IN THE SUPREME COURT OF FLORIDA

SYE CHRISTOPHER JENKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

Case No.65,139

INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE

The state charged by information that petitioner robbed Richard Dyle, and that "in the course thereof, there was carried a firearm or other deadly weapon, to wit: a handgun." R144. The case was tried to a jury, which found petitioner "guilty as charged in the information of robbery." R149. The trial court adjudged petitioner guilty, and sentenced him to seventy-five years imprisonment, retaining jurisdiction over one-third of the sentence,[1] and imposing a three-year mandatory minimum term under Section 775.087(2), Florida Statutes (1981). R150-R154. He timely filed his notice of appeal, R156, and the District Court of Appeal, Fourth District of Florida, affirmed the conviction and sentence, except to set aside the three-year mandatory minimum. Jenkins v. State, 448 So.2d 1060 (Fla. 4th DCA 1984). Petitioner unsuccessfully moved for rehearing, and then undertook the instant proceeding for discretionary review in this Court.

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[1] The trial court never entered a separate order stating its grounds for the retention of jurisdiction

STATEMENT OF THE FACTS

Richard Dyle was working at a Citgo Station at 10:30 p.m. on May 1, 1982. R18. Apparently the station also served as a convenience store, and Dyle was behind the counter stocking the shelves when three black men entered the store. R18. Asked at trial to describe the men, he responded: "Three black males." R19. He testified at one point that all three entered together, R32, but then admitted to prior testimony under oath that he did not know whether they came in together. R33. In any event, the three men went over to a cooler and then walked up to the counter. When one of the men, whom Dyle identified as petitioner, R21, threw a cigarette on the floor, he was chastised by Dyle. R19.

Then a second man, the tallest of the three, set down a drink on the counter, and Dyle opened the cash register to ring up the sale. R21-22. Then the third man, "the shortest of the three," not petitioner, pulled out a derringer and directed "the tallest one" to take the money from the till. R22-R23. The tallest man took the money. R23. Petitioner simply stood by, and Dyle had no idea whether petitioner ever saw the robbery. R23. Then the tallest man and petitioner ran out of the store. R24. The gunman then robbed a customer named Mel, and also fled the store heading in the same direction as the other two. R26. Dyle later picked petitioner's photo out of a photo lineup, R60, and was asked on cross-examination:

> [Q] The person you picked out from the photo lineup, did he do anything affirmatively, did he do any affirmative act to take money from you or the store?
>
> [A] No, sir.

[Q] All he was doing was standing by the side and he left with these people?

[A] Yes, sir.

R43-R44.

Melvin Norris testified that he went to the station at 11:00 p.m. on May 1, 1982 to buy a six-pack and cigarettes. R49. There were three black men and the manager in the store when he arrived. R50. As Norris approached the counter with these purchases, he saw that one of the black men had a gun. R50. Another of the black men took money from the till and left with the third. R51. The gunman then robbed Norris and also left. R52. Norris was unable to say whether petitioner was in the store that night, R53; he did pick out someone out of a photo lineup, but the person he picked was the "wrong" one. R56. He also testified that the police showed Dyle a photo lineup on May 1, 1982, and that Dyle picked someone out. R55-R56. (Dyle did not recall this incident. R42).

Detective Piroth testified that on May 11, 1982, Dyle picked petitioner's picture out of a photo lineup. R60. He testified that he then drove to petitioner's neighborhood in an unmarked car, while dressed in a business suit. R64-R65. When petitioner saw him, he ran away. R65.

SUMMARY OF ARGUMENT

In this armed robbery case, the trial court retained jurisdiction over one third of the sentence, but did not state any reason for the retention. The District Court of Appeal affirmed the retention solely on the basis that the matter was not preserved for appeal. Petitioner contends that the district court erred and that sentencing errors may be addressed for the first time on appeal.

Also in this case, the evidence showed at most that petitioner was present when the robbery occurred, and fled with one of the robbers. The state's principle witness testified that petitioner did not aid or abet the robbers. Under such facts, petitioner contends, it was erroneous to uphold the conviction where there is a lack of substantial competent evidence that petitioner knew of the robbery ahead of time and aided or abetted the robbers in any way.

