**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC09-556**

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**THOMAS ANTHONY WYATT,**

**Petitioner,**

**v.**

**WALTER McNEIL, Secretary**
**Florida Department of Corrections,**

**Respondent.**

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# REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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**RACHEL DAY**
**Assistant CCRC-South**
**Fla. Bar No. 68535**

**M. CHANCE MEYER**
**Staff Attorney**
**Fla. Bar No. 56362**

**OFFICE OF THE CAPITAL**
**COLLATERAL REGIONAL COUNSEL**
**101 N.E. 3rd Avenue, Suite 400**
**Fort Lauderdale, Florida 33301**
**(954) 713-1284**

**COUNSEL FOR PETITIONER**

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### CLAIM I: Ineffective assistance of appellate counsel

Regarding Mr. Wyatt's claim that appellate counsel was rendered ineffective in this case due to significant omissions in the appellate record, the State contends that the claim has no merit because Mr. Wyatt failed to prove that the omitted portions of his trial transcript, charge conference and other proceedings contained any meritorious issues for appeal (Response at 10). In other words, the State contends, paradoxically, that Mr. Wyatt cannot claim that his inability to examine portions of his record for error create a constitutional issue unless he can first prove that constitutional errors are contained in the very transcript which has been denied him. Put simply, Mr. Wyatt must prove what is in the omitted portion before he can establish an entitlement to it.

However, the law provides, for this very reason, that capital defendants have a right to complete review of trial records by this Court, *Delap v. State*, 350 So. 2d 462, 463 n.1 (Fla. 1977), and requires circuit courts to certify the record on appeal in capital cases. Fla. Stat. § 921.141(4); FLA. CONST. art. V, § 3(b)(1). This Court must review "the entire record of the conviction and sentence of death." *Delap*, 350 So. 2d at 463 n.1 (citing § 921.141(4)). If a full and complete record of the trial court proceedings is not available for review by this Court, there is "no alternative but to remand for a new trial." *Id*. at 463.

Further, the very nature of the missing portions is indicative of constitutional error such that whatever requirement may fall on Mr. Wyatt to establish potential errors in the unexamined portions of the trial has been satisfied. A major area of the omitted record in this case involves jury questions. Jury questions posed to the court are rare and vital glimpses into the deliberation process, which is otherwise well hidden from scrutiny. It is common for those questions to indicate key areas of investigation for appellate counsel and bases of support for juror interviews. Likewise, the reactions of the court and the attorneys to those questions and their related discussions are critical to forming a clear picture of the trial. As addressing jury questions is one of the most critical moments in a trial, excluding those proceedings from a transcript is suspect and improper. Any objections that occurred at that time would not have been recorded for appeal, regardless of what representations they may have made later as to their views on how the court dealt with the jury questions. The State suggests that the participation of Mr. Wyatt's appellate counsel in attempting to reconstruct the record somehow cures the deficiency in counsel not conducting an appeal based on an incomplete record and the prejudice created there from; however, the constitutional error inherent in conducting an appeal based on an incomplete record is not cured by appellate counsel ineffectively acquiescing to the proceedings.

Likewise, the charge conference is a critical proceeding in a trial with irreplaceable insight for appellate review into how the jury instructions were constructed, what instructions were excluded and why, what objections the parties made to the instructions that were included and what representations the trial court may have made concerning its thinking on the inclusion and exclusion of certain instructions.

Finally, the State asserts that Mr. Wyatt has failed to show that the record is incomplete while at the same time acknowledging off record proceedings that occurred during trial (Response at 12). Mr. Wyatt contends that those off record proceedings on critical matters such as jury instructions lead necessarily to the conclusion that the record in this case is incomplete and that the direct appeal was conducted on that incomplete record.

The reconvening of the trial court to attempt to reconstruct the record merely resulted in the judge ruling that he believed the original record to be accurate. (ROA Supp. Vol. I at 26). However, a trial court's ruling that there is no need for an appellate court to review actions it took and discussions it had in a capital murder trial is an insufficient method of guaranteeing by appellate review the constitutionality of such trials (an Eighth Amendment requirement that cannot be circumvented by sweeping a violation under the rug). The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review

in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The United States Supreme Court has "held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error . . . ." *Id*. (citing *inter alia Dobbert v. Florida*, 432 U.S. 282, 295 (1977) and *Proffitt v. Florida*, 428 U.S. 242, 253 (1976)). If complete and independent appellate review is crucial to preventing constitutional error, the affirmance of Mr. Wyatt's conviction on an incomplete record is unconstitutional. Specifically with regard to transcripts on appeal, the United States Supreme Court has explained that when "counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript? His duty may possibly not be discharged if he is allowed less than that." *Hardy v. United States*, 375 U.S. 277, 279-80 (1964).

**CLIAM II: Inadequate harmless error analysis**

In response to Mr. Wyatt's claim that this Court failed to conduct an adequate harmless error analysis on direct review, the State contends that Mr. Wyatt merely summarily concludes that striking any aggravator is necessarily prejudicial (Response at 23). However, the State's argument is limited to the weight of the aggravator and fails to address the critical issue of who is doing the weighing, rather than what is being weighed. However, only a trial court can

perform a reweighing for purposes of a new sentencing determination. *See Parker v. Dugger*, 498 U.S. 308, 318 (1991); *White v. Dugger*, 565 So. 2d 700 (Fla. 1990); *Hudson v. State*, 538 So. 2d 829, 831 (Fla. 1989); *Brown v. Wainwright*, 393 So. 2d 1327 (Fla. 1981). Thus, a constitutionally adequate harmless error analysis can only be performed in light of a sentencing court's reweighing of the aggravating and mitigating circumstances without the influence of the improper aggravator in the mix. Otherwise, this Court is making an unconstitutional assumption as to what the sentencing court would have done "if the thumb had been removed from death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 223 (1992). In order to determine what the sentencer would have done, as is required by the Eighth Amendment, *id*. at 230, this Court must remand the case for a resentencing.

Respectfully submitted:

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RACHEL L. DAY
Assistant CCRC
Florida Bar No. 68535

## CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Times New Roman 14-point font.

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RACHEL L. DAY
Assistant CCRC
Florida Bar No. 68535

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by U.S. mail, first class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401 this ___ day of February 2010.

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RACHEL L. DAY
Assistant CCRC
Florida Bar No. 68535

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER