IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-____

THOMAS ANTHONY WYATT,

Petitioner,

v.

WALTER McNEIL, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is the first filed by Mr. Wyatt in this case. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Wyatt was deprived of effective assistance of counsel on direct appeal and that his convictions and death sentences were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.[1]

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." FLA. CONST. art. I, § 13.

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[1] Citations to the record on direct appeal appear in the following format: "(R. __)." All other citations shall be self-explanatory.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied a direct appeal. *See, e.g., Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Wyatt requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

The Circuit Court of the Nineteenth Judicial Circuit, Indian River County, Florida, entered the judgments of conviction and sentence under consideration. An Indian River County grand jury indicted Mr. Wyatt on one count of first degree murder. Mr. Wyatt's trial was held in Indian River County beginning on November 12, 1991. The jury returned a guilty verdict on November 26, 1991 (R. 2058). At the conclusion of the penalty phase on December 5, 1991, the jury recommended a death sentence by a vote of 11-to-1 (R. 2363). On December 20, 1991, the trial court sentenced Mr. Wyatt to death.

On direct appeal, appellate defense counsel raised challenges based on the following: jury instruction on flight, cross-examination of Mr. Wyatt, limitations

on discovery, limitations on voir dire, admission of an autopsy photograph, limitation on defense cross examination, judicial misconduct, improper character evidence, the reasonable doubt instruction, the State's guilt phase argument to the jury, findings of aggravating circumstances, failure to weigh mitigation evidence, penalty phase jury instructions, Confrontation Clause violations and cumulative evidence, the State's penalty phase argument and the constitutionality of Florida Statute § 921.141. This Court affirmed Mr. Wyatt's conviction and sentence. *Wyatt v. State*, 641 So. 2d 335 (Fla. 1994) (cert. denied, 514 U.S. 1023 (1995)). Rehearing was denied on June 30, 1994, and a mandate issued on September 30, 1994.

On March 14, 1997, Mr. Wyatt filed a Rule 3.850 motion in order to toll the time requirements of Mr. Wyatt's federal habeas corpus proceedings. A Preliminary Amended Rule 3.850 Motion was filed on November 29, 1999, and an Amended Motion to Vacate was filed on December 19, 2003. A subsequent Amended Motion to Vacate Judgments of Conviction and Sentence was filed on March 30, 2004. On March 24, 2006, Mr. Wyatt filed an Amended Motion to Vacate Judgment of Convictions and Sentence, which led to an evidentiary hearing on August 6 through August 9, 2007. Subsequent to the evidentiary hearing, new grounds for relief were discovered, and a Supplement To Amended Motion To Vacate Judgments of Conviction and Sentence With Special Request For Leave to

Amend was filed on February 12, 2008, asserting four new claims for relief. One of those claims challenges Florida's lethal injection procedure. On February 18, 2008, the court entered an Amended Order Construing Supplement As Successive Motion And Staying Successive Motion pending the resolution of *Baze v. Rees*, which was at the time pending in the United States Supreme Court and involved the constitutionality of Kentucky's lethal injection procedure. Having stayed the four claims contained in the February 12, 2008 motion, the court denied all previously filed claims in an order entered February 29, 2008. An appeal was filed in this Court on April 2, 2008. On July 15, 2008, the lower court entered an order staying the claims contained in the February 12, 2008 motion pending the disposition of the appeal, finding under *Washington v. State*, 823 So. 2d 248 (4th DCA 2002) that it lacked jurisdiction in the interim. This Court issued a briefing schedule on November 17, 2008.

On December 10, 2008, undersigned counsel received newly discovered evidence, concerning the Federal Bureau of Investigation ("FBI") testimony in Mr. Wyatt's case, previously unknown to Mr. Wyatt and undersigned counsel. Specifically, undersigned counsel received a copy of an August 7, 2008 letter and an October 22, 2008 letter from D. Chris Hassell, Ph.D., Director of the FBI Laboratory, to Ryan Butler, Assistant State Attorney. The letters explain that the FBI Laboratory reviewed the testimony of the FBI examiner in Mr. Wyatt's case,

and it is the position of the FBI that his testimony was unreliable in that it was not supported by science.

On January 22, 2009, Mr. Wyatt filed a Motion to Relinquish Jurisdiction in this Court. The motion was predicated upon the FBI's disclosures regarding the false and misleading testimony of the FBI agent John Riley at Mr. Wyatt's trial. On April 7, 2009 this Court issued an order relinquishing jurisdiction to the lower court to conduct a hearing on the evidence disclosed by the FBI in addition to the claims in the amended motion filed on February 12, 2008. The hearing was conducted on August 10 and August 17, 2009. Posthearing memoranda were filed.

The lower court issued an order denying Mr. Wyatt's motion for postconviction relief and jurisdiction returned to this Court. This Petition is being filed simultaneously with Mr. Wyatt's initial brief appealing the denial of his motion for postconviction relief. Mr. Wyatt relies on facts presented in his initial brief.

ARGUMENT

CLAIM I

MR. WYATT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Wyatt had a constitutional right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), which extended to his direct appeal to this Court. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id*. The two-prong test articulated in *Strickland* that governs ineffective assistance of counsel claims applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). A defendant is prejudiced by the deficient performance of appellate counsel when the deficiencies compromise the appellate process to such a degree as to undermine confidence in the correctness of the result. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Such deficiencies and prejudice occurred in Mr. Wyatt's case.

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Wyatt's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was

deficient and omitted meritorious issues, which had they been raised, would have entitled Mr. Wyatt to relief.

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel in Mr. Wyatt's case failed to perform its constitutionally-required function, as articulated in *Wilson*, of ensuring that all critical errors in the lengthy record were identified, highlighted for the Court and presented in the light of zealous advocacy. Appellate counsel's failure to focus the Court's attention on substantial constitutional errors amounted to a violation of *Strickland*.

As this Court stated in *Wilson*:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163 (citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985)). While appellate counsel is not ineffective for failing to raise issues which were procedurally barred because they were not properly raised at trial, *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000), such failure does warrant reversal if it constitutes fundamental error, which has been defined as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied*, 523 U.S. 1083 (1998).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases ("ABA Guidelines").[2] "Given the gravity of the

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[2] The ABA Guidelines were originally promulgated in 1989, and revised in 2003. The 2003 version of the Guidelines spells out in more detail the reasonable professional norms that trial counsel should have utilized in the investigation of Mr. Wyatt's case. However, notwithstanding the fact that Mr. Wyatt's case was tried prior to 2003, there is no doubt as to the applicability of the 2003 Guidelines to his case. The United States Supreme Court has recently reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. In *Rompilla v. Beard*, 545 U.S. 374 (2005), in which the trial took place in 1989, prior to the promulgation of either the 1989 or the 2003 Guidelines,

punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds. In light of the serious reversible error that appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

A. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS, BASED ON REVERSIBLE ERRORS COMMITTED BY THE TRIAL COURT AND PRESERVED BY NUMEROUS OBJECTIONS, REGARDING THE REPEATED ADMISSION OF PREJUDICAL EVIDENCE OF PRIOR STATE PROSECUTIONS OF MR. WYATT FOR HOMICIDE.

On numerous occasions during Mr. Wyatt's trial, the State sought to admit evidence in containers which bore markings indicating they were previously used in other trials (R. 910, 928, 950-51, 1001-02). Certain tags or cards were attached to the bags in which evidence was placed, and those tags were admitted with the evidence to which they were attached. Mr. Wyatt's trial counsel objected on numerous occasions and entered a continuing objection, preserving the issue thoroughly for appeal, that the notations on the tags were prejudicial as they betrayed the use of the evidence in a previous criminal prosecution of Mr. Wyatt,

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the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines to the case.

irrelevant and hearsay. While submitting an objection at sidebar, Mr. Wyatt's trial counsel explained that the tags "definitely show[] it was used in another trial because they have no exhibit number. I object to those cards being before the jury because they're obviously related to another trial" (R. 910). Trial counsel later objected to the admission of an evidence bag that bore the plural term "homicides," stating "the front of the bag says homicides, plural, which is highly prejudicial in this case," (R. 928) due to the fact that Mr. Wyatt was only being prosecuted for one homicide in the present proceeding. The trial court determined it would correct the problem by crossing out the word; however, trial counsel continued to object on the basis that the jury would be left to speculate or guess what the word was (R. 929). Further, the jury may have been able to scrutinize the markings and redactions and determine what they said. Trail counsel then asked for a continuing objection to the notations on the evidence bags, but the court refused, stating that the Defense "can't have a shotgun objection, you state your objection and I'll rule on it" (R. 930). The Defense explained that it would be objecting on every occasion to the notations on the evidence bags that betrayed their use in another trial, and the court overruled the objection (R. 930). Later in the guilt phase trial counsel again objected to a brown evidence bag with stickers containing the word "homicides" which was previously marked from another trial (R. 951). The Defense objected not only to the prejudicial quality of the notations but also their

