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IN THE SUPREME COURT OF FLORIDA

JERRY WILLIAM CORRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. SC15-147
L.T. No. CR85-3550

DEATH WARRANT SIGNED

EXECUTION SCHEDULED
February 26, 2015, 6:00 p.m.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

The record on appeal in the instant case, from the denial of Correll's successive motion for postconviction relief, will be referred to as "V" followed by the appropriate volume and page numbers.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on the appeal from the summary denial of Correll's successive motion to vacate. The claims raised in this successive motion were properly denied as meritless as a matter of established Florida law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Appellant Jerry Correll killed his ex-wife, her sister and mother, and his own five-year-old daughter in 1985. All four victims were stabbed multiple times. In 1986, jurors convicted him of four counts of first degree murder and recommended the death sentence for each victim. He was sentenced to death on each of the four murders on February 7, 1986.

On direct appeal, this Court upheld the convictions and sentences. Correll v. State, 523 So. 2d 562 (Fla.), cert. denied, 488 U.S. 871 (1988). Following the signing of Correll's first death warrant, state and federal collateral challenges were universally rejected. See Correll v. State, 558 So. 2d 422 (Fla. 1990); Correll v. State, 698 So. 2d 522 (Fla. 1997); Correll v. Secretary, Dept. of Corrections, 932 F.Supp.2d 1257 (M.D. Fla. 2013). On January 16, 2015, Governor Rick Scott signed Correll's second death warrant. Execution is scheduled for February 26, 2015 at 6:00 p.m.

On January 21, 2015, Correll filed demands for additional public records from the Department of Corrections, the Florida Department of Law Enforcement, and the Medical Examiner for the Eight Judicial Circuit, seeking documents related to the administration of lethal injection in Florida (V2/306-54). Following a status hearing the same day, Correll filed his

successive motion for postconviction relief later that afternoon (V3/359-441, 459-72). Three claims were presented in the motion, challenging: the constitutionality of Florida's death penalty scheme, which permits a death recommendation by a non-unanimous jury; the length of time Correll has been on death row; and the confidentiality afforded to execution team members under Florida law.

Objections to the requests for public records were filed and following a hearing on Thursday, January 22, the requests were all denied (V3/444-51, 452-58, 473-79, 482-99; V4/637-53). The trial court found that Correll had not demonstrated that a colorable claim existed to entitle him to disclosure of any records (V4/637-53).

The State filed a response to the postconviction motion on Friday, January 23, asserting that all claims were procedurally barred and meritless (V4/659-75). At a hearing on Monday, January 26, Correll's attorney announced her intent to file an emergency motion for a stay of execution, based on the United States Supreme Court accepting certiorari review of Glossip, et al. v. Gross, et al., 2015 WL 302647 (January 23, 2015) [Case No. 14-7955] (V14/2203-10). The motion was filed later that afternoon, asserting that the United States Supreme Court's intention to review the constitutionality of Oklahoma's

procedures for lethal injection compelled a stay of execution, since Florida protocols also call for the use of midazolam in order to render a condemned prisoner unconscious for execution (V5/679-V6/901). The State responded on January 27, asserting that Correll's failure to raise a lethal injection claim in his postconviction motion precluded the court from granting a stay, and that Florida's procedures for lethal injection, including midazolam, are constitutional as a matter of well established law (V11/1732-39). The court held a hearing on the motion on January 27, and permitted Correll to file additional supporting materials following the conclusion of the hearing (V15/2212-28; V7/903-V11/1731).

On January 28, 2015, the court below entered an order denying the successive motion for postconviction relief (V15/2233-41) and an order denying the emergency motion for stay of execution (V15/2229-32). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly rejected Correll's successive postconviction claims, finding no merit to any of the arguments. The rulings below are all in accord with binding precedent from this Court and should not be disturbed on appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING CORRELL'S PUBLIC RECORDS REQUESTS.

Correll initially challenges the trial court's denial of his post-warrant requests for public records. Rulings with regard to public records requests under Florida Rule of Criminal Procedure 3.852 are reviewed for an abuse of discretion. Valle v. State, 70 So. 3d 530, 549 (Fla. 2011). No abuse has been demonstrated in this case, and Correll is not entitled to any relief.

Correll filed expansive requests for public records in the court below, seeking, *inter alia*, records pertaining to eleven (11) prior executions in Florida; records and correspondence with federal agencies; and the identification, background, criminal and medical history, disciplinary records and training of medical and non-medical personnel relating to the procedures and drugs used for lethal injection. Pursuant to Rule 3.852(i), a defendant must establish that "the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." As Correll has failed to establish the existence of a colorable claim, the court below properly denied

these records.

