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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC11-2038

RICHARD ENGLAND,
Appellant,

v.

STATE OF FLORIDA
Appellee,

ON APPEAL FROM THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT FOR VOLUSIA COUNTY STATE OF FLORIDA

REPLY BRIEF

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PRELIMINARY STATEMENT

This reply brief addresses Issues I and II of Appellee's Answer brief. (Received on 5/17/2013). As to all other issues, Mr. England stands on the previously filed initial brief and Habeas Corpus petition.

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO QUESTION STEVEN DIEHL ABOUT HIS RELATIONSHIP TO THE STATE. (As stated by Appellee)

Appellee's reliance on Topps v. State, 865 So.2d 1253, 1254 (Fla. 2004) is misplaced. Massaro v. U.S. 538 U.S. 500 (2003) holds in part:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raise the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rules objective: conserving judicial resources and respecting the law's important interest in the finality of judgements. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been opportunity fully to develop the claims factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts. Id. at 504.

In Mr. England's case, Mr. Diehl's relationship with Mr. England and his case took an interesting turn, as described by the following testimony:

BY MR. VIGGIANO
Q. While you were in the Volusia County jail, did a jail deputy ever approach you about some kind of offer?
A. Yes, he did.
Q. And could you describe who this jail deputy was?
A. He was a taller Hispanic male, kind of thinning receding hairline, brushed back, shaded glasses. I don't believe he had any facial hair. And I do not recall specifically what his name – it seems to me that the name was like Martinez, or something to that effect. I would, however, like to elaborate on what I'm saying, if that's okay.
Q. Yes. Well, what did the jail deputy say to you?
A. He asked me if I was – well, he didn't ask me. He informed me that he knew I was kind of buddying up with Richard England and asked me if I would be interested in speaking with anyone about what was to – you know information that I heard from Richard England. And at that point, you now, obviously I said I would be. So during the trial, if – from what I'm hearing that was read back to me of testimony, did I request to – did I request to speak to police? Yes, I did request to speak to police, but I did not initiate the contact.
Q. Okay. Did anyone ask you back then, any of the attorneys representing Richard England, to your knowledge, ask you specifically these questions that I'm asking you today about how you got involved in the case?
A. No, not that I recall. I –this has been, what, four years I believe.?
Q. So you basically took that to mean that you could get involved in this case in some capacity?
A. Yes.

Q. So did the jail deputy specifically tell you what you were to do to help yourself?
A. Not specifically, no.
Q. And do you know what if the jail deputy ever saw or knew you were speaking with Richard England?
A. Yes. He made it clear to me that he was aware that I was in contact with Richard England.
Q. Did you eventually come into contact with a Detective Session and Maguire?
A. Yes. (PCR Vol. II p. 233-34).

Attorney Robert Sanders was in charge of handling Steven Diehl as a witness at trial. Most importantly he argued the motion to suppress Diehl's statements due to his working as an agent for the State of Florida. (PCR Vol. V p. 620-21). Attorney Sanders testified as follows:

BY MR. SHAKOOR
Q. Okay. So as you testified Mr. Diehl was the subject of the motion to suppress. And the deposition that you mentioned, that happened after the motion to suppress?
A. Yeah, I think it was within a couple of days where he just wanted to at least have a shot at him before the trial to do – find out anything we could just to try to trick him up.
Q. So anything you learned at that deposition obviously couldn't have helped you in the motion to suppress?
A. Well, we could always renew it.
Q. Okay. If the motion transcript – you mentioned you reviewed the motion to suppress transcript?
A. Yes.
Q. If the record of that transcript revealed you failed to ask questions indication how the initial, the very initial meeting between Mr. Diehl and State authorities took place, would you refute the record?
A. No, sir (PCR Vol. V p. 624).

Trial counsel recognized the issue in regards to how Diehl was unlawfully used as a state agent against Mr. England, but trial counsel was woefully ineffective in fleshing the issue out and properly presenting it in the motion to suppress. A key problem is the fact that trial counsel neglected to discover how the initial meeting between Steven Diehl and a state official took place. Had trial counsel done this, he would have been able to discover that Mr. Diehl was blatantly solicited by a state actor to become a state agent against Mr. England.

At no time during the post-conviction testimony did Mr. Diehl "recant" and testify that Mr. England did not commit the crime. (PCR Vol. II p.236).

Prejudice

The prejudice is obvious. Due to trial counsel's ineffectiveness; Diehl was not asked about how he became a State agent initially. Had counsel asked this important question; England's statements would have been suppressed. Relief is proper.

