

IN THE SUPREME COURT OF FLORIDA

Case No. SC02-0429

Circuit Court Case No. 90-0429

GARY RICHARD WHITTON,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**EMERGENCY
PETITION**

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**SUPPLEMENT TO AMENDED EMERGENCY PETITION
FOR WRIT OF MANDAMUS AND TO INVOKE THIS
COURT'S EXTRAORDINARY JURISDICTION TO ISSUE ALL WRITS
NECESSARY TO THE COMPLETE EXERCISE OF ITS JURISDICTION**

COMES NOW, Petitioner, GARY RICHARD WHITTON, and hereby
Supplements his Amended Emergency Petition for Writ of
Mandamus and to Invoke this Court's Extraordinary Jurisdiction
to Issue All Writs Necessary to the Complete Exercise of its
Jurisdiction. In support hereof, Petitioner submits the
following:

On July 25, 2002, counsel filed his Emergency Petition
for Writ of Mandamus and to Invoke this Court's Extraordinary
Jurisdiction to Issue all Writs Necessary to the Complete
Exercise of its Jurisdiction in this case. The Petition was
Amended on July 26, 2002.¹

¹The Amendment was to comply with this Court's requirement
for a certificate of compliance regarding font size, which had
been inadvertently omitted from the original Petition.

Mr. Whitton filed the Petition to request that this Court issue a Writ of Mandamus to the Honorable Kenneth L. Bell, Circuit Court Judge, First Judicial Circuit, Walton County, directing him to enter a Temporary Injunction in this case. The Temporary Injunction is necessary in order to prevent Mr. Whitton from suffering irreparable harm by actions proposed by the State.

Specifically, the State is in the process of preparing and/or removing items of evidence collected in this case for further DNA testing or testing for similar purposes. This is despite Mr. Whitton's Emergency Motion to Prohibit Proposed DNA Testing and Motion for Protective Order and Order Requiring Notice, filed on or around July 9, 2002, and despite undersigned counsel's requests that the State, in good faith, wait until Judge Bell could hear Mr. Whitton's objections and request for safeguard measures. The earliest Judge Bell can hold a hearing on this issue is August 22, 2002. See Amended Petition at 4-6. In response to the State's continued and expressed intentions to proceed with testing, Mr. Whitton requested Judge Bell enter a Temporary Injunction enjoining the State from proceeding with any testing of evidence, including evidence entered into evidence at Mr. Whitton's 1992 trial, and evidence collected in the case but not entered into

evidence at trial and currently in the possession of the State, e.g., evidence housed at the Walton County Sheriff's Office (WCSO) and WCSO warehouse.

In response to Judge Bell's failure to promptly act upon Mr. Whitton's request for temporary injunctive relief, Mr. Whitton sought relief from this Court by way of his Petition for Writ of Mandamus directing Judge Bell to issue a Temporary Injunction.

Subsequent to the filing of this petition, on July 29, 2002, undersigned counsel received a copy of an Order signed by Judge Bell. See Attachment, "Temporary Injunction," dated July 26, 2002. Mr. Whitton hereby supplements his Emergency Petition with that Order and maintains that the Order is inadequate to prevent irreparable harm to Mr. Whitton.

The Order signed by Judge Bell has been annotated by hand to reflect that the State is enjoined from testing only that evidence "which was admitted into evidence at trial."² Attachment at p. 1. Thus, the order does not prevent the harm to Mr. Whitton, described in Petition at p. 6-11, regarding

² The order is based on a proposed order submitted to Judge Bell. See Petition, at Attachment C. Obviously, the proposed order did not contain Judge Bell's handwritten annotations. The proposed order, as submitted to Judge Bell, would have been adequate to protect Mr. Whitton from irreparable harm. However, in light of Judge Bell's annotations, the order that was issued is wholly inadequate.

evidence that was collected but not entered into evidence at trial. That evidence consists of the following:³

A1: knife from roadside	A44: washcloth from floor between beds
A10: cigarette butt	A45: Reeboks with blood droplets
A11: swabbing #2 from door	A46: hairbrush from toilet
A12: swabbing #3 from door	A50: sanitary strip from bathroom toilet
A13: swabbing #4 from door	A53: ice bucket with blood
A14: hand towel from shower	A54: stack of cups near body
A15: washcloth from bathroom	A55: cigarette pack, matchbook
A16: beer can from toilet tank	A61: plastic sandwich cover
A17b: hair from A17a	A63: food container, lid, utensils, napkin
A18: hair from V neck area	A65: paper bags, receipt, sandwich package, package of cigarettes, 1 potato chips bag
A19: hair from front shirt	A66: two sheets and one pillow case
A20: hair from jeans	A71: bed-size piece of cloth from mattress
A21: hair from north bed	B2a-f: oral, anal and penile swabs and slides
A22: hair from top of suitcase	B2g, B2h: victim's fingernail scrapings
A23: hair from sunglasses	B3: body bag and debris fold
A24: hair from south bed	B4: victim's shirt
A25: hair from south bed	B5a: victim's jeans
A26: hair from pillow on bed	B5b: victim's belt
A27: hair from pillow on floor	
A28: hair from floor by desk	
A29: hair from floor by chair	
A30: hair from top of toilet	
A31: hair from bathroom sink	
A32-38: vacuum sweepings from floor	
A41: hand towel	
A43: bedspread covering body	

³ This list consists of items undersigned counsel presumes is the most likely to be tested. This list is not intended to be inclusive but rather to give the Court an idea of the items the State may test, or may be testing, for DNA or similar purposes. However, because the State has never moved for such testing, counsel has no idea what specific exhibits or items the State wants to test.

The numbers used here are the numbers assigned to each item from the Department of Law Enforcement.

B6-9: hand and foot bags	right foot
B10: hair and/or fibers from shirt	B14: hand and/or fibers from left foot
B11: hair and/or fibers from right hand	B15: hair and/or fibers from body bag
B12: hair and/or fibers from left hand	C5: underwear with possible blood
B13: hair and/or fibers from	

Undersigned counsel has learned that the State is in the process of preparing and removing, at least some of, this evidence, such as hair evidence, that was never used at trial. If the State is allowed to proceed as they intend, the harm to Mr. Whitton concerning the evidence that was not covered by Judge Bell's Order, will still occur. Consequently, this Court's intervention is needed to prevent that harm.

At this point in time, it is still undisputed that the State intends to conduct the testing despite Mr. Whitton's objections, his request to receive notice of the specific details of the testing, his request to have a representative present at such testing, and his request for an opportunity to be heard by the circuit court on these issues. Because Mr. Whitton presently has no way to ensure that the DNA evidence will not be completely consumed, no way to arrange for experts to observe the testing, and no way to ensure the proper handling of evidence, he will suffer irreparable harm (and may have already due to the circuit court's failure to order an adequate and timely temporary injunction) if the State

proceeds with the testing before the circuit court has an opportunity to hear and rule upon Mr. Whitton's objections and request for safeguard measures. To avoid irreparable harm and irreversible violations of his constitutional rights, Mr. Whitton files this Petition for Writ of Mandamus.

Mr. Whitton has requested that, at a minimum, the State provide notice of the details of its proposed testing and that the State formally move to conduct such testing. To permit the State to conduct testing without providing any of this information to the capital defendant and the circuit court would result in the appearance of inequality and the actual effect of inequality.

Accordingly, undersigned counsel respectfully requests this Court grant Mr. Whitton's Petition and enter a Writ of Mandamus directing Judge Bell to issue the Temporary Injunction to include evidence collected in this case but not used at trial.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court exercise its authority in this case and issue a Writ of Mandamus to the Honorable Kenneth L. Bell, Circuit Court Judge, First Judicial Circuit, directing him to issue a Temporary Injunction, enjoining the State and its

representatives from removing, transporting, and testing any evidence in this case, including **both** evidence admitted at trial and evidence collected but not admitted at trial; and ordering that any testing, or efforts to prepare items for testing, that are currently occurring must be immediately stopped. Alternatively, Petitioner requests this Court issue any and all other writs necessary for the completion of its jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplement to Amended Petition for Writ of Mandamus has been furnished by United States Mail, first class postage prepaid, on July 31, 2002 to The Honorable Kenneth L. Bell, Circuit Court Judge, Judicial Building, 190 Governmental Center, Pensacola, Florida 32501; John Spencer, Assistant State Attorney, M.C. Blanchard Building, 190 Governmental Center, Pensacola, Florida 32501; Stephen White, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399.

CERTIFICATE OF COMPLIANCE

This is to certify that the Amended Petition for Writ of Mandamus has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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