IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOSEPH CURTIS SMITH,

Respondent.

CASE NO. 66,128

ANSWER BRIEF OF RESPONDENT

ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following addition:

1. There were four additional issues raised by Respondent in the Fourth District Court of Appeal that were not reached in the District Court of Appeal's opinion.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts with the following additions and/or corrections.

The incident giving rise to the case-at-bar involves an illegal burglary with an assault which occurred on August 26, 1983 in Fort Lauderdale, Florida. The Information alleges that Respondent, Joseph Curtis Smith, entered the room rented by Rebecca Plyler, with a fork-like instrument, with the intent to commit a theft. Disputed issues at trial included the identification of Mr. Smith as the perpetrator of the offense and the sufficiency of proof as to intent as alleged.

The prosecution called five (5) witnesses to testify during its case-in-chief. The first witness, Rebecca Plyler, rented a room in the residence of Vickie Brayton (R177-178, 224, 236-237). The night of the incident, Ms. Plyler fell asleep with the television on. The door could have been left unlocked (R179-180). She awakened at approximately 1 a.m. to find a man standing in her room (R181). At trial she described the intruder as a short, slim black man, clad only in short-shorts (R182-183). The man was about 5'2". He pointed a weeder, that looked like a fork, (R183, 226) at her. The man told her to stop screaming and directed her to place a blanket over her head. After reciting the Lord's Prayer, Ms. Plyler asked him what he wanted. The man replied, "I want you" (R184). Ms. Plyler told him that Jesus loved him, that he "didn't have to do that" and put a hand on his back. She also said if he left, everything would be o.k. She gave the man religious tracts and he departed (R185-186).

Ms. Plyler called Ms. Brayton on the telephone and told her to contact the police. Ms. Brayton called a friend before calling the police (R187-188, 241-243). The police arrived one and one-half (1-1/2) to two (2) hours after the incident (R189).

The police returned again one hour and one half (1-1/2) later and questioned Ms. Plyler about one of the tracts with the word "lonely" in the title (R190-192). Over defense objection (R192-193) the State introduced the tract into evidence (R193).

The following afternoon, Ms. Plyler was shown a photographic line-up. No identification was made (R196-197, 221). One week later, Ms. Plyler spoke with a detective for one and a half (1-1/2) hours and was shown a six (6)-man photographic line-up. The detective told her that the tract was found on one of the six men. She made a tentative identification, but asked to see a live line-up. After five (5) minutes, she identified Mr. Smith from the live line-up as the intruder (R206-207, 221-222). Ms. Plyler identified Mr. Smith in court (R207). Over defense objections, the photographic arrays and a photograph of the live line-up were introduced into evidence (R198-199, 201).

On cross-examination, Ms. Plyler admitted that the previous day, during a motion hearing, she could not tell that her friends were present in court. Although the judge asked her to look around the courtroom, she did not do so. Ms. Plyler stated at trial that she did not want to focus on, or look at, Mr. Smith (R223-224). Ms. Plyler did not recall her initial statement to the police that the intruder was clad only in yellow bikini underwear (R208-210).

She could not remember how many religious tracts she gave the intruder. Of the original eight (8) tracts she had, only four (4) remained after the intruder left (R213). The tracts were obtained from her church or at a Christian bookstore; either name was stamped on the tract (R213-214). Ms. Plyler initially told the police that the pamphlet was called "are you lonely." The officer then told her that the pamphlet said "never lonely" and she agreed (R218, 263-264). Ms. Plyler stated that she made no personal identification mark on the pamphlet (R220).

Vickie Brayton testified that she heard Ms. Plyler's screams and saw a small black male wearing only bikini pants leaving (R238-239). The following day, she checked her unlocked utility room. She found one of her gardening gloves in the hedges but could not locate a forked trough (R240). On cross-examination, Ms. Brayton testified that she last saw the weeder, or trough, a few days before the incident (R244).