ISSUE II

WHETHER TRIAL COUNSEL'S PREPARATION FOR THE PENALTY PHASE, UNDER THE CIRCUMSTANCES, FELL WITHIN THE BROAD SPECTRUM OF REASONABLE AND EFFECTIVE REPRESENTATION. (As stated by Appellee)

The "circumstances" of which Appellee alludes to is caused by trial counsel's ineffectiveness. During the evidentiary hearing, the following questions were asked and answered:

> Q. Okay. But – so you agree, though, that you didn't do any penalty phase preparation between the time you were appointed and the time of your motion to dismiss hearing on speedy trial in February?
> A. Yeah. "Any" is kind of a big word. I'm sure I went to the Statute 921.141, looked at my mitigators, looked at my aggravators, tried to get a feeling on that, found out about his family members generally. But I don't think I contacted his family until we were actually in the trial posture later that April.
> Q. And you didn't though, retain an expert witness or mental health professional to do an examination of Mr. England?
> A. Not at that time.
> Q. And you're aware of the ABA guidelines regarding death penalty cases, that you want to – well, basically at every stage you have an obligation to conduct a thorough and independent investigation relating to issues of both guilt and penalty in the penalty phase?
> A. Yes, sir.
> Q. And you would want to do that if you could. If you had the time in an optimum situation, you would be able to do that kind of thing, correct?
> A. Well, I'm going to do it in any situation, but in this situation, I was a little bit hampered in my investigation by Mr. England's – I'm going to call it a demand for speedy trial, but we had a too early trial and so it kind of cut short my opportunity to do a full and complete phase two investigation. (PCR Vol. V p. 546-7).

The ABA standards are clear and unambiguous in that an investigation should begin upon appointment whether the client likes it or not. Clearly, trial counsel did not meet the standards in that a penalty phase investigation was begun at the eleventh hour rather than upon appointment. Counsel would have had from December of 03 until the date of trial, six months to prepare. Six months was plenty of time for a mental health professional to visit Mr. England and gain his trust (it took Dr. Carpenter three visits). Six months were enough time for a mental health professional to call Ines Fyffe and Alison England and obtain a *complete* factual history of the abuse Mr. England suffered as a child, as was adduced at the evidentiary hearing. A reasonable attorney would have used every minute of the time constraints placed upon him to prepare a penalty phase case. Trial counsel's blaming Mr. England for not waiving speedy trial is an attempt to cover up the fact that his performance was deficient and not objectively reasonable. There is no excuse for waiting six months until he was in a trial posture to begin a penalty phase investigation. Mr. England was not to blame for the deficient performance, trial counsel was. In Collier v. Turpin, 177 F.3d 1184, 1202 (11th Cir. 1999) The Collier court held:

> Although Collier's attorneys concede that their performance was deficient, they blame the trial judge rather than themselves for their poor display. We find that the trial judge was not to blame for counsels'

> ineffectiveness; rather, they were. In sum, counsel did not perform as objectively reasonable attorneys would have; their performance fell below the standards of the profession and therefore their assistance at the sentencing phase of the trial was ineffective. Id. at 1202.

Whether the trial court was at fault for "pushing" counsel into trial or whether England was the cause of the poor penalty phase preparation will be addressed in the State Habeas reply; one fact is clear. Trial counsel did not begin his penalty phase investigation until it was too late. A full penalty phase could and should have been begun upon appointment. The jury never heard the compelling mitigation adduced at the evidentiary hearing yet they returned a recommendation of 8 to 4 in favor of death. Had the jury heard the mitigation cited above; the ego-dystonic homophobia, the abuse by Ronnie England, the sexual manipulation caused by the "belly rubbing coach", at least two jurors would have been swayed to vote for life. England was prejudiced by counsel's ineffectiveness and relief is proper. Dr. Danziger's relationship to this case is eerily similar to the one Dr. Krop had in Larzelere v. State, 979 So.2d 195 (Fla. 2008). In both cases, the expert was retained after the jury had reached its recommendation rendering any opinions they may have almost moot. Dr. Danziger wasn't provided with any materials beyond state agency produced police reports. He wasn't given school records, or former PSI's or any personal family history information. He testified as follows:

Q. But these reports are something you'd be interested in in doing your evaluation. Is that – isn't that true?
A. Well, yes it would certainly be potentially valuable to have more information.
Q. And you would agree that you did have scant information in doing your evaluation of Mr. England; correct?
A. It's true that the collateral information I had was indeed, limited, that's correct. (PCR Vol. VI p.705-07).