lack of relevance to this case and resulting inadmissibility (R. 951). The State suggested that the trial court should cross out the "s" (R. 951). The trial court made a redaction saying it was crossing out the word (R. 951). The Defense clarified for the record that the jury was present as the court was crossing out words on the bags (R. 952), which further aggravated the concern that the jury would speculate as to or investigate the nature of the notations on the bags. Later in the guilt phase, defense counsel again objected to a tag on a plastic evidence bag as prejudicial hearsay and irrelevant (R. 1001). That tag bore the notation "State v. Wyatt" from a previous trial and indicated the date upon which the evidence was admitted at that trial (R. 1001). The bag was stamped with identifying marks clearly showing that Mr. Wyatt had previously been tried by the State (R. 1001-02). On this occasion the trial court received the bag, stamps and notations into evidence (R. 1002). The Defense pointed out that the bag was stamped with extensive hearsay, including references to evidence, such as .38 caliber rounds which the bag contained at the previous trial but did not presently contain for purposes of this trial (R. 1003). The bag also referenced "Domino's Pizza," in relation to the victims of the offense for which the evidence was previously used against Mr. Wyatt in criminal prosecution by the State (R. 1003). It referenced "homicide" as the offense (R. 1003). It seems from the record that the trial court's previously used method—attempting to mark out the prejudicial hearsay

notations—was used again at this point as the trial court stated that the objection was "cured" (R. 1004), but the Defense's comments that the marks were extensive suggests that marking out all of the many notations effectively and completely was impossible or difficult.

The above are merely examples of a recurring problem at the trial. The parties noted that hundreds of pieces of evidence had the same problem of the notations (R. 1001-04).

Jurors saw items being marked out and could put two and two together that the evidence they were viewing was inside evidence bags clearly used previously at a trial in a way that had to be concealed from them by making repeated and extensive redactions. The jury saw the many sidebar conferences that resulted in the redactions they could later closely examine. The jury would surely realize that the prior use of the evidence must have been at a trial, even if they were unable to look in the light past the marker ink and down to the printed letters beneath to read them. The obvious prior use of the evidence against Mr. Wyatt in a criminal prosecution is prejudicial even if the jury could not find and read a notation referring to multiple homicides or to evidence previously removed from a bag.

Even though trial counsel's thorough objections to the prejudicial evidence are found throughout the record, and despite the blatant prejudice and

unconstitutionality of the trial court's admission of irrelevant hearsay evidence related to a prior crime, appellate defense counsel failed to raise the issue.

Mr. Wyatt was convicted by a jury aware of crimes that were supposed to be concealed from it and surely influenced by the desire to punish Mr. Wyatt for those offenses as well. The conviction in this case is thus unreliable in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and appellate counsel was ineffective for failing to raise the issue, preserved for appeal by numerous objections at trial.

B. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS BASED ON OBJECTIONS TO PREJUDICIAL, NON-PROBATIVE AND GRUESOME PHOTOGRAPHS OF THE VICTIM.

During the guilt phase, the State sought to present a photograph of the victim's body vividly portraying blood all over the victim's face (R. 33). The Defense objected to the admission of the photograph (R. 633) as a photograph of a bloody homicide victim is highly prejudicial and requires significant probative value to be admissible. The trial court simply stated, "I'll overrule the objection. I don't see anything gory anyway" (R. 634). The State was not required by the court to assert what if any probative value the photograph had. Other photographs of the victim were not objected to because they did not portray needless and visceral images of blood (R. 633). Whatever probative value the photograph may have had would be merely cumulative and duplicative along with the other photographs;

however, the trial court admitted the photograph without explanation or requesting argument.

Direct appeal counsel failed to raise this issue and failed to make this Court aware of the lower court's admission of prejudicial evidence without analysis or reason.

C. APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ARGUMENTS BASED ON OBJECTIONS TO PREJUDICIAL AND IMPROPER COMMENTARY BY THE STATE REGARDING THE KILLING OF WITNESSES.

While the State was questioning the venire prior to trial, the State implied so strongly in its questioning that Mr. Wyatt had taken steps to ensure there would be no witnesses to the crime, not yet tried and prior to the presentation of any evidence, that the trial court had to pause to point out twice that the jury should not assume that those things happened "necessarily" in this case (R. 102-03). The following exchange occurred:

> State: In regard to witnesses in general, do you agree or do you understand that many times in criminal cases, in first degree murder cases, people kill people so there won't be witnesses to what they did? . . . That sometimes their reason for killing the victim is so that the victim can't tell what they saw of what they know about the defendant?
>
> Venirewoman: Yes.

State: Okay. So oftentimes the reason that the murder is committed is to eliminate –

Defense: Your Honor, I'm going to object.

Court: Well I don't see anything basically wrong with it, but this is not to say that that necessarily occurred in this case though, but I think that's a – let's go on. You should not take that to mean that this necessarily happened in this case.

