IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1313

DAVID COOK,

Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Cook was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be: "(R. ____)." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, §3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, §13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Cook requests oral argument on this petition.

PROCEDURAL HISTORY

The Circuit Court for the Eleventh Judicial Circuit in and for Dade County Florida entered the judgments of conviction and sentence of death at issue. Mr. Cook was charged by indictment dated September 12, 1984, with two counts of first-degree murder and related offenses (R. 1-4A). He pled not guilty.

Mr. Cook was tried by a jury August 6 - 9, 1985. The jury rendered verdicts of guilty (R. 1010-11). The penalty phase was conducted on August 13, 1985. The jury recommended death for both of the first degree murder convictions, by a vote of seven (7) to five (5) on Count One, and a vote of eight (8) to four (4) on Count Two (R. 1156). The trial court found the following aggravating circumstances: (1) prior commission of a capital felony; (2) the murders were committed while the defendant was engaged in the felonies of attempted robbery and burglary and for pecuniary gain (merged); (3) the murder of Onelia Betancourt was committed to avoid arrest; and (4) the murder of Onelia Betancourt was "especially cruel, pitiless and without conscience". The trial court found one statutory mitigating circumstance: that Mr. Cook had no significant history of criminal activity.

On October 25, 1985, the trial court imposed a sentence of life imprisonment with a minimum mandatory of twenty-five (25) years on Count One of first-degree murder, and a sentence of death on Count Two of first-degree murder. The court also imposed a sentence of life imprisonment for the armed burglary, a sentence of fifteen years for each of the counts of attempted robbery, and suspended the sentence for count six, unlawful possession of a firearm. Each of these sentences was to be served consecutively (R. 233-34). The sentencing hearing at which these sentences were imposed was not recorded.

On direct appeal, this Court affirmed Mr. Cook's convictions, but struck the "heinous, atrocious and cruel" and "avoid arrest" aggravating circumstances, and remanded to the trial court with instructions to resentence Mr. Cook for the murder of Onelia Betancourt. Cook v. State, 542 So. 2d 964.

On remand, the trial court imposed a sentence of death for the conviction of first-degree murder ore tenus on February 5, 1990 (Supp.R. 22). No written sentencing order was entered until March 30, 1990 (Supp.R1-4).

On direct appeal from the re-sentencing, this Court affirmed the convictions and sentences. Cook v. State, 581 So. 2d 141 (Fla. 1991). The United States Supreme Court

denied certiorari on October 7, 1991. Cook v. Florida, 112 S. Ct. 252 (1991). On January 8, 1993, Mr. Cook filed a motion to vacate judgment of conviction and sentence with special request for leave to amend (PCR.100-157). He supplemented this on October 6, 1993 (PCR.202-242). Mr. Cook then filed a motion to compel production of public records on April 7, 1996 (PCR. 251-257).

On December 4, 1996, the Circuit Court summarily denied Mr. Cook's motion to vacate. On December 24, 1996, Mr. Cook timely filed a motion for rehearing on the court's order denying Rule 3.850 relief (PCR.12-144). The Circuit Court denied the motion for rehearing on July 31, 1998(PCR.145-146).

Mr. Cook then filed a notice of appeal to this Court. Following briefing and oral arguments this Court reversed the lower court’s summary denial and remanded the case to the lower court for an evidentiary hearing on the issue of ineffective assistance of counsel at Mr. Cook’s penalty phase. Cook v. State, 792 So. 2d 1197 (Fla. 2001). The evidentiary hearing was held in September and December 2003. On September 22, 2004, the Circuit Court entered its order of denial. Mr. Cook appealed the denial of relief, and his Initial Brief is being filed simultaneously with this Court.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES THAT WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH.

