

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC2024-0273

LOWER TRIBUNAL CASE NUMBER: 541988CF001357

RICHARD BARRY RANDOLPH,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE.

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT REGARDING REFERENCES

This appeal arises from the circuit court's summary denial of Mr. Randolph's 3rd successive motion to vacate sentence of death filed pursuant to Florida Rule of Criminal Procedure 3.851.

The following symbols will be used to designate references to the record in this appeal:

“(R. ___)” – record on direct appeal to this Court;

“(PCR. ___)” – postconviction record on appeal to this Court;

“(PCR3. ___)” – record on current appeal;

All other references will be self-explanatory.

Generally, Richard Barry Randolph is referred to as “Mr. Randolph” and the State of Florida, is referred to as “the State.”

REQUEST FOR ORAL ARGUMENT

Mr. Randolph has been sentenced to death. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Randolph, through counsel, urges that the Court permit oral argument.

INTRODUCTION

Mr. Randolph, who was sentenced to death by a mere eight to four majority jury recommendation, filed his motion seeking a new trial based on the newly discovered evidence of the identity of his birth parents – a fact which he had previously been prohibited from finding under New York law. The change in New York adoption law allowed Mr. Randolph to not only learn the names of his biological parents, but also allowed him to learn facts surrounding his adoption and the remarkable story of his biological parents' lives, which Randolph argued would allow a reasonable juror to give greater weight to the mitigation testimony presented at trial and post-conviction as to the effect of the abuse he experienced from his mentally-ill, alcoholic adoptive mother and neglectful, sometimes cruel adoptive father and thus would likely result in a reduced sentence of life in prison. Neither the jury or the sentencing court were told the true facts surrounding his adoption, including the sacrifice Randolph's teenaged mother made in not only choosing life for her unborn baby, but also how she always cared and wondered about him. Nor was the jury given an opportunity to weigh those facts or the psychological testimony proffered at the Case

Management Conference in support of Randolph's motion seeking an evidentiary hearing. Randolph argued that he was entitled *at minimum to an opportunity to present his claim at an evidentiary hearing* before the post-conviction court. The post-conviction court denied Mr. Randolph an evidentiary hearing and in so doing violated Florida law and Mr. Randolph's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Seventh Judicial Circuit, in and for Putnam County, entered the judgment of conviction and sentence of death at issue. This appeal arises from the circuit court's summary denial of Mr. Randolph's third successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851(f)(5) based upon newly discovered evidence. (PCR3. 84)

a. Trial Proceedings

The State charged Mr. Randolph with first degree murder, armed robbery, sexual battery, and grand theft of a motor vehicle in the death of Minnie Ruth McCollum. *Randolph v. State*, 562 So. 2d 331 (Fla. 1990). Mr. Randolph was found guilty by jury trial on February 23, 1989. *Id.*

The next day, February 24, 1989, Randolph proceeded to penalty phase presenting a single witness - Dr. Harry Krop. The penalty phase presentation lasted half a day. Dr. Krop's background review consisted of him speaking to Mr. Randolph, Mr. Randolph's adoptive father and Mr. Randolph's ex-girlfriend. (R. 1720). Defense counsel failed to provide any background records to his expert. (PCR3.194).

The limited testimony Dr. Krop provided included that Mr. Randolph was adopted at five months old, and that Mr. Randolph's birthparents were two college students who had a baby and put "it" up for adoption. (R. 1732) "And that's as far as we know about his early life." *Id.*

When testifying about Mr. Randolph receiving therapeutic treatment in third grade, Dr. Krop admitted Randolph's adoptive father was not a particularly good historian in terms of the nature of any kind of diagnosis, "so again, we don't have records, we just know that he was in trouble in terms of seeking professional help from a young boy." (R. 1728). Dr. Krop further stated about this counseling, "I do not have records of that, and the father was not particularly helpful". (R. 1733).

Dr. Krop did admit that he had been told by Mr. Randolph and his adoptive father, that Randolph's adoptive mother was emotionally unstable, had been hospitalized on a "couple of occasions" for psychiatric reasons, and was an ineffective parent. (R. 1733). Dr. Krop mentioned to the jury, in a single passing reference, that Randolph's adoptive father physically abused him by tying him up and beating him all over his body with his hands, a broomstick or a belt. Dr. Krop further acknowledged that the father downplayed this physical abuse as needed discipline. (R. 1733). Dr. Krop stated Mr. Randolph graduated high school and served in the military with an honorable discharge, but subsequently became addicted to crack-cocaine. (R. 1734). On cross-examination, the prosecutor had Dr. Krop reaffirm that Mr. Randolph's biological parents were college students when they gave him up for adoption (R. 1753). The prosecutor further insinuated that the adoptive parents must have loved Mr. Randolph because they adopted him. *Id.*

The jury rendered an advisory recommendation for a sentence of death by a mere eight (8) to four (4) vote. The jury was not asked to make any factual findings.

Trial counsel failed to present any additional evidence at the *Spencer* Hearing. The trial court found as non-statutory mitigation that Randolph was addicted to crack cocaine, was adopted and never really bonded with his mother, and that he had a history of mental illness, but the court discounted the weight of this mitigation stating that, “even if proven does not rise to the level of a mitigating circumstance which would . . . outweigh the aggravating circumstances found to exist.” (PCR. 4310).

On April 5, 1989, the trial court sentenced Mr. Randolph to death. In its sentencing order, the trial court found four aggravators: (1) the crime was committed while engaged in the commission or flight after commission of a sexual battery; (2) the crime was committed for the purpose of avoiding or preventing a lawful arrest; (3) the crime was committed for pecuniary gain; and (4) the crime was heinous, atrocious or cruel (R. 641-652). The trial court rejected proposed statutory mitigation of no significant history of criminal activity based on information in the pre-sentence report which had not been presented to the jury and rejected the statutory mitigating factor of extreme mental or emotional disturbance. The trial court found but gave little to no weight to two non-statutory

mitigators: (1) Mr. Randolph possesses an atypical personality disorder; and (2) Mr. Randolph expressed shame or remorse for his conduct. *Id.*

The trial court unreasonably determined that “Dr. Krop testified that the Defendant **was loved by both parents.**” (R.1902). (emphasis added). However, Krop’s actual testimony, when asked by the prosecutor about Mr. Randolph’s belief that his adoptive parents didn’t love him, was as follows:

Q: [T]he mere fact that he had adoptive parents, adoptive parents would indicate that someone had loved him?

A: I’m not questioning, as I indicated, that his parents loved or didn’t love him, **I don’t know that.** The father indicated to me that he’s always seen his son as being different, and always in need of help psychologically. But it’s, in my opinion, Mr. Randolph’s perception [is] that he was not loved.

(R. 1751). (emphasis added).

The trial court’s order failed to mention the abuse inflicted upon him by his adoptive parents, noting in his Sentencing Order that Randolph was adopted and never bonded with his mother, but repeated the erroneous factual finding that Randolph was loved by his adoptive parents.

The Defendant, having been adopted, never had a loving relationship with his mother. This testimony adduced through Dr. Harry Krop, shows a young man whose mother had a history of mental problems. Regardless, Dr. Krop testified that the Defendant was loved by both parents. Thus, this factor even if proven does not rise to the level of a mitigating circumstance which would, in conjunction with Paragraph One, outweigh the aggravating circumstances found to exist.

(R. 645-646).

b. Direct Appeal

This Court affirmed Mr. Randolph's convictions and sentences.

Randolph v. State, 562 So. 2d 331 (Fla. 1990)¹, cert. denied,

Randolph v. Florida, 498 U.S. 992 (1990).

¹ Issues raised on direct appeal included:

1. The trial court violated state and federal due process protections by excusing for cause a prospective juror who expressed her repugnance to the death penalty, but said she could still vote to impose it in an appropriate case. The Florida Supreme Court rejected this error.

2. The trial court erred in denying his motion for individual voir dire. The Florida Supreme Court did not find an abuse of discretion.

3. The trial court should have reduced the charge of sexual battery with great force to sexual battery where the victim is physically helpless to resist. The Florida Supreme Court rejected this claim as meritless.

4. The trial court should have granted Randolph's motion for mistrial made upon the prosecutor's rebuttal at final argument pertaining to whether Mrs. McCollum's medical treatment was the cause of her death. The Florida Supreme Court rejected this claim as meritless.

5. The trial court erred in denying his motion for mistrial after the state elicited testimony during the guilt phase that Randolph did not exhibit remorse. The Florida Supreme Court found the error to be harmless beyond a reasonable doubt in both the guilt and penalty phases.

6. The trial court improperly admitted irrelevant and prejudicial photographs of Mrs. McCollum's body taken during the autopsy. The Florida Supreme Court did not find an abuse of discretion.

7. The state improperly questioned the medical examiner concerning the effects of administering type-O blood to Mrs. McCollum while she was in the hospital. The Florida Supreme Court concluded this error did not affect the jury's recommendation and harmless beyond a reasonable doubt.

8. The trial court considered inappropriate aggravating circumstances (HAC). The Florida Supreme Court rejected this claim as meritless.

9. The trial court erred in refusing to instruct the jury separately on specific non-statutory circumstances. The Florida Supreme Court rejected this claim as meritless.

10. The Court's review of cases imposing the death penalty is arbitrary and capricious because the jury was not required to make written findings. The Florida Supreme Court rejected this claim as meritless.

11. The aggravating factor of Heinous, atrocious, or cruel is unconstitutionally vague under state and federal constitutions. The Florida Supreme Court rejected this claim as meritless.

12. The trial court improperly found aggravating circumstances and failed to find various mitigating circumstances. The Florida Supreme Court rejected this claim as meritless.

c. Previous Postconviction Proceedings

This Court appointed the Office of the Capital Collateral Regional Counsel-South (“CCRC-South) to represent Mr. Randolph in postconviction proceedings upon the issuance of this Court’s Mandate.

On April 6, 1992, Randolph timely filed his initial postconviction motion pursuant to Fla. R. Crim. Pro. 3.850, which he amended on July 6, 1992.²

The postconviction court summarily denied relief on all of Mr. Randolph’s claims, including his “Howard Pearl” claim.³ This Court

Florida’s capital sentencing statute is unconstitutional on its face as applied. The Florida Supreme Court rejected this claim as meritless.

² Mr. Randolph’s first motion was filed on April 7, 1992, on July 9, 1992 an Amended Motion to Vacate Judgment and Sentence was filed, his Second Amended Motion for postconviction relief was filed on May 1, 1993, and third Amended Motion for postconviction relief with the Court’s permission was filed on January 26, 1998.

³ Mr. Randolph was represented at trial by Howard Pearl, an infamous Florida capital defense attorney who maintained “special deputy” status with the Marion County Sheriff’s Office while he acted as a capital defense attorney. He also armed himself during a capital trial “in response to a perceived threat to his personal safety[,]” from the client he was representing at the trial. Initially all capital defendants with a *Pearl* claim were consolidated for an

reversed and remanded the case for an evidentiary hearing on the claims raised in his 3.850, including the *Pearl* issue. *Randolph v. State*, 676 So. 2d 369 (Fla. 1996).

On remand the postconviction court conducted an evidentiary hearing July 22 through 24, 1997, including on his claims relevant to this proceeding.

At the post-conviction evidentiary hearing, Mr. Randolph presented multiple witnesses, both family and friends, who testified for the first time about the horrific childhood abuse Mr. Randolph suffered, including how his adoptive parents beat him and shut in a closet for days. (PCR. 3614-3681)

Trial counsel admitted that he conducted no investigation into Mr. Randolph's background in preparation for Mr. Randolph's penalty phase. Rather, trial counsel inexplicably testified that he delegated his responsibility as defense counsel to Dr. Krop, his mental health expert Trial counsel abdicated his obligation to

evidentiary hearing. After this Court reversed the consolidation of all cases, Mr. Randolph's claim became part of his 3.850 pending before the postconviction court. *See, Teffeteller v. Dugger*, 734 So. 2d 1009, 1017 (Fla. 1999).

determine what investigation needed to be conducted and relied on Dr. Krop to conduct the investigation himself, “to be the judge of what was relevant and to conduct any investigation.” (PCR. 3181, 3193). Trial counsel testified that he left it to Dr. Krop to be the judge of what was relevant in Mr. Randolph’s life to his mitigation case. (PCR. 3191-92). “Dr. Krop finds these things out. He selects those things which he feels are relevant to the testimony he wants to give.” (PCR.3194).

Postconviction counsel presented neuro-psychologist Dr. Hyman Eisenstein, who testified to finding statutory and non-statutory mental health mitigation, (PCR3. 3418-3490) and addiction expert Dr. Milton Burglass, who explained Mr. Randolph’s addiction and the effects of that addiction on his reasoning and thought processes. (PCR3. 3517-3542)

Mr. Randolph’s family and friends testified in striking detail about Mr. Randolph’s drug problems, emotional problems, child abuse and personal history. (PCR. 3614-3681). Because trial counsel failed to conduct a reasonable investigation as required under prevailing norms, the sentencing jury and judge never heard any of the mitigating evidence set out below.

At the evidentiary hearing Mr. Randolph's father, Timothy Randolph, testified that in 1969 or 1970, the school, concerned about Mr. Randolph's behavior, recommended that Timothy Randolph and his wife—Mr. Randolph's adoptive mother—Pearl Randolph, take Mr. Randolph to a psychiatrist for medication to control his behavior. (PCR. 3624). Mr. Randolph was medicated for over two years, and it seemed to help. (PCR. 3624-25). Timothy Randolph explained that he punished and beat Mr. Randolph to control his "disruptive behavior." (PCR. 3642-45). Timothy Randolph claimed that Pearl Randolph loved Mr. Randolph until she lost control when Mr. Randolph was a little boy. (PCR. 3645). Timothy Randolph said he divorced Pearl Randolph in 1972, when Mr. Randolph was 10, because of Pearl Randolph's drinking problem and resulting behavior. (PCR. 3619-20). When Pearl Randolph became intoxicated, she would frequently burn meals and engage in bouts of uncontrollable behavior. (PCR. 3620). Timothy Randolph also testified that they frequently argued in front of their son. (PCR. 3622). Timothy Randolph was contacted to attend the sentencing after Mr. Randolph was convicted but was never asked

to testify. Timothy Randolph explained that had he been asked to testify, he would have done so. (PCR. 3640).

Regarding Mr. Randolph's adoptive mother, Mr. Pearl testified he would have wanted Dr. Krop to inquire of Mr. Randolph's parents, (although he did not ask Dr. Krop to conduct these interviews) whether he, as counsel, had the information or not. Mr. Pearl said if Dr. Krop had had the information provided by Pearl Randolph, he would have elicited the information during Dr. Krop's testimony. (PCR. 3197).

During the evidentiary hearing, Pearl Randolph testified that Timothy Randolph had suggested they adopt a child. (PCR. 3660). Having never heard of adoption, Pearl Randolph was initially not agreeable, but eventually agreed. (PCR. 3660). Pearl Randolph explained that she went to an agency and after two years was told the agency had a boy child for her. They named the child Richard Barry Randolph. (PCR. 3661). During the first two years, Pearl Randolph noticed Mr. Randolph not acting normally. He cried such that Pearl Randolph believed something was out of the ordinary. (PCR. 3662-63). Mr. Randolph would have tantrums, grit his teeth and do unusual things. (PCR. 3663). Pearl Randolph noticed that

neither his hands nor feet developed normally. (PCR. 3663). Pearl Randolph came to believe that the adoption agency knew something was wrong with the infant or the birth mother but had not told her. (PCR. 3663). Mr. Randolph's unusual behavior continued as he grew up.

When Mr. Randolph was told that he was adopted he became extremely upset, started screaming and crying, and could not accept the news. Mr. Randolph was four- or five-years- old at the time (PCR. 3664-65).

Concerning the demise of her marriage to Timothy Randolph, Pearl Randolph said that it was Mr. Randolph who learned that his father was talking on the phone to other women, and that was who told her about the phone conversations. (PCR. 3665). Thus, it was Mr. Randolph's disclosure of his father's infidelity that led to the separation of his parents. After Timothy Randolph left Pearl, she saw Timothy Randolph harshly beat Mr. Randolph. (PCR. 3667). Pearl Randolph said she told Timothy Randolph to hit her instead and explained that Timothy Randolph had previously beaten her with a broom, injuring her and prompting her to call the police. (PCR. 3668). Pearl Randolph testified that she had to get

psychological help when she learned that Timothy Randolph was going to remarry. (PCR. 3671). Pearl Randolph usually relieved her emotional pain by drinking beer. (PCR. 3671). No one from Mr. Randolph's defense team ever attempted to contact Pearl Randolph by telephone or letter. Pearl Randolph explained that she would have testified on her son's behalf if asked. (PCR. 3676).

Mr. Randolph's stepmother, Shirley Randolph, also testified at the postconviction evidentiary hearing. Shirley Randolph explained how Mr. Randolph came to live with her and Timothy Randolph shortly after they were married and stayed until his senior year. Shirley Randolph described their relationship as not the best, but not terrible, (PCR. 3649) and explained that Mr. Randolph had a good relationship with Jermaine, his young stepbrother. (PCR. 3649). Shirley Randolph explained that Mr. Randolph did not speak about Pearl Randolph or express much emotion, (PCR. 3649), and he never saw Pearl Randolph while living with her and Timothy Randolph. To her recollection, Pearl Randolph never called, never sent for him, never came to visit, and never sent him a birthday card or even tried to call him on his birthday. (PCR. 3650-51). Shirley Randolph also admitted, however, that neither she nor

Timothy Randolph ever celebrated Mr. Randolph's birthday. (PCR. 3655). Shirley Randolph was never contacted by trial counsel or any other member of Mr. Randolph's trial defense team but would have testified had she been asked. (PCR. 3654).