* * *

State: Now, do you understand that even aside from that, even aside from when the victim is the eyewitness that oftentimes people who commit crimes and people who carry out especially very serious crimes like murder do it in a way that there won't be witnesses. Can you agree with that?

Venirewoman: Yes.

Defense: Judge, again, I'm going to object.

(R. 102-03). The trial court overruled the objection, and the State continued with its line of questioning (R. 104). However, the State's questioning had already biased the future jury against Mr. Wyatt by causing them to presume prior to the production of any evidence that "oftentimes" individuals charged in first degree murder cases like Mr. Wyatt killed witnesses (R. 102). There was a presumption

expressed and received that people in Mr. Wyatt's position oftentimes killed witnesses or killed victims in a way to avoid there being any witnesses. The State was clearly referring to Mr. Wyatt, as it specified first degree murder defendants and used the definite article "the" to refer to "the defendant" in this case rather than "a" defendant (R. 102). Trial counsel promptly objected twice to the prosecutor's improper comments; however, appellate counsel failed to raise the issue on direct appeal. Prior to hearing any evidence the State had asserted and the trial court condoned a representation of first degree murder defendants, namely Mr. Wyatt, as "many times" killing witnesses. While the trial court instructed that it did not necessarily happen in this case, the implication and strong suggestion was already there, and the fact that it didn't "necessarily" happen in this case did nothing to diminish the implication that it probably—"oftentimes" or "many times"—did in such cases. The court's admonition did not address the problem—the creation of an unconstitutional presumption that Mr. Wyatt probably committed a homicide. The court failed to explain to the jury that the State incorrectly stated the burden of proof. Mr. Wyatt's constitutional right to be presumed innocent was violated.

Appellate counsel failed to present this critical issue as part of the evidence it brought before this Court when challenging the validity of the conviction.

D. APPELLATE COUNSEL FAILED TO CHALLENGE FLORIDA'S RULE PROHIBITING COUNSEL FROM INTERVIEWING JURORS, WHICH VIOLATES THE FIRST,

SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial after the dismissal of the jury. Appellate counsel failed to challenge the unconstitutional barrier which prevented him from investigating how juror biases, caused in part by the improper comments of the prosecutor described above, translated into the jury's deliberations and potentially led to juror misconduct. This ethical rule is unconstitutional on its face.

Under the Sixth, Eighth, and Fourteenth Amendments, Mr. Wyatt is entitled to a fair trial and sentencing. Mr. Wyatt's inability to fully explore possible misconduct and biases of the jury prevents him from fully detailing the unfairness of the trial. Misconduct may have occurred that Mr. Wyatt could only discover through juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (finding a showing of prejudice and violation of Due Process when an intimate relationship is established between jurors and witnesses); *Russ v. State*, 95 So. 2d 594 (Fla. 1957) (finding "where a juror on deliberation [relies on or] relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, it is misconduct which may vitiate the verdict").

In the present case, Mr. Wyatt believes that circumstances exist that indicate bias and a lack of impartiality on the part of his jury. The prosecutor made

prejudicial comments suggesting to the jury prior to the presentation of any evidence that Mr. Wyatt made sure there were no eye witnesses to his act of murder. However, appellate counsel failed to challenge the rules that prevented him from interviewing those jurors and investigating such prejudice.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional because it is in conflict with the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights, including Mr. Wyatt's rights to due process, *see Smith v. Phillips*, 455 U.S. 209, 217 (1982) (finding "due process means a jury capable and willing to decide the case solely on the evidence before it"); *Turner v. Louisiana*, 379 U.S. 466 (1965) (finding "[t]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors") and access to the courts of this State under Article I, § 21 of the Florida Constitution. Appellate counsel failed to argue this issue on direct appeal and thusly caused this Court to assess the constitutionality of Mr. Wyatt's conviction and sentence without full knowledge of the errors undermining his trial.

The many errors described above and appellate counsel's failure to present such to this Court on direct review entitle Mr. Wyatt to relief. Because the constitutional violations which occurred during Mr. Wyatt's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot

be said that the "adversarial testing process worked in [Mr. Wyatt's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to present the meritorious issues discussed above demonstrates that the representation of Mr. Wyatt involved serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). In light of the serious reversible error that appellate counsel never raised, relief is appropriate. The many errors which appellate counsel failed to call to the attention of this Court must be viewed in conjunction with the errors acknowledged by this Court in its direct appeal opinion, namely the erroneous overruling of objections found to be, without the added errors described above, harmless. *Wyatt v. State*, 641 So. 2d 355, 358 (Fla. 1994).

CONCLUSION

For the foregoing reasons and in the interest of justice, Mr. Wyatt respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF FONT

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

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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 March 2010.

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