IN THE SUPREME COURT OF FLORIDA

THOMAS OVERTON,

Appellant,

vs. Case No. SC04-2071

STATE OF FLORIDA,

Appellee.
_______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT,
IN AND FOR MONROE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, THOMAS OVERTON, was the defendant in the collateral proceedings below and will be referred to herein as either "appellant", or "Overton." Appellee, the State of Florida, was the plaintiff in the collateral proceedings below and will be referred to herein as "the State." Reference to the entire record on appeal will be by the symbol "ROA followed the appropriate page number."

STATEMENT OF THE CASE AND FACTS

Appellant has been before this Court on one prior occasion. In 2001, Overton's convictions for two counts of first degree murder, sexual battery, burglary and the killing of an unborn child, were upheld. Overton v. State, 801 So. 2d 877 (Fla. 2001). The facts leading up to Overton's arrest and conviction as recounted by this Court were as follows:

> The discovery of this death scene produced a large-scale investigation, and comparable media coverage focused on the murders. Over the years following the murders, law enforcement agencies investigated several potential suspects. Through this investigatory process, Thomas Overton's name was brought up during a brain-storming session in May 1992. The reason he was considered a suspect was because he was a known "cat burglar," whom police suspected in the murder of 20-year-old Rachelle Surrett. At the time of the MacIvor murders, Overton worked at the Amoco gas station which was only a couple of minutes away from the MacIvor home. Janet Kerns, Susan's friend and fellow teacher, had been with Susan on several occasions when Susan pumped gas at that Amoco station. No further investigation was undertaken with respect to Overton at that time.
>
> In June of 1993, the cuttings from the bedding were sent to the FDLE lab in Jacksonville where James Pollock, an expert in forensic serology and DNA identification, proceeded to examine the cuttings. Through a process known as restriction fragment length polymorphism ("RFLP"), Dr. Pollock was able to develop a DNA profile from two of the cuttings (i.e., one cutting from the fitted sheet and another from the mattress pad).

Specifically, the profile was developed by examining the DNA at five different locations, known as loci, within the chromosomes. Dr. Pollock compared the profile to samples from several potential suspects. No match was made at that time.

In late 1996, Overton, then under surveillance, was arrested during a burglary in progress. Once in custody, officers asked him to provide a blood sample, which Overton refused. Days later, Overton asked correction officers for a razor, and one was provided. Overton removed the blade from the plastic razor using a wire from a ceiling vent, and made two cuts into his throat. The towel that was pressed against his throat to stop the bleeding was turned over to investigators by corrections officers. Based on preliminary testing conducted on the blood from the towels, police obtained a court order to withdraw the defendant's blood for testing.

-In November of 1996, over five years after the murders, Dr. Pollock was able to compare the profile extracted from the stains in the bedding to a profile developed after extracting DNA from Overton's blood. After comparing both profiles at six different loci, n6 there was an exact match at each locus. Dr. Pollock testified that the probability of finding an unrelated individual having the same profile was, conservatively, in excess of one in six billion Caucasians, African- Americans and Hispanics.

In 1998, the cuttings from the bedding were submitted to yet another lab, the Bode Technology Group ("Bode"). Dr. Robert Bever, the director at the Bode lab, testified as to the tests which were conducted on the bedding and the resulting conclusions. The Bode lab conducted a different DNA test, known as short tandem repeat testing ("STR"), from that performed by the FDLE.

Overton's DNA and that extracted from a stain at the scene matched at all twelve loci. These results were confirmed by a second analyst and a computer comparison analysis. Asked to describe the significance of the Bode lab findings, Dr. Bever testified that the likelihood of finding another individual whose DNA profile would match at twelve loci was 1 in 4 trillion Caucasians, 1 in 26 quadrillion African Americans and 1 in 15 trillion Hispanics.

In addition to the presentation of the DNA evidence, the State presented the testimony of two witnesses formerly incarcerated in the same facility with Overton. The first was William Guy Green, who testified that Overton had admitted to him that Overton had "done a burglary at a real exclusive, wealthy, wealthy area down in the Keys. The guy had his own airplane and a private airway and he could land his plane in his front yard." Overton further told Green that when he went into the house, he "started fighting with the lady," whom he later described as a "fat bitch," and that "she jumped on his back and he had to waste -- waste somebody in the Keys." Green also testified that Overton stated that he had struggled with another person inside the house. Green further testified that Overton spoke to him about specific action he would take when he committed burglaries. Among these precautions were the cutting of phone lines before going into the house to stop victims from calling out or to stop automatic alarm systems; he would always wear gloves, and he would bring with him a "kit," consisting in part of a gun, knife, gloves and disguises. Green also testified that Overton told him that the "best time" to commit a burglary would be during a power outage or severe storm.

The second informant to testify was James Zientek, who met Overton at the Monroe County Jail in May 1997. Overton, who believed that Zientek was a hardened

criminal from New York, sought Zientek's assistance to carry out a plan that would relieve Overton from the pending charges. Specifically, Overton planned to give Zientek significant details of the MacIvor murders, and then have Zientek contact authorities and inform them that another inmate by the name of Ace had provided such details. Using Overton's logic, this would create reasonable doubt and he would be found not guilty. Therefore, during the course of several months, according to Zientek, Overton gave Zientek precise details of what occurred in the MacIvor home on the night the couple was murdered. Overton also showed Zientek pictures related to the crimes, which Overton had obtained to assist his attorneys in preparing his defense. Specifically, Overton told Zientek that he had met Susan at the Amoco gas station where he worked. Overton believed that he had a "hot and cold type relationship" with Susan; some days she was polite to him and others she was "cold and bitchy." There came a point when Susan stopped coming to the gas station. However, according to Zientek, Overton retrieved Susan's address from either a check or a credit card receipt. Zientek testified that Overton informed him that he had surveilled the house on several occasions. On one occasion, Overton had observed Michael doing construction work at the lower level of the house. Another time, he said he had intended to enter the home, but did not because he realized that the MacIvors had company.

Turning to the events on the night of August 21, 1991, Overton told Zientek that he went to the home carrying a bag, which contained, among other things, a police scanner. He described his attire as being a Ninja-type suit, consisting of a mask, black military-style fatigues and gloves. One of the first things Overton completed when he arrived was the cutting of phone wires. He then positioned a ladder against the balcony that surrounded the house, but in the

process of moving the ladder, he made a noise. A light in the house came on which caused him to wait outside for approximately twenty minutes before ascending the ladder. Once he reached the balcony, Overton cut some clothesline, "popped" the sliding glass door to the spare bedroom and gained entry into the home. He walked around the house and saw the MacIvors sleeping in their bedroom. He proceeded to walk throughout the house, but suddenly he heard a noise and observed Michael walking over to the kitchen and opening the refrigerator. Overton said he panicked and that his adrenaline started rushing. Michael started looking around as if he sensed that something was wrong. Michael walked out of the kitchen and through the area where Overton was then standing. Overton then approached Michael from behind and "slammed him in the back of the head" with a pipe he had found at the house. Zientek testified that "the blow to the head with the pipe didn't immediately knock him out. There was a struggle and Mr. Overton knocked him out with his fist." While Overton was attempting to restrain Michael, Susan ran out of the bedroom screaming. He chased her back into the bedroom and temporarily restrained her, using articles he found inside the bedroom to bind her. Overton tried to calm Susan by stating that as long as everyone cooperated no one would get hurt. However, Susan began to plead with him, inquiring "Why are you doing this to me?" She told him that she was married, and began to plead with Overton for her husband's and baby's life. Overton also admitted to Zientek that Susan had stated: "I know who you are."

At that point, Overton became "concerned about the male just being temporarily knocked out. He knew that he wasn't dead." He then proceeded to place a sock over Michael's eyes and covered his face with masking tape. According to Zientek's testimony, Overton did not strangle Michael at that point. Instead, he went back into

the master bedroom and raped Susan. When he had completed his attack, Overton said he strangled her because he "doesn't leave any witnesses." He also stated that either in the process, or after completing the strangulation, Overton noticed motion in her stomach, placed his hand over it, and felt the fetus move.

Overton then returned to the living room area "where the male was apparently just becoming conscious." Overton then kicked Michael in the abdominal area and proceeded to strangle him with "some kind of cord." Overton "made it very clear that he doesn't leave witnesses." Overton also explained to Zientek that the reason why he placed a sock over Michael's eyes and tape around his head was because he thought that as he strangled Michael, his eyes would bulge out and he would bleed through his nose.

Appellant continued to show Zientek photographs from the scene. When Zientek saw a picture of a shell casing and a bullet hole in the curtain, he asked Overton, "Why would they take a picture of that?" Overton replied that the casing and the bullet hole had nothing to do with the crime. Overton further stated that he "confused the crime scene" and ripped pages from the address book in the bedroom because he believed it would lead the police to think that the attacker wanted to remove the assailant's name from the phone book. Overton also told Zientek that he took things "nobody would realize were gone." The only item which neither law enforcement officers nor the families were able to account for were several pictures that Susan had taken that weekend of her pregnant stomach. Overton essentially concluded by informing Zientek that he entered the house with the intent to rape Susan.

Zientek also testified that while looking at autopsy photos of one of the victims, he began to vomit. Overton started to laugh and

cautioned Zientek to not get the pictures wet. Overton also showed Zientek a picture of a small chalkboard in the kitchen where one of the victims had written "renew life insurance." Overton laughed and said something to the effect that, "You don't think they knew what time it was?"

The primary thrust of the defense in the case was centered upon a theme that law enforcement officers, Detective Visco in particular, had planted Overton's semen in the bedding, which was essential to the prosecution. The defense theorized that Detective Visco obtained the defendant's sperm from Overton's one-time girlfriend, Lorna Swaybe, transported the sample in a condom, and placed it on the bedding. n8In an attempt to substantiate this fabrication of evidence theory, the defense consulted Dr. Donald Wright, a forensic pathologist. The doctor suggested that the defense examine the samples from the bedding for Nonoxynol-9, a compound contained in spermicidal condoms. Relying on this advice, the defense caused the samples to be sent to the lab at the Consumer Products Testing Company in New Jersey.

In the sample labeled as originating from the bottom sheet, the lab director, Mr. Trager, found 53 micrograms of Nonoxynol-9. The state attorney's office requested a confirmatory test and submitted two new cuttings from the bedding sheet. In the first sample, Trager found 50 micrograms of Nonoxynol-9. In the second sample, Trager also found an undetermined amount of Nonoxynol-9. Also, 11 micrograms of Nonoxynol-9 were found in a sample from the comforter. On cross-examination by the State, Trager testified that there are various forms of Nonoxynol and that the tests he performed did not provide a basis to distinguish whether the Nonoxynol-9 found on the bed sheet was of a spermicidal nature, or whether it was a commercial grade of Nonoxynol-9 commonly used in household

detergents. Although he acknowledged that the perpetrator could have been wearing a condom which might have torn during the course of the struggle with Susan, Dr. Wright continued to opine that the seminal fluid forming the stain on the fitted sheet had been planted through the use of a condom.

Several factors were elicited during cross-examination. A spermicidal condom contains 25 to 35 milligrams of Nonoxynol-9. It may be concluded that there are usually 25,000 to 35,000 micrograms of Nonoxynol-9 in one spermicidal condom. In this case, 53 micrograms were found from the first test sample and 50 micrograms from the second test sample. Dr. Wright further noted that the initial report he received from Mr. Trager (i.e., the report that led Wright to believe that the seminal fluid had been planted) indicated that the amount found was 53 milligrams (there are 1000 micrograms in 1 milligram), but that a revised report indicated that there had been a typographical mistake and that the actual amount of Nonoxynol-9 present was only 53 micrograms. Dr. Wright candidly admitted that he did not know the amount of Nonoxynol-9 normally contained in a condom when he initially suggested that the seminal fluid had been planted; nor did he know that not all condoms contain Nonoxynol-9 or that Nonoxynol-9 was used in detergents.

