IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2353

JOEL DALE WRIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
141 N.E. 30th Street
Wilton Manors, FL 33334
(305) 984-8344

NEAL DUPREE
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of a post-conviction motion. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"1PC-R." -- record on appeal of denial of first Rule 3.850 motion;

"2PC-R." -- record on appeal of denial of first Rule 3.850 motion after remand;

"3PC-R." -- record on appeal of denial of this second Rule 3.850 motion;

"Supp. 3PC-R." -- supplemental record on appeal of denial of this second Rule 3.850 motion.

REQUEST FOR ORAL ARGUMENT

Mr. Wright has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Mills v. State, 786 So. 2d 532 (Fla. 2001) Swafford v. State, 828 So. 2d 966 (Fla. 2002); Roberts v. State, 840 So. 2d 962 (Fla. 2002).

In each one of these cases, this Court granted oral argument even though the appeal arose from the denial of a successive motion for post-conviction relief. In opposing oral argument Appellee makes no effort to distinguish these cases. To deny Mr. Wright an oral argument here while granting oral argument to similarly situated individuals, could only be characterized as arbitrary and capricious. As such, it would constitute a violation of due process. 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 and the stakes at issue. Mr. Wright, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY TO THE STATE'SSTATEMENT OF THE CASE AND FACTS

In reply to the Statement of the Case and Facts contained in the Answer Brief, Mr. Wright notes that not only has the State refused to accept the factual allegations contained in Mr. Wright's current motion to vacate, the State relies upon an FDLE report that was not introduced to evidence and has not been subject to an adversarial testing of any kind.

The State completely ignores the fact that Mr. Wright's request for DNA testing was as to the hair evidence that was introduced into evidence. The State completely ignores the fact that the results of the DNA testing that was requested by Mr. Wright were exculpatory. On March 1, 2005, MitoTyping Technologies forwarded a report on its analysis of the hairs (3PC-R. 283-85). The report concluded that Mr. Wright, the victim and their maternal relatives were not the contributors of the two tested hairs (3PC-R. 285). The report also concluded that the mitochondrial DNA sequences of the two tested hairs were different and therefore that the hairs were contributed by two different people (3PC-R. 285). As a result, the hair evidence taken from the victim and introduced against Mr. Wright at his trial did not originate with either the victim or with Mr. Wright. The presence of foreign pubic hair on the victim's

body that was not Mr. Wright's is evidence that he did not commit the rape and/or the murder.

Completely ignoring the test results favorable to Mr. Wright, the State relies upon the test results obtained from FDLE. The testing conducted by FDLE was not requested by Mr. Wright. As his counsel explained below, previous DNA testing on the rape kit had been inclusive and counsel was advised that all of the evidence was consumed in the course of the testing. The State advised the circuit court that it opposed testing the hair evidence unless the rape kit, Exhibit 56, was also tested by FDLE. The testing of the rape kit was at the State's request.

In fact, Mr. Wright's counsel objected to having FDLE examine Exhibit 56 because "FDLE was involved in this case pre-trial" and "FDLE employees in fact were called as witnesses by the State at Mr. Wright's trial" (3PC-R. 227). Mr. Wright's counsel noted that during the conference call about this matter, "the State's position was that it would not agree to any examiner other than FDLE" (3PC-R. 228). Mr. Wright's counsel suggested that Orchid Cellmark Diagnostics examine Exhibit 56 for DNA material (Id.). In light of the State's assertions at the December 19, 2003, hearing that the crime scene was contaminated and dirty and that therefore any results of DNA testing would be of no value, Mr. Wright's counsel requested an

evidentiary hearing regarding the contamination of the crime scene (3PC-R. 228, citing Swafford v. State, Fla. Sup. Ct. No. SC03-931 (Fla. Mar. 26, 2004) (ordering an evidentiary hearing on contamination of crime scene)).

After FDLE reported results favorable to the State,[1] Mr. Wright was denied the opportunity to have an examiner of his choice test the rape kit. No evidentiary hearing was conducted on the contamination issue raised by Mr. Wright even before the testing occurred. In fact, no evidentiary hearing of any kind was permitted, even though DNA testing had produced conflicting results from the different examiners involved.

Ignoring the conflict in the results of the DNA testing, ignoring the unresolved contamination issue, ignoring the fact that the FDLE results were not admitted into evidence and subjected to the crucible of adversarial testing, the State relies upon the FDLE testing results as conclusive. The State's treatment of the FDLE results is inconsistent with this Court's longstanding jurisprudence that the factual allegations of the Rule 3.850 movant are accepted as true unless conclusively rebutted by the record. The State's reliance on the FDLE

[1]According to FDLE, the DNA profile from the "vaginal swabs and slides" matched the DNA profile of Mr. Wright "at all loci tested" (3PC-R. 293). The DNA profile from the "anal swabs and slides" matched the DNA profile of Mr. Wright "at six (6) STR loci plus amelogenin" (3PC-R. 293).

testing here is akin to allowing the State to present affidavits not subject to cross-examination to refute the factual allegations contained in a Rule 3.851 motion. McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993) ("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims").

STANDARD OF REVIEW

In its Answer Brief the State inexplicably asserts: "This Court does not substitute its judgment for that of the trial court on issues of fact when competent, substantial evidence supports the circuit court's factual findings. *See*, Windom v. State, 886 So. 2d 915, 921 (Fla. 2004). This is NOT the standard in cases in which the circuit court summarily denied a Rule 3.850 motion, and did not conduct an evidentiary hearing. Deference is not accorded to the circuit court's summary denial of a motion to vacate. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

ARGUMENT IN REPLY

The State in its Answer Brief chooses to not address Mr. Wright's arguments in order, but to address three of Mr. Wright's arguments (I, II, IV) together in one section of its brief. The result is a very confusing hodgepodge in which the State camouflages the fact that it has no argument to make as to the fact that Mr. Wright pled due diligence.

I. DILIGENCE.

The State early in its argument entitled, "Claims I and II and IV", makes reference to Mr. Wright's need to show due diligence, and cavalierly states, "Wright has made no such showing in this case." (Answer Brief at 17). However, a "showing" can only be made at an evidentiary hearing. In cases in which an evidentiary hearing has not been held, the question is whether the movant pled due diligence. In its Answer Brief, the State does not address Mr. Wright's pleading and whether due diligence is properly pled.

Mr. Wright's motion included affidavits from Ronald Thomas and Idus Hughes. The Thomas and Hughes affidavits themselves explain in detail how and when Thomas learned that Hughes possessed relevant information, how and when Thomas contacted Mr. Wright, and how and when an investigator contacted Thomas and, through him, Hughes. In his motion and in his oral arguments in the circuit court, Mr. Wright repeatedly alleged

that he did not discover Ronald Thomas until Thomas wrote to Mr. Wright in 2003 and did not discover Idus Hughes until after talking to Thomas. There is absolutely nothing in the record to refute Mr. Wright's allegations in this regard. There is nothing in the record to suggest that Mr. Wright should have known to contact Mr. Thomas prior to the receipt of his letter in August of 2003.

Moreover, the record is clear that Mr. Wright did not obtain the results of the mitochrondial DNA testing until March of 2005. As Mr. Wright indicated in circuit court, the results of the mitochrondrial DNA testing could not have been obtained until the circuit court permitted the testing. Mr. Wright alleged due diligence.

These allegations must be accepted as true. Accepting them as true, they are sufficient, at the least, to require an evidentiary hearing regarding Mr. Wright's diligence. *See* Lightbourne v. State, 742 So. 2d 238, 245-46 (Fla. 1999).

II. BRADY/GIGLIO CLAIM.

The State in its Answer Brief asserts that there was no meritorious Brady/Giglio claim because "Ron Thomas had no information that was imparted to the State prior to 2003." (Answer Brief at 20). Accepting Ron Thomas' affidavit as true,

the State's assertion is false. Mr. Thomas swore in his affidavit as follows:

> 8. Sometime after Jody Wright and Charles Westberry were arrested for murder I ended up going back to Palatka, from Tomoka Correctional Facility, for my parole violation charge. I went back sometime in 1983. At first, I was in the County Jail. One of the guards asked me if I wanted to stay over in the City Jail. I said yes because the food was better and the City Jail was not as crowded. Before I left the County Jail a detective told me that I was going to be put in a cell with Charles Westberry. The detective told me to find out what Charles did with the bloody clothes.
>
> 9. I was put in a cell with Charles Westberry. I tried to talk with Charles about the school teacher who was murdered, but he would only say that he did not want to talk about it. A few days later I went to court on my charge and eventually I was sent to Lake Butler and continued serving my prison sentence.

