

IN THE SUPREME COURT OF FLORIDA

ETHERIA JACKSON

Appellant,

v.

CASE NO. SC05-1312

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT  
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

MEREDITH CHARBULA  
Assistant Attorney General  
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
Tallahassee, Florida  
(850) 414-3300, Ext. 3583  
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

PRELIMINARY STATEMENT . . . . . 1

STATEMENT OF THE CASE AND FACTS . . . . . 2

SUMMARY OF THE ARGUMENT . . . . . 8

ARGUMENT . . . . . 9

**WHETHER THE TRIAL JUDGE ERRED IN DENYING  
JACKSON'S SUCCESSIVE MOTION FOR POST-  
CONVICTION RELIEF**

CONCLUSION . . . . . 15

CERTIFICATE OF SERVICE . . . . . 15

CERTIFICATE OF FONT COMPLIANCE . . . . . 16

**TABLE OF AUTHORITIES**

Cases

Allen v. State,  
854 So.2d 155 (Fla. 2003) ..... 10,13

Apprendi v. New Jersey,  
530 U.S. 466 (2000) ..... 11

Arbelaez v. State,  
775 So.2d 909 (Fla. 2000) ..... 10

Barnes v. State,  
794 So.2d 590 (Fla. 2001) ..... 11

Blackwelder v. State,  
851 So.2d 650 (Fla. 2003) ..... 13

Crain v. State,  
894 So.2d 59 (Fla. 2004) . . . . .  
13

Everett v. State,  
893 So.2d 1278 (Fla. 2004) ..... 13

Finney v. State,  
831 So.2d 651 (Fla. 2002) ..... 10

Floyd v. State,  
808 So.2d 175 (Fla. 2002) ..... 10

Hodges v. State,  
885 So. 2d 338 Fla. 2004) . . . . .  
13

Jackson v. Florida,  
488 U.S. 1050 (1989) ..... 6,9,12

Jackson v. Singletary,  
613 So.2d 5 (Fla. 1993) ..... 7

Jackson v. State,  
530 So.2d 269 (Fla. 1988) ..... 4-6

<u>Jackson v. State,</u> 630 So.2d 1051 (Fla. 1993) .....	7
<u>Johnson v. State,</u> 904 So.2d 400 (Fla. 2005) .....	8,12
<u>Johnston v. State,</u> 863 So.2d 271 (Fla. 2003) .....	12
<u>Jones v. State,</u> 855 So.2d 611 (Fla. 2003) .....	12
<u>Mansfield v. State,</u> 911 So.2d 1160 (Fla. 2005). . . . . .13	
<u>McGregor v. State,</u> 789 So.2d 976 (Fla. 2001) .....	11
<u>Parker v. State,</u> 904 So.2d 370 (Fla. 2005) . . . . . 13	
<u>Porter v. Crosby,</u> 840 So. 2d 981 (Fla. 2003) . . . . . 13	
<u>Proffitt v. Florida,</u> 428 U.S. 252 (1976) .....	10
<u>Ring v. Arizona,</u> 536 U.S. 584 (2002) .....	2,8
<u>Schad v. Arizona,</u> 501 U.S. 624, 645 (1991). . . . . 12	
<u>Turner v. Crosby,</u> 339 F.3d 1247 (11 <sup>th</sup> Cir. 2003) .....	11
<u>Witt v. State,</u> 387 So.2d 922 (Fla. 1980) . . . . . 12	

Other Authorities

Rule 3.851(d), Florida Rules of Criminal Procedure ..... 8,9  
Rule 3.851(d)(1)(A), Florida Rules of Criminal Procedure .... 9

**PRELIMINARY STATEMENT**

Appellant, Etheria Jackson, appeals the June 23, 2005 summary denial of his successive motion for post-conviction relief from the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida. References to appellant will be to **AJackson@** or **AAppellant,@** and references to appellee will be to **Athe State@** or **AAppellee.@** The record on appeal in the instant case consists of one volume and will be referenced as (SPCR) followed by the appropriate page number. References to Jackson's initial brief in the instant case will be referred to as (IB) followed by the appropriate page number. The record on appeal from Jackson's direct appeal will be referenced as (TR) followed by the appropriate volume and page number. The record of appeal from Jackson's initial post-conviction proceedings will be referenced as (PCR) followed by the appropriate volume and page number.

