IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-34

ALBERT HOLLAND

Petitioner

vs.

JAMES V. CROSBY, JR., as Secretary of the Florida Department of Corrections

Respondent

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT

GROUND I

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE TRIAL COURT'S ORDER EXCLUDING ANY REFERENCE TO INTERNAL AFFAIRS RECORDS SHOWING OFFICER WINTERS' REPUTATION FOR USING EXCESSIVE FORCE

The cases cited by the Respondent do not support its position and, in fact to the contrary, are either distinguishable or require an opposite result than that urged. Respondent first cites Berrios v. State, 781 So.2d 455 (Fla. 4th DCA 2001), for the proposition that "[b]efore a victim's violent character may be introduced to prove the victim was the aggressor, there must be evidence of . . . an overt act by the victim at the time of the incident indicating a need for the defendant to act in self-defense." (Response at 15). But Berrios, which held a defendant was not entitled to elicit testimony concerning the victim's prior acts of violence ***because the defendant had failed to provide evidence to support a self-defense instruction***, is distinguishable for several reasons.

First, the facts in Berrios fall far afield of those at bar as Berrios was not in danger, could easily have ended the confrontation, and the weapon was not a firearm:

> Lora's alleged overt act of moving toward appellant with a knife as the appellant was sitting in his vehicle and in the process of backing away cannot reasonably be regarded as placing appellant in imminent danger of death or great bodily harm. Given the fact that the weapon allegedly used by Lora was a knife and not a firearm, appellant could have ended the confrontation and averted any threat of danger simply by driving away. Under these circumstances it was unreasonable for appellant to resort to deadly force.

Berrios v. State, 781 So.2d at 457 (citations omitted).

Second, unlike Berrios, ***Holland did adduce evidence supporting his theory of self-defense*** (See *infra*), making Officer Winters' violent character relevant.

Third, unlike the jury in Berrios, ***jurors at Holland's trial did receive a self-defense instruction***. Berrios rested on the lack of such an instruction.

Fourth, the deceased ***did commit overt acts at the time of the incident indicating a need for the defendant to act in self-defense***. Respondent has taken some literary license, omitting material facts from its account of the testimony adduced at trial concerning Officer Winters' overt acts at the time of the incident. State witnesses demonstrate a reasonable basis for Holland's claim of self-defense:

State witness Roland Everson testified that he heard noises and saw a police officer next to a marked K-9 unit holding a man in a headlock. (58-R-3492-3494). Everson heard 2 shots and saw the officer leaning on the side of the car. Holland was kneeling with the gun, hesitating before he eventually left. (58-R-3495-3498). State witness Betty Bouie testified she saw a police officer with a man in a face-to-face headlock and that the man had to reach over the officer's back to get the gun. (35-R-3516-3522). State witness Dorothy Horne testified she saw an officer and a man struggling over a gun. (59-R-3662). The men were close and their hands were moving up and down in the air (59-R-3664) when a shot rang out and the officer fell. (59-R-3664). State witness Dorothy Horne could not tell whose hands were on the gun. (59-R-3678). State witness Nicki Horne testified that the officer and the man were struggling before the gun discharged. (59-R-3685-3687). State witness Parish Horne testified the officer had Holland in a headlock when he reached around, got his hand on the gun and shot him. (59-R-3703-3704). State witness Abraham Bell testified he heard an officer say, "Hey you, get over here." When the man stopped and went back to the cruiser, the officer told the man to put his hands on the cruiser and he complied. When the officer placed his night stick in the man's back, a struggle ensued and the officer grabbed the man, placing him in a headlock and taking him down to the ground. (65-R-4320-4324). The man tried to rise to his feet and the officer hit him repeatedly

in the back with his nightstick. (65-R-4325-4326). When the officer finally lost his night stick (65-R-4327) the two began struggling over the firearm. (65-R-4327-4328-4330). The gun somehow came out of its holster during the struggle and discharged twice. (65-R-4331). Bell testified that both men's hands were on the gun (65-R-4347) when it discharged. (65-R-4355).

