IN THE SUPREME COURT OF FLORIDA



CARY M. LAMBRIX,

Appellant,

v. CASE NO. 65,203

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR GLADES COUNTY
STATE OF FLORIDA

# BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

JAMES H. DYSART
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

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TABLE OF CONTENTS

## TABLE OF CITATIONS

Other Authorities:

## STATEMENT OF THE FACTS

Appellee accepts appellant's statement of the facts, but believes it should be supplemented with the following facts:

When Alicia Dawn Bryant's body was unearthed, her shirt was found to be pulled up in the vicinity of the armpits, and her jeans were found to be pulled down to about her knees. (R 1936, 2225)

Before appellant buried Mr. Lamberson, he took a gold necklace off Mr. Lamberson's neck and put it on his own neck. He also went through Mr. Lamberson's pockets. (R 2221) Appellant subsequently told Frances Smith there was $40 or $50 between the two victims. (R 2318)

Frances Smith asked appellant why he killed the victims. He said, "It's already forgotten. You should forget it too. At least now we have a car." (R 2245)

Appellant searched Mr. Lamberson's car after the killings and told Frances Smith he thought Mr. Lamberson "had more money than that." (R 2246) He took Mr. Lamberson's clothes out of the car and subsequently wore them. (R 2247) He told Frances Smith that he sold Mr. Lamberson's gold necklace. (R 2247)

Appellant told Preston Branch a relative of Frances Smith's, that he knew where two dead bodies were and that if Mr. Branch ever told anyone what he said he would do away with him and also Debbie Hanzel. (R 2418-19, 2421-22)

Debbie Hanzel recalled appellant saying, "If you give me $100, I could take you back and show you where I killed two

people and buried them." (R 2445) Ms. Hanzel subsequently read to appellant an article in the newspaper which had indicated that the police were looking for him. She asked him if he had killed a guy for his car, and appellant said that was one of the reasons. (R 2449)

## SUMMARY OF ARGUMENT

Appellant's arguments concerning the jury selection process (based on Grigsby) have previously been rejected by this Court and other courts, and should be rejected again.

The excusal of juror Mary Hill was not in violation of the Witherspoon standard in light of the recent decision of Wainwright v. Witt.

Appellant did not intend to actually impeach Francis Smith; he merely wanted the jury to draw an inference that she had given a prior inconsistent statement. Since Francis Smith stated (in a proffer) that she did not recall making a prior inconsistent statement, the question and answer could accomplish nothing. If it was error for the trial court to exclude the question and answer, the error was certainly harmless.

The testimony the defense sought to elicit from Agent Connie Smith was beyond the scope of direct examination and was an improper attempt to elicit testimony for the defense on cross examination.

A sufficient predicate was laid for Dr. Schultz's opinion concerning the cause of death.

## ARGUMENT

### ISSUE I.

WHETHER THE TRIAL COURT ERRED IN UTILIZING A JURY SELECTION PROCESS WHICH DENIED THE DEFENDANT A TRIAL BY A JURY REPRESENTATIVE OF A CROSS-SECTION OF THE COMMUNITY AND WHICH CREATED A JURY THAT WAS CONVICTION PRONE.

Appellant's arguments as to this issue have been rejected before and should be rejected again. See McCleskey v. Kemp, __F.2d__(11th Cir. 1985); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Caruthers v. State, __So.2d__(Fla. 1984)[10 FLW 114; Case No. 64,114; February 7, 1985]; Witt v. State, __So.2d__ (Fla. 1985)[10 FLW 148; Case No. 66,626; March 4, 1985]; Copeland v. State, 457 So.2d 1012 (Fla. 1984); Downs v. State, 386 So.2d 788 (Fla.) cert. denied, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980); Gafford v. State, 387 So.2d 333 (Fla. 1980); Riley v. State, 366 So.2d 19 (Fla. 1978). See also Wainwright v. Witt, __U.S.__, [36 CrL 3116; Case No. 83-1427; January 21, 1985]; Witt v. Wainwright, __U.S.__(1984); Witt v. Wainwright, __F.2d__(11th Cir. 1985); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1980); Sullivan v. Wainwright, 464 U.S. 109 (1983); and Witt v. Wainwright, __U.S.__[36 CrL 4227; Case No. 84-6325; March 5, 1985].

## ISSUE II.

WHETHER THE TRIAL COURT ERRED IN EXCUSING JUROR MARY HILL FOR CAUSE IN VIOLATION OF THE WITHERSPOON AND CHANDLER STANDARDS.