## STATEMENT OF THE CASE AND FACTS

Jackson appeals the trial court's June 23, 2005, summary denial of his successive post-conviction motion. In his successive motion, Jackson claimed his conviction and sentence to death were unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002).

The relevant facts concerning the 1985 murder of Linton Moody are recited in this court's case on direct appeal:

...Wendell and Linton Moody operated a retail furniture business in Jacksonville, Florida. To facilitate the collection of monthly installment payments, Linton obtained cash from the bank every month and then cashed customers' government checks, deducting their installment bills from the respective checks. On November 29, 1985, Linton cashed a check at the bank for \$ 4,000. On December 2, Linton worked in the furniture store from 10:30 a.m. until early afternoon. The following day Linton failed to report for work and his brother filed a missing person report. On December 5, Officer Raymond Godbee discovered Linton's body rolled up in a carpet in the back of Linton's 1983 Chevrolet station wagon. Several pieces of evidence were discovered with the body, including the victim's brown briefcase and a calling card box.

On the same day, Linda Riley, appellant's live-in girlfriend and the mother of one of appellant's children, reported Linton's murder to the police department. According to Linda Riley's trial testimony, she purchased a washing machine from Linton Moody on the installment plan. On December 3, 1985, Linton came to her home to collect the monthly payment. On this particular occasion, Riley's two children and the appellant were also present. Riley stated that after Linton cashed the check, he gave her a receipt. At this point, the appellant, Jackson,

grabbed Moody and put a knife to his neck. Riley testified that appellant then forced Moody to the floor and directed her to remove his wallet and keys. As the sixty-four-year-old Moody begged for mercy, he was bound, gagged, and then choked with a belt until he was unconscious. After Moody regained consciousness, Jackson beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest. Jackson and Linda Riley then disposed of the body by rolling it up in a carpet and stuffing it in the back of the victim's car. The car was driven by Jackson to another location and abandoned, where it was later discovered by police. Riley also testified that after Jackson left with the body, he returned forty-five minutes later with two men, summoned Riley into the kitchen, and asked her to inject cocaine into his arm.

One of the two men who returned with Jackson also testified at the trial and stated he was driving with a friend when they were flagged down by a man with a cast on his forearm, later identified as Jackson. He stated Jackson asked if they knew where to find cocaine, and offered to purchase a tank of gas for the witness's car, stating, "I'll fill your tank, I have money all over, I just hit a sweet lick." According to the witness, Jackson later pulled stacks of folded twenty- and fifty-dollar bills from his pockets. After they purchased drugs, the witness said they returned to Jackson's house where his girlfriend injected him with cocaine.

An autopsy established that the victim had numerous bruises on the head, face, and neck, a shallow slash wound on the neck, a rug-burn on the left elbow, and bruised kneecaps. The victim also sustained seven stab wounds in the upper left chest area, causing massive internal bleeding and death. There was no blood on the lower extremities, indicating the victim was prone when the injuries were inflicted. The bruises on the neck were consistent with strangulation by either a forearm or cast, or possibly a broad belt.

In an interview with detectives on December 9, Jackson said Riley committed the murder and claimed he was not present when it occurred. He further stated on this

occasion that an affair between Riley and the victim while he was in prison had prompted the killing. Jackson's mother testified that Jackson visited with her on December 8 and related three different versions of the murder, at least two of which placed Jackson at the scene of the crime.

