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

**DAVID COOK,**

**Petitioner,**

**v.**

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

**Respondent.**

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# REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

CLAIM I ..... 1

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES THAT WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTION AND SENTENCE OF DEATH. ..... 1

B. APPELLATE COUNSEL FAILED TO RAISE JUDICIAL BIAS DURING TRIAL AND RESENTENCING ..... 1

C. APPELLATE COUNSEL FAILED TO RAISE THE SENTENCING JUDGE'S FAILURE TO PREPARE A WRITTEN ORDER AT RESENTENCING ..... 2

CONCLUSION ..... 6

CERTIFICATE OF SERVICE ..... 8

CERTIFICATE OF COMPLIANCE ..... 9

## TABLE OF AUTHORITIES

Cases

Cook v. State, 542 So. 2d 964 ..... 1

Van Royal v. State, 497 So. 2d 625 ..... 5, 6

Statutes

Fla. Stat. Sec. 775.082 ..... 2, 5, 6

Fla. Stat. Sec. 921.141(3)(b) ..... 2, 6

## 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.**

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

As argued in Mr. Cook's Petition for Habeas Corpus, Judge Carney's bias and predetermination of the case were 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.

In its Response, the State attempts to mischaracterize this argument. The State asserts that, "A claim that this rehabilitation was improper was raised on direct appeal and addressed exhaustively by this Court" (Response, p.6). In fact, the question raised on direct appeal was whether the Circuit Court abused its discretion in denying Mr. Cook's challenges for cause. Cook v. State, 542 So. 2d 964, 966. The question of bias, as evident from the trial court's efforts at rehabilitating prospective jurors, was not raised on direct appeal and was not considered by this Court when

deciding the completely separate issue of the lower court's discretion in granting or denying challenges for cause.

The State's assertion that "the lack of bias stemming from this Court's finding that the lower court had not abused its discretion in denying the cause challenges" is without merit and is not borne out by the record. To the contrary, nowhere in this Court's opinion on direct appeal is this claim addressed due to the fact that appellate counsel never raised it.

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

Florida's sentencing statue is clear that

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific **written findings** of fact based upon [aggravating and mitigating circumstances] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence **within 30 days** after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Fla. Stat. Sec. 921.141(3)(b)(emphasis added).

In it's Response, the State asserts that at February 5, 1990 resentencing hearing, Judge Carney "made specific findings of fact as to the remaining aggravators and

mitigators not stricken by this Court on appeal" (Response, p. 15). The State then argues that the subsequent written sentencing order supports its contention that "the court clearly made contemporaneous findings of fact" (Response, p. 17).

Judge Carney's "specific findings of fact" at the February 5, 1990 resentencing are limited to: 1) "Impaired capacity is not a part of this case, as far as this Court is concerned;" and 2) "it was a double killing. He killed her to quiet her down, and that's a quote from his confession." Judge Carney's reasoning for imposing a death sentence at the February 5, 1990 resentencing is limited to:

> Now, we have an execution to either eliminate someone as a witness or to kill her because he was so cold blooded not to care anything about another human life. As far as I'm concerned, you can take your pick; one is as bad as the other.
>
> The sentence will remain the same.

At no time during the hearing does Judge Carney adopt the findings made in his original sentencing order other than to say, "In so far as the prior criminal activity or lack thereof is concerned, I'm going to leave that as it was." Nor does Judge Carney pronounce how much weight is given to whatever aggravating or mitigating circumstances he may have found.

Judge Carney never states what aggravating factors are found other than the suggestion that the murder was committed to eliminate a witness or that Mr. Cook "was so cold blooded not to care anything about another human life." In any event, he makes no finding that either of these factors applies, other than offering both and asking us to "take your pick." Assuming, arguendo, that Judge Carney's rant constitutes a "finding" in support of a death sentence, neither of the aggravators he offered for our consideration in his oral pronouncement of sentence are valid under Florida law.

The contrast between these findings orally pronounced at the resentencing hearing and the findings detailed in the written sentencing order, some two months later, after a Notice of Appeal had already been filed, are striking. In the written sentencing order (apparently written by the State), Judge Carney specifically adopts factual and legal findings from the previous sentencing order, specifically enumerates the aggravating and mitigating factors found, and details the weight given to each aggravator. While his oral pronouncement of sentence is limited to one (1) page of double spaced transcript, his subsequent written sentencing order consists of three (3) pages, single spaced, of detailed findings, which

incorporates or addresses eleven (11) pages of detailed findings in his previous order.

The State's position that "the court clearly made contemporaneous findings of fact" (Response, p. 17) at the oral pronouncement of Mr. Cook's death sentence is simply absurd.

Written findings assure that this integral part of capital sentencing, the weighing of aggravating and mitigating factors, is well reasoned. As Justice Ehrlich opined in Van Royal v. State:

> How can this Court know that the trial court's imposition of the death sentence is based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative. Since the entry of this order came within a matter of days after the defendant had served his motion to dismiss and to vacate the death sentence because of the trial judge's failure to comply with section 921.141(3), Florida Statutes, it can be argued with some degree of persuasion that it was the defendant's aforesaid motion to dismiss that awakened the trial judge to the fact of his obvious dereliction and that his sentence was not the result of a weighing process or the "reasoned judgment" of the sentencing process that the statute and due process mandate. I am of the opinion that the trial

> court's written findings with respect to aggravating and mitigating circumstances must at least be coincident with the imposition of the death penalty. It is inconceivable to me that any meaningful weighing process can take place otherwise.
>
> While I eschew deciding a case other than on its merits, we have no alternative. The legislature has spoken and said that "if the [trial] court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082." The trial judge, for reasons not disclosed in the record, egregiously failed to perform his statutory duty in the sentencing process. We must do ours and vacate the death sentences and remand for the imposition of life sentences in accordance with section 921.141.

Van Royal v. State, 497 So. 2d 625, 629 (Ehrlich, J., concurring).

As in Van Royal, the sentencing court in Mr. Cook's case did not make the necessary findings requiring the death sentence coincident with the imposition of the death penalty as required by Florida law. Fla. Stat. Sec. 921.141(3)(b) and Sec. 775.082. mandates Habeas relief and imposition of a sentence of life imprisonment.

## CONCLUSION

For issues not addressed in the Reply, Mr. Cook relies on the arguments set forth in his Petition for Writ of Habeas

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

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to the following on January _____, 2006.


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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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