Fort Lauderdale police officers Amanda Alexander and Susan Tubman testified that they arrived at the scene at about 3:00 a.m. (R246-247).

On cross-examination, Officer Alexander stated that the first BOLO, based on Ms. Plyler's initial interview, described the intruder as 5'5" slim black male wearing yellow bikini pants (R353). Mr. Smith was apprehended wearing a brown T-shirt with dark brown trim, blue shorts and light blue bikini underwear (R253-254).

On her way to the scene, Officer Tubman observed a black man on a bicycle wearing a blue shirt. He was about two (2) blocks from the scene (R259, 267). After speaking with Ms. Plyler, she

sent out another BOLO. Later, she identified a man on a bicycle apprehended by Sergeant Jones as the man she saw on the way to the scene (R262). The man identified as Mr. Smith, was seven (7) blocks from the house (R263). The officer and Sergeant Jones said that the religious pamphlet and marijuana were found on Mr. Smith's person (R264-266, 273-274).

Fort Lauderdale Detective Ralph Perante testified that Mr. Smith told him, after being Mirandized, that he never rode his bike north of Sunrise Boulevard, the location of the residence (R279-281). The detective conducted the photo and live line-ups for Ms. Plyler (R283-289).

On cross-examination, Detective Perante stated that Mr. Smith told him the evening of the incident, he rode his bike by Burger King and had obtained the religious pamphlet from a man outside Publix (R291-292). The detective stated that Ms. Plyler described a two-pronged fork to him but that she did not call it a weeder. After Ms. Brayton told him that a weeder was missing, the detective drew a picture of a weeder. Ms. Plyler stated that it looked like the instrument used (R295-296). No instrument was found or introduced into evidence.

Both sides rested (R299, 304, 314).

POINTS INVOLVED

POINT I

THE STATE'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE RESPONDENT COMMITTED THE OFFENSE OF BURGLARY.

POINT II

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS WHERE THE INVESTIGATORY STOP WAS IMPROPER

POINT III

RESPONDENT'S CONVICTION CANNOT STAND WHERE THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING EVIDENCE REGARDING AN IMPERMISSIBLE OUT-OF-COURT IDENTIFICATION OF RESPONDENT

POINT IV

RESPONDENT'S SENTENCE WAS IMPERMISSIBLY IMPOSED IN EXCESS OF THE SENTENCING GUIDELINES AND THEREBY VIOLATES THE STATUTE, THE RULE OF CRIMINAL PROCEDURE AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

POINT V

THE TRIAL COURT ERRED IN IMPOSING COSTS ON RESPONDENT WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO CONTEST THOSE COSTS

SUMMARY OF ARGUMENT

Petitioner only discusses one issue in its brief; the issue which the District Court of Appeal relied on in its opinion. However, there were four other issues raised in the District Court of Appeal by Respondent; which were not reached in the opinion of the District Court of Appeal. It is well settled that when this Honorable Court accepts jurisdiction of a case, its scope of review encompasses the entire cause. Reed v. State, ___ So.2d ___, Case No.65, 323, Opinion filed May 2, 1985 (Fla. 1985); Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976).

The first issue involves the question of whether the prosecution is required to prove intent to commit the offense of theft when it is alleged in the information. The District Court of Appeal found that this was required and that the prosecution did not meet its burden. Respondent acknowledges that this Honorable Court has ruled that the prosecution need only prove intent to commit any offense. L.S. v. State, ___ So.2d , 10 FLW 140, Opinion filed february 28, 1985 (Fla. 1985). Respondent would urge this Honorable Court to reconsider its decision in L.S., supra.

The second issue involves the validity of a stop of Respondent, and the failure to suppress the fruits of this stop. The stop was based on two BOLO's, which were inconsistent with each other. Respondent matched neither BOLO, aside from being a Black male, which was not unusual in this racially-mixed area. Respondent's attire was inconsistent with both of the BOLO's. Thus, there was no basis to stop Respondent.