Respondent's contention that Abraham Bell did not testify that Officer Winters had his nightstick "stuck" in Holland's back is an exercise in semantics. Bell testified that, after Holland had already complied with Winters' command to place his hands on the car, Winters "reached down by having his nightstick in the man's back." (65-R-4324). It was only after Winters' overt acts of putting his nightstick into the (thus far) compliant Holland's back that Holland attempted unsuccessfully to strike back and the two men began to struggle. (Id). It was only after Winters' overt acts of placing Holland into a headlock, taking him down to the ground, and beating Holland in the back with his night stick that the struggle began over Winters' gun.

Also, Officer Butler testified Holland told him that Officer Winters threatened to put the dog on him and they struggled. When Winters drew his gun and threatened to shoot him, Holland got his hands on it, shooting him twice. (60-R-3745, 3834).

Palm Beach County Chief Medical Examiner, John Marracini, M.D., testified the physical evidence was consistent with Winters' effecting a face-to-face headlock with

both men's hands on the gun as it fired (67-R-4555); with both men's fingers inside the trigger guard (67-R-4559); with shots fired very rapidly (67-R-4566-4567) and the second shot caused by the struggle rather than an intentional act. (67-R-4570).

Threatening to put the dog on Holland, putting a nightstick in his back despite his initial compliance, putting him in a headlock, taking him to the ground, beating him in the back repeatedly with a nightstick and engaging in the final struggle in which both men had their hands on the gun as it left its holster, comprised overt acts by the victim that may have reasonably prompted Holland to act in what he believed to be self-defense to avoid being injured or killed by a dog, a nightstick and a firearm.

It is well established that "if there is the slightest evidence of an overt act by the victim which may reasonably be regarded as placing the defendant in imminent danger, all doubts as to the admission of self-defense evidence must be resolved in favor of the accused." Smith v. State, 606 So.2d 641, 642 (Fla. 1st DCA 1992).

As stated in the very case law relied upon by the State:

> Evidence of the dangerous character of the victim is admissible to show, or as tending to show, that the defendant acted in self defense. *See* Smith v. State, 606 So.2d 641, 642 (Fla. 1st DCA 1992); *see also* §§ 90.404(1)(b), Fla. Stat. (1999). The victim's character becomes relevant to resolve an issue as to the reasonableness of the defendant's fear at the time of the

> incident. See Lozano v. State, 584 So.2d 19, 23 (Fla. 3d DCA), *rev. denied*, 595 So.2d 558 (Fla.1992). Evidence of the victim's reputation is admissible to disclose his or her propensity for violence and the likelihood that the victim was the aggressor.

Berrios v. State, 781 So.2d at 458.

The other case cited by the Respondent, Sanford v. State, 785 So.2d 654 (Fla. 3rd DCA 2001), is directly contrary to the Respondent's position. Convicted of attempted first-degree murder, the defendant in Sanford appealed and the appellate court held it was harmful error to preclude him from introducing evidence of the victim's reputation for violence proffered to support his theory of self-defense. As the court stated in Sanford:

> Sanford testified that when he encountered the victim, the victim punched him in the face, that the victim had the gun and pulled the gun on him; Sanford struggled with the victim to avoid being shot. The gun went off during the struggle, and not before. This rendition of the events was clearly sufficient to support the introduction of the evidence regarding the victim's reputation for violence in the community. Where, as here, the defendant's sole defense rests on his assertion of self-defense, we cannot conclude that sustaining the state's objection was harmless error.

Sanford v. State, 785 So.2d at 655.

At the time of Holland's direct appeal, the law was clear that a person may defend themself against unlawful or excessive force, even when being arrested. Ivester v. State, 398 So. 2d 926 (Fla. 1st DCA 1981). While a person may not use force to resist arrest, he may use force to defend himself against the use of excessive force in making the arrest. Id. Where an accused asserts a theory of self-defense, evidence that the victim had a reputation for using excessive force is admissible.[1]

Not one of the cases relied upon by the Respondent in opposition to Issue I had been decided at the time of Holland's direct appeal. Holland's appellate counsel filed the Initial Brief in December 1998. Respondent's citations to cases decided ***after*** that

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[1] Where an accused proceeds on a defense that rests on the conduct of the victim, he may offer evidence of the victim's character as circumstantial evidence to prove that conduct. Section 90.404(1)(b), makes admissible evidence of a victim's character trait when offered by the accused to prove the victim acted in conformity with his or her character. If an accused offers evidence of the victim's character, the prosecution may offer evidence to rebut the defense evidence of the victim's character. *See* Section 90.404(1)(b)1 ("or by the prosecution to rebut the trait.").