In this case, Correll did not explain how his requests were relevant to a colorable claim for postconviction relief. According to the demands, the records would be "related to the execution procedure" making them purportedly "relevant as to Mr. Correll's constitutional challenges" and further "are related to Mr. Correll's competency, mental health status, medical problems which can affect the application of the lethal injection to this individual, and other relevant claims" (V2/306-54). After the demands were filed, Correll filed a successive motion for postconviction relief which did not raise a lethal injection claim or any claim related to any mental health status, medical, or competency concerns (V3/359-441).

On appeal, Correll has changed his argument, and now claims that the acceptance of Glossip for certiorari review has "added strong support" for his suggestion that the use of midazolam in Florida's lethal injection protocol might violate the Eighth Amendment and "proves" this is a colorable claim (Initial Brief, p. 21). Of course, reliance on the Glossip case is procedurally barred since it was never offered below as a basis for the disclosure of additional public records. After Glossip was accepted, Correll did not renew his public records requests on that basis or provide any indication that he had a new colorable

claim to pursue. To the contrary, he has repeatedly acknowledged that he cannot, in good faith, raise a challenge to Florida's lethal injection protocols under the Eighth Amendment and has affirmatively observed that any such challenge would be futile. See Correll's Reply to the State's Response to the Motion to Stay, filed in this Court February 3, 2015, p. 4.

In Walton v. State, 3 So. 3d 1000, 1013-14 (Fla. 2009), this Court explained that records regarding lethal injection do not lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court." Here, challenges to the 2013 lethal injection protocol have been fully considered and rejected. Banks v. State, 150 So. 3d 797 (Fla.), cert. denied, 135 S. Ct. 511 (2014); Chavez v. State, 132 So. 3d 826 (Fla.), cert. denied, 134 S. Ct. 1156 (2014); Muhammad v. State, 132 So. 3d 176, 203 (Fla. 2013), cert. denied, 134 S. Ct. 894 (2014). In those cases, pre-execution requests nearly identical to that filed in this case were denied, rulings which this Court upheld due to the lack of any identifiable, colorable claim for relief. Similarly, Correll has also not shown that the records here are relevant to a colorable claim for postconviction relief.

Additionally, this Court has held that requests that ask

for "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files" are overly broad and not proper under this rule. See Diaz v. State, 945 So. 2d 1136, 1148-50 (Fla. 2006); Hill v. State, 921 So. 2d 579, 584-85 (Fla. 2006) (rejecting request for all information on executions because, *inter alia*, the requests were overbroad); Mills v. State, 786 So. 2d 547, 551-52 (Fla. 2001). Correll's demands are replete with the use of the words "any" and "all" in describing the items he requests. This Court has stressed that public records requests are not to be used for fishing expeditions and that defendants bear the burden of proving that the records they request are, in fact, related to a colorable claim for postconviction relief. Moore v. State, 820 So. 2d 199, 204 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 253 (Fla. 2001); Sims v. State, 753 So. 2d 66, 70 (Fla. 2000). This Court has also upheld the denial of a request for additional public records where the requests sought general information to "research and discover" postconviction claims that Defendant had no specific basis for believing actually existed. Johnson v. State, 804 So. 2d 1218, 1224 (Fla. 2001). Moreover, this Court has described requests pursuant to Rule 3.852 as postconviction discovery requests. Amendments to Fla. R. Crim. P. 3.852, 754 So. 2d 640, 643 (Fla. 1999). This Court has determined that it

is proper to deny postconviction discovery if the documents sought would not support a claim. Reaves v. State, 942 So. 2d 874, 881-82 (Fla. 2006).

The fact that other courts in other states may be litigating cases with regard to the constitutionality of lethal injection does not render that claim colorable in Florida, where repeated evidentiary hearings have consistently upheld the use of midazolam. As the records sought below were not founded on any colorable claim, and in light of this Court's established law upholding the denial of similar requests by defendants under an active death warrant, this Court must affirm the rulings entered below denying Correll's requests for additional public records.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING CORRELL'S CLAIM THAT FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE A NON-UNANIMOUS JURY CAN RECOMMEND A SENTENCE OF DEATH.

Correll also disputes the summary denial of his third successive motion for postconviction relief. This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record shows that the movant is entitled to no relief. Walton, 3 So. 3d at 1005; State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

The first issue presented in Correll's motion asserted that Florida's death penalty statute is unconstitutional because it permits a non-unanimous jury to recommend a death sentence. According to Correll, the evolving standards of decency imposed by the Eighth Amendment require reconsideration of this Court's prior caselaw rejecting this issue. As this Court has denied the issue even under an Eighth Amendment, evolving standards context, the court below properly rejected this claim.