In addition to family members, Mr. Randolph presented the testimony of other witnesses who had not been contacted by trial counsel. Janene Betts's mother, Verna Whitney Betts (PCR. 3297), testified that she met Mr. Randolph in Fairfield, North Carolina in 1986 when he 17. Mr. Randolph was Janene's boyfriend. (PCR. 3298). He called Verna Betts "mama" and wanted her to be his mother because she did not use punishment in the unusual and severe way his father had. (PCR. 3336, 3339). Mrs. Betts and Mr. Randolph became close. Mrs. Betts testified that Mr. Randolph had suffered severe punishment for minor things during his childhood. (PCR. 3318). His parents put him in a room or closet for two to three days in the dark and forced him to eat alone. (PCR. 3318, 3339). Mr. Randolph was required to be an A student by his father and tried and tried to get good grades to avoid punishment. Mr. Randolph felt badly because he saw Mrs. Betts's treatment of her children and it hurt him that he was not treated as a "real" child of

his father's or as well as his father's natural son. (PCR. 3319, 3324). Mr. Randolph felt like an outcast in his own family. (PCR. 3325). Mrs. Betts explained that when she saw Mr. Randolph get angry, many times she noticed he would bite himself on the arm, hand, and fingers. (PCR. 3321-22). Janene and Mr. Randolph's daughter displays similar behavior. (PCR. 3322). Mr. Randolph would also do things to harm himself when he was frustrated. (PCR. 3326). Mrs. Betts did not recall anyone from Mr. Randolph's defense team interviewing her. (PCR. 3302). She would have shared what she knew about Mr. Randolph or testified if asked. (PCR. 3302).

The postconviction court issued an Order denying relief on May 14, 1998. The court found that Dr. Eisenstein's review of the record included head injuries that occurred after Mr. Randolph was convicted in this case. The court also found that the non-statutory mitigators were testified to by Dr. Krop at trial. Lastly, the court found that Dr. Burglass' opinions were based on Mr. Randolph's self-serving statements after he was sentenced to death. (PCR. 4606-4607)

This Court denied Mr. Randolph’s appeal without comment on Dr. Eisenstein or Dr. Burglass’ opinions. *Randolph v. State*, 853 So. 2d 1051 (Fla. 2003).⁴ As to the lay witness testimony in mitigation, this Court held that there was competent, substantial evidence to support the postconviction court’s determination that “none of the witnesses at the evidentiary hearing offered any mitigation testimony in addition to that presented by Dr. Krop.” *Id.* at 1060.

d. Current Post conviction proceeding

On October 1, 2023 Mr. Randolph filed his timely Third Successive Motion to Vacate Judgements of Conviction and Sentence based upon newly discovered evidence. (PCR3.14-64).

⁴ Mr. Randolph also filed a first successive motion arguing his non-unanimous eight to four jury recommendation was unconstitutional based on *Ring v. Arizona*, 536 U.S. 584 (2002), which this Court denied, determining *Ring* didn’t render Florida’s scheme unconstitutional. *Randolph v. Crosby*, 861 So. 2d 430 (Fla. 2003). Mr. Randolph also argued that his death sentence should be set aside after the United States Supreme Court in *Hurst v. Florida*, 577 U.S. 92 (2016), determined *Ring* rendered Florida’s death penalty scheme unconstitutional. This Court then denied Mr. Randolph relief because this Court held Mr. Randolph’s case fell outside the window in which Florida death-sentenced individuals could obtain *Ring/Hurst* relief. *Randolph v. State*, 320 So. 3d 629 (Fla. 2021).

Newly Discovered Evidence

Mr. Randolph stated the following in his timely filed motion. In 2019, the New York legislature passed, and the Governor signed, Senate Bill 2019- S3419, codified as N.Y. Pub. Health Law § 4138-e (“The Act”), establishing the right of adoptees to receive a certified copy of their original birth certificate upon reaching the age of 18. The Act changed a 78-year-old New York law that had kept adoptions “closed” and shielded birth parents’ identities from disclosure. The Act went into effect January 15, 2020.

Mr. Randolph also alleged through counsel, that upon learning of the change in the law, he promptly applied for his pre-adoption birth certificate and after making diligent, continuous effort to obtain the birth certificate, received his pre-adoption birth certificate on October 4, 2022. (PCR3. 41)

Mr. Randolph alleged that this was the first time he knew or could have known the name of his birth mother. Upon receiving Mr. Randolph’s pre-adoption birth certificate, Mr. Randolph, through counsel, made timely diligent efforts to locate and speak to Mr. Randolph’s birth mother, Wanda Branch Kelly. Counsel contacted and spoke to Mrs. Kelly on October 26, 2022. In speaking to Mrs.

Kelly, counsel learned that the information relayed to Dr. Krop and, through him, to the jury and sentencing judge, about Mr.

Randolph's birth parents being college students was incorrect. In fact, the information given to the sentencing judge and jury about Mr. Randolph's adoption was not true or accurate.

Mr. Randolph stated in his motion that both his birth mother, Mrs. Kelly, and his birth father, Hayves Streeter, would testify to relevant facts. (PCR3. 23) Mr. Randolph explained the relevant facts in detail, meeting the pleading requirements necessary to be granted evidentiary development.