The third issue involves the impermissibly suggestive procedures employed to obtain an out-of-court identification of Respondent.

The pertinent facts as to this issue were adduced at the December 5, 1983, motions hearing. Ms. Plyler was shown a photographic array at her residence the day after the incident. No identification was made (R36-37, 104-105, 108-109). One week later, Ms. Plyler was summoned to the police station. She spoke with Detective Parente for one (1) hour to one hour and a half (1-1/2) (R105-106). She next asked to see a live line-up. A live line-up was soon arranged, and Ms. Plyler identified Respondent, who was the only man in both the photo array and live line-up (R26-28, 37-43). The fact that Respondent was the only person in the photo array and the live line-up placed an undue emphasis on him and thus gave rise to a "substantial likelihood of irreparable misidentification." Neil v. Biggers, 409 U.S. 188 (1972).

The fourth issue involves the sentencing of Respondent to a sentence of twenty (20) years in prison, when the sentencing guidelines called for a sentence of four and one-half (4-1/2) to five and one-half (5-1/2) years in prison (R398-399, 409, 437-441, SR). The trial judge departed dramatically from the guidelines sentence, even though he had no guidelines scoresheet (SR). This requires reversal of the sentence. Additionally, many of the reasons given for departure are inappropriate. Newsome v. State, ___ So.2d ___, Case No.84-1487, Opinion filed March 29, 1985 (Fla. 2nd DCA 1985).

The fifth issue involves the imposition of costs on an indigent defendant without notice and an opportunity to contest costs. Jenkins v. State, 444 So.2d 947 (Fla. 1984).

POINT I

THE STATE'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE RESPONDENT COMMITTED THE OFFENSE OF BURGLARY.

Respondent concedes that the recent opinion of this Honorable Court in L.S. v. State, ___ So.2d ___, 10 FLW 140, opinion filed February 28, 1985, (Fla. 1985) holds that the prosecution need only prove intent to commit any offense therein, rather than the offense charged in the Information. However, Respondent respectfully urges this Honorable Court to reconsider its decision in L.S., supra and approve the decision of the Fourth District Court of Appeal in the instant case.

The opinion of the Fourth District Court of Appeal is based on the long established legal principle that every element alleged in the charging document must be proven beyond a reasonable doubt. Booker v. State, 397 So.2d 910, 915 (Fla. 1981); Davis v.State,326 So.2d 196 (Fla. 4th DCA 1976). This Honorable Court's opinion in State v. Waters,436 So.2d 66 (Fla. 1983) reaffirmed this principle, as to the requirement of intent to commit an offense within the structure.

> Of course, such intent, along with the other elements, must then be proved beyond a reasonable doubt in order for a verdict of guilt and judgment thereon to be proper.
>
> 436 So.2d at 46.

The opinion of the Fourth District Court of Appeal, on this issue, is consistent with the established law of this state and should be left undisturbed.

POINT II

THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS WHERE THE INVESTIGATORY STOP WAS IMPROPER

The present argument challenges the trial court's denial of Respondent's Motion to Suppress. At issue is the validity of the initial stop which led to Respondent's arrest. Examination of the record sub judice demonstrates that there were insufficient circumstances to justify the stop (R11-132). Therefore, the physical evidence, a religious tract and statements that were obtained as a result of the improper stop must be suppressed. Amendment IV, United States Constitution; Article I, §12, Florida Constitution.

The evidence pertinent to the search and seizure herein was adduced at the December 5, 1983 hearing on Respondent's Motion to Suppress Physical Evidence and Statements (R420-422, 11-132). The initial dispatch to the scene was received by Officers Tubman and Alexander about two hours after the incident (R20, 48, 66). Ms. Plyler initially described the intruder as a black male, 5'5", with a slim build, short afro, clad only in yellow bikini underwear. The man held a fork-like instrument (R55, 57, 72). Officer Alexander placed a BOLO based on this description (R72). On her way to the scene, Officer Tubman had observed a black male riding a black bicycle. The man wore a blue shirt and possibly blue jeans (R51, 55-56, 87). After arriving at the scene, Officer Tubman placed a second BOLO, based on this description (R87).