Third, the information alleged that in the course of the robbery "there was carried a firearm," but did not allege that petitioner or anyone in cahoots with him carried a firearm or other weapon. Accordingly, petitioner argues, the information charged only a robbery rather than an armed robbery. Since the state did not charge petitioner with armed robbery, his conviction and sentence for that offense violate his constitutional right to due process of law.

Finally, petitioner contends that his conviction and sentence are illegal because the trial court gave a flight instruction not supported by the evidence, and erroneously refused to give his instruction as to identification evidence.

POINT I

THE DISTRICT COURT OF APPEAL ERRED IN UPHOLDING THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF PETITIONER'S SENTENCE.

A. Factual Background

In this cause, petitioner was convicted of armed robbery. R149,R150. The trial court sentenced appellant as follows:

> THE COURT: Seventy-five years State Prison, retain jurisdiction for one third. That doesn't say you can't be paroled but they can't parole you without contacting me though. You've got thirty days if you want to appeal though. Advise the Court and you'll be appointed a lawyer.
>
> MR. JULIAN [defense counsel]: Your Honor, two things. I'd like to object to the retention of jurisdiction on the grounds that there hasn't been an adequate showing to retain jurisdiction.
>
> Additionally, I would ask the Court to declare him indigent for purposes of appeal.
>
> THE COURT: Granted. Just give me the papers.
>
> R142.

The trial court gave no reason at the sentencing hearing for the retention of jurisdiction, and entered no written order setting forth grounds for retention.

On appeal, the district court wrote:

> [Appellant] suggests first that the circuit court erred in retaining jurisdiction over the appellant for the first one-third of the sentence without stating the grounds therefor with the particularity required by Section 947.16(3), Florida Statutes (1981). The record shows that the circuit court failed to follow the statute; however, the point is not preserved for appellate purposes because appellant made no objection at the time, [cit.], and because the error is not of fundamental

> proportions. [Cit.]. Accordingly, we do not disturb the sentence insofar as it maintains circuit court jurisdiction over the appellant for the first third of that sentence.
>
> Jenkins v. State, 448 So.2d 1060, 1061 (Fla. 4th DCA 1984)

B. Applicable Law

1. Retention of Jurisdiction.

Section 947.16(3), Florida Statutes (1983), permits the trial court to retain jurisdiction over the first third of a robbery sentence. Section 947.16(3)(a) governs the procedure for retention:

> (a) In retaining jurisdiction for the purposes of this act, the trial court judge shall state the justification with individual particularity, and such justification shall be made a part of the court record. A copy of such justification shall be delivered to the department together with the commitment issued by the court pursuant to s.944.16.

Failure to give the accused the opportunity to respond to grounds for retention of jurisdiction violates the due process clauses of the state and federal constitution. Cf. Stafford v. State, 440 So.2d 55 (Fla. 4th DCA 1983). See also Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed. 2d 326 (1967) (due process clause requires hearing and right of confrontation before court renders enhanced sentence).

2. Justiciability

In State v. Rhoden, 448 So.2d 1013 (Fla. 1984), the state tried a juvenile as an adult. At sentencing, the trial judge imposed adult sanctions without complying with the requirements of section 39.111(6), Florida Statutes (1981) (setting forth the procedure for imposing adult sanctions on a juvenile

offender). Although defense counsel failed to object to the trial court's failure to comply with section 39.111(6), this Court held that the matter could be raised for the first time on appeal, writing:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. [Cit.] The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. If the state's argument is followed to its logical end, a defendant could be sentenced to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence.
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> 448 So.2d at 1016
> (e.s.)

C. Discussion

From the foregoing, it appears that the District Court of appeal erred by applying the contemporaneous objection rule to the sentencing issue at bar. As this Court noted in Rhoden, the contemporaneous objection rule does not apply to such proceedings. The defense has no strategic reason for not objecting to an illegal sentence.

Turning to the merits, petitioner argues that the trial court committed two errors when it retained jurisdiction over the first third of his sentence. The first error was the failure to pronounce explicit grounds for retention at the time of the sentencing hearing. The second error was the failure to reduce to writing the grounds for retention.

Under Stafford and Specht it was erroneous to retain jurisdiction without disclosing to petitioner the grounds for detention. Further, the trial court erred by failing to state with particularity any grounds for retention, in violation of section 947.16(3)(a).