The investigating detectives obtained a search warrant for Jackson's cast. In accordance with the warrant, they took Jackson into custody and brought him to Jacksonville's University Hospital to examine his cast for blood traces. One of the detectives testified that during this time Jackson made statements to the detective, admitting that the detective had him "like a hawk" and stating, "I had the opportunity." The detective testified that when he replied that Jackson still had the opportunity to tell the truth, Jackson, responded, according to the detective, "Not really, I have to go with what I told you, I can't change my story now." The examination of the cast failed to produce any blood trace evidence. The state did present, however, expert testimony matching appellant's fingerprints with prints found on the victim's calling card box. The jury found Jackson guilty of first-degree murder.

In the penalty phase, the state presented witnesses who established that Jackson was previously convicted of armed robbery and escape. Multiple witnesses were presented on Jackson's behalf. A former attorney who represented appellant Jackson on the armed robbery charge testified that appellant had pled guilty and agreed to be a state witness against his codefendant for that offense. Evidence from the family reflected that Jackson was talented, intelligent, and a good student; that he was respectful and helpful to members of the family; that he helped care for his older sister, who had polio, and his father, who suffered from arthritis and a heart condition. Favorable testimony was also given by Vanessa Jackson, the mother of two of appellant's children. Appellant's mother testified that appellant had substantially changed in the month before Moody's murder and that she assumed he was under the influence of drugs. Jackson testified in his own behalf, advising the jury that he wanted to live, that he loved his parents and

children, and, if given a chance to live, he would try to be a positive influence on his children's lives, as he always had been.

Jackson v. State, 530 So.2d 269 (Fla. 1988).

The jury recommended a sentence of death by a vote of seven to five. The trial judge found five aggravating factors: (1) the murder was committed while the defendant was under sentence of imprisonment because he was on parole at the time of the killing; (2) the defendant was previously convicted of a felony involving the use or threat of violence to some person (armed robbery); (3) the murder was committed for financial gain; (4) the murder was especially wicked, evil, atrocious, or cruel; and (5) the murder was committed in a cold, calculated, and premeditated manner. The trial judge concluded that no statutory or nonstatutory mitigating circumstances exist. Jackson v. State, 530 So.2d 269 (Fla. 1988). The trial judge followed the jury's recommendation and sentenced Jackson to death.

Jackson appealed his convictions and sentences, raising three issues as to the guilt phase. Jackson claimed the trial court erred in (1) limiting appellant's cross-examination of Linda Riley concerning her present dating relationships; (2) allowing the state to introduce evidence that Jackson had been in prison prior to this offense; and (3) admitting the statements Jackson made to a detective during the examination of

his arm cast.

Jackson also raised five issues regarding the penalty phase penalty phase of his trial. Jackson claimed the trial court erred by: (1) permitting the state to introduce evidence of appellant's conviction for escape, because the evidence was unnecessary to prove the aggravating circumstance that appellant was in prison at the time of the offense; (2) allowing the state to cross-examine appellant regarding prior convictions; (3) refusing to give the jury specific instructions as to the nonstatutory mitigating circumstances it could consider; (4) improperly doubling up the aggravating circumstances of heinous, atrocious, and cruel, and cold, calculated, and premeditated; and (5) failing to allow evidence, that the parole commission does not consider for parole inmates serving life sentences without eligibility for parole for twenty-five years, as a mitigating circumstance.

This Court found no merit to any of Jackson's guilt phase claims and rejected all but one of Jackson's penalty phase claims. This Court ruled the trial court improperly found the cold, calculated, and premeditated aggravating factor, but concluded that elimination of this aggravating factor would not have resulted in a life sentence. This Court affirmed Jackson's conviction and sentence to death. Jackson v. State, 530 So.2d

269 (Fla. 1988).

Jackson filed a petition for writ of certiorari in the United States Supreme Court. The United States Supreme Court denied review on January 23, 1989. Jackson v. Florida, 488 U.S. 1050 (1989).