Character evidence is admissible under section 90.404(1)(b) to prove the conduct of the victim when the conduct is a material issue. When the defense asserts that the accused acted in self-defense, evidence of the victim's character trait of violence may be admissible on the issue of who was the aggressor. Since the conduct of the victim is relevant or pertinent, section 90.404(1)(b) permits evidence of a pertinent character trait of the victim to be admitted as evidence of the victim's conduct. Evidence relating to the victim's violent character is admissible under section 90.404(1)(b) when offered by the defendant to prove that the victim was in fact the aggressor. It is offered to prove that, at the time of the alleged crime, the victim acted in conformity with a pre-existing character trait.

date are irrelevant to the effectiveness of Holland's appellate counsel in determining which errors to raise in the Brief, which must be determined according to the law as it existed at the time of direct appeal; not in retrospect.

"Appellate counsel's performance must be measured in terms of the law in effect at the time of the appeal, and not in hindsight." Smith v. Crosby, 2004 WL 574427 (Fla. 4th DCA March 24, 2004).

Each of the cases relied upon by Holland, *i.e.*, Melvin v. State, 592 So. 2d 356 (Fla. 4th DCA 1992); Banks v. State, 351 So.2d 1071 (Fla. 4th DCA), *cert. denied*, 354 So.2d 986 (1977); and Smith v. State, 606 So.2d 641, 643 (Fla. 1st DCA 1992), had been decided at the time of Holland's direct appeal.[2]

Not one of the cases relied upon by the Respondent to deny relief had been decided at the time of Holland's direct appeal. Respondent's summarizations of the decisions in Melvin, Banks and Smith, *supra*, fail to distinguish them in any meaningful

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[2] *See also* Marcum v. State, 341 So.2d 815 (Fla. 2nd DCA 1977) (reversible error to refuse to allow defendant to introduce witness testimony on deputy sheriff's reputation for aggressiveness and violence relative to the issue of who was the initial aggressor); Cole v. State, 193 So.2d 47 (Fla.1st DCA 1967) (reversing manslaughter conviction where trial court disallowed evidence that decedent had record for cuttings and was a violent man); Fine v. State, 70 Fla. 412, 70 So. 379, 381 (1915) (evidence of victim's reputation admissible to prove "who really began the difficulty.").

way. To the contrary, the application of these cases to the present facts argues forcefully for reversal.

For the foregoing reasons and those set forth in the original Petition on this Issue, Holland should be accorded a new trial.

GROUND II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S ERROR IN REFUSING TO DISCHARGE TRIAL COUNSEL AS HOLLAND'S CLAIMS THAT TRIAL COUNSEL WERE NOT BEING TRUTHFUL TO HIM OR TO THE COURT WENT UNREFUTED

This Ground for Relief has nothing to do with the *credibility* of Holland's allegations that defense counsel had done nothing in his case for at least six months and were being untruthful to him and the trial court concerning their activities.

Respondent fails to address the central issue in Ground II of the Petition, *i.e.*, whether appellate counsel unreasonably failed to raise or discuss the trial court's error in refusing to discharge appointed defense counsel in light of the fact that Holland's testimony that defense counsel had done nothing to advance the case in six months

and had made untruthful representations to him and to the trial court went unrefuted.[3]

Instead, Respondent attacks Holland's character, casting him as someone whose procedural history demonstrates that his allegations were not credible, including (often without citation to the record) (Response, Pages 23-24), allegations nowhere contained in its Statement of Facts, with digressions to events at a former trial (Response, Pages 23 n.4, 25 n.5, 31 n.6), the propriety of which is not at issue.