Mr. Randolph set out that Mrs. Kelly and Mr. Streeter were actually high school students when Mr. Randolph was conceived. Mrs. Kelley was 16 years old when Mr. Randolph was conceived and had just turned 17 years old when she gave birth. Mr. Randolph was not placed for adoption by a college student who was impregnated by another college student, but rather he was born to a 17-year-old girl, who went to a home for unwed mothers so that her then unborn baby could live. She was later made to give her baby up for adoption, a decision she didn't fully understand at the time, and one she wondered about for much of her life. (PCR3. 31)

Mr. Randolph also asserted that David M. Brodzinsky, Ph.D., an expert in the psychological impact of adoptions on children, interviewed Mr. Randolph, Mrs. Kelly, Mr. Streeter and reviewed documents describing the adoption that were obtained by post-conviction counsel. (PCR3. 33) Mr. Randolph attached Dr. Brodzinsky's report to his motion as required by Fla. R. Crim. P. 3.851(e)(2)(C)(iii). (PCR3 46-57).

Mr. Randolph asserted that Dr. Brodzinsky would testify about Mrs. Kelly's emotional and psychological suffering after choosing life for her unborn baby, and then learning of the abusive and neglectful childhood her baby experienced, and the nature of her new connection with her long-lost child, and the implications of that on Mr. Randolph as stated in Dr. Brodzinsky's report. (PCR3. P. 47-57)

Mr. Randolph further alleged that Mrs. Kelly would testify that she is now a retired widow, holds an advanced degree in business, had a successful career in the banking industry, and a long happy marriage. She never had any children of her own and often wondered what had happened to the baby boy she had given up for adoption. She now regrets not taking the initiative to have had more

of a say in keeping her baby, but as a child herself, she did not fully comprehend the significance of the situation and what rights she may have had.

Shortly after Mrs. Kelly married at 29 years old, she began a search looking for Mr. Randolph. She tracked down the adoption agency her family used, Spence Chapin, but they refused to provide any information based on New York law at the time. She also attempted to gain information from the hospital where he was born, City Hospital at Elmhurst, but all attempts were thwarted by New York's closed adoption laws. While Mrs. Kelly was deeply disappointed that no one would give her information on her son, she always remained hopeful that one day he would try and find her. (PCR3. 31-32)

When a CCRC-S investigator first contacted her, Mrs. Kelly was joyful and excited, but those feelings quickly turned to dismay when she learned of Mr. Randolph's legal situation. However, while recognizing the horrific nature of the crime, Mrs. Kelly and Mr. Randolph have nonetheless developed a relationship and bond that continues to this day. Both she and Mr. Randolph have found meaning – and healing - in getting to know each other. After

spending a lifetime believing he was unwanted, Mr. Randolph has finally learned that he was in fact very much wanted as an infant by his biological mother, and the lengths she has gone to in order to try and find him. *Id.*

Mr. Randolph further alleged that having been given the birth father's name, Mr. Randolph, through his counsel, contacted Mr. Streeter on July 12, 2023, in California, where he now lives. Mr. Streeter relayed that he met Mrs. Kelly as a high school student. Mrs. Kelly's mother and stepfather told him about the pregnancy when he had just started college. Mr. Streeter remembered that Mrs. Kelly's stepfather placed a gun on the table while telling him about the pregnancy. Mr. Streeter felt scared and threatened and interpreted it as a warning to stay far away from Mrs. Kelly. Mr. Streeter has had no contact with Mrs. Kelly since that day. He did not know that she had put their son up for adoption until informed by the CCRC-S investigator in July of 2023. This is significant to Mr. Randolph, as again, he was raised to believe that college students gave him up for adoption, not that his biological father was scared away and did not even know he was placed up for adoption. (PCR3. 33-34)

Mr. Streeter holds an advanced degree, has had a distinguished career as an engineer, has worked with government agencies and received awards. Mr. Streeter has been married twice, has adult children, and is now retired, working part-time teaching children math. (PCR3. 33-34)

Much like Mrs. Kelly, Mr. Streeter was shocked to hear about Mr. Randolph and the crime but would like to get to know his son and has begun the process of setting up a means to communicate with Mr. Randolph. *Id.*

Dr. Brodzinsky reviewed the psychological and emotional implications of the newly discovered evidence. Dr. Brodzinsky reviewed trial transcripts, evidentiary hearing transcripts and conducted clinical interviews of Mr. Randolph, Mrs. Kelly and Mr. Streeter. Dr. Brodzinsky would have testified that, “[t]he new information provides an important and previously undisclosed context for interpreting information already heard by the court.” The most important feature of this newly discovered evidence is the impact it had on Mr. Randolph as to what he felt and believed growing up. Believing he was unwanted when in fact Mrs. Kelly went to great lengths to try and find him. (PRC3. 47-57)

On October 23, 2023, the state filed a response. In its response, the state argued that while the identity of the birth parents can be “newly discovered” evidence, that the mitigating evidence that would be presented by Mr. Randolph at an evidentiary hearing is neither newly discovered or admissible, nor is it likely to produce a life sentence at trial. (PCR. 76).

After conducting a *Huff*⁵ hearing on November 14, 2023, the postconviction court summarily denied the motion in written order on December 11, 2023 (PCR3. 84-96)

The postconviction court correctly identified the Jones standard stating:

A Defendant under the sentence of Death may be provided relief if there is newly discovered evidence that would probably produce an acquittal or yield a less severe sentence on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*) *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (*Jones I*). To obtain a new trial based on newly discovered evidence, a Defendant must meet two requirements. *Jones II*, 709 So. 2d 512. First, the evidence must not have been known by the Trial Court, the party, or Counsel at the time of trial, and it must also appear that neither the Defendant nor Defense Counsel could have known of such evidence by

⁵ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

the use of diligence *Id.*, *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997). Second, the newly discovered evidence must be of a nature that would probably produce an acquittal on retrial or yield a less severe sentence. *Jones II*, 709 So. 2d 512.

(PCR3. 88)

However, in its written order, the court *questioned* the timeliness of the motion even though Mr. Randolph had asserted that his efforts were diligent and timely and nothing in the record refuted his assertions. Despite the court's speculative doubts about the timeliness of the motion, the postconviction court proceeded to analyze the claim on the second prong of *Jones*, 709 So. 2d at 521.