A. INTRODUCTION

Mr. Cook had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Cook's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in [Mr. Cook's] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Cook's behalf is identical to the lack of advocacy

present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Cook involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 477 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

B. APPELLATE COUNSEL FAILED TO RAISE JUDICIAL BIAS DURING TRIAL AND RESENTENCING

Judge Thomas M. Carney presided over the jury trial of this capital case and ultimately imposed the initial sentence of death. On remand by the Florida Supreme Court for reconsideration of the death sentence following the striking

of two aggravating circumstances[1], Judge Carney presided over the resentencing proceedings.

The law is well established that a fundamental tenet of due process is a fair and impartial tribunal. Marshall v. Jerrico, 446 U.S. 238 (1980); In re Murchison, 349 U.S. 133 (1955). Absent a fair tribunal there is no full and fair hearing. Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988), dictates that even the appearance of bias is sufficient to warrant reversal. Mr. Cook was not afforded due process because his trial court was not an impartial tribunal. Mr. Cook was denied his rights to due process by virtue of Judge Carney's obvious prejudice against him, which manifested itself throughout the trial and resentencing.

Judge Carney's bias and predetermination of the case was obvious even before the jury was sworn. During jury selection, the court rehabilitated two jurors whose command of the English language was clearly insufficient to enable them to understand the proceedings. This put defense counsel in the position of using peremptory challenges on these jurors who should have been challenged for cause. This demonstration of judicial bias is a consistent theme throughout the trial.

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[1]The heinous, atrocious, or cruel, and the cold, calculated and premeditated aggravating circumstances.

The record is replete with instances in which the Court abused its discretion.

Judge Carney's pattern and practice of bias against Mr. Cook extended to Mr. Cook's resentencing proceedings. The case was sent back to the trial court to consider the sentence because two aggravating circumstances had been erroneously considered by the jury. Judge Carney attempted to salvage his prior finding of death based on a plethora of improper non-statutory aggravating factors (Supp. R. 19, 22). The trial court imposed a sentence of death ore tenus after hearing argument by both counsel (Supp. R.22). The court stated, "The sentence will remain the same." No other findings were made on the record. Trial Counsel made no objection.

Only after a period of two months had elapsed did Judge Carney realize that he was required under the law to issue written findings simultaneously with his oral pronouncement of sentence. In a second hearing, held without the presence of Mr. Cook, Judge Carney announced:

> We had a hearing and I imposed the same sentence that was imposed before. What I did not do at that hearing, because I didn't really think I was required to do it, was enter another written sentencing order.
>
> I have since been persuaded that another written order is necessary. To that end I have prepared one and have given copies to

> Mr. Waksman and to Mr. Cook's attorney. (Supp. R. 26)(emphasis added).

This language suggests that Judge Carney would do anything to prevent the possibility of Mr. Cook getting a life sentence even despite the judge's per se reversible error. His bias and prejudice against Mr. Cook was so pervasive that he was willing to engage in improper ex parte contact with the State in a botched attempt to correct his mistake. The second resentencing hearing consisted of statements that were not pronounced to Mr. Cook on Feb. 5, 1990 (Supplemental RS. 1-4).[2]

The above-described evidence of the judge's bias at trial and resentencing impels Mr. Cook to reasonably question the court's impartiality. "In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's

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[2]Because of the allegation of Judge Carney's ex parte communication with the prosecutor in this case, Judge Carney has made himself a material witness in this cause. As such, he should have recused himself from presiding over Mr. Cook's postconviction proceedings. The fact that he did not lends yet further credence to Mr. Cook's fear that Judge Carney's bias and prejudice against him prevented Mr. Cook from receiving a fair hearing.

sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993)(quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)).

Not surprisingly, the evidentiary value of the defense case evaporates when the judge prosecutes the State's case and rehabilitates the state's case adversely to Mr. Cook's position. The court's action was improper. Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). The sheer number of rulings based solely on bias against Mr. Cook is extraordinary. As a result, Mr. Cook was denied even the showing of a fair and impartial tribunal.