Respondent also accuses Holland no less than five times of having launched into a what Respondent characterizes as a "tirade" in which he complained about being treated unfairly and not receiving effective assistance of defense counsel. (Response, pages 23, 26, 28, 30, 31). Respondent also attempts (again without citation to the record) to explain-away trial counsel Evan Baron's equivocation concerning his lack of contact even with Holland's father (Response, 32-33), which Mr. Baron had, in fact, ultimately ***admitted***. (37-R-1486).[4]

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[3] Prior to trial, Holland moved to discharge appointed counsel, asserting their incompetence, which the trial court refused without inquiry. (36-R-1383). Trial counsel later moved to withdraw (37-R-1403) and the trial court began a Nelson inquiry. (37-R-1405, *et seq*.). Holland requested substitute counsel. (37-R-1411). The trial court again denied Holland's motion to discharge counsel. (37-R-1438). It is to these latter proceedings alone that Ground II is directed.

[4] Baron stated that in the 1 to 1½ years since his appointment (37-R-1407) he had only prepared for trial by reading old medical records, keeping abreast of new medical reports and speaking on 2 occasions with Holland's father (once by phone) without "any cooperation at all" (37-R-1479). (Deficiencies in the investigation of the

Holland's allegations concerning attorney James Lewis' failure to do anything to advance the case and that Lewis was being untruthful in claiming that Holland had refused his attempt to visit him are not addressed.[5]

This Ground for Relief has nothing to do with whether Holland's defense

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facts in mitigation are discussed in Point II of Holland's collateral appeal). When Holland noted that Baron did not even have Holland's father's telephone number, Baron admitted: "I guess I don't. The last time I tried calling the number it was disconnected." (37-R-1486). The follow exchange then occurred:

> THE DEFENDANT: Right. See when did you talk to him on the telephone?
> MR. BARON: Before I spoke to him in person the last time. I spoke to him in person when he was down here.
> THE DEFENDANT: In February.
> MR. BARON: Whenever that was.

(37-R-1486). The foregoing took place in August 1996, *i.e.*, 6 months later. (Id.).

[5] When Lewis stated he had visited Holland to see if he had copies of depositions he requested, claiming Holland refused to discuss it, Holland responded:

> DEFENDANT: That's not true. You only went over a week ago. When did you come back over? No. Nobody told me when you came over. When did you come over and check that? You never did. You're just lying.
> It was over a week ago, you talked to me for about eight minutes....I don't know why he's standing here lying.

(37-R-1493-1494). Though Holland's allegations about appointed counsel's conduct remained unrefuted, his request to discharge counsel was simply denied.

counsel *actually* lied to Holland or the court, whether Holland launched into "tirades" or what occurred at a former trial. Instead, this Ground turns on whether the evidence was sufficient to support a finding that counsel were competent where Holland's testimony that they were being untruthful about their activities went unrefuted.

As to the substance of Ground II of the Petition, Respondent merely states: "Simply put, there were no factual allegations that were unrefuted at the hearings." (Response, page 33). Respondent's conclusory statement does not overcome the record facts set forth in footnotes 4 and 5, *supra*. Respondent cites to no portion of the record in which Baron or Lewis refuted Holland's allegations that they had done little to advance the case in six months and that Lewis was not telling the truth.

Respondent's contention that "Holland has not cited a single case in support of his assertion that the trial court erred by not discharging counsel in this case" (Response, page 33) is refuted by reference to pages 24-25 of the Petition, wherein Petitioner cites to both Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973), and this Court's approval of that decision in Hardwick v. State, 521 So.2d 1071, 1074 (Fla. 1988), in asserting the evidence that Holland's appointed trial counsel were incompetent, that they had done nothing new to advance the investigation for more than six months and had misrepresented facts to Holland as well as to the trial court remained unrefuted. Unlike Branch v. State, 685 So.2d 1250, 1252 (Fla. 1996) (where

"[t]he record contain[ed] competent substantial evidence to support the trial court's ruling" following a Nelson inquiry), the ruling in the present case simply ignored Holland's unrebutted testimony–forcing him to trial with counsel who had done virtually nothing in the previous six months on this case in which the State was aggressively seeking the death penalty. As the evidence did not support the trial court's ruling, appellate counsel was remiss in failing to raise and discuss this issue on direct appeal and, had he done so, Nelson itself would have required reversal.