Section 947.16(3)(a) also requires that the grounds for retention be reduced to writing and sent to the department of corrections. The record discloses that the trial court failed to comply with this requirement.

D. Conclusion

The District Court of Appeal erred by upholding the retention of jurisdiction in this cause.

POINT II

THE DISTRICT COURT ERRED BY UPHOLDING PETITIONER'S CONVICTION WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION

A. Facts

The evidence in this case was that petitioner was present in a store when two other persons committed a robbery, and that he left with one of the robbers. Asked whether petitioner did "any affirmative act" in the furtherance of the robbery, the robbery victim answered, "No, sir." R43-44. Ten days later, petitioner ran away from a policeman who was dressed in a business suit. R64-65.

B. Applicable law

Judicial review of the sufficiency of the evidence in a criminal case is an essential safeguard embodied in the due process clause of the federal constitution. Thus, in United States v. Powell, 53 U.S.L.W. (S.Ct.) 4012 (December 10, 1984), Justice Rehnquist wrote for the unanimous court that criminal defendants are "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and the appellate courts." 53 U.S.L.W. (S.Ct.) 4015. In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 560 (1979), the Court set forth the standard for federal review on habeas corpus of the sufficiency of the evidence supporting a state criminal conviction:

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself

> whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 US, at 282, 17 L.Ed. 2d 362, 87 S.Ct. 483 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 US, at 362, 32 L.Ed. 2d 152, 92 S.Ct. 1620. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.
>
> 443 U.S. at 318-319
> (emphasis in original)

The Court went on to note that the "no evidence" and the "modicum of evidence" standards of review are inadequate to safeguard the rights of the accused, 443 U.S. at 320, that it would be absurd to uphold a conviction on the basis of "one slender bit of evidence," and that the fact that the jury is instructed on the reasonable doubt standard does not relieve the reviewing court of its burden of considering the sufficiency of the evidence. Ibid. n.4.

In Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982), Cosby was convicted of burglary in a Georgia court on the basis of circumstantial evidence. On federal habeas corpus review, the Eleventh Circuit set aside the conviction on the ground that the

evidence was insufficient to support the conviction, applying Jackson as follows:

> If the reviewing court can only say that the ultimate fact is more likely than not, then the Jackson v. Virginia standard has not been met. See text following note 12 supra. This is because Jackson requires that a reasonable juror be able to find the defendant guilty beyond a reasonable doubt, and if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt. Accord, U.S. v. Jones, supra, 418 F.2d at 824-26. This is not to say that whenever the evidence supports a reasonable inference consistent with innocence the jury must acquit, for the Supreme Court has rejected the "theory that the prosecution [must] rule out every hypothesis except that of guilt," Jackson, 443 U.S. at 326, 99 S.Ct. at 2793, as have we U.S. v. Bell, 678 F.2d 547, 550 (5th Cir. 1982) (Unit B en banc). It is only where, after viewing the evidence in its most favorable light and making all credibility decisions in favor of the state the evidence still fails to at least preponderate in favor of the state, that we become concerned with conflicting inferences.
>
> 682 F.2d at 1383
> (emphasis in original)

In accordance with the foregoing principles, this Court has ruled that a conviction cannot stand unless supported by "substantial competent evidence." Heiney v. State, 447 So.2d 210, 212 (Fla. 1984). Implicit in this standard is the proposition that a reviewing court must set aside a conviction unless the evidence is inconsistent with any reasonable hypothesis of innocence. Thus in Brumbley v. State, 453 So.2d 381 (Fla. 1984), this Court ruled as follows:

> We agree with appellant, however, that the evidence, exclusive of any substantive use of the prior inconsistent statements, does not support a finding that he shared in the