The court below cited to this Court's decisions in Kimbrough v. State, 125 So. 3d 752, 754 (Fla.), cert. denied, 134 S. Ct. 632 (2013), Mann v. State, 112 So. 3d 1158, 1162

(Fla.), cert. denied, 133 S. Ct. 1752 (2013), and Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013), in denying relief (V15/2235-36). Kimbrough and Mann were both cases decided under an active death warrant, where the Eighth Amendment argument on evolving standards of decency was put forward. Robards was a direct appeal where this Court again reaffirmed that death recommendations supported by only a bare majority of the jury are constitutional. All of these decisions were released within the last two years and cannot be considered too remote or stale to have precedence, even under an evolving standards analysis.

Correll acknowledges these cases and asks this Court to "recede from such authority" (Initial Brief, p. 34), but provides no reasonable justification for doing so. He simply repeats the same arguments which this Court previously rejected. He has offered nothing new that has changed or evolved since the prior rejection of this claim.

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Williamson v. State, 961 So. 2d 229, 234 (Fla. 2007). Because the record in this case conclusively showed

that no relief was warranted, the court below properly denied Correll's motion, and this Court must affirm this ruling.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING CORRELL'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL DUE TO THE LENGTH OF TIME HE HAS SPENT ON DEATH ROW.

Correll's next issue claims that Correll's incarceration of 29 years on death row is itself cruel and unusual, requiring reversal of his death sentence. As this issue was summarily denied, review is *de novo*. Walton, 3 So. 3d at 1005; Coney, 845 So. 2d at 137.

The court's ruling rejecting Correll's claim as to the length of time he has spent on death row is also supported by established law. Both this Court and the United States Supreme Court have repeatedly rejected this argument as a basis for relief. Muhammad v. State, 132 So. 3d 176, 206-07 (Fla. 2013), cert. denied, 134 S. Ct. 894 (2014); Carroll v. State, 114 So. 3d 883, 889 (Fla.), cert. denied, 133 S. Ct. 2762 (2013); Pardo v. State, 108 So. 3d 558, 569 (Fla.), cert. denied, 133 S. Ct. 815 (2012); Ferguson v. State, 101 So. 3d 362, 366-67 (Fla.), cert. denied, 133 S. Ct. 497 (2012); Gore v. State, 91 So. 3d 769, 780 (Fla.), cert. denied, 132 S. Ct. 1904 (2012); Valle v. State, 70 So. 3d 530, 552 (Fla.), cert. denied, 132 S. Ct. 1 (2011); Tompkins v. State, 994 So. 2d 1072, 1085 (Fla. 2008), cert. denied, 555 U.S. 1161 (2009); Knight v. Florida, 528 U.S.

990 (1999); Elledge v. Florida, 525 U.S. 944 (1998); Lackey v. Texas, 514 U.S. 1045 (1995).

Correll acknowledges these cases and asks this Court to "recede from its prior decisions" (Initial Brief, p. 43), but provides no reasonable justification for doing so. He simply repeats the same arguments which this Court previously rejected. He has offered nothing new that has changed or evolved since the prior rejection of this claim.

In the instant case, much of the delay in execution is attributable to Correll's own actions. The State sought to execute Correll in 1990, compelling Correll to begin pursuing his collateral challenges. He twice requested the federal district court to hold his habeas action in abeyance while he returned to state court to litigate procedurally barred and meritless claims. His initial round of collateral review just concluded in 2013. The fact that his litigation has taken many years does not render his death sentence unconstitutional or preclude the issuance of a death warrant. Accordingly, the court below properly summarily denied this claim, and this Court must affirm.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING CORRELL'S CLAIM THAT FLORIDA'S STATUTE PROTECTING THE IDENTITY OF EXECUTION TEAM MEMBERS IS UNCONSTITUTIONAL.

Correll's next issue challenges Florida law protecting the identification of execution team members. As this issue was summarily denied, review is *de novo*. Walton, 3 So. 3d at 1005; State, 845 So. 2d at 137.