(Supp. 3PC-R. 15-17).

According to Mr. Thomas' affidavit, he was sent in as a state agent to try to obtain information from Westberry, specifically what Westberry did with the bloody clothes. This information was not disclosed to the defense.

The State besides arguing that "Thomas had no information that was imparted to the State prior to 2003", alternatively argues that contrary to what Mr. Wright asserts in his Initial Brief, there is no indication that Mr. Westberry ever told his wife, Paige, about the existence of bloody clothes. According to the State:

> There are no record cites to these facts. Paige did not testify to these facts at trial. (TT2472-2476). This claim is built on speculation.

(Answer Brief at 21).

The record belies the State's contention in this regard. At trial, Mr. Westberry was asked if he had told Paige "that when [he] saw Jody at the trailer, that his shirt was covered with blood?" Mr. Westberry responded, "No, sir." (R. 2172). Later in the cross-examination, he indicated that when Mr. Wright came inside the house that morning, Mr. Westberry did not see any blood on Mr. Wright or his clothing (R. 2175). Subsequently, Mr. Wright's counsel called Paige as a witness and failed to ask her whether Mr. Westberry had told her that Mr. Wright was covered with blood.

During the previous Rule 3.850 proceedings, Mr. Wright alleged that trial counsel was ineffective in this regard. During trial counsel's testimony, he was shown an April 18, 1983, sworn statement by Paige Ann Westberry. Trial counsel identified the sworn statement as one that was provided to him before Mr. Wright's trial (PC-R. 829). Thereupon, Paige's sworn statement was introduced into evidence as Def. Ex. 4. This statement provides:

> Charles said that Jody had come to his trailer about 7:00 to 7:30 that Sunday morning. Jody knocked on the window and told Charles to get up and open the door. Charles said that he got up and went to the door.

> When he opened the door, he saw that Jody was covered with blood.

(PC-R. 297). Despite having this statement which indicated that Mr. Westberry had told Paige a story that conflicted with his trial testimony and despite having told the jury in his opening statement that he would impeach Mr. Westberry through Paige, trial counsel failed to elicit any testimony regarding Mr. Westberry's statement to her that Mr. Wright was covered with blood (PC-R. 417). In the previous 3.850 proceedings, Mr. Wright argued that this failure was ineffective assistance of counsel (PC-R. 417-19).

Clearly, the State's contention that there was no evidence in the record that Paige had advised the police that Mr. Westberry was covered with blood is bogus. Paige's sworn statement to that effect was introduced into evidence at the 1988 evidentiary hearing.

Moreover, accepting Mr. Thomas' affidavit as true, which the State refuses to do, it is clear that either Mr. Westberry also told law enforcement that Mr. Wright was covered with blood or law enforcement suspected that Mr. Westberry had been covered with blood. Either way, the State knew that Mr. Westberry's claim that he had never indicated that Mr. Wright was covered with blood was false testimony, and in fact, the

State found something suspect about Mr. Westberry's story, suspect enough to warrant sending in a fellow inmate to try to get to the bottom of the matter. For exactly the same reasons that the United States Supreme Court found Beanie's statements to law enforcement were undisclosed exculpatory evidence that warranted a new trial in Kyles v. Whitley, 514 U.S. 419 (1995), Mr. Thomas' affidavit if true demonstrates the presence of undisclosed exculpatory evidence that when considered cumulatively with all the other undisclosed exculpatory evidence warrants a new trial.

Further, it demonstrates that the State knew that Mr. Westberry was not telling the truth when he denied during cross-examination[2] ever indicating that Mr. Wright was covered with blood.

III. NEWLY DISCOVERED EVIDENCE CLAIM.

---

[2]The State seems to suggest that if there is false testimony from a State's witness and the State knows the testimony is false, there is no duty to correct the testimony if the false testimony occurs during the cross-examination by the defense attorney (Answer Brief at 22). That is simply not the law. In Napue v. Illinois, 360 U.S. 264 (1959), the false testimony first occurred during the cross-examination. In ordering a new trial, the United States Supreme Court made it clear that who elicited the false testimony was not pertinent, if the State knew the testimony was false and did not correct it. Id. at 269 ("The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.").