Dr. Danziger provided further interesting information which demonstrated the ineffectiveness of trial counsel:

Q. And then in the penalty phase, you may present a completely different story because – you may present a completely different scenario of what happened because it's a different trial?
A. Yes, I understand that the strategic decisions lawyers make, yes, you have wide latitude and do whatever you think is best for your client.
Q. And you didn't have the opportunity to review all the discovery materials and the multiple statements of the parties involved in this case, people who didn't testify and some people who did testify. You didn't have all that – the benefit of all that material because Mr. Keating didn't provide it to you.
A. I did not have that material, that is correct.
Q. And had Mr. Keating provided you that material, you may have been able to do a thorough investigation into the mental health issues regarding Mr. England and explain to the jury why this case occurred. You don't know because you never got presented the materials, correct?
MS. DAVIS: Objection, argumentative.
THE COURT: Overruled.
DR. DANZIGER: It's correct. It is possible, though I would say less likely than not, that I might have reached

> different conclusions, but it's possible, yes. (PCR Vol. VI p. 716-17)

Dr. Danziger mentioned on multiple different occasions during questioning that the materials he received were scant, or lacking in some way. Moreover, when presented with specific, additional details that either were available to trial counsel,, or should have been discovered by following leads, Dr. Danziger testified that such information would be valuable or be of interest to him. (PCR Vol. VI p. 713-14). Dr. Danziger based his evaluation of Richard England solely on the arrest reports and the self-reporting of Richard England.

Appellee's contention on page 66 of his Answer Brief that there was no prejudice as Keating made a "strategic decision not to use the information at the *Spencer* hearing" is error. In Wiggins v. Smith, 539 U.S. 510, 511 123 S.Ct. 2527, 2529 (2003), the United States Supreme Court addresses the reasonableness of the mitigation investigation:

> In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable.* The Court thus conducts an objective review of their performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from

> counsel's perspective at the time of that conduct. *Id.*, at 688, 689, 104 S.Ct. 2052 Pp. 2534-2536.
>
> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. The record of the proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly stemmed from inattention not strategic judgment. Id. at 511-12 *2530.

In Mr. England's case, trial counsel was grossly ineffective long before the *Spencer* hearing. Counsel's failure to retain a mental health expert until after the recommendation was rendered by the penalty phase jury deprived Richard England

of a reliable testing of the evidence. *See* Larzelere v. State, 979 So.2d 195 (Fla. 2008). In light of the glaring fact that the second degree murder conviction of Mr. England at age 16 involved an elderly homosexual as did the instant case, competent counsel would have tried, through investigation, to explain to the penalty phase jury Richard England's antipathy to elderly homosexuals. The PSI and school records were never provided to Dr. Danziger. The PSI report indicated that England had *some sort of problem* before age 15 when his criminal activities began. The school records indicate some sort of learning disability which resulted in a retention of the 5th and 8th grades and poor grades in general. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice regarding the presentation of mitigation. The prior murder of Ryland was a focal point in the State's penalty phase presentation. (FSC ROA Vol. XII p. 1876-1916).

Appellee's reliance on Winkles v. State, 21 So.3d 19, 26 (Fla. 2009) "an ineffective assistance claim does not arise for the failure to present mitigation evidence where that evidence presents a double-edged sword." is misplaced.

A double edged sword can only be determined to be "double edged" when unsheathed from its scabbard by timely and thorough investigation. Trial counsel did not investigate Mr. England's past history as he should have upon appointment.

In his clinical interview with State expert Dr. Riebsame, Mr. England denied being homosexual, bisexual and described himself as heterosexual. (PCR Vol. I p. 117-118). However, when asked about homosexual experiences while growing up, the following exchange took place:

> DR. RIEBSAME: No homosexual experiences growing up?
> MR. ENGLAND: No, sir. Now, see – see, this is – this is what I'm getting at. These type of questions are kind of like invasive.
> DR. RIEBSAME: Right. I'm going to back off a little bit. Let's look at Dr. Carpenter's eval. Let's challenge his evaluation, okay? He says part of it that there's some sort of hatefulness on your part towards homosexuals and that might explain how you got involved in this crime.
> MR. ENGLAND: Right.
> DR.RIEBSAME: So I mean, what do you think –
> MR. ENGLAND: Well, my standpoint on that is –
> DR. RIEBSAME: Yes.
> MR. ENGLAND: – whether there is or isn't, whether I do have it or not or don't have it – what is it? Homophobia is what they call it?
> DR. RIEBSAME: Yes.
> MR. ENGLAND: It has – it has no relationship to the crime. (PCR Vol. I p. 118-19).