Sergeant Jones, who had heard both BOLOs (R91-94), stopped Respondent at about 3:30 a.m. (R87-88). Respondent was riding a bicycle approximately six (6) or seven (7) blocks from the scene, a racially mixed area (R92, 96). Sergeant Jones stated that Respondent was wearing a brown shirt with brown trim, blue and white shorts, and light blue undershorts (R92-93). Sergeant Jones testified that Respondent looked over his shoulder at him, and after the officer beeped his horn and turned on his lights, Respondent stumbled off his bike (R89).

Officers Tubman and Alexander arrived eventually (R90). Officer Tubman said that Respondent was the man she had seen previously (R90). Although Sergeant Jones did an initial weapons pat down and seized no property (R90-91), Officer Alexander seized the religious tract sought to be suppressed and Officer Tubman seized marijuana from Appellant's pocket (R98-99).

It is well-settled that to justify temporary detention, the officer must have a "reasonable" suspicion that the person has committed, is committing, or is about to commit, a crime. Section 901.151 Florida Statutes (1983); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980); State v. Stevens,354 So.2d 1244 (Fla. 4th DCA 1978). Such a "reasonable" suspicion must be well-founded, articulable, and based on objective facts. See: Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979). "Mere" or "bare" suspicion, in contrast, cannot support detention. State v. Stevens, supra at 1247.

The evidence sub judice reveals that the basis for Sergeant Jones's detention of Respondent was that he was a black male

riding a bicycle on a public street in a racially mixed neighborhood at 3:30 a.m. (R92-93). He did not match either of the two BOLOs. The first BOLO described the intruder as clad only in yellow bikini underwear, carrying a forked instrument. No bicycle was mentioned (R55, 57,72). The second BOLO, which was based on a description by Officer Tubman, and not the victim [Ms. Plyler], described a black male wearing a blue shirt, riding a bicycle (R51, 55-56). Respondent was apprehended wearing a brown shirt with brown trim, blue pants, and blue undershorts (R92-93). He was not carrying a forked instrument. Thus, there was insufficient information to justify a stop. Nor did Respondent's subsequent behavior; looking over his shoulder at a marked police car following him and hurrying off his bicycle at the request of the police officer (R89), provide a reason for detention. E.g.: McClain v. State, 408 So.2d 721 (Fla. 1st DCA 1982); Kearse v. State, supra.

The above-described factors are patently insufficient to constitute a founded suspicion that Respondent was involved in any kind of criminal activity. Amendment IV, United States Constitution; Article I, Section 12, Florida Constitution. See: Wilson v. State, 433 So.2d 1301 (Fla. 2nd DCA 1983) [changing package from arm to arm and changing direction in high crime area not legally sufficient to justify stop]; Freeman v. State, 433 So.2d 9 (Fla. 2nd DCA 1983) [carrying lighted flashlight through parking lot during early morning hours in neighborhood that suffered "rash" of burglaries did not support founded suspicion].

See also: Ross v. State, 419 So.2d 1170 (Fla. 2nd DCA 1982) [involving a twenty-five (25) minute time lapse between BOLO and stop and suspect who did not match BOLO description].

The fact that Respondent was out riding a bicycle late at night, two hours after a burglary occurred in the area, cannot constitute a valid basis to detain him. State v. Stevens, supra. See also: Levin v. State, 449 So.2d 288, (Fla. 3rd DCA 1983), decision approved State v. Levin, 452 So.2d 5652 (Fla. 1984). Each BOLO description here was inconsistent with the other. One was not even based upon a witness's description. Respondent matched neither BOLO, aside from being a Black male, which in itself was not unusual in this racially-mixed area. Moreover, Respondent's attire was inconsistent with both of the BOLO descriptions. Ross v. State, supra.