As to Mr. Wright's argument that the affidavits of Mr. Hughes and Mr. Thomas and the mitochondrial DNA results are newly discovered evidence, the State argues "If the information did not exist until 2003, it is not newly discovered under Jones because it did not exist at the time of trial." (Answer Brief at 24). This assertion seems designed to inject a red herring into the case. Mr. Hughes' affidavit sets forth information, *i.e.* his observations the night of the homicide, which he explains he did not tell anyone until he spoke to Mr. Thomas in 2003. Accepting Mr. Hughes' affidavit as true as required by law, his observations and his knowledge of his observations did exist at the time of trial, but he had not told anyone.

Similarly, Mr. Thomas was sent by law enforcement into Mr. Westberry's jail cell before Mr. Wright's trial in order to find out what Mr. Westberry did with the bloody clothes. Again, these are events that had occurred prior to Mr. Wright's trial that were not revealed by either Mr. Thomas or by the State to Mr. Wright until 2003.[3]

---

[3]As to Mr. Thomas' affidavit, the State says that Mr. Wright "does not explain how information that Westberry really did have Wright's bloody clothing would help Wright." (Answer Brief at 27). In making this assertion, the State is engaging in sleight of hand tricks. Mr. Wright's claim is that Mr. Westberry is a **LIAR**. He made up a story to his wife, Paige. And because it was a made up story, he could not keep track of the details, that is a common problem for liars. As a result, every time he told the story facts changed. By the time he testified at

Finally, the hair evidence was introduced at trial. The mitochondrial DNA testing demonstrates that the foreign hair did not come from Mr. Wright.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The State asserts that "Wright intersperses ineffective assistance of counsel claims within his newly-discovered claims in an attempt to avoid a procedural bar." (Answer Brief at 27). Perhaps the State believes this inaccurate statement because as noted earlier in this brief, the State is apparently unaware of the fact that during the 1988 evidentiary hearing Paige Westberry's sworn statement was introduced into evidence in support of an ineffective assistance of counsel claim.

Now from Mr. Thomas, Mr. Wright has learned that the State possessed information regarding law enforcement's efforts to get another jail inmate to try to pump Mr. Westberry for

---

trial, he had to lie and say that he had not told Paige that Mr. Wright was covered with blood because other witness inside his house said that they saw Mr. Wright and did not see any blood.

But besides the fact that Mr. Westberry is a liar, the State **KNEW** that he was lying when he said that he had not told Paige that Mr. Wright was covered with blood, and the State did not correct Mr. Westberyy's false testimony. *See* Napue v. Illinois, 360 U.S. at 269 ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.").

information regarding the bloody clothes that Paige discussed in her sworn statement. Clearly, the State believed the discrepancy was important, and clearly, the State was distrustful of Mr. Westberry's truthfulness and candor in his statements to law enforcement. Yet, not only did the State sit on this information at the time of trial, it sat on the information during Mr. Wright's prior 3.850 proceedings.

V. DNA RESULTS.

The State's position seems to be that the circuit court was entitled to weigh the DNA results the State obtained from FDLE and consider them against the mitchondrial DNA results that were favorable to Mr. Wright and decide which results to accept without the benefit of an evidentiary hearing. The State's position is simply erroneous.

According to well established law, factual allegations made by a 3.850 movant are to be accepted as true unless conclusively rebutted by the record. Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). The same standard applies to successive motions. Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989)(As to a successive postconviction motion, allegations of previous unavailability of new facts, as well as diligence of the movant, are to be accepted as true and warrant evidentiary development so long as not conclusively refuted by

the record). *See* McClain v. State, 629 So. 2d 320 (Fla. 1st DCA 1993) ("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims").

The report from FDLE regarding the results of its DNA analysis cannot under the well established law rebut the mitochondrial DNA results that Mr. Wright relies upon. The movant's factual allegations must be accepted as true. If the State goes outside the record to refute Mr. Wright's factual allegations, it has conceded the need for evidentiary hearing. Relying upon the FDLE results that have not been introduced into evidence and subjected to an adversarial testing, constitutes going outside the record. An evidentiary hearing is warranted.