> "premeditated design to effect the death" of Clifton Rogers. §782.04(1)()a), Fla.Stat. (1975). The fact that Smith and appellant discussed killing Rogers and that later it was done by Smith is a circumstance that might tend to support the conclusion that appellant aided, abetted, counseled, hired, or otherwise procured the commission of the murder. If such fact is proven then the accused can be considered a principal of the first degree "whether he is or is not actually or constructively present at the commission of such offense." §777.011, Fla.Stat. (1975). Appellant's shrugging of his shoulders when Smith suggested killing Rogers is another circumstance from which a premeditation concurrent with that of the actual perpetrator might be inferred. The prior inconsistent statements of Smith, properly understood as impeachment of his credibility, might also contribute factual inferences by persuading the jury to believe parts of Smith's testimony, but to disbelieve other parts. But at best the factual inference that appellant shared in the premeditated design is supported purely by circumstantial evidence.
>
> "When circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of his innocence." Mayo v. State, 71 So.2d 899, 904 (Fla. 1954). Under the evidence in this case, we cannot say that the circumstances, which were consistent with premeditation on the part of appellant, were also inconsistent with any reasonable hypothesis of lack of premeditation. We therefore conclude that appellant's conviction for first-degree murder is grounded upon the felony murder statute.
>
> 453 So.2d at 385-386
> (e.s.)

In Lincoln v. State, 9 F.L.W. 483 (Fla. November 21, 1984), the defendant's husband told her that he was going to rob a store or get some drugs, and insisted that she drive the car. She refused at first, but finally relented. She drove her husband to and from the scene of the robbery. Law enforcement officers

pursued the car for four miles.[2] On discretionary review, this Court held that the evidence was sufficient to sustain Lincoln's robbery conviction. In reaching its conclusion this Court specifically noted that the record contained "evidence from which the finder of fact could conclude that defendant knew that her husband was going to commit a robbery when she drove him to the drugstore." 9 F.L.W. at 483. This Court found that the facts in Lincoln were distinguishable from those in A.Y.G. v. State, 414 So.2d 1158 (Fla. 3rd DCA 1982) (holding that presence at the scene of the crime and driving the getaway car are not sufficient facts to exclude reasonable hypothesis that accused had no prior knowledge of the crime), and specifically disapproved of the notion that driving a getaway car in an elusive manner to avoid the police, with nothing more, makes one a principle.

To be guilty as an aider or abettor, one must do some act or say some word that aids or abets the perpetration of the offense. Thus, in G.C. v. State, 407 So.2d 639 (Fla. 3rd DCA 1981), the court wrote and held as follows:

> G.C., a juvenile, was adjudicated delinquent as an aider and abettor to attempted burglary.
>
> Accepting all of the evidence in a light most favorable to the state at best there is proof that (1) G.C. knew that Delgado was going to burglarize an apartment, (2) G.C. followed Delgado to the scene of the crime, (3) G.C. stood back at least fifteen feet and watched Delgado remove jalousie glasses from the window of the apartment. The evidence before the court is less than that necessary to prove that G.C. aided and abetted in the attempted burglary.

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[2] These facts are taken from the concurring opinion by Judge Dauksch in Lincoln v. State, 444 So.2d 27,29 (Fla. 5th DCA 1983) (Dauksch, J., concurring). On discretionary review, this Court relied upon the facts set forth in Judge Dauksch's concurring opinion. 9 F.L.W. at 483.

In order for one person to be guilty of a crime physically committed by another under Section 777.011, Florida Statutes (1979), it is necessary that he not only have a conscious intent that the criminal act shall be done, but further requires that pursuant to that intent he do some act or say some word which was intended to and which did incite, cause, encourage, assist or induce another person to actually commit the crime. Ryals v. State, 112 Fla. a4, 150 So. 132 (1933); J.L.B. v. State, 396 So.2d 761 (Fla. 3rd DCA 1981); R.W.G. v. State, 395 So.2d 1279 (Fla. 2d DCA 1981); Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978).

The state implores that the necessary elements of intent and act may be infered because G.C. knew that Delgado was going to commit a crime and was present during Delgado's attempt, it is established beyond and to the exclusion of any reasonable doubt that G.C. was a "lookout". Where two or more inferences must be drawn from the direct evidence, then pyramided to prove the offense, the evidence lacks the conclusive nature necessary to support a conviction. Gustine v. State, 86 Fla. 24, 97 So. 207 (1923). Presence at the scene, without more, is not sufficient to establish either intent to participate or act of participation. J.L.B. v. State, supra; J.H. v. State, 370 So.2d 1219 (Fla. 3rd DCA 1979). Mere knowledge that an offense is being committed is not equivalent to participation with criminal intent. See, e.g., United States v. Martin, 533 F.2d 268 (5th Cir. 1976). Knowledge that a crime is going to be committed and presence at the scene, without more, is generally insufficient to establish aiding and abetting. See, e.g. Nye & Nissen v. United States, 336 U.S. 613, 169, 69 S.Ct. 766,769, 93 L.Ed. 919, 925 (1949); Baker v. United States, 395 F.2d 368 (8th Cir. 1968); Ramirez v. United States, 363 F.2d 33 (9th Cir. 1966).