In Wainwright v. Witt, __So.2d__, [36 CrL 3116; Case No. 83-1427; January 21, 1985], the United States Supreme Court endeavored to clear up confusion surrounding the application of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court declared:

> Despite Witherspoon's limited holding, later opinions in this Court and the lower courts have referred to the language in footnote 21, or similar language in Witherspoon's footnote 9, as setting the standard for judging the proper exclusion of a juror opposed to capital punishment. See, e.g., Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969);[2] Hackathorn v. Decker, 438 F.2d 1363, 1366 (CA5 1971); People v. Washington, 71 Cal. 2d 1061, 1091-1092, 458 P.2d 479, 496-497 (1969). Later cases in the lower courts state that a veniremember may be excluded only if he or she would "automatically" vote against the death penalty, and even then this state of mind must be "unambiguous," or "unmistakably clear." See, e.g., Burns v. Estelle, supra, at 398.
>
> But more recent opinions of this Court demonstrate no ritualistic adherence to a requirement that a prospective juror make it "unmistakably clear . . . that [she] would automatically vote against the imposition of capital punishment...."
>
> * * *
>
> This Court again examined the Witherspoon standard in Adams v. Texas, 448 U.S. 38 (1980).... The Court discussed its prior opinions, noting the Witherspoon Court's recognition, in footnote 21, that States retained a "legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." 448 U.S., at 44. The Court concluded:

"This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Id., at 45 (emphasis added.)

* * *

...The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing, gone too is the extremely high burden of proof.

* * *

We therefore take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above-quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with Witherspoon's reference to "automatic" decision-making, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be

> unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror.
>
> Given this standard, it is clear that the Court of Appeals below erred at least in part; the court focused unduly on the lack of clarity of the questioning of venireman Colby, and on whether her answers indicated that she would "automatically" vote against the death penalty.

In the instant case it was clear to the trial judge that Juror Mary Hill's views would "prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." The record supports the conclusion of the court. Consequently the court did not err in excusing Juror Hill for cause.

## ISSUE III.

WHETHER THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, FRANCES SMITH.

Appellee believes that in deciding this issue it will be helpful to the Court to have the relevant portions of the trial transcript set out in full below:

> Q [By defense counsel, Mr. Jacobs]: Do you recall being asked to give a statement under oath by a detective from the Hillsborough County Sheriff's Department?
>
> A [By Frances Smith]: I remember talking to several. I don't know them by name.
>
> Q Do you recall giving ... a deputy sheriff from Hillsborough County a statement on February 11th, 1983, when you were in custody?
>
> A Maybe I did, I don't know.
>
> MR. JACOBS: Your Honor, I would refer to a statement by Miss Smith under oath on February 11th, 1983, supplied to me by the state attorney.
>
> Q Do you ever recall saying this to Officer Miesel?
>
> MR. MCGRUTHER: Objection, Your Honor. May we approach the bench?
>
> THE COURT: Surely.
>
> MR. MCGRUTHER: Judge, first of all, I would like to make counsel very much aware of something. I don't know if the Court is aware or not but at the time that Miss Smith was arrested, she was arrested for aiding a fugitive, Mr. Lambrix, who had escaped from a correctional institution at that point. He is getting dangerously close to some material and I'm advising the Court that if it comes out, I think it's going to have to be his burden. I would object to him trying to impeach based on that testimony. As I understand it, she does not recall the statement.

THE COURT: She has stated she didn't recall.

MR. JACOBS: ...The State had asked her about different statements of whether or not she said anything about the bodies while she was in custody. I think this is a very relevant issue and I should be able to ask her about that, Judge.

THE COURT: By the same token, I'm stating at this time you know what the State brought out. I know what the State brought out. And don't open any doors.

MR. JACOBS: Judge, ...I think I have a right to question her as to that though.

THE COURT: You may question. But what I'm saying is you know what doors that there are.

(In open court.)

THE COURT: For the benefit of the both of you gentlemen, I do not have a copy of any statement.

MR. JACOBS: Just have one further question, Judge.

Q [By Mr. Jacobs]: Do you recall ever saying to an officer of the Hillsborough County Sheriff's Department —

MR. MCGRUTHER: Your Honor, I object at this point....If they did wish to put it into evidence at this point, I believe he cannot, since she has already stated she does not recall giving it. And without placing the statement into evidence, he cannot use that at this point.

MR. JACOBS: Judge, she made the statement—

THE COURT: Ask her if she remembers talking to an officer and get out the fact that she made a statement.

Q [By Mr. Jacobs]: Do you remember talking to any officers while you were in the Hillsborough County Jail?

A Yes. I don't remember the names, though.