The court's ruling rejecting Correll's claim as to the confidentiality of the identification of execution team members is also well supported by this Court's precedent. Of course, this information is privileged by statute and unavailable to courts or the parties to this action. See § 945.10(g), Fla. Stat. This Court has repeatedly rejected the argument that capital defendants must be provided with personal identifications of execution team members. In Muhammad, this Court upheld the statute and determined that the identification of execution team members was not constitutionally required. Muhammad, 132 So. 3d at 205. See also Troy v. State, 57 So. 3d 828 (Fla. 2011); Darling v. State, 45 So. 3d 444 (Fla. 2010); Henyard v. State, 992 So. 2d 120, 130 (Fla. 2008).

In light of this binding precedent, Correll's reliance on rhetoric, speculation, incomplete news articles, a questionable

doctor in Missouri, purported "botched" executions, and the recent dissent from the denial of certiorari review in Warner et al. v. Gross, et al., 574 U.S. ___, 2015 WL 171517 (January 15, 2015), is insufficient and unpersuasive. None of these authorities require or even justify the granting of Correll's plea for identification of execution team members.

Correll cites California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), as support for disclosure. In that case, a California prison regulation which limited the extent to which witnesses could observe the execution process was found to be unconstitutional, as a violation of the public's First Amendment right to view the entire execution. Central to that court's decision was the recognition that there was an alternative available to protect what the court recognized to be a legitimate security concern, protecting the anonymity of the execution staff. Woodford, 299 F.3d at 880. The court upheld the specific finding that having execution team members wear surgical garb to conceal their identities would be an effective and safe means of protecting the identity of the staff. Thus, Woodford does not require that execution team members be personally identified at any time, but recognized that the confidentiality of this information was a legitimate security concern. It does not offer any support for

Correll's current request for execution team member identifications.

Correll also relies on two federal district court cases from 2006 and a case interpreting Pennsylvania's public records law, but none of these decisions required any state to reveal the identity of the execution team members or staff. See Travaglia v. Dept. of Corrections, 699 A.2d 1317 (Pa. Comm. 1997) (finding that Pennsylvania state law required the disclosure of the identity of execution *witnesses*); Morales v. Tilton, 465 F.Supp.2d 972 (N.D. Cal. 2006) (addressing California protocols for lethal injection); Taylor v. Crawford, 2006 WL 1779035 (W.D. Mo. June 26, 2006) (unpublished) (addressing Missouri protocols for lethal injection).

Again Correll acknowledges this Court's caselaw against him and requests that this Court recede from precedent, but has offered no reason to do so. Even with all of the active litigation over lethal injection in other jurisdictions, he cannot cite a single case where this issue has prevailed. As there is no legal reason to compel the disclosure of the identity of execution team members, the court properly summarily denied this claim. This Court must affirm.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING CORRELL'S EMERGENCY MOTION FOR STAY OF EXECUTION.

Correll's final issue disputes the trial court's ruling to deny his motion for a stay of execution. Correll urges that the acceptance of review in Glossip demonstrates a "significant possibility of reversal of Florida's precedent" because four justices of the United States Supreme Court "have definite concerns" with the use of midazolam and with the "tenor of facts continually emerging as to its efficacy as a sedative, there is a significant possibility that a fifth justice will, upon hearing such facts, be persuaded that it is unconstitutional" (Initial Brief, p. 56). Correll's wild speculation is unfounded and his failure to identify or recite any actual "emerging facts" demonstrates that no stay was necessary and Correll's motion was properly denied.

Correll continues to argue this point in a manner which completely ignores the extensive litigation on the use of midazolam in Florida. He relies entirely on the Warner and Glossip orders from the United States Supreme Court, and continually puts Florida on an equal par with Oklahoma because both use the same doses and combination of drugs for judicial executions. Yet, he never attempts to either contrast or

reconcile any of the decisions from this Court upholding the use of midazolam with any unsettled issue out of Oklahoma. He does not address any of the evidence which was before this Court which led to the approval of midazolam, or to even attempt to explain why that evidence must now be reconsidered. See Banks v. State, 150 So. 3d 797, 800-01 (Fla.), cert. denied, 135 S. Ct. 511 (2014); Muhammad v. Sec'y, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir.), cert. denied, 134 S. Ct. 894 (2014); Chavez v. Florida SP Warden, 742 F.3d 1267 (11th Cir.), cert. denied, 134 S. Ct. 1156 (2014); Davis v. State, 142 So. 3d 867, 873 (Fla.), cert. denied, 135 S. Ct. 35 (2014); Muhammad v. State, 132 So. 3d 176, 193-194 (Fla. 2013), cert. denied, 134 S. Ct. 894 (2014); Howell v. State, 133 So. 3d 511, 518-20 (Fla.), cert. denied, 134 S. Ct. 1376 (2014); Henry v. State, 134 So. 3d 938, 947-48 (Fla.), cert. denied, 134 S. Ct. 1536 (2014).

