IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,084

FREDERICK K. JONES,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Jones was arrested for burglary on July 9, 1980 (R 1-2), and was charged by information on July 16, 1980 (R 5). Jones entered a plea of guilty to the charge of burglary of a structure; the Circuit Court of Duval County, Judge Nimmons presiding, entered judgment and sentence on October 3, 1980 (R 6). In the judgment and sentence the court sentenced Jones to five years with credit for 30 days jail time, with the first year in the Duval County Jail and the balance of the sentence suspended, placing Jones on a community control program for the remaining four years (R 6). The court adjudged Jones a youthful offender under Ch. 958, Fla.Stat. (R 6). Also filed on October 3, 1980, was the "Uniform Commitment to Custody of the Department of Corrections" (R 7) and the "Judgment, Sentence and Order placing

Defendant on Probation During Portion of Sentence"[1] (R 8), both reflecting the sentence imposed with the latter placing Respondent on probation for the four years following the one year in county jail.

On August 17, 1982, Probation Officer Carico filed an Affidavit of Violation of Probation stating that Jones had violated conditions 1, 3, 7, and 8 of the Order placing Jones on probation (R 9). A warrant based on the affidavit was issued (R 10) and Jones was arrested on the warrant on August 25, 1982 (R 11). The trial court entered an Order of Modification of Probation pursuant to §948.03, Fla.Stat., finding that Jones had violated conditions 1, 3, 7, and 8 and modifying his probation as follows:

> 1. Defendant will serve twenty-seven (27) days Duval County Jail with credit for twenty-seven (27) days jail time.
>
> 2. Defendant will enter and remain in the Probation and Restitution Center, will abide by the rules and regulations of the program and follow the instructions of the supervisory personnel, and will satisfactorily complete said program.

(R 13, dated September 21, 1982; filed October 1, 1982). Shortly

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[1] Aside from the nine standard conditions of probation contained on Order of Probation forms, the order of probation form added the following conditions for Jones:

> (10) Defendant is adjudged and sentenced pursuant to the Youthful Offender Act.
> (11) Defendant will pay restitution to the victim as determined by the Court, based upon a recommendation by the Probation Supervisor.

(R 8).

thereafter, on December 31, 1982, the trial court entered another Order of Modification of Probation, stating that Jones had "successfully completed all phases and requirements for graduation of the Probation and Restitution Center" and modifying the probation as follows:

> 1. That condition (2) of his Order of Modification of Probation which states he shall enter and remain in the Probation and Restitution Center until satisfactorily completing said program, is hereby deleted.
>
> 2. Shall maintain present employment and shall not terminate said employment without first securing the consent of his Probation Officer.

(R 14).

On April 7, 1983, Probation Officer Carico filed an Affidavit of Violation of Probation stating that Jones violated conditions 5, 7, and 8 of his probation (R 15). A warrant based on the affidavit was issued on April 6, 1983 (R 16). Jones was arrested on the warrant on October 14, 1983 (R 17). On November 18, 1983, an Amended Affidavit of Violation of Probation was filed by Probation Officer Homan, stating that Jones had violated conditions 1, 2, 5, 7, and 8 of his probation (R 20). Jones filed a Motion to Discharge the Affidavit of Violation of Probation on December 9, 1983, alleging that 1) he was adjudged a youthful offender under Ch. 958, Fla.Stat., 2) the amended affidavit of violation of probation alleges Jones violated the terms of his probation under Ch. 948, Fla.Stat., and 3) the circuit court is without jurisdiction to enter sanctions against Jones for violating community control, under §958.02(2) and Clem v. State, ___ So.2d ___ (Fla. 4th DCA 1983), 8 F.LW. 2135

(R 21). The court, Judge Moran presiding, heard arguments on the Motion to Dismiss on January 6, 1984 (TR 2-13). On February 17, 1984, Judge Moran granted the Motion to Dismiss and urged the State to appeal (R 22, TR 16-17). The State filed its Notice of Appeal on February 27, 1984 (R 23), and filed a Motion to Stay the Proceedings and toll speedy trial (R 26), which was granted by the court on March 2, 1984 (R 27).