On April 16, 1990, Jackson filed a petition for habeas corpus in this Court. In his petition, Jackson claimed (1) this Court improperly placed exclusive sentencing authority with the jury and the trial judge by not reweighing the aggravating and mitigating factors or applying a harmless error analysis; (2) this Court erred in finding that the trial court correctly found that there were sufficient aggravating circumstances to support the death sentence; (3) the trial court denied Jackson the right to an individualized and reliable sentencing proceeding; (4) the judge and jury improperly considered victim impact evidence; (5) the trial court's instruction improperly diluted the jury's sense of responsibility for sentencing and that counsel was ineffective for not litigating this issue; and (6) the prosecutor improperly commented on the evidence, thus rendering Jackson's conviction and sentence fundamentally unfair. Jackson v. State, 633 So.2d 1051 (Fla. 1993)

Subsequently, on September 5, 1990, Jackson filed an initial motion for post-conviction relief in the trial court raising

numerous claims. The trial court summarily denied all of his claims without an evidentiary hearing. Jackson appealed and this

Court consolidated that appeal with consideration of Jackson's petition for writ of habeas corpus filed in April 1990.

While these cases were still pending, Jackson filed a petition for writ of habeas corpus through a fellow inmate as his "Next Friend". On January 4, 1993, this Court denied the petition. Jackson v. Singletary, 613 So.2d 5 (Fla. 1993).

On September 19, 1993, this Court concluded that Jackson's motion for post-conviction relief under rule 3.850 was properly denied. This Court also denied Jackson's April 16, 1990 petition for writ of habeas corpus. Jackson v. State, 633 So.2d 1051, 1055 (Fla. 1993). Jackson's motion for rehearing was denied and mandate issued on March 15, 1994. Id. On June 28, 1994, Jackson filed a motion to recall the mandate. On January 26, 1995, this Court denied his motion.

On June 24, 2003, Jackson filed a successive motion for post-conviction relief. In his motion, Jackson alleged his conviction and sentence to death was unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). The State filed a response. On June 23, 2005, the collateral court denied Jackson's motion.

This appeal ensues.

**SUMMARY OF THE ARGUMENT**

The trial court properly summarily denied Jackson's successive post-conviction motion challenging his conviction and death sentence pursuant to the decision in Ring v. Arizona, 536 U.S. 584 (2002). This claim is time barred. Jackson filed his successive motion more than one year after his conviction became final. Jackson's motion did not fall within an exception to the one year filing period as set forth in Rule 3.851(d), Florida Rules of Criminal Procedure.

Jackson's claim is procedurally barred. Jackson failed to raise these constitutional challenges to Florida's capital sentencing statute on direct appeal.

Even if Jackson's claim were not procedurally barred, Ring cannot disturb Jackson's sentence to death because Ring has no retroactive application to Jackson's case already final some thirteen years before Ring was decided. Just recently, in Johnson v. State, 904 So.2d 400 (Fla. 2005), this Court held that Ring is not retroactive.

Finally, Jackson's Ring claim must fail because the trial court found in aggravation that Jackson was under a sentence of imprisonment at the time he committed the murder and that Jackson had previously been convicted of a prior violent felony.

**ARGUMENT**

**WHETHER THE TRIAL COURT ERRED IN DENYING  
JACKSON'S SUCCESSIVE POST-CONVICTION MOTION**

A. **Jackson's claim is time barred**

On January 23, 1989 when the United States Supreme Court denied Jackson's petition for a writ of certiorari, Jackson's conviction and sentence became final. Jackson v. Florida, 488 U.S. 1050 (1989).<sup>1</sup> Jackson filed his successive motion for post-conviction relief on June 24, 2003.

Rule 3.851(d), Florida Rules of Criminal Procedure, requires any motion to vacate a judgment of conviction and sentence to be filed within one year after the judgment and sentence become final. The rule provides for an exception to this one year time limit if the fundamental constitutional right asserted was not established within one year of the date the conviction becomes final and the right has been held to apply retroactively. At the time Jackson filed his successive motion for post-conviction relief, neither the United States Supreme Court nor this Court had held Ring to apply retroactively. Accordingly, the trial court properly ruled that Jackson's successive motion for post-conviction relief was time barred.