In response to this defense expert's testimony presented to support the fabrication theory, the State presented one rebuttal witness, Mr. Richard Oliver, a chemist from the Home Personal Care Industrial Ingredients Division of a national laboratory, the company which is the sole manufacturer in the United States of Nonoxynol-9 as a spermicide. Oliver testified that Nonoxynol-9 is not only used as a spermicide (i.e., spermicidal Nonoxynol-9), but it is also commonly

incorporated as an ingredient in household detergents (i.e., commercial grade Nonoxynol-9). Mr. Oliver testified that as a manufacturer, his company could possibly tell the difference between the two types, given a "significantly large sample." He added, however, that after either type of the chemical has been "put out into the environment and say, placed on other objects," there is no test to distinguish between the two types of Nonoxynol-9. After reviewing the results of the tests performed by Mr. Trager, Oliver concluded that the correct methodology had been used, but based upon sample quantities extracted from the fitted sheet, there was absolutely no way to determine whether the Nonoxynol-9 found was spermicidal (from a condom) or commercial grade (from detergent). Oliver further opined that it is "most likely" that residue amounts of the commercial grade Nonoxynol-9 remain after the rinse cycle in a standard washing machine. Ultimately, during closing arguments, the State argued both that the perpetrator might have been wearing a spermicidal condom, or that any amount of Nonoxynol-9 found in the fitted sheet was residue which remained after the sheet had been washed.

At the conclusion of the guilt phase proceedings, the jury found Overton guilty of the first-degree murders of Susan and Michael MacIvor. The jury also returned guilty verdicts as to the charges of killing an unborn child, burglary, and sexual battery.

At the penalty phase, the State presented only victim-impact evidence, and relied on the testimony from the guilt phase proceedings in support of the aggravating factors it sought to establish. The defendant declined to present any evidence in mitigation of the death penalty and unequivocally stated on several occasions that he did not want his attorneys to present any mitigating evidence, nor would

he permit them to make any arguments on his behalf. After concluding the penalty phase deliberations, the jury recommended imposition of the death penalty by a vote of nine to three as related to the death of Susan, and as to Michael MacIvor, the jury recommendation favored the death penalty by a vote of eight to four.

The trial court found the following aggravators as to both victims: (1) the crimes were heinous, atrocious and cruel ("HAC"); (2) the murders were committed in a cold, calculated and premeditated manner ("CCP"); (3) the defendant has been previously convicted of another offense involving the use of violence (contemporaneous murder); (4) the murders occurred during the commission of a sexual battery and burglary; and (5) the murders were committed in an attempt to avoid arrest.

With regard to mitigation, the court considered, pursuant to section 921.141(6)(h), Florida Statutes (1999), the defendant's family background, military record, employment record, possible history of substance abuse and possible mental health problems. The judge concluded that nothing in the defendant's background could be classified as a statutory mitigating circumstance. As to nonstatutory mitigators, the court found that the defendant would be incarcerated for the rest of his life with no danger of committing any other violent acts, but gave this factor little weight. The court also recognized the defendant's courtroom demeanor and behavior as a nonstatutory mitigating factor, and accorded it some weight.

The trial court ultimately determined that "in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestionably to the side of death." Accordingly, the judge imposed the death penalty upon Overton

> for the murders of Susan and Michael MacIvor. As to the other offenses, Overton was sentenced to 15 years for the killing of an unborn child and to two terms of life imprisonment for the burglary and sexual battery

Overton, 801 So. 2d at 884-889.

Subsequent to the filing of appellant's initial brief, the trial court entered an order on February 14, 2005, denying all relief in appellant's motion for postconviction relief.

The trial court held two separate hearings on appellant's two motions for DNA testing. At neither hearing did appellant ever seek to introduce any evidence in support of the argument presented in his written motion. (ROA 37-56. 139-151).

SUMMARY OF ARGUMENT

Issue I - The trial court concluded correctly that appellant did not provide sufficient factual support regarding his request for DNA testing, because regardless of the results, the information would neither exonerate him of the crime or mitigate his sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT DENIED PROPERLY APPELLANT'S REQUEST FOR DNA TESTING OF TAPE USED TO RESTRAIN THE VICTIM DUE TO APPELLANT'S INABILITY TO DEMONSTRATE A NEXUS BETWEEN THE DNA TEST RESULTS AND THE IDENTITY OF THE MURDERER

In circuit court, appellant sought permission to test strands of dark hair, for the presence of DNA, that had adhered to tape that was used to bind the female victim's hands and cover her eyes. Such testing was sought pursuant to Florida Rule Criminal Procedure, 3.853. In support of that request, appellant relied on one fact; a visual inspection of the hairs revealed that they neither belonged to appellant, or the victims, Missy and Michael MacIvor. (ROA 74-76). Appellant therefore concluded that the hair had to belong to the actual perpetrator of the murders. The trial court denied the request finding that appellant did not present sufficient facts pursuant to 3.853(b)(4). (ROA 58, 84-86).