England's evasive response to Riebsame's questions regarding homosexual experiences as a child is typical of a victim of child sexual abuse in that England stated later in the clinical interview that he may be homophobic although he steadfastly denied killing Mr. Wetherell. (PCR Vol. I p. 120) .

Mr. England explained his homophobia to Dr. Riebsame in the following manner:

> DR. RIEBSAME: Okay? I'm listening. And this report of Dr. Carpenter's is out there, and it talks about the possibility of this homophobic rage and how that might explain why you weren't involved in the crime and you don't have this homophobic rage or you're not homosexual?
> MR. ENGLAND: I may have, but it has nothing to do with the crime, is what I'm telling you.
> DR. RIEBSAME: Okay. When you say you may have, what do you mean by that?
> MR. ENGLAND: Well, I mean, do you know my history? I spent time in prison before.
> DR. RIEBSAME: Yes.
> MR. ENGLAND: and I've been around and I've seen that stuff that I didn't want – particularly want to see, you know, so maybe that might have –
> DR. RIEBSAME: What are you describing?
> MR. ENGLAND: Other men having sex.
> DR. RIEBSAME: Okay. Okay.
> MR. ENGLAND: Or other men imposing themselves on other men that aren't of that – that aren't homosexual and just – just things that you would see in that type of an environment. (PCR Vol. I p. 120-21).

Mr. England admitted that he had read Dr. Carpenter's report and could "respect his conclusions." in spite of the fact that he could not see how Carpenter's conclusions were connected to the crime. (PCR Vol. I p. 126).

Competent counsel would have realized that Mr. England's antipathy towards elderly homosexuals began before he killed Ryland. Competent counsel;

upon being made aware of the murder of Ryland, would have explored the issue of ego-dystonic homophobia early on in the case. As cited above, the murder of Ryland was a feature in the State's penalty phase. An explanation as to why Ryland was murdered was necessary to mitigate the damage to the defense penalty phase case that the Ryland murder caused. Trial counsel was unable to do this because of his ineffective and untimely investigation (if in fact, any real investigation was done). Relief is proper. Dr. Danziger's testimony during the evidentiary hearing can best be described as "too little, too late". He relied only on police reports and the self-reporting of Richard England. In fact, he did not even testify at the *Spencer* hearing. His evidentiary hearing testimony should be discounted as irrelevant. On page 62 of Appellee's brief, regarding the order of the lower court states: "Although, Counsel had Defendant evaluated by a mental health expert ("Dr. Danziger") after the guilt phase, the mental health expert did not find any statutory mitigators." This is a misapprehension of fact by the post-conviction court.

Dr. Danziger testified at the evidentiary hearing as follows:

> Q. Doctor, you sent a statement to Gerald [sic] Keating on July 13th. And what day did you actually get asked to do an evaluation in this case by Mr. Keating?
> A. I believe there was an order after the jury had come back 8 to 4, asking me to go up and see Mr. England.

I believe that might have been the 5th or the 6th, and then the earliest I could get up was the 11th.
Q. And you testified that you were involved in postconviction matters in the past; is that correct?
A. Yes.
Q. And did you ever testify before a jury in a penalty phase?
A. Oh, yes.
Q. Okay. And did you – how many cases did you do that in?
A. Perhaps, a dozen, 15 over the years.
Q. Have you ever been retained by an attorney in any of those cases after the penalty phase was completed to do an evaluation?
A. Have I ever been first retained afterwards? No. There are times I've only spoken in the penalty phase, not in the guilt phase, but I will say I've never done an evaluation after the jury reached their findings in a penalty phase.
Q. Would you agree that it's not an optimal situation to have you retained to speak to a jury until after the jury's already come back? It doesn't make any sense; correct?
A. Obviously, I'm not going to speak to a jury in that situation. My understanding is that after the jury votes, then there's another hearing before the judge – I guess it's called a Spencer hearing, if I'm correct – and then the judge evaluates everything and makes the final decision, including the jury's recommendation. So I have testified at Spencer hearings, as well, but this was the only case where I ever only was asked to see someone after a jury came back. (PCR Vol. VI p. 691-2)

Regarding the investigation of the mitigation available to Mr. England but not presented, the defendant directs this Court's attention to the Larzelere Court which held:

Unlike the attorneys in Lewis who consulted a mental health expert before allowing Lewis to waive the presentation of mitigation evidence, Wilkins and Howes did not retain Dr. Krop to examine Larzelere until after the jury recommended death. Dr. Krop testified that he had done over 1500 first-degree murder evaluations in his career and that "this case was the only case that I've ever been involved in when I was asked to get involved **after the jury already came back with its recommendation."** (emphasis added). Donald West testified that there is "probably no worse timing" than to hire an expert after the jury recommendation because "at that point, all you can do is ask the court to override .... a jury's recommendation which, by law, the court is required to give great weight." Howes testified that he did not know why Dr. Krop was not retained early in the representation because he did not become Larzelere's counsel of record until around the time jury selection began. Wilkins first could not remember why he did not contact Dr. Krop before the recommendation but later explained that he did not contact Dr. Krop sooner because he did not suspect that Larzerlere had been abused, and he did not feel that it was worth looking for a needle in a haystack until after the death recommendation. Ordinarily counsel is not deficient where counsel has made a strategic decision. However, "strategic choices made after less than a complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." Wiggins, 539 U.S. at 528, 123 S.Ct. 2527 (quoting Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052). Counsel would have seen a reason to consult a mental health expert regarding Larzelere had counsel interview her family members or otherwise pursued the investigator's report. As Dr. McClaren explained, "When you're talking to [Larzelere], boy she's easy to believe, but when you're out of the situation and start looking at all of those conflicting things ... there are

> many inconsistencies." The trial court correctly concluded that counsel was deficient for failing to obtain an informed mental health evaluation of Larzelere in advance of the penalty phase. Larzelere at 205-206

In Mr. England's case the similarities are noteworthy. Sanders, like Howes was appointed shortly before trial. (PCR Vol. V 617-619).

Keating agreed that he could have retained a mental health expert in December of 2003. (PCR Vol. V p. 575). Keating retained a mental health expert after the jury rendered a recommendation for death but before the Spencer hearing and he agreed that he would like to have an expert in earlier. (PCR Vol. V p. 580). In Rompilla v. Beard, 125 S.Ct. 2456 2458 (2005) the Supreme Court of the United States held:

> Even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial' sentencing phase. Id. at 2458.

At the evidentiary hearing Mr. Keating testified in this manner:

> A. Well, we'd be having pretrials every month, so I'd see England and the trial judge. But I'd also come to see him in the jail from time to time. Even though he was in second place with me, we kept – I kept visiting him at the jail. And during that time I was trying to find out more about the case.
>
> Mr. England was very closed mouth. He didn't share much with me about the facts of the case. And one

> of the obvious things about the case was that it appeared to involve homosexuality. I tried to bring up the subject of homosexuality inside the case.
> Q. What was it about the case at that point that you believed that this had overtones of homosexuality?
> A. Well, I think the discovery that we received indicated that the victim, Mr. Wetherell, may have been a homosexual and that he may have been involved in homosexual activities with someone named Michael Jackson.
>
> And we knew from discovery that Michael Jackson was a friend of Mr. England, and so there was – just homosexuality was a part of the case. (PCR Vol. V p. 547-48).

It is clear from the above cited testimony that Attorney Keating knew early on from the discovery provided to him from the State that homosexuality would be an issue in this case. Yet he did nothing. Dr. Richard Carpenter was employed by the State of Florida as a Jimmy Ryce evaluator (PCR Vol. III p. 309). Dr. Carpenter detailed rapport which he developed with Mr. England by visiting him multiple times (three times) and eventually established the issue of ego-dystonic homophobia. (PCR Vol. III p.323-356). Ultimately, Richard England admitted to State expert Dr. Riebsame that he disliked homosexuals (PCR Vol. I p. 120-21) and that Mr. England had read Dr. Carpenter's report and could "respect his conclusions." (PCR Vol. I p. 126).

Prejudice

The prejudice in this case is both obvious and blatant. The penalty phase jury knew nothing about Mr. England's past and his mental state at the time of the crime. Had they known the mitigation adduced at the evidentiary hearing at least 2 jurors would have voted for life. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Wherefore, in light of the facts and the law presented in this Initial and in the Reply brief, along with the State Habeas and the Reply to State's Response to Petition for writ of Habeas Corpus Mr. England respectfully moves this Honorable Court to:

1. Vacate the judgements and sentences especially the sentence of death.
2. Order a new trial or in the alternative,
3. Order a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF has been furnished by E-MAIL to [ken.nunnelly@myfloridalegal.com and CapApp@myfloridalegal.com] and U.S. Mail to Richard England DOC# 115574, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 21st day of June 2013.

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CERTIFICATE OF COMPLIANCE.

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF, was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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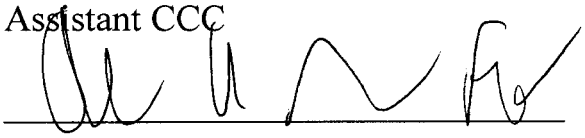

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