Q You don't remember their names, but you remember talking to certain officers; is that correct?

A Yes.

Q Okay. Did you ever tell an Officer Miesel that you were not with Cary Lambrix?

MR. MCGRUTHER: I'm going to object to it once again. May we approach the bench. I believe the Court should see the statement itself.

(Bench conference held out of the hearing of the jury.)

MR. JACOBS: Your Honor, for the record, she indicated in that statement that she was not with Cary Lambrix from the first to the fifth of February. She did not see him until the ninth of February when he picked her up. That goes to her credibility, Judge.

THE COURT: When you do that, I'm going to allow him to attempt to rehabilitate her. And in an attempt to rehabilitate her—all that statement was about aiding and abetting....

MR. JACOBS: I want to be able to ask the question if she was with him during those dates.

THE COURT: If you do that, I will allow them to go back for the purpose of the statement in this. Now I'm telling you.

MR. JACOBS: We are going to do it, I would profer it out of the presence of the jury.

PROFFERED CROSS-EXAMINATION

Q [By Mr. Jacobs]: Miss Smith, have you ever made the statement to any police officer you were not with Cary Lambrix from the 1st to the 5th of February and that you did not see him until the 9th of February, 1983?

A I don't remember any statement like that.

MR. JACOBS: Judge, that's the only question I have....I don't know where that would be considered opening any doors. That's why I wanted it proferred.

THE COURT: What I'm saying to you, though, is this. If you merely ask that question and quit right there and don't go back to it, that's one thing. But if you are going to refer to that in closing, then I'm certainly going to allow him to go into the fact that the statement was made and so forth and why it was made. It did not have to do with this case as you and I both know. But you don't want anything else brought out about what they were questioning her about in the first place....

MR. JACOBS: Judge, let the record be clear. The state attorney is the one who brought out her arrest. We did not.

THE COURT: I'm aware of that.

MR. JACOBS: I want the record to be clear of that, because I feel we are being penalized as far as our cross-examination.

THE COURT: I'm not in any way penalizing you....What I'm saying [is], if you go into a statement, he has the opportunity to go back into that statement. What was the statement taken for in the first place? If had nothing whatsoever to do with this case.

MR. JACOBS: Yes, sir, it did.

THE COURT: At that time I don't believe they were aware anything had taken place in Glades County.

MR. ENGUALSON: She was aware; she wasn't taking the opportunity.

THE COURT: I'm aware of that fact. But what I'm talking about, the statement was not taken in relation to this case. If he tried to bring a statement in, I would stop him from doing it. You have got an option to bring it in.

MR. JACOBS: I can ask the question and you won't allow them to bring it in?

THE COURT: The question you asked and the one question. You stop there. But I'm going to tell you this. I won't allow you to use it in closing or anything else.

> MR. MCGRUTHER: Judge, at this point I would object to him even asking. She says she doesn't recall ever giving such a statement. I feel all the jury can do is draw an inference. If he wanted to put the statement into evidence, I would [be] more than happy to do so and let the jury see the stuff about him being in state prison. But for him to ask the question and her to give an answer: No, I don't recall giving such a statement, it establishes nothing.
>
> THE COURT: Whichever way I go on it, it is going to be appealed. I'll just deny the statement and we will proceed here. (R 2319-25)

What was the "statement by Miss Smith under oath on February 11th, 1983, supplied to [Mr. Jacobs] by the state attorney"? (See R. 2319) In his brief (page 24), appellant refers to "a sworn statement to Detective Kenneth N. Mizell of the Hillsborough County Sheriff's Office." (R 578) Yet at R 578 Detective Mizell merely states in a deposition taken by the Public Defender's Office (R 573) that he interviewed Frances Smith at the county stockade and she told him she wasn't with Lambrix from February 1st through 5th, 1983, and that she didn't see him until he came to pick her up on the 9th of February. (R 578-580) Nowhere does Detective Mizell say that Frances Smith gave him a sworn statement.

There is no sworn statement of Frances Smith's in the record on appeal in which Smith denies being with Lambrix from February 1st through 9th, 1983. No such statement was ever introduced at trial. Thus, appellee submits that there was no sworn statement with which defense counsel could have impeached Frances Smith.

The only way defense counsel could have impeached Frances Smith would be to have laid a proper predicate for impeachment and then to call Detective Mizell to testify about the statement Smith allegedly made to him. Yet defense counsel did not lay a proper predicate for impeachment, and he was not prepared to call Detective Mizell to testify.

