate references to the record in the instant case:

"R." -- The record on instant 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Wainwright lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Wainwright accordingly requests that this Court permit oral argument.

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CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

On September 24, 2007, the Circuit Court of the Third Judicial Circuit in and for Hamilton County, Florida, summarily denied Appellant's motion for post-conviction relief under Florida Rule of Criminal procedure 3.851 (R.36-50)

The genesis of this cause at bar was the filing by the appellant of a post conviction motion, a "successor" motion brought pursuant to Florida Rule of Criminal Procedure 3.851 seeking to vacate the judgment and sentence of death based on newly discovered evidence. (R.1)

On July 23, 2007, appellant filed such a motion under Florida Rule of Criminal procedure 3.851 arguing that the existence of new evidence formed a basis sufficient to vacate his judgments and sentences of death. Specifically, Appellant filed a motion pursuant to the aforementioned rule along with a July 22, 2006 affidavit (R.11-13) from the hand of his co defendant Richard Hamilton (Co-Defendant in State vs. Hamilton, Case No: CR94-150 CFI) which stated, under penalties of perjury, that appellant was not involved in any manner of the sexual assault committed upon the victim in the case.

A case management conference was held on August 22, 2007. Both sides were permitted to submit proposed final orders. The Court issued its order summarily denying appellant's motion on September 19, 2007. This appeal ensues.

PRIOR PROCEDURAL HISTORY

On July 15, 1994, Mr. Wainwright was indicted on the following charges: First-Degree Murder; Armed Robbery; Armed Kidnapping: Armed Sexual Assault. On May 30, 1995, the jury found Mr. Wainwright guilty counts in case number Case #94-150-CF2 of armed robbery, armed kidnapping armed sexual assault and first-degree murder. The jury recommended death on June 1, 2005. The presiding Judge, the Honorable Vernon Douglas, upheld the sentence on June 12, 1995.

This Court affirmed Appellant's convictions and sentence of death on direct appeal. *See, Wainwright v. State 704 So 2d. 511 (Fla. 1997).* On July 10, 1995, the United States Supreme Court denied his Petition for Writ of Certiorari *See, Wainwright v. McDougall 523 U.S. 1127 (U.S. 1998)*

A motion pursuant to Florida Rule 3.850 of Criminal Procedure was filed on May 14, 1999 and denied on April 19, 2002. This Court affirmed the denial of the 3.850 on November 24, 2004. *See, Wainwright v State, 896 So.2d 695 (Fla 2004)*

The United States District Court for the Middle District of Florida denied with prejudice Mr. Wainwright's Petition for Writ of Habeas Corpus on March 13 2006. the District Court denied Mr. Wainwright's motion to alter or amend on May 6, 2005.

Mr. Wainwright filed a Petition for Writ of Certiorari by the United States Supreme Court on May 31, 2005 which was denied on October 3, 2005.

The Eleventh Circuit affirmed the Middle District Court Court's dismissal of Mr. Wainwright's petition for habeas corpus on November 13, 2007 and denied the motion for rehearing on December 26, 2007. On July 16, 2007 a motion under Rule 3.851 was filed and denied (summarily without an evidentiary hearing on September 19, 2007. The appeal of that denied motion is pending before the Florida Supreme Court.

I GROUND ONE: THE TRIAL COURT ERRED IN FINDING THAT THE MOTION WAS INSUFFICIENTLY PLED AND IN SUMMARILY DEBYING SAID CLAIM

In *Diaz v. State, 945 So 2d 1136 (Fla. 2006),* This court enunciated a functional and governing threshold for the introduction of newly discovered evidence

> To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See, Jones v. State, 709 So.2d 512 (Fla. 1998)* newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State, 678 So.2d 309, 315 (Fla.1996)*). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones v. State, 591 So.2d 911, 915 (Fla.1991)*. at 1145

The Court Order makes a finding that appellant failed to set forth an explanation as to why the newly discovered testimony of Mr. Hamilton was not previously discoverable by diligent effort.

On page two of his affidavit, Mr. Hamilton simply puts forth the assertion that he has come forth spontaneously because he

simply did not feel right about “allowing this felony to exist against him (appellant) when it is false” (R. 13)

The trial court in its finding fails to satisfactorily explain what appellant could do in terms of diligent investigative effort to have “discovered” or brought about the revelation and disclosure which apparently was of such a spontaneous character. The recantation of certain witness testimony is literally impossible to impute to the proffering party as discoverable by diligent effort short of holding said party to an impossible standard of clairvoyance.

The Trial Court relies upon the case of *State v. White, 964 So.2d 1278 (Fla. 2007)* to support this finding. However, upon closer examination, the White case presents a fundamentally different scenario than that which is at bar.

White had asserted that newly discovered evidence would have resulted in his acquittal had it been presented at trial. This evidence was a statement, similarly to the one by Hamilton, exculpatory of the appellant. However the statement at issue in the White case was made by the co defendant, not years after the case had closed but on the day after the murder which had occurred in that case.