Instead, he completely disregards what this Court has conclusively determined about midazolam, arguing anew that there were "problems" in Florida executions (Happ, Muhammad, Chavez and Davis) long after this Court has put those claims to rest. He recites Justice Sotomayor's dissent in Warner, speculating that Florida's "apparent success" is "subject to question because the injection of the paralytic vecuronium bromide may mask the effectiveness of midazolam" (see Correll's Reply to the

State's Response to the Motion to Stay, filed in this Court February 3, 2015, pp. 8-9).

In Howell, this Court discusses the testimony supporting the use of midazolam, including the rejected testimony of "Dr. Lubarsky, the defense's eminent anesthesiology expert," as well as the safeguards which Florida procedures employ for assuring that midazolam will be effective in executions:

> In addition, the State presented evidence that DOC added an additional test to ensure unconsciousness, where the person undertaking the consciousness check added a painful pinch test of the trapezius muscle. In fact, Dr. Lubarsky recognized that before current technology provided other means of testing for unconsciousness, he would similarly use a clamp to pinch a patient's skin to determine whether the patient was able to feel pain. Dr. Dershwitz likewise testified that he would use a painful pinch as the noxious stimuli to ensure that a person was unconscious prior to surgery. Accordingly, because the consciousness check as testified to by the DOC employee and found by the postconviction court will ensure that Howell is unable to perceive any noxious stimuli, Howell has not shown that midazolam fails to sufficiently render an inmate unconscious and insensate before the administration of the last two drugs or that the consciousness check portion of the protocol is insufficient.
>
> Moreover, as to Howell's as-applied challenge concerning the possibility of paradoxical reactions, he failed to establish that even if he reacted to midazolam in an unexpected manner, he would undergo needless suffering. As Dr. Dershwitz testified, if a patient was experiencing a paradoxical reaction, the patient would be unable to pass a noxious stimuli test. In contrast, if the patient passed a graded noxious stimuli test in a state of unconsciousness by not responding to the test, the patient would be insensate. Howell failed to present any evidence at

> all to show that if he did experience a paradoxical reaction to midazolam, he would still pass the graded noxious stimuli test that DOC employees undertake to ensure unconsciousness.

Howell, 133 So. 3d at 522. In light of Florida's use of the "trapezius pinch" to assure that a proper level of unconsciousness has been achieved before proceeding with the other lethal injection drugs, Justice Sotomayor's concerns are completely unwarranted.

Certainly Justice Sotomayor cannot be faulted for failing to remember the specific facts and conclusions from Florida cases which were not before her in dissenting from the granting of a stay in Warner. She has never expressed such concerns when a Florida warrant case was before the Court. Correll's attorneys, however, have no excuse for failing to recognize that Florida has proven midazolam to be effective and, in the event that it isn't, that Florida's mandated consciousness check will insure that the execution will not proceed until the inmate is adequately unconscious. No potentially meritorious Eighth Amendment claim can be made with regard to Florida's use of midazolam.

Correll's only response to the multiple hearings and findings on this issue in Florida is that the United States Supreme Court seems troubled by Oklahoma, because Justice

Sotomaor's dissent questions why Dr. Lubarsky's opinion was not accepted by the district court after the hearing in that case. From all of the materials available and the scores of documents which Correll has filed to support his request for a stay, he has identified nothing new beyond Dr. Lubarsky's opinion, which has been soundly rejected in Florida a number of times.

Under these circumstances, Correll has fallen far short of establishing that he is entitled to stay of execution. He has not presented substantial grounds for relief, or any likelihood of success on the merits. See Chavez v. State, 132 So. 3d 826, 832 (Fla. 2014); Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998); Delo v. Stokes, 495 U.S. 320, 321 (1990); Barefoot v. Estelle, 463 U.S. 880, 895 (1983); Bowersox v. Williams, 517 U.S. 345 (1996). This Court must affirm the ruling entered by the court below to deny the stay, and must deny the stay that has been requested from this Court.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the denial of postconviction relief and DENY a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2015, a true and correct copy of the foregoing has been furnished electronically to the Clerk of the Florida Supreme Court at **warrant@flcourts.org**; and to **Maria Perinetti** and **Raheela Ahmed, Assistants CCRC-M**, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 at **perinetti@ccmr.state.fl.us**, **ahmed@ccmr.state.fl.us** and **support@ccmr.state.fl.us**,.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Carol M. Dittmar
COUNSEL FOR APPELLEE