It has long been established that a witness cannot be impeached by proof of inconsistent statements without first laying the proper foundation for the introduction of such evidence. "In laying the foundation for such impeachment it is necessary to inquire of him as to the time, place and person involved in such supposed contradiction. (Emphasis supplied) Bennett v. State, 63 So. 842 (Fla. 1914); Clinton v. State, 43 So. 312 (Fla. 1907); Whitley v. State, 265 So.2d 99 (Fla. 3d DCA 1972). See also Hutchinson v. State, 397 So.2d 1001 (Fla. 1st DCA 1981).

In the instant case, defense counsel merely asked, "Miss Smith, have you ever made the statement to any police officer you were not with Cary Lambrix from the 1st to the 5th of February and that you did not see him until the 9th of February, 1983?" (R 2323) The question did not specify the time, place, or person involved in the supposed contradiction. As such, the question and Frances Smith's answer did not establish a proper predicate for impeachment.

Detective Mizell did not testify at trial for either the State or the defense. He was never listed as a defense witness. (See R 256, 889, 934, 935, 944, 952, 1267) Consequently, he was not available to the defense for impeachment purposes.

Not only did the defense not lay a proper predicate for impeachment and fail to have Detective Mizell available to testify, the record (set out above) indicates that the defense did not actually want to impeach Frances Smith. To do so would enable the State to rehabilitate her (see §90.614(2) Fla. Stat.) and thereby bring out the fact that at the time Smith allegedly told Detective Mizell she had not been with Lambrix, she had been arrested for aiding Mr. Lambrix, a fugitive who had escaped from state prison. (R 2320) The damage that information would do to Lambrix far outweighed the benefit of Smith's inconsistency.

The defense was unable to impeach Smith and did not want to impeach her. The defense merely wanted to ask Smith, "Have you ever made the statement to any police officer you were not with Cary Lambrix from the 1st to the 5th of February and that you did not see him until the 9th of February, 1983? (R 2323) Smith's answer would have been, "I don't remember any statement like that." (R 2323) When it became apparent that the defense did not have a "sworn statement" (or a witness) to impeach Smith with, and did not actually intend to impeach Smith, the prosecutor objected to defense counsel's question. He said,

> She says she doesn't recall ever giving such a statement. I feel all the jury can do is draw an inference. If he wanted to put the statement into evidence, I would [be] more than happy to do so and let the jury see the stuff about him being in state prison. But for him to ask the question and her to give an answer: No, I don't recall giving such a statement, it establishes nothing. (R 2325)

The trial judge apparently agreed with the State that the proposed question and Frances Smith's answer established nothing. At best (for the defense) it enabled the jury to draw an inference that was not supported by any evidence or testimony. If the court erred in excluding the question and answer, that error was clearly harmless.

## ISSUE IV.

WHETHER THE TRIAL COURT ERRED IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF A KEY STATE WITNESS, SPECIAL AGENT CONNIE SMITH.

On direct examination, Special Agent Connie Smith testified as to: (1) where and how the victim's bodies were located (R 1842-57); (2) what she observed inside the trailer at the crime scene (R 1858, 1859); (3) a letter she received from Frances Smith (R 1860-64); (4) a shovel she recovered in LaBelle (R 1864, 1865); and photographs of the crime scene. (R 1873, 1874)

On cross-examination, defense counsel attempted to elicit testimony from Agent Smith on the portion of her investigation relating to the discovery of evidence in Clarence Moore's vehicle. (R 1887-91)

Section 90.612(2), Fla. Stat. (1983) controls the scope of cross-examination of the witnesses. It provides in relevant part:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matter affecting the credibility of the witness.

In the present case, it is plain that the testimony defense counsel attempted to elicit from Agent Smith was not limited to the subject matter of the direct examination. Agent Smith had given no testimony concerning the discovery of evidence in Clarence Moore's vehicle. The trial court was correct in sustaining the State's objection that Agent Smith's proffered testimony was beyond the scope of direct examination.

Cross-examination is not properly used as a vehicle for the presentation of defensive evidence. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The trial court was correct in sustaining the State's objection on that ground as well.

## ISSUE V.

WHETHER THE TRIAL COURT ERRED IN PERMITTING A MEDICAL EXAMINER TO TESTIFY THAT A HOMICIDE OCCURRED IN THIS CASE.