Understandably the circuit court in that case summarily denied this claim, finding it to be procedurally barred, noting that White had "failed to specifically explain why his proposed witness, could not have been discovered by diligent efforts either prior to trial, in preparation of his 1983 post conviction motion, or through an amendment to his 1983 post conviction motion." Id. There is a wide factual discrepancy between the White cases to the instant case which renders the former inapplicable

The trial court determined the aforementioned summarily. Such a finding *clearly* cannot be made without benefit of an exhaustive and dispositive evidentiary hearing. The Court made this determination not only on its own unwarranted and conclusory inference it did so in light of the very statement of the affidavit's author, Mr. Hamilton.

The trial court abused its discretion in determining aforesaid issues *without* an evidentiary hearing. Clearly this revelation came about in July of 2006. This affidavit and accompanying motion was raised within the year deadline provided for in Rule 3.851.

Defendant's instant motion is successive and based on newly discovered evidence. Richard Hamilton #123846 is currently housed on Florida's death row located at Union Correctional Institution. Richard Hamilton is available to testify under oath to the facts

alleged in the instant motion and contained in the attached exhibit. The affidavit was not previously available as it constitutes "recanted" testimony. Any explanations as to why Richard Hamilton came forward on July 22, 2006 can be established at the evidentiary hearing. However, to support this successive motion, defendant cites to the Affidavit, Paragraph 4: "I do not feel comfortable with him being convicted with this felony when I was the sole perpetrator, nor do I feel justice is served by allowing this felony to exist against him when it is false."

In Roberts v. State, 678 So.2d, 1232, (Fla. 1996), the Supreme Court of Florida determined that the trial court improperly denied a newly discovered evidence claim without an evidentiary hearing. The court found that "Haines" recanted testimony qualifies as newly discovered evidence because, "the asserted facts must have been known by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *See, Johnson v.Singletary, 647 So.2d. 106,111 (Fla. 1994)* (Remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to," demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [the newly discovered evidence]"). *Also see, Spaziano v. State, 60 So.2d. 1363 (Fla.1995).* This court has expressed a strong preference for the conducting of evidentiary hearings in capital cases.

Appellant is entitled to an evidentiary hearing on a motion for post conviction relief unless (1) the motion files and records in the case conclusively shows that the prisoner is entitled to no relief or the motion or particular claims are legally insufficient *See, Patton v. State 784 So. 2d 380 (Fla. 2000).*

GROUND II: THE TRIAL COURT ERRED IN FINDING AS TO THE SECOND PRONG THAT THE NEWLY DISCOVERED EVIDENE PROFFERED BY APPELLANT WOULD NOT HAVE ALTERED THE OUTCOME

"Reasonable probability" of a **different outcome** required to support a finding of ineffective assistance of counsel is not synonymous with the "more likely than not" standard invoked when a defendant asserts entitlement to a new trial on the basis of **newly discovered evidence**. *U.S.C.A. Const.Amend. See Gaskin v. State 822 So.2d 1243 Fla., 2002*

Appellant contends the trial court erred in summarily denying that aspect of the claim which argues that the newly discovered evidence would have changed the outcome below. The trial court once again entertains and denies such suggestion, which is in fact a real possibility, without the benefit of an evidentiary hearing.

As to this assertion, the appellant would contend the trial court order is deficient in that it discounts any credibility that Hamilton would have based sole on his affidavit. “Hamilton’s claim made more than a dozen years after the murder, is inherently incredible because it is not only inconsistent with his previous statements it is inconsistent with the evidence produced at trial including forensic evidence and Wainwrights own admission to law enforcement and to fellow inmate Gary Gunter”

These are all determinations that would more logically follow from the conducting of an evidentiary hearing. A more thorough examination and weighing process, which apparently did not occur in the truncated summary disposition above, would have and should have been the by–product of an evidentiary hearing.

Even though the trial court, which happens to have been the same trial court adopting the advisory death verdict of the jury, may be able to state unequivocally the effect this newly discovered evidence would have on him, he cannot effectively speculate, especially via summary denial, that this disclosure might not have had an impact on the jury. That is one scenario unaddressed by the trial court - that it would have still even have ***overturned*** a jury recommendation of life

CONCLUSION

For all of the foregoing arguments, appellant respectfully submits that this Court should reverse the denial of his 3.851 motion and remand to the trial court with instructions that he be granted an evidentiary hearing on same.

CERTIFICATE OF SERVICE

I certify that a copy of the following has been sent via e-mail and United States mail to: Meredith Charbula, Esq. Office of Attorney General, The Capitol, Tallahassee, Florida 32399-1050 and to the Office of State Attorney P.O. Drawer 1546 Live Oak, FL 32060 on May 13, 2008.

Respectfully Submitted,

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