VI. CUMULATIVE CONSIDERATION.

In arguing against cumulative consideration the State ignores the law as set forth by the United States Supreme Court.

In the Brady context, the United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). This Court has recognized that previously denied Brady claims

must be reheard and evaluated cumulatively when new Brady evidence is discovered. In Lightbourne v. State, 742 So. 238 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for post-conviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.**
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).**

Lightbourne, 742 So. 2d at 247-248 (emphasis added) (citations omitted).[4]

[4]To the extent that this Court while denying Mr. Wright's previous 3.850 motion that it would not revisit Brady claims previously found meritless, this Court's ruling is inconsistent with Kyles and with Lightbourne. Wright v. State, 857 So. 2d

In addition, this Court has repeatedly recognized that the prejudice prong of an ineffective assistance of counsel claim must be evaluated cumulatively with any Brady evidence. Evidence that the State failed to disclose and evidence that counsel was ineffective should be considered cumulatively in determining whether the jury's failure to know of the unpresented exculpatory evidence undermines confidence in the guilty verdict. Mordenti v. State, 894 So. 2d 161 (Fla. 2004); State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Given what this Court said while previously denying Mr. Wright's claims under Brady, *i.e.* without more, prejudice was not demonstrated, the matter must be revisited in light of Kyles and Lightbourne, in order for the requisite cumulative analysis to be conducted. A cumulative analysis requires noting each piece of undisclosed favorable information that the State possessed and considering how that evidence cumulatively and synergistically could have effected not just the jury, but the manner in which the defense approached the case. Certainly, the failure to disclose the names of the witnesses with material information, impacted the manner in which defense counsel would

---

861, 871 (Fla. 2003). Brady claims that are found meritless because the undisclosed exculpatory information did not undermine the Court's confidence in the outcome must be revisited if additional undisclosed exculpatory information turns up.

have investigated and presented his case. Scipio v. State, 31 Fla. L. Weekly S114, 2006 Fla. LEXIS 261 (Fla. February 16, 2006). In State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court noted that "the question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the factfinder but rather upon its impact on the defendant's ability to prepare for trial." The issue is how could Mr. Wright's counsel at trial use the suppressed evidence. Kyles, 514 U.S. at 446 ("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.").

Further, as the United States Supreme Court explained:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply insufficient evidentiary basis to convict.

Kyles, 514 U.S. at 434-35. In fact, the Supreme Court in Kyles specifically noted, "the effective impeachment of one eyewitness

can call for a new trial even though the attack does not extend directly to others, as we have said before." Id. at 445.

When the proper cumulative analysis is conducted here, confidence is undermined in the outcome. Based upon the factual allegations, at this juncture an evidentiary hearing is required in order to permit Mr. Wright to present the proof in support of his factual allegations.

VII. ADDITIONAL DNA TESTING.

In addressing Argument III of the Initial Brief, the State relies upon this Court's decision in Swafford v. State, 946 So. 2d 1060, 1061 (Fla. 2006). Mr. Wright does not understand why the State is relying upon the decision in Swafford. There, this Court was presented with an interlocutory appeal from the denial of Mr. Swafford's request for additional DNA testing. This Court denied the interlocutory appeal, but said "This denial is without prejudice to Swafford presenting DNA issues, including any issues concerning possible contamination of DNA samples, in further proceedings under rule 3.851."

Mr. Wright's appeal is not interlocutory in nature. It is from the circuit court's final order denying the 3.851 motion which precluded Mr. Wright from challenging the FDLE's report that the circuit court relied upon to deny the 3.851

motion. It appears that, if anything, this Court's opinion in Swafford supports Mr. Wright's position that the circuit court's decision to preclude him from challenging the FDLE results and obtaining a second opinion was erroneous.

CONCLUSION

In light of the foregoing arguments and those presented in the Initial Brief, Mr. Wright requests that this Court remand to the circuit court for a full and fair evidentiary hearing, so that he may be grant Mr. Wright a new trial after he has been afforded an opportunity to prove his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Barbara Davis, Office of Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, on August 13, 2007.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

MARTIN J. MCCLAIN
Special Assistant CCRC-South
Florida Bar No. 0754773
141 N.E. 30th Street

Wilton Manors, FL 33334
(305) 984-8344

NEAL DUPREE
CCRC-South
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Counsel for Appellant