Medical Examiner, Dr. Robert Schultz, testified, "An autopsy is an examination... to determine the cause of death as near as one can possibly identify it in either a natural setting or, in the case where we are referring to, in a setting of post-homicide". (R 2041)

Appellant's counsel objected to Dr. Schultz's reference to "homicide" on the ground that it constituted an expression of opinion as to appellant's guilt or innocence. (R 2041) The court overruled the objection because "The term 'homicide' relates to the taking of life, one human being by another human being. It does not specify whether it is accidental, intentional, or anything of that nature." (R 2043)

Dr. Schultz subsequently described the injuries he discovered with respect to each victim. (R 2045-47, 2056-59) He stated that Clarence Moore, a/k/a Lawrence Lamberson, "had severe crushing injuries to the head," (R 2056) "a laceration of the ear" (R 2056), and "a puncture wound in the back of the left chest ... which penetrated the chest". (R 2058) He said, "There were at least 8 blows struck to the forehead, four on the left, four on the right. The right ear constitutes yet another blow and the penetrating wound to the back would make yet another blow." (R 2058) "...[T]he skull was severely and

multiply fractured, depressed fractures, crushing the skull into small fragments over the frontal portion of the skull and involving also the bones of the eye and the bones around the eye, as well as the cheeks." (R 2059) Dr. Schultz also testified that he found no evidence of disease or of accidental causes of death. (R 2059)

With respect to the other victim, Alicia Dawn Bryant, Dr. Schultz discovered a laceration of the right ear and a badly distorted ring on the right hand which pinched the middle finger. He found no evidence of disease. (R 2046, 2047)

Dr. Schultz concluded that Clarence Moore "suffered multiple crushing blows to the head which resulted in his death." (R 2064)

In determining the cause of Alicia Bryant's death, Dr. Schultz took into account the findings at the autopsy and the circumstances under which the body was found. (R 2049) From the autopsy he took into consideration "the fact that there was trauma to the hand and to a ring on the hand which would have been a painful wound and, secondly, a laceration of the ear. Both of those wounds were non-lethal wounds but painful wounds." (R 2050)

Dr. Schultz stated that he received information from Investigator Sam Johnson that the bodies of Clarence Moore and Alicia Bryant were recovered from a shallow grave in Glades County and that "they were adjacent to one another or in the same common grave, I can't recall which." (R 2055)

Dr. Schultz concluded from the decomposition of the bodies that both Moore and Bryant had been dead about the same interval of time. (R 2073)

Dr. Schultz also testified that he believed Alicia Bryant was strangled. In explaining that belief he said, "We have a 19 year old girl who is dead, who was found alongside a victim who is, in my opinion, obviously the victim of a homicidal blow." (R 2073) "Hers has some signs of physical trauma but no signs at the time of autopsy that we could point to with certainty and say this was the cause of death. Yet, we have therefore to assume — I assume and I believe within reasonable medical certainty... that the victim died of an unnatural condition. If one has then to consider the unnatural states that could leave a victim in this condition, we have little choice but to choose asphyxia, and of the choices that are available to us, manual strangulation is the most likely and that was my opinion as to the cause of death." (R 2076, 2077)

Appellee submits that a sufficient predicate was laid for Dr. Schultz' conclusion that Clarence Moore was "obviously the victim of a homicidal blow." A sufficient predicate was also laid for Dr. Schultz's opinion that Alicia Bryand died of an unnatural condition, probably manual strangulation. The decomposition of Bryant's body made it impossible for Schultz to conclusively determine that Bryant had been strangled. (R 2078, 2079)

Appellant complains that Dr. Schultz's testimony was based on inaccurate information and data. However, at trial no

objections were raised as to the information Dr. Schultz relied upon, and he was not cross-examined on that subject. No contrary information was presented by rebuttal witnesses.

The instant case is very different from Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983), relied on by appellant. The Spradley court declared:

> Over appellant's objection, Dr. Schultz, a forensic pathologist, testified why he excluded "accident" as the cause of Munn's death, notwithstanding admissions by him that at the time he performed the autopsy he did not have any knowledge about either the shooting incident or the investigation surrounding the incident, and that he was told prior to completing the certificate that the shooting had not been an accident. He thus was not qualified to opine that Munn's death was not caused by an accident.

In the present case, Dr. Schultz did not base his opinion on what he had been told, but on his knowledge of the investigation surrounding the incident (the obvious indications of foul play) and on the results of the autopsies. There was not sufficient predicate for Dr. Schultz's opinion in Spradley, but in the instant case the predicate was sufficient.

## CONCLUSION

Based on the foregoing facts, authorities and arguments, the judgments and sentences of the lower court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JAMES H. DYSART
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Appellee

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to J.L. "Ray" LeGrande, Barbara LeGrande of LeGRANDE & LeGRANDE, P.A., 1418-1420 Dean Street, Fort Myers, Florida 33901 on this 8 day of April, 1985.

OF COUNSEL FOR APPELLEE