The court held that the proffered evidence was the “[t]hinest of new evidence,” and “not really newly discovered.” (PCR3. 91). The court also stated that, “While the State/AG argue convincingly, and the Court agrees, that the evidence Mr. Randolph anticipates to present is inadmissible, the Court finds, at best, the evidence could be admissible.” (PCR3. 91). The postconviction court then conducted a weighing analysis which was limited to the four aggravating factors when the court concluded: “Adding the alleged ‘newly discovered’ evidence to the calculus would not alter the

analysis of any of those aggravating factors.” The postconviction court did not mention that the trial court found virtually no mitigation in its Sentencing Order. (PCR3 p. 91).

SUMMARY OF ARGUMENT

The trial court erred in failing to grant an evidentiary hearing on Mr. Randolph’s newly discovered evidence claim. Mr. Randolph robustly pled and set out sufficient facts in his motion as required under Florida law to entitle him to evidentiary development on his claim. Mr. Randolph’s claim was not refuted by the record and thus an evidentiary hearing was necessary for the postconviction court to weigh the weight and credibility of the witnesses’ testimony in mitigation and consider that testimony against the totality of the evidence presented in this case, including that presented in prior postconviction proceedings. The postconviction court erred in finding that the evidence was “not really newly discovered,” that the evidence was inadmissible, and misapplied the law when focusing its weighing analysis to the four aggravating factors found at trial and failing to consider how little weight was given to mitigation at trial. The court erred in applying *Jones* in three significant ways: 1)

the court essentially applied a heightened standard of proof requiring Mr. Randolph to prevail on the *Jones* standard at the pleading stage, 2) weighed the credibility of the expert testimony without hearing from the witness, and 3) failed to weigh all the mitigation evidence cumulatively, including that previously presented, against the trial court's finding that virtually no mitigation evidence was presented. Mr. Randolph was sentenced to death by a bare 8 to 4 majority, thus under current law, he needed to persuade a single juror that the additional testimony would have served as a basis for a life recommendation.

Mr. Randolph's motion sufficiently pled facts that warranted a hearing as to whether a single juror could have been persuaded to vote for life knowing that Mr. Randolph's mother chose life for her unborn baby, even though she was only a teenager at the time of Mr. Randolph's birth, and that she loved her baby so much that she sacrificed placing him for adoption, believing that he would have a good home. Additionally, Dr. Brodzinsky's testimony shed new light and a fuller understanding of the implications of Mr. Randolph's adoption by cruel, alcoholic and mentally ill birth parents. Had the court heard this testimony, the court would have determined that,

based on the cumulative effect of all the evidence in this case, the new evidence would have resulted in at least one juror changing their vote and thus Mr. Randolph would have received a life sentence. Mr. Randolph went through life believing he was an unwanted child. Based on the newly discovered evidence, this was simply untrue, and the penalty phase jury never got to hear and consider the truth.

Mr. Randolph pled sufficient facts to warrant an evidentiary hearing on his newly discovered evidence claim; the court's denial of a hearing was error. This Court should reverse and grant Mr. Randolph an evidentiary hearing so that he can present evidence in support of his claim.

STANDARD OF REVIEW

The decision of whether to grant an evidentiary hearing on a rule 3.851 motion is a pure question of law subject to de novo review. *See State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

ARGUMENT

I. THE LOWER COURT'S DENIAL OF MR. RANDOLPH'S MOTION WITHOUT AN EVIDENTIARY HEARING WAS CONTRARY TO FLORIDA RULES OF CRIMINAL PROCEDURE, ESTABLISHED FLORIDA LAW AND VIOLATED MR. RANDOLPH'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The trial court erred when it summarily denied Mr. Randolph's timely successive post-conviction motion and in so doing violated Florida law, Mr. Randolph's due process rights to be heard and for a fair sentencing determination, and his Eighth Amendment right against cruel and unusual punishment. This Court should remand for an evidentiary hearing.

When reviewing a postconviction court's summary denial of a successive rule 3.851 motion, this Court accepts the factual allegations of the movant as true to the extent that they are not refuted by the record. *See generally* Fla. R. Crim. P. 3.851(f)(5)(B). This Court has instructed lower courts to liberally view the defendant's allegations to allow evidentiary hearings on timely raised claims that commonly require a hearing. *See generally*

Amendments to Fla. Rules of Crim. P. 3.851, 797 So. 2d 1213, 1219-20 (Fla.2001). Davis v. State, 26 So. 3d 519, 526 (Fla. 2009)

When assessing a newly discovered evidence claim, the postconviction court must first determine if the motion is legally sufficient. *Nordelo v. State, 93 So. 3d 178, 185 (Fla.2021)*. If the motion is facially sufficient, then the postconviction court must determine if the allegations are refuted by the record. *Id.*

This Court has repeatedly held “where there is no evidentiary hearing held below [the appellate court] must accept the defendant’s factual allegations to the extent they are not refuted by the record.” *Id. citing Peede v. State, 748 So. 2d 253,257*). It is only if the motion, files, and records in the case conclusively show that the movant is entitled to no relief, that the motion may be denied without an evidentiary hearing. *Henyard v. State, 992 So. 2d 120, 125–26 (Fla. 2008); Amend. to Fla. Rule of Crim. P. 3.851, 797 So. 2d 1213, 1219 (Fla.2001)*.

This Court has set forth a two-prong test that a defendant must satisfy *in order to obtain a new trial* in cases involving newly discovered evidence. While Mr. Randolph need not conclusively demonstrate that he would obtain relief in order to be granted a

hearing, a court must analyze a defendant's newly discovered evidence claim under the *Jones* framework. This Court has explained that to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See *Jones v. State*, 709 So. 2d 512, 521 (Fla.1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla.1996)). If the defendant is seeking to vacate a sentence, as Mr. Randolph is here, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See *Jones v. State*, 591 So. 2d 911, 915 (Fla.1991) (*Jones I*). Because Mr. Randolph received an 8 to 4 jury death recommendation, Mr. Randolph need only persuade a single juror to vote for life to receive a lesser sentence.

Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial. *Swafford v. State*, 125 So. 3d 760, 775–76 (Fla.2013).

In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a “total picture” of the case and “all the circumstances of the case.” *Id.* at 776 (quoting *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla.1999)). As this Court held in *Lightbourne*, and more recently in *Swafford*, a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal. *Swafford*, 125 So. 3d at 775–76; *Lightbourne*, 742 So. 2d at 247; *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. *Jones II*, 709 So. 2d at 521 (citations omitted).

In denying Mr. Randolph an evidentiary hearing, the postconviction court erred and misapplied the law and facts in

significant ways. The postconviction court stated that it was “genuinely concerned” that “this application is not timely.” (PCR3. 88); that the evidence was “not really newly discovered,” (PCR3. 91); agreed with the State that “the evidence Mr. Randolph anticipates to present is inadmissible [or] at best [] could be admissible,” (PCR3. 91); limited the focus of its weighing analysis to the four aggravating factors, failing to mention that the trial court found gave little to no weight to this mitigation at trial, (PCR3. 92)(PCR. 4310); and, dismissed Dr. Brodzinsky’s testimony as speculative without allowing Mr. Randolph to present his witness’s qualifications and the underlying basis for his opinion to establish that the testimony was not speculative in nature but grounded in science. (PCR3. 94).

These errors rendered the postconviction court’s conclusion that the proffered evidence would not have probably produced a lesser sentence – made without evidentiary development – erroneous. While the postconviction court, in denying Mr. Randolph an evidentiary hearing on the merits of his claim, correctly identified the *Jones* standard, the postconviction court erred in applying that standard at a heightened level, essentially requiring

Mr. Randolph to show he would prevail at the pleading stage. The court erred by dismissing expert testimony as speculative, doubting the timeliness of the motion, and failing to consider the trial court's mitigation determination at sentencing.

The postconviction court erred in not considering all the facts provided in the written documents as true, as well as a review of the entire record. When taken as true for purposes of evaluating the legal sufficiency of the motion, the factual allegations and [Randolph's] proposed [mitigating] testimony present a legally sufficient claim triggering an evidentiary hearing and were not conclusively refuted by the record. Only after holding an evidentiary hearing can the circuit court determine if the evidence is credible and newly discovered, and whether it would probably produce a different result on retrial—a separate issue requiring the circuit court to review the new evidence and the evidence that was presented at the original trial.

Nordelo, 93 So. 3d at 187.

a. The Motion Was Timely.

Mr. Randolph alleged that he could not have discovered his birth parents' identity, nor have spoken to them, until the change in New York law. He further alleged that he made timely and diligent effort to obtain his birth certificate, identify his birth parents, and speak to them. There was nothing in the record that disproved

these facts. The postconviction court's "concern" that the motion was not timely was unfounded and demonstrates a fundamental flaw with the court's approach to Mr. Randolph's motion.

b. The Proffered Evidence was Admissible.

Here the postconviction court accepted the state's flawed argument that certain facts were inadmissible but also ignored the facts that the postconviction court found "could be admissible." (PCR3. 91) The court, in adopting the state's erroneous argument focused on where the biological parents are now and what their lives are like, to characterize the proffered testimony as speculative as to how Mr. Randolph's life could have been different had he been raised by loving mentally-healthy parents. In so doing, the lower court erred.

The relevance of this information being relayed to a jury is not for the jury to speculate to "what might have been," but rather to show that Mr. Randolph "does not appear to have a genetic predisposition for criminality, substance abuse, or significant mental health," and thus the mitigating evidence of the abuse he suffered in childhood is more fully elucidated. A reasonable juror could see, based on the newly discovered evidence, that Mr.

Randolph did not have a genetic predisposition to criminal violence and that a significant contributing factor to his decision-making was the cruelty he suffered as a child from his adoptive parents- a fact which lessens his moral culpability – and upon which a reasonable juror could find as a basis to vote for life. (PCR3. 37) Mr. Randolph need only persuade a single juror to vote in favor of life to produce a life sentence.

Additionally, this previously unknown information provides a more complete understanding of Mr. Randolph as would have been explained by Dr. Brodzinsky. Mr. Randolph struggled all his life with “issues related to adoption and received no help from his adoptive parents in resolving them” (PCR3. 50) Mr. Randolph was greatly upset when he realized, shortly after being told of the adoption, that the extended family all knew, and he felt they all viewed him differently, because he was “not blood to them.” *Id.* He always felt unwanted which led to his feeling diminished and rejected as a person. (PCR3. 51).

The postconviction court’s determination that Mr. Randolph’s proffered evidence would be inadmissible was erroneous and violated Mr. Randolph’s Eighth Amendment rights. The court

evidenced a misapprehension of long-standing death penalty jurisprudence. It has been black letter law for approximately 50 years that a capital defendant is constitutionally allowed to present, and the court must consider, any aspect of a defendant's life or character that could reasonably be considered as mitigating. "[T]he concept of individualized sentencing [and the need for the sentencing court to have as much information about the individual before them] in criminal cases generally, although not constitutionally required, has long been accepted in this country." *Lockett v. Ohio*, 438 U.S. 586, 602, 98 S. Ct. 2954, 2963, 57 L. Ed. 2d 973 (1978). Thus, "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* 438 U.S. at 604. Mitigation can be found in broad categories of evidence and includes evidence that may move a juror to consider mercy based on the frailties of humankind that lessen moral culpability, which is exactly what the new evidence here would show. "To meet constitutional

requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608

Indeed, the postconviction court's acceptance of the State's unfounded argument at the CMC that the proffered evidence is inadmissible because it is not linked to Mr. Randolph's character or the crime is patently incorrect and constitutes a substantial violation of a capital defendant's right to present any evidence of mitigation to a judge and jury. The United States Supreme Court has ruled that a defendant *has a virtually unrestricted right to present any circumstance to a jury or judge for consideration as a reason to spare his life.* See *Smith v. Texas*, 543 U.S. 37, 44, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) ("[T]he jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold for relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'") (quoting *Tennard v. Dretke*, 542 U.S. 274, 284–85, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)). The evidence need not go to the crime itself or to aggravating factors. Mr. Randolph has met this low threshold as set out in his pleading.

The State's argument as to relevancy is inconsistent with clearly established federal law as set out by the Supreme Court of the United States. The State's unduly restrictive interpretation of *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) cannot be squared with *Smith* or *Tennard* and is simply wrong.

Further, Mr. Randolph's proffered evidence was not merely a repackaging of information that has already been presented as the postconviction court suggested, but it is the psychological and emotional implications of the discovery of his birth parents and more importantly, the truth about why he was placed for adoption and the profound impact it has on Mr. Randolph that needs to be considered and weighed with the other statutory and non-statutory mitigation presented in his previous postconviction hearing against the minimal presentation at his jury trial. The penalty phase jury was never given the entire picture of the facts surrounding his adoption or who his birth parents were.

c. The Court Weighed the Credibility of the Expert and the weight of the Evidence Without Taking Testimony.

The postconviction court further erred by weighing the evidence without hearing from any witnesses or viewing a single

piece of evidence. Denying Mr. Randolph, the right to present evidence, to suggest that he has been less than diligent without allowing him to present testimony to establish diligence, and to weigh the evidence or credibility of his proffered expert's testimony, without hearing from witnesses, is, respectfully, error.

Clearly, the newly discovered evidence, and Dr. Brodzinsky's explanation of the impact the newly discovered evidence has on Mr. Randolph, is relevant and mitigating, as is the testimony from Mr. Randolph's birth mother about her decision-making and search for Mr. Randolph a few years after giving birth. Mr. Randolph's trial counsel's minimal penalty phase presentation, lasting a half day and with only one sentence of testimony from Dr. Krop about the horrific abuse Mr. Randolph suffered at the hands of his adoptive father, produced an 8 to 4 jury recommendation. It cannot be said, without conducting a hearing, that this new evidence, would not have persuaded a single additional juror to recommend life.

Additional testimony that must be considered as part of the *Jones*' cumulative analysis includes testimony from the original postconviction proceedings. This testimony must be viewed in the

aggregate, not as diminishing the value of the newly discovered evidence.

Dr. Eisenstein, who testified at Mr. Randolph's 1997 postconviction evidentiary hearing, opined that Mr. Randolph presented with organic brain damage, and borderline personality disorder, and that these combined diminished Mr. Randolph's impulse control. (PCR. 3399, 3414) In explaining finding the existence of mental health statutory mitigation that had not been presented to the jury or found by the trial court, Dr. Eisenstein testified:

[H]e presented with extreme mental or emotional disturbance. I think that it rises to the level of impairment because of the variety of different head traumas, cognitive impairment due to the chronic drug usage as seen in the neuropsychological evaluation, the MMPI results, the history of learning disabilities, the emotional trauma that he sustained from growing up with the separation, the divorce. There is significant findings that are consistent with disturbance of both mental and emotional impairment that the individual has persistently shown consistent over a period of time.

(PCR. 3418)

Dr. Eisenstein also found the statutory mitigation of diminished capacity. (PCR. 3419). Dr. Eisenstein in explaining his findings coupled with the other factors mentioned by Dr. Krop concerning Mr. Randolph's upbringing opined that led to his inability to develop and to cope and to deal with failure, and that his drug use was either to self-medicate or to escape his own inability to deal with his own anger or frustration. (PCR. 3428-3429)

Further, when testifying about the non-statutory mitigating circumstances, which tied into the statutory mitigation of Mr. Randolph's upbringing, Dr. Eisenstein stated:

After interviewing both his mother and father and stepmother, what was clear is that he was raised in a house where there was chaos, there was confusion. There was abuse, which was something that Dr. Krop had mentioned. His father was a very demanding individual. And someone that Mr. Randolph never really was able to live up to his expectations.

One of the issues that goes to the issue of adoption is always one of abandonment or one's desire to seek out and to know the identity of their birth parent is certainly a traumatic event that anyone who is adopted wants to know the background and wants to know where they come from. There is something that lingers in the mind of the individual. And certainly, addresses and goes to the heart of the issue of one's self-esteem, of

one's own personality makeup and crisis and identity that they need to deal with. And that is assuming that the biological parents, that there is nothing out of norm, that is even in normal circumstances. And that is what I am referring to there. I am not even mentioning anything about what we don't know at this point. But anyway, the issues of abandonment and the attachment theory really go to the heart of the issue of non-statutory as far as adoption . . . the issue is that attachment theories would apply to the case of any adoptive individual who does not know their biological parents.

(PCR. 3489-3490)

The newly discovered information, *in addition* to all the testimony presented at the 1997 postconviction hearing, would change the vote of one juror and produce a life sentence. The trial court failed to consider the testimony of Dr. Eisenstein and Dr. Burglass in conjunction with the newly discovered evidence in summarily denying Mr. Randolph's Motion. To the extent that the court mentioned the 1997 testimony, the court appeared to weigh this evidence against the newly discovered evidence as a means to deny Mr. Randolph's claim without a hearing. This was the wrong analysis under *Jones*.

This Court should remand for the trial court to conduct an evidentiary hearing and consider the entire record. Mr. Randolph has met the minimal pleading requirements to warrant evidentiary development on his claim. This Court should reverse and remand for an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

This Court should reverse and remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I filed this document on May 21, 2024 using the Florida Courts' Efiling Portal which contemporaneously served Assistant Attorney General Doris Meacham.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word count and font requirements contained Florida Rule of Appellate Procedure Rule 9.045. The brief contains 9,646 words and uses Bookman Old Style 14-point font.

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