GROUND III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE OR DISCUSS THE TRIAL COURT'S DENIAL OF ADDITIONAL PEREMPTORY CHALLENGES AS HOLLAND'S CHALLENGE FOR CAUSE OF A RACIALLY BIASED JUROR WAS IMPROPERLY DENIED

The State's contention that "Holland's factual assertions are factually incorrect" (Response, page 34) suggests--inaccurately--that the petition alleges Juror Keith Mulford remained on the jury for the entire trial. Nowhere does the Petition make such an allegation. Instead, the Petition correctly states that Mulford was selected and seated as a juror (Petition, page 31) (citing to 50-R-2905). It was only ***after*** Mulford was selected, sworn and seated on the panel (50-R-2911), and only ***after*** the panel's

alternate jurors had been selected and sworn (51-R-2923), that the courtroom Deputy informed the trial court that another Deputy had told him that Juror Mulford had stated: "I can't do this" (51-R-2926) and he was excused (51-R-2934).

The State's argument that Holland's never identified a specific juror he would have stricken had he received the requested peremptories (Response, page 37) is not supported by the record, which shows instead that when it had exhausted its peremptory challenges, the defense requested six more based on the racial disparity ("it is almost completely devoid of minority representation. . . there is only one black woman on the jury of twelve") (50-R-2894), of which the trial court granted only two. (50-R-2894). When the defense exhausted the two, it requested additional peremptories (50-R-2901) which the trial court denied. (50-R-2901-2902). The defense then renewed its challenge to Juror Mulford, noting the State still had seven remaining peremptories. (50-R-2902). The defense renewed its request for additional peremptories, which the trial court denied and Mulford was seated on Holland's jury. (50-R-2905). Only one of the twelve jurors was African-American. (50-R-2893).

The State's contention that the fact Juror Mulford was not one of the jurors who ultimately decided the case somehow cures this harmful error is without merit. The prejudicial impact of the trial court's refusal to excuse Juror Mulford for cause until after Holland had expended all of his peremptory challenges, until after he was refused

additional peremptories and until after the original alternates had already been selected is that Holland was denied peremptory challenges needed to ensure he was tried by a jury of his peers.

Appellate counsel's failure to raise or discuss this error on direct appeal was a serious deficiency measurably below objective standards of reasonably effective representation in a capital case but for which there remains a reasonable probability the case would have been reversed and remanded on direct appeal. A new trial is required.

GROUND IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL FUNDAMENTAL ERROR INHERING IN THE TRIAL COURT'S UNEXPLAINED INCREASE IN HOLLAND'S ORIGINAL SENTENCE FOR ARMED ROBBERY FROM 17 YEARS TO LIFE IN PRISON AFTER HOLLAND EXERCISED HIS RIGHT TO APPEAL

The trial court gave no good reason why it increased Holland's sentence for the Robbery in Count II of the Indictment from 17 years, as imposed at the original sentencing, to Life in Prison, as imposed on remand. In the absence of any record showing of intervening conduct on Mr. Holland's part to support such an increase, the vindictiveness of imposing such a sanction should be presumed.

In Gilliam v. State, 582 So.2d 610 (Fla. 1991) (citing North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)), this Court held that running a Life sentence for sexual battery consecutive to a death penalty for murder on remand, constituted the imposition of a more severe sentence than the Life sentence originally imposed concurrently with a death penalty--and concluded the sentencing judge should have given reasons for the more severe sentence, remanding for resentencing. *A fortiori*, an increase from 17 years to Life without good reasons, as in the present case, comprises an increased sentence warranting a presumption of vindictiveness.

That the sentences are worlds apart in quality is illustrated by the fact that Holland has nearly completed, day-for-day, the 17-year term as originally imposed.