On appeal, Respondent Jones filed a Motion to Dismiss the State's appeal on the ground the order appealed from is a non-appealable order. Pursuant to the District Court's Order to Show Cause dated May 22, 1984, Petitioner filed a response explaining why an appeal should lie, and in the alternative requesting the appeal be heard as a petition for writ of certiorari. On June 27, 1984, the District Court issued an order deferring ruling on the motion to dismiss until the cause is submitted to a panel for consideration on the merits. The District Court further ordered the parties to fully brief the jurisdictional issue. The Florida Parole and Probation Commission filed an amicus brief.

On April 25, 1985 the District Court rendered an opinion and certified the following questions as being of great public importance:

> 1. Are the provisions of Article V, Section 4(b)(1) of the Florida Constitution (1980) self-executing so as to afford the State the right to appeal from a final judgment in a criminal case the same as any other party litigant except where an appeal would be futile under applicable principles of double jeopardy?

2. If the answer to the first question is in the negative, may the district court of appeal utilize the common law writ of certiorari to review the final judgment assuming the elements of the writ are satisfied?

The State filed its Notice to Invoke Discretionary Jurisdiction on May 24, 1985.

SUMMARY OF ARGUMENT

The State has a constitutional right to appeal under Article V, Section 4(b)(1); this provision is self-executing and speaks for the people of the State of Florida. Alternatively, the State definitely has the right to appeal the order in question under Section 924.37.

If this Court finds no constitutional or statutory right to appeal in this case, then the State contends that the writ of common law certiorari must be available as a means of seeking review.

ARGUMENT - ISSUE I

ARE THE PROVISIONS OF ARTICLE V, SECTION 4(b)(1) OF THE FLORIDA CONSTITUTION (1980) SELF-EXECUTING SO AS TO AFFORD THE STATE THE RIGHT TO APPEAL FROM A FINAL JUDGMENT IN A CRIMINAL CASE THE SAME AS ANY OTHER PARTY LITIGANT EXCEPT WHERE AN APPEAL WOULD BE FUTILE UNDER APPLICABLE PRINCIPLES OF DOUBLE JEOPARDY?

In State v. Creighton, 10 F.L.W. 257 (Fla., May 2, 1985), motion for rehearing pending, this Court reviewed the question of whether the State could appeal from an order granting a judgment of acquittal in a criminal case, and decided that the State's right of appeal in criminal cases depends on statutory authorization. In summary of its decision, this Court explained:

> In view of the above considerations - the fact that Crownover interpreted constitutional language that has been changed, that court's decisions decided after the constitutional change make clear that appeals by the state are governed by statute, that Crownover itself was an aberration in interpretation of the pre-1973 language, that the present constitutional language merely allocates jurisdiction rather than conferring appeal rights, and that the common-law rule provides insight into the meaning and purpose of the criminal appeal statutes - we reaffirm the princple that the state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute.

10 F.L.W. at 259.

Petitioner respectfully contests the soundness of this Court's analysis in the above-cited opinion, and reasserts the argument that Article V, §4(b)(1) is indeed self-executing and provides the State the right to appeal from final judgments in criminal cases where double jeopardy is not a bar to further proceedings.

In Creighton, supra, this Court examined the language of Article V, §4(b)(1), i.e., "shall have jurisdiction to hear appeals, that may be taken as a matter of right", and decided that the use of the word "that" instead of "which" restricts the right of appeal and informs the reader to look elsewhere to determine whether there is a right to take an appeal. In short, the use of "that" intead of "which" was the primary basis for this Court finding that the State's right to appeal is purely statutory. Petitioner disagrees with this Court's interpretation and reliance upon The Elements of Style (1972), for the following reasons. First, the text specifically directs the reader (at p. 59) to the dictionary definitions of the words "that" (and "which"). Various dictionaries equate "that" with "which", a fact overlooked by this Court. For example,

> "THAT: A relative pronoun equivalent to who or which, either singular or plural. Dunn v. Bryan, 77 Utah 604, 299 P2 253, 255." Black's Law Dictionary, Rev. 4th Ed., (1968) p. 1647.

> "THAT: Pronoun (4) used as the subject or object of a relative clause, especially one defining or restricting the antecedent, sometimes replaceable by who, whom or which." The Random House College Dictionary, Rev. Ed. Random House (1982).

This Court also overlooked the more recent edition of The Elements of Style, 3rd Ed. (Macmillan 1979) where, following the term "that", the reader is expressly directed to "Rule of Usage 3" on pages 2 and 3 of the text. Rule 3 states:

> Non-restrictive relative clauses are parenthetical, as are