B. **Jackson's claim is procedurally barred**

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<sup>1</sup> Rule 3.851(d)(1)(A), Florida Rules of Criminal Procedure.

Jackson's Ring claim is procedurally barred because Jackson did not raise any Sixth Amendment constitutional challenge to Florida's capital sentencing structure on direct appeal. Any challenge to Florida's capital sentencing scheme should have been raised on direct appeal. Failure to do so acts as a procedural bar to Jackson raising this issue now. Allen v. State, 854 So.2d 155 n. 4, (Fla. 2003); Finney v. State, 831 So.2d 651, 657 (Fla. 2002) (ruling that because Finney could have raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal his claim was procedurally barred on post-conviction motion); Floyd v. State, 808 So.2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred because it should have been raised on direct appeal); Arbelaez v. State, 775 So.2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal).

Jackson cannot excuse his failure to raise this claim on direct appeal by an assertion that Ring was not decided until well after his conviction and sentence became final. The Sixth Amendment issue addressed in Ring is by no means new or novel. That claim, or a variation of it, has been known since before the United States Supreme Court issued its decision in Proffitt

v. Florida, 428 U.S. 252 (1976), holding that jury sentencing is not constitutionally required.<sup>1</sup> Jackson certainly could have pursued a Sixth Amendment challenge to Florida's capital sentencing structure on direct appeal. Yet, he failed to do so.

In Turner v. Crosby, 339 F.3d 1247 (11<sup>th</sup> Cir. 2003), the Eleventh Circuit ruled that Turner's Ring claim was procedurally barred because Turner never claimed, in state court, that Florida's capital sentencing structure violated his Sixth Amendment right to a trial by jury. The Court rejected any notion that claims, like the one raised by Jackson here, could not have been raised before the Supreme Court handed down the decision in Ring.

The Court observed that Florida's capital sentencing structure has been under repeated constitutional attack in the twenty years before the Court adjudicated Turner's appeal. Accordingly, the Court ruled that, though Ring was not decided until several years subsequent to the conclusion of Turner's

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<sup>1</sup> In his initial brief, Jackson points out that he raised various constitutional challenges to Florida's capital sentencing scheme, but did not raise these issues on appeal. This Court has applied procedural bar to bar claims brought under the predecessor decision rendered in Apprendi v. New Jersey, 530 U.S. 466 (2000), even in cases tried before the opinion in Apprendi was issued. Barnes v. State, 794 So.2d 590, 591 (Fla. 2001); McGregor v. State, 789 So.2d 976, 977 (Fla. 2001).

state post-conviction proceedings, the issue was not so new and novel that the legal basis for such a claim could not have been raised in prior state court proceedings. Turner at 1282.

The basis for any Sixth Amendment attack on Florida's capital sentencing procedures has always been available to Jackson. Accordingly, Jackson should be procedurally barred from raising this claim in a successive motion for post-conviction relief.

**C. *Ring is not applicable retroactively to Jackson's case***

In Johnson v. State, 904 So.2d 400, 412 (Fla. 2005), this Court determined that Ring does not apply retroactively to cases on collateral review. <sup>2</sup> Jackson's conviction was final on January 23, 1989 when the United States Supreme Court denied certiorari review from his direct appeal. Jackson v. Florida, 488 U.S. 1050 (1989). Ring was decided in June 2002. Because Jackson's conviction was final more than thirteen years before Ring was decided, Ring has no application to Jackson's conviction and sentence to death.

**D. *Jackson's claim fails on the merits***

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<sup>2</sup> Jackson incorrectly asserts this Court has not analyzed Ring's retroactivity under the standard outlined in Witt v. State, 387 So.2d 922 (Fla. 1980). (IB at page 68). This Court in Johnson v. State, 904 So.2d 400, 412 (Fla. 2005) determined that under Witt, Ring does not apply retroactively in Florida.