C. APPELLATE COUNSEL FAILED TO RAISE THE SENTENCING JUDGE'S FAILURE TO PREPARE A WRITTEN ORDER AT RESENTENCING

Mr. Cook's resentencing hearing was conducted on Feb. 5, 1990, but the court did not enter an order imposing the death penalty with findings of fact (R. 26) until March 30, 1990. The court's finding clearly did not result from a contemporaneous independent weighing of the applicable statutory and constitutional standards as Florida law requires. In addition, it was evident from the Court's

comments that the State Attorney had engaged in ex parte communications with the judge to get him to correct his error. Failure to raise an objection or argue this issue on appeal is deficient performance.

Written findings of fact in support of a death sentence are required. Fla. Stat. §921.141; see also Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Florida law requires the sentencing court to state specific reasons for the imposition of the death penalty. The sentencing court failed to properly state its reasons justifying the death sentence on the record. Grossman v. State, 525 So. 2d 833 (1988); Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). Judge Carney clearly did not afford the Mr. Cook an individualized capital sentencing determination. He received neither a reasoned nor an independent sentencing determination. In this case, the trial judge did not prepare findings until well after notice of appeal had been filed. In fact, the court didn't realize that it needed to make written findings until the state notified him through ex parte communications nearly two months later that he needed to make written findings. Then, the court exacerbated the error by not preparing its own findings, instead relying on the state

to prepare them. It is obvious that the court made an error that he tried to remedy on March 30, 1990. Without Mr. Cook present, the court attempted to resentence him and adopt the written findings well after the oral pronouncement. Defense counsel then inexplicably failed to object to the error and expressly waived Mr. Cook's presence without his permission. This was clearly not a "meaningful weighing" as required by Florida law. This Court has strictly enforced the written findings requirement mandated by the legislature, Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), and has held that a death sentence may not stand when "the judge did not recite the findings on which the death sentences based into the record." Van Royal, 497 So. 2d at 628. The imposition of such a sentence is contrary to the "mandatory statutory requirement that death sentences be supported by specific findings of fact." Id. The written findings assure that this integral part of capital sentencing, the weighing of aggravating and mitigating factors, is well reasoned. Here, the record shows no such specific findings of fact that indicate that the trial court made a well reasoned decision as to why Mr. Cook should die.

The trial court denied Mr. Cook's right to an individualized and reliable sentencing determination by

failing to conduct the contemporaneous independent weighing which the law requires. It never made findings of fact to support the sentence at all until months later when it "memorialized" its decision through a writing that was not "timely filed" so as to show the "sentence was based on a well-reasoned application of the aggravating and mitigating factors" (See Rhodes, supra).

Habeas Corpus relief is appropriate.

D. MR. COOK'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS MERITORIOUS ISSUE.

Mr. Cook did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991). Due process was deprived because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new

sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So. 2d 991 (Fla. 1993)(new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994).

This Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The

severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Larkins v. State, 655 So. 2d 95 (Fla. 1995).

The flaws in the system that convicted Mr. Cook of murder and sentenced him to death are many. They have been pointed out throughout not only this Petition, but also in Mr. Cook's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

These errors cannot be harmless. The results of the trial and sentencing are not reliable. Appellate counsel was ineffective for failing to raise this issue. Habeas Corpus relief must issue.

CLAIM II

MR. COOK WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION AND SENTENCE OF DEATH DUE TO OMISSIONS IN THE RECORD.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1955) (Petitioner needs a transcript "to get adequate appellate review of . . . alleged trial errors.") Without recourse to a complete and accurate transcript, appellate counsel was precluded from discovering substantial errors that occurred during the trial, and he was thereby rendered ineffective. In Mr. Cook's case, portions of the record, including the record of the entire sentencing hearing, are missing.