Reversed with instructions to discharge the juvenile.

407 So.2d at 640
(emphasis in original)

The discussion and conclusions in G.C. are in accordance with the common law policies codified in section 777.011, Florida Statutes (1981), our aider and abettor statute. In United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938), Judge Learned Hand discussed at length the common law history giving rise to our concept of the liability of aiders and abettors, and, after surveying the various common law definitions of the term accessory before the fact, he wrote:

> It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by this action to make it succeed. All the words used--even the most colorless, "abet"--carry an implication of purposive attitude towards it.
>
> 100 F.2d at 402

C. Discussion

At bar there was no evidence that petitioner had any prior knowledge of the robbery. The state's principle witness testified that appellant did nothing to aid or abet the robbery. R43-44. The only evidence was that appellant arrived with the robbers and was present when the robbery was committed, that he fled with one of the robbers, and that ten days later he ran away from a policeman in a business suit. Petitioner submits that under the teachings of the foregoing cases, specially Lincoln, G.C., and Brumbley, the record does not contain substantial competent evidence that appellant aided and abetted the robbery, so that his conviction and sentence are violative of the due process clauses of the state and federal constitutions.

POINT III

WHERE THE INFORMATION CHARGED PETITIONER ONLY WITH SIMPLE ROBBERY, THE TRIAL COURT ERRED BY ADJUDGING PETITIONER GUILTY OF,AND SENTENCING HIM FOR, ARMED ROBBERY

The information charged that petitioner committed a robbery,and added:

> ...in the course thereof, there was carried a firearm or other deadly weapon, to wit: a handgun,...
>
> R144 (e.s.)

Thus the information failed to allege that petitioner carried a weapon during the robbery, so that the information only charged petitioner with simple robbery. See Sanders v. State, 386 So.2d 256 (Fla. 5th DCA 1980). Likewise, the information did not plead that anyone acting in concert with petitioner carried the weapon, which allegation would have served the state's purpose. See State v. McQuay, 403 So.2d 566 (Fla. 3rd DCA 1981).

From the foregoing, petitioner was convicted of a crime for which he was not charged. Conviction upon a charge not made is a sheer denial of due process. De Jonge v. Oregon, 299 U.S. 353,362, 57 S.Ct. 255, 81 L.Ed. 278 (1937). It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. Presnell v. Georgia, 439 U.S. 14,16, 99 S.Ct. 235, 58 L.Ed. 2d 207 (1978).

Since the state charged petitioner only with simple robbery, the conviction and sentence for armed robbery violate petitioner's rights under the due process clauses of the state and federal constitutions and must be set aside.

POINT IV

THE TRIAL COURT ERRED BY GIVING A FLIGHT INSTRUCTION NOT SUPPORTED BY THE EVIDENCE

The trial court instructed the jury over objection, R75, that where person flees the scene of crime before he has been suspected of crime, his flight is a circumstance of guilt. R148. The state's case was that that petitioner fled the scene after Dyle saw him "participate" in the crime: ergo, the flight occurred after petitioner was suspected of the crime, and the evidence did not support the instruction. Accordingly, petitioner should receive a new trial under Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977) (defendant entitled to new trial where no factual basis for flight instruction).

POINT V

THE TRIAL COURT ERRED BY REFUSING TO GIVE PETITIONER'S REQUESTED INSTRUCTION AS TO IDENTIFICATION

The trial court refused to give petitioner's request for an instruction as to the issue of identification. R74-R75, R146-R147. Petitioner is aware that this Court has ruled that a trial court need not give such an instruction, State v. Freeman, 380 So.2d 1288 (Fla. 1980), but submits that the due process clause of the federal constitution requires such an instruction where the identity of the malefactor is seriously in dispute during the trial. United States v. Telfaire , 469 F.2d 552 (DC Cir. 1972).

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Russell H. Bohn, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 7th day of January, 1985.

Richard B. Greene
Of Counsel