Based upon the foregoing, it is clear that the stop of Respondent was improper. The resulting arrest and search were fruits of the illegal detention. Therefore, on motion the evidence should have been suppressed.

POINT III

RESPONDENT'S CONVICTION CANNOT STAND WHERE THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING EVIDENCE REGARDING AN IMPERMISSIBLE OUT-OF-COURT IDENTIFICATION OF RESPONDENT

This issue involves the impermissible suggestive procedures employed to obtain an out-of-court identification of Respondent. Respondent objected to this evidence prior to trial (R423-424, 122-132). At trial, the admission into evidence of Ms. Plyler's identification testimony was highly prejudicial because identification was a primary issue in dispute. Therefore, the tainted identification denied Respondent due process of law. Amendment XIV United States Constitution; Article I, Section 9, Florida Constitution.

The pertinent facts as to this issue were adduced at the December 5, 183, motions hearing. Ms. Plyler was shown a photographic array at her residence the day after the incident. No identification was made (R36-37, 104-105, 108-109). One week later, Ms. Plyler was summoned to the police station. She spoke with Detective Parente for one (1) hour to one hour and a half (1-1/2) (R105-106). Then she was shown a six-man photo array (R105-106). She next asked to see a live line-up. A live line-up was soon arranged, and Ms. Plyler identified Respondent, who was the only man in both the photo array and the live line-up (R26-28, 37-43).

An examination of the photograph of the live line-up reveals that Respondent was noticeably shorter than the other subjects (SR - Original Exhibit #3). Thus, the live line-up was unduly weighed toward selection of Respondent. Additionally, Respondent

was the only subject in both the photographic array and the live line-up (SR - Original exhibits #2, #3, #5). Consequently, there was an inherent emphasis on identification of Respondent. Until the live line-up, Ms. Plyler's "identification" of Respondent from the second photographic array was equivocal and full of doubt (R41-43).

However, the trial court found that the line-ups were not unduly suggestive (R126). At trial, prosecution witnesses Plyler and Parente referred to the pre-trial identifications (R197-207, 282-289). The second photographic array and photograph of the live line-up were introduced into evidence by the State (R427, SR - Original Exhibits #2, #3). The lower court erred in failing to exclude this evidence, which was tainted by an impermissibly suggestive procedures.

The standard for determining whether the confrontation is so impermissibly suggestive as to give rise to a "substantial likelihood of irreparable misidentification" has been delineated by the United States Supreme Court in Neil v. Biggers, 409 U.S. 188 (1972).

The factors to be considered in evaluating the likelihood of misidentification include:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness as the confrontator, and the length of time between the crime and the confrontation." Id., 409 U.S. at 199-200.

In the present case, it is apparent that the second photographic array and the live line-up were impermissibly suggestive. Respondent was the only subject in both the array and the live line-up (SR - Orignal Exhibits #2, #3, #5). Also to be considered is the time lapse of one week between the incident and the line-ups and the fact that Ms. Plyler was unable to make an identification the day after the incident (R36-37, 104-105, 108-109). Finally, the fact that Respondent was much shorter than the other live line-up subjects must be considered (SR -Original Exhibit #3). Clearly, the line-ups were impermissibly suggestive and the in-court references to the line-ups should have been excluded.

Moreover, the prosecution failed to sustain its burden of proof that Ms. Plyler's in-court identification was not tainted by the out-of-court line-up. E.g.: M.J.S. v. State, 386 So.2d 323 (Fla. 2nd DCA 1980); Cribbs v. State, 297 So.2d 335 (Fla. 2nd DCA 1974). During the incident, the only light in the room was provided by the television (R30). Ms. Plyler's head was covered by a blanket during part of the episode (R16). Ms. Plyler was unable to make an identification the day after the incident (R36-37), 104-105, 108-109). These facts do not satisfy the State's burden or in any way vitiate the taint of the impermissible line-up.