The cases cited by Respondent are clearly distinguishable for several reasons. First, not one of the cases cited by Respondent was decided at or before the time of Holland's direct appeal. Holland's case became final when his direct appeal was affirmed in Holland v. State, 773 So. 2d 1065 (Fla. 2000), on October 5, 2000. Only cases decided prior to that date may be said to have reasonably guided Holland's appellate counsel. As none of the cases cited by Respondent was decided prior to the time Holland's appeal was briefed, argued and decided, it may be said the Respondent has cited absolutely no law in support of its position concerning this ground for relief.

Additionally, Trotter v. State, 825 So. 2d 362 (Fla. 2002), a drug trafficking

case, merely held that where a sentencing error (failure to apply a drug trafficking multiplier) is corrected on remand and results in a less severe sentence *on a single charge*, there is no presumption of vindictiveness. At bar, in contrast, the sentence for the single charge of Robbery was increased from 17 years to Life in Prison without any record reasons to conclude the original sentence had been miscalculated.

The First District case cited by the Respondent, James v. State, 845 So. 2d 238 (Fla. 1st DCA 2003) (a drug case involving possession of a firearm by a convicted felon which challenged solely habitual offender sanctions), is also distinguishable not only because it was decided two and a half years ***after*** Holland's direct appeal was briefed, argued and decided, but also because there was no challenge in that case to the *judgments of guilt* automatically rendering the sentence more onerous should the appellate court find the trial court erred also concerning a more serious charge.

James appealed solely his *sentences* for possession of a controlled substance within 1000 feet of a school and possession of a firearm by a convicted felon. James' sole issue on appeal was whether the trial court erred by imposing a habitual felony offender sanctions for the firearm possession conviction upon resentencing. James v. State, 845 So. 2d at 239. The Respondent's injection of such a sharply distinguishable case into its opposition to this ground for relief (where the trial court gave absolutely no good reason why it increased Holland's sentence for the Robbery

in Count II from 17 years to Life in Prison) is, at the very least, unavailing.

Respondent's reliance on Van Loan v. State, 779 So.2d 497 (Fla. 2nd DCA December 6, 2000) (published 2 months ***after*** Holland's opinion on direct appeal), for the proposition that Holland must, but has failed to, show actual vindictiveness is also unavailing. The Van Loan Court, in fact, reversed and remanded for resentencing precisely because "the trial judge never pointed to specific facts that would justify an upward departure" from the sentencing guidelines. Van Loan v. State, 779 So.2d at 500. The same is true at bar where the sole reason given by the trial judge for increasing Holland's 17-year sentence to Life in Prison was that the capital offense in Count I was an unscorable offense that was not taken into account in the original guidelines sentence. As in Van Loan, *supra*, the trial court's "conclusory statements do not satisfy the requirement that the reasons for departure be shown by a preponderance of the evidence." 779 So.2d at 500.

By departing upward from the guidelines to sentence Holland to Life rather than to the original 17 years on Count II based solely on the fact that the Legislature and this Court elected to make capital offenses "nonscorable" simply because Holland exercised his right to appeal denies due process. Had Holland refrained from exercising his right to appeal, conversely, he would have been spared this assurance that should his death sentence be vacated, he will serve the rest of his life in prison.

As the Response cites no law in existence at the time of Holland's direct appeal and fails to show that the reasons for departure were shown by a preponderance of the evidence, this Court should reverse and remand, at the very least, for resentencing.

CONCLUSION

For the foregoing reasons and those set forth in the original Petition, Holland should be accorded a new trial with directions that, if re-convicted, the trial court not impose a sentence in Count II greater than that received at the initial sentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was furnished to: (1) Assistant Attorney General Debra Rescigno, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, (2) Susan Bailey, Esquire, Office of the State Attorney, 201 S.E. Sixth Street, Suite 675, Fort Lauderdale, FL 33301,(3) Hon. Charles M. Greene, 201 S.E. Sixth Street, Fort Lauderdale, FL 33301, and (4) Albert Holland, #122651, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-4410, by United States Mail, this _____ day of _____, 2004.

CERTIFICATE OF FONT AND TYPE SIZE

This petition is word-processed utilizing 14-point Times New Roman type.

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