Jackson's argument rests on the premise that Ring precludes the State from proceeding on a felony murder theory when the indictment charges only premeditated murder. Jackson suggests that Ring overturned Schad v. Arizona, 501 U.S. 624, 645 (1991), a case in which the United States Supreme Court ruled that the Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder. The Court in Schad also ruled that separate verdict forms for felony and premeditated murder were not constitutionally required.

This Court, well after Ring was decided, has consistently rejected the same arguments Jackson makes here. Mansfield v. State, 911 So.2d 1160 (Fla. 2005)(ruling that Mansfield failed to demonstrate the holdings in Ring and Apprendi overturned Schad); Parker v. State, 904 So.2d 370, 382-383 (Fla. 2005) (noting that "[i]t is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories."); Crain v. State, 894 So.2d 59 (Fla. 2004)(ruling that it is well settled that if an indictment charges premeditated murder, the State need not charge felony murder or the particular underlying felony to receive a felony murder instruction).<sup>3</sup>

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<sup>3</sup> This Court has also rejected claims that Ring requires the aggravating circumstances to be alleged in the indictment or

In any event, Jackson's claim falls on the merits because Jackson's judgment of conviction and sentence satisfy the dictates of Ring on two separate and independent grounds: (1) Jackson was previously convicted of a violent felony and (2) the murder was committed while Jackson was under a sentence of imprisonment (parole).

This Court has consistently denied relief in cases where the defendant had been convicted of a prior violent felony. Johnston v. State, 863 So.2d 271, 286 (Fla. 2003) (holding that "prior violent conviction [aggravator] alone" satisfies the mandate of Ring); Jones v. State, 855 So.2d 611 (Fla. 2003) (rejecting Jones=Ring claim because Aone of the aggravators found was that Jones had a prior violent felony conviction, a factor which under Apprendi and Ring need not be found by the jury.@); Allen v. State, 854 So.2d 1255 (Fla. 2003)(fact of a prior conviction need not be submitted to a jury for determination in light of Ring v. Arizona); Blackwelder v. State, 851 So.2d 650 (Fla. 2003)(rejecting Ring challenge when Blackwelder had been found by the court to have been previously convicted of a violent felony); Duest v. State, 855 So.2d 33, 49 (Fla. 2003) (concluding that Sixth Amendment right to jury trial does not require that

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to be individually found by a unanimous jury verdict. Hodges v. State, 885 So. 2d 338, 359 nn.9 & 10 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003); Porter

aggravating circumstance of previous violent felony conviction be found by a jury beyond a reasonable doubt).

Additionally, this Court has rejected Ring claims when the defendant was under a sentence of imprisonment at the time of the murder. In Allen v. State, 854 So.2d 1255, 1262 (Fla. 2003), this Court rejected Allen's claim that Florida's capital sentencing scheme is unconstitutional in light of Ring when one of the aggravating factors found was that the murder was committed while Allen was under a sentence of imprisonment. This Court found, in Allen, that this aggravator need not be found by the jury. Because the trial judge found that Jackson was under a sentence of imprisonment as a result of a prior violent felony conviction, Jackson's Ring claim fails. See also Everett v. State, 893 So.2d 1278, 1282 n.3 (Fla. 2004).

#### **CONCLUSION**

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Jackson's successive motion for post-conviction relief.

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

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MEREDITH CHARBULA

---

v. Crosby, 840 So. 2d 981, 986 (Fla. 2003).

Assistant Attorney General  
Florida Bar No. 0708399

Department of Legal Affairs  
PL-01, The Capitol  
(850) 414-3583 Phone  
(850) 487-0997 Fax

Counsel for Appellee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David Gemmer, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 this 4th day of January 2006.

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MEREDITH CHARBULA  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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MEREDITH CHARBULA  
Assistant Attorney General