Mr. Cook's appellate counsel, on appeal of both the initial trial and the resentencing, had not represented him at trial and were unfamiliar with his case. The need for an accurate transcript in Mr. Cook's case was more than usually critical in that the ultimate appellate counsel was not the attorney originally appointed by the trial court. The trial court had originally appointed Eric Hendon as Special Assistant Public Defender to represent Mr. Cook at his capital appeal. However, this Court determined that Mr. Hendon's

initial brief on behalf of Mr. Cook was totally inadequate and constituted, on its face, ineffective assistance of appellate counsel, and ordered the chief Judge of the Eleventh Judicial Circuit to appoint another appellate counsel for Mr. Cook. It is within this context that the importance of a complete and accurate transcript of the proceedings became all the more critical: "the fact that his [petitioner's] new appellate counsel is foreclosed from examining for possible error a substantial and crucial portion of the trial renders illusory his right to appeal." United States v. Selva, 559 F. 2d 1303, 1305 (5th Cir. 1977).

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. Mayer v. Chicago, 404 U.S. 189, 195 (1971); Entsminger v. Iowa, 386 U.S. 748, 752 (1967). Eighth Amendment considerations demand even greater precautions in a capital case. See, Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S.

242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the Eighth amendment. See, Proffitt v. Florida; Dobbs v. Zant, 113 S. Ct. 835 (1993), Johnson v. State, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, §3(b)(1) Fla. Const.; §921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).

Critical transcripts of proceedings from the record on appeal were omitted from Mr. Cook's record. Several of these omissions are material to Mr. Cook's claims. For example, at least two bench conferences were not recorded by the court reporter. Though efforts were made by trial and appellate counsel to supplement the record, Counsel cannot accurately determine what occurred due to inaccurate incomplete court

reporting of Mr. Cook's capital murder trial. Appellate counsel was therefore prevented from rendering effective assistance in the in the absence of a complete record. Moreover this Court's review could not be constitutionally complete. See, Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4) Fla. Stat. (1996). When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. It is impossible to accurately determine what occurred due to inaccurate incomplete court reporting of Mr. Cook's capital murder trial. Appellate counsel was therefore prevented from rendering effective assistance in the in the absence of a complete record. Moreover, this Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991). Habeas Corpus Relief is warranted.

CLAIM III

THIS COURT FAILED TO CONDUCT A CONSTITIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON THE DIRECT APPEAL FOLLOWING MR. COOK'S RESENTENCING

This Court determined that the aggravating factors of "heinous, atrocious or cruel" and "avoiding arrest" were not applicable to the murder for which Mr. Cook was sentenced to death. Cook v. State, 542 So. 2d 964, 970 (Fla. 1989). This Court was unable to determine that this error was harmless, and remanded to the trial court to resentence Mr. Cook without the benefit of the jury. Id. at 971. This Court did not consider the effect of this error on the jury. Such an analysis failed to conform with the Eighth Amendment. See Sochor v. Florida, 112 S. Ct. 2114, 2122 ("...a jury is unlikely to disregard a theory flawed in law..."). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt.

This Court's harmless error analysis on direct appeal of the resentencing was Eighth and Fourteenth Amendment error. The harmless error test was set forth in Chapman v. California, 386 U.S. 18 (1967). In order for constitutional error to be harmless, the state must show "beyond a reasonable

doubt that the error complained of did not contribute to the [outcome] obtained." Yates v. Evatt, 111 S. Ct. 1884 (1991), citing Chapman v. California. The burden is on the state to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminate, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable doubt and Mr. Cook is entitled to relief. Chapman v. California; Yates v. Evatt.

Florida adopted the Chapman test in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), which held that the state, as the beneficiary of the error, must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction or sentence.

This Court failed to conduct a proper analysis as required by the United States Constitution. Had it conducted a proper analysis of harmless error under Chapman it would have recognized the harmfulness of the error. Even though this Court had found that there was no evidence to support the "avoid arrest" and "HAC" aggravators, the trial court relied

upon the death recommendation given by a jury after erroneously being instructed on these factors. Even after being erroneously instructed, the jury's recommendation for death in this case was only 8 to 4.

Since Mr. Cook's sentence rests upon invalid aggravating circumstances, unsupported by any evidence, habeas corpus relief must be granted.

CONCLUSION

For all of the reasons discussed herein, Mr. Cook respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to the following on July 25, 2005.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this petition complies with the font requirements of rule 9.100(l), Fla. R. App. P.

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