On appeal, and relying on Ortiz v. State, 884 So. 2d 70 (Fla. 2004), appellant claims that the trial court concluded erroneously, without the benefit of hearing any testimony, that there was insufficient facts presented which demonstrate his entitlement to relief. Appellant argues, "[a]ltough, these hairs were visually excluded as coming from either the victims or Mr. Overton prior to trial, they were never tested for DNA. If the hairs do not match either Mr. Overton of [sic] either of the victims, they should indicate the identity of the persons who bound the female victim." **Initial brief at 13.** A review of the pleadings and arguments made below and on appeal demonstrate that the trial court concluded correctly that appellant's request was based on erroneous assumptions not supported by any facts.

During litigation of appellant's motion for postconviction relief pursuant to 3.851, Overton filed two motions pursuant to rule 3.853, wherein he requested permission to test various items for the presence of DNA. Included in both motions was a request to test cuttings of tape that were found on both victims. The tape was used to bind the ankles of the female Missy MacIvor and the hands of the male victim, Michael MacIvor. (ROA 141-142, 21, 75). In the initial motion filed on March 26, 2004, Overton alleged the following, "There are tape cuttings from both bodies. The tape can be swabbed to find out who last

touched it; the ends may give a profile of who tore it off." (ROA 21). At a hearing on the motion, (ROA 35-55), the state objected to the request for testing arguing that simply because another person's hair attached itself to the tape[1] at some point in time is not proof that this same person murdered the MacIvors. (ROA 16, 47). Appellant did not attempt to bolster the conclusory assertion with any additional facts. On May 14, 20004, the trial court denied the request based on the following,

> The defendant claims that, if found, DNA on the rope cuttings, item # 31, and the tape cuttings, item #24, would indicate who touched those items last. That assertion is obviously erroneous. Any DNA present would show no more that than one or more persons touched the cuttings at some point in the past. There would be no way to demonstrate when the DNA was deposited or, if the source of the DNA was not the Defendant or either victims, that the donor was a participant in the crime.

(ROA 29).

On August 10, 2004, less than a month prior to commencement of the evidentiary hearing in the 3.851 proceedings, Overton filed a second motion for DNA testing. Therein he again requested that item #24. He pled as follows,

> These hairs were visually inspected and determined not to belong to either the victims or Mr. Overton. This piece of

[1] The tape cuttings were labeled item #24 for identification.

> evidence was pertinent to the crime were not subject to DNA testing. Mr. Overton seeks to have such items tested.

(ROA 75). At a second hearing, appellant again relied on the completely baseless assumption that because a visual inspection of the hairs determined that the did not belong to Overton or either of the victims, than they **must** belong to the killer. (ROA 135, 145-146). Again the trial court asked appellant to satisfy the requirements of 3.853 (b)(3)& (4), and provide a factual statement that would explain how the hair strands attached to the tape would provide the identity of the murderer and therefore either (1) exonerate appellant or (2) mitigate his sentence. In response Overton twice conceded that the results of the DNA testing <u>would not exonerate him</u>. (ROA 142, 146). With regard to how the results would mitigate the sentence received, counsel curiously admitted the following;

> I'm not saying it would, but I think that it would put into play the fact that there were <u>additional perpetrators</u> in this crime and that my client should not be on death row when the <u>other perpetrators who are equally culpable</u>, could be walking the street as we speak.

(ROA 147). However, Overton did not provide the court with the name or names of any of these alleged "<u>additional</u> perpetrators" whose DNA would presumably match the DNA found on the tape

cuttings. Nor did Overton explain how he could concede his own culpability above and yet simultaneously insist that he is completely innocent of these murders.[2] See generally Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2002)(upholding denial of request for DNA testing because results could not refute evidence that defendant was present and was also participating with co-defendant in the crimes). The state asserts that the illogical nature of this argument underscores its complete lack of merit.

The trial court reaffirmed its original ruling finding the request to be based on nothing but inferences and assumptions rather than facts. (ROA 146, 147-148). A written order was entered the following day. The trial court's order in total was as follows:[3]

> If the DNA evidence had been admitted at trial, there is no reasonable probability that the Defendant would have been acquitted or would have received a lesser sentence. Specifically, even assuming that the source of the hairs in question is a person other than the Defendant or one of the victims, that information is of no consequence. First of all, there is no way to determine where the tape itself came from, that is, was it in the MacIvor's residence before the

[2] Appellant's defense at trial was that his semen was planted at the crime scene by law enforcement personnel from Monroe County Sheriff's Department. Overton v. State, 801 So. 2d 877 (Fla. 2001).In the postconviction proceedings, appellant maintained that same theory of defense.

[3] Appellant recounts only a portion of the court's order in the initial brief.

> break-in or was it brought to the crime scene by the perpetrator? Secondly, the fact of the matter is that tape is a sticky substance which can easily pick-up a few strands of hairs in a variety of ways and from a variety of sources. For example, the pieces of hair in question could have been on the tape prior to the commission of the crimes, or the pieces of hair could have been left in the MacIvor residence weeks, months, or even years before the crimes by a legitimate guest and then picked up by the tape at the time of the crimes. In view of the fact that it is impossible to establish when and how the pieces of hair became attached to the tape, DNA testing is of no use or significance.

(ROA 85).

Appellant's inability to establish the necessary link between DNA found on the unknown hair and the identity of the murderer was fatal to his claim. On appeal, he has simply repeated his unfounded assumptions that, "[t]he hairs were found stuck in between the bindings over the female victim's eyes and hands. As such, it is likely that the hair came from the perpetrator who bound the female victim" **Initial brief at 16** Appellant has never explained how the presence of an unknown person's hair on the tape used to bind the victim proves that this unknown person was the murderer. There is no statement explaining the origin of the tape; and there is no statement describing when and where the unknown hair was posited on the tape. Because appellant did not properly plead the motion pursuant to 3.853 (b)(3), his baseless and speculative request

was denied properly. See King v. State, 808 So. 2d 1237, 1247-1248 (Fla. 2002)(upholding denial of request for DNA testing of hair found on victim's nightgown as it was not possible to discern how, when or where the hair had been transferred to the victim); Tompkins v. State, 872 SO. 2d 230, 242-243 (Fla. 2003)(rejecting argument that DNA testing would have provided relief for defendant given that any DNA evidence obtained from items found on or near victim's body was, "unreliably contaminated due to the location of the remains").

In his brief, Appellant relies on, Ortiz. However, the facts therein are clearly distinguishable and actually underscore the weakness of appellant's argument. Ortiz, convicted of sexualbattery sought to test semen found on the, "anal, vaginal, and oral swabs from the rape kit, the victim's clothing and the victim's saliva." Ortiz, 884 So.2d at 71.[4] These facts established the requisite nexus between the contributor of the DNA and the identity of the rapist. For instance, the DNA sought in Ortiz was contained in semen, not in hair as in the instant case. And in Ortiz the DNA was found either inside the victim's body or on the clothing the victim wore at the time of the attack. Id. Obviously, the sexual nature of semen along with facts which can pinpoint when and how

[4] The trial court granted Overton's request to test the sexual assault kit and fingernail scrapings from Ms. MacIvor. (ROA 62-63).

the DNA was left at the scene, establish its relevancy to the inquiry at hand. See also Huffman v. State, 837 So. 2d 1147, 1148-1149 (Fla. 2nd DCA, 2003)(finding that DNA testing on the contents of rape kit in sexual battery case could provide exculpatory evidence of accused). Appellant cannot demonstrate that same. Strands of hair attached to a role of tape that was at some point used to bind a victim does not establish the identity of that same victim's rapist and killer. Relief was denied properly, as the results of the DNA testing would neither exonerate appellant or mitigate his sentence of death. King; Tompkins.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's DENIAL of appellant's request of DNA testing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Lucrecia Diaz, Office of the Capital Collateral Regional Counsel, 101 N.E. 3rd Ave. Suite 400, Fort Lauderdale, Florida, 33301, this ____ day of March, 2005.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

____
CELIA A. TERENZIO
Assistant Attorney General