Based upon the foregoing, the lower court erred reversibly in admitting evidence relating to the second photo array, the live line-up and Ms. Plyler's in-court identification of Respondent. Accordingly, the present cause must be reversed and remanded.

POINT IV

RESPONDENT'S SENTENCE WAS IMPERMISSIBLY IMPOSED IN EXCESS OF THE SENTENCING GUIDELINES AND THEREBY VIOLATES THE STATUTE, THE RULE OF CRIMINAL PROCEDURE AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

This issue involves the trial court's imposition of a twenty (20) year sentence when the sentencing guidelines called for a sentence of four and one-half (4-1/2) to five and one-half (5-1/2) years (R398-399, 409). Respondent affirmatively elected to be sentenced under the sentencing guidelines (R398-399, 409).

The trial court departed from the sentencing guidelines, without a scoresheet. There are very vague and confusing discussions concerning the recommended guidelines sentence (E397-400, 407, 417). Respondent attempted to supplement the record on appeal with the guidelines scoresheet and the clerk certified that no scoresheet had been prepared (SR). It has consistently been held that the departure from a guidelines sentence is improper when there is no scoresheet. Gage v. State, 461 So.2d 202 (Fla. 1st DCA 1984); Myrick v. State, 461 So.2d 1359 (Fla. 2nd DCA 1984); Doby v. State, 461 So.2d 1360 (Fla. 2nd DCA 1984); Newsome v. State, ___ So.2d __, No.84-1487, 10 FLW 829, opinion filed March 29, 1984, (Fla. 2nd DCA 1984); Ford v. State, ___ So.2d ___, Case No.84-1723 and 84-1724, 10 FLW 1076, Opinion filed May 3, 1985 (Fla. 2nd DCA 1985). The lack of a scoresheet, alone, has been consistently held to require re-sentencing.

Many of the reasons given by the trial judge for departure are wholly improper. The trial judge's reasons included a per se rejection of a four and one-half (4-1/2) year sentence for a felony punishable by life (R439). This is a completely improper reason for departure. The degree of the offense, at conviction, is figured in the point assessment. Florida Rule of Criminal Procedure 3.701. Several courts have held that it is improper to depart for reasons which are already figured into the scoring. Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985). The trial court also relied on the fact that Respondent had been convicted of a life felony; when he had actually been convicted of a first degree felony punishable by life (R434) Section 810.02(1) Florida Statutes (1983). Thus, the judge's sentence was based, at least, in part, on an incorrect assessment of the offense.

The trial judge also relied on a comparison with a prior term of incarceration of Respondent (R439). The judge stated that respondent's sentence should be at least one day longer than his prior sentence (R439). This is not a reason for departure. The trial court also stated that it would be a "travesty" for Respondent to be released after only serving 20% of the time he had just served (R439). A mechanical formula based on the Respondent's prior time served is not an appropriate reason for departure. Also, there is no explanation of how the judge arrived at the 20% figure. The only seemingly objective reason for departure was Respondent's prior record. However, this has already been considered in arriving at the guidelines sentence.

Thus, it is not a valid basis for departure. Burch, supra. Therefore, the trial court erred in departing from the guidelines sentence.

Assuming arguendo, that departure is proper, the extent of departure is excessive. Respondent was sentenced to four (4) times the guidelines sentence. Such severe departure cannot be justified.

POINT V

THE TRIAL COURT ERRED IN IMPOSING COSTS ON RESPONDENT WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO CONTEST THOSE COSTS

Costs were imposed against Respondent without notice and an opportunity to contest these costs (R430-437). This is improper. Jenkins v. State, 444 So.2d 947 (Fla. 1984).

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondent would respectfully request this Honorable Court to approve the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 21st day of May, 1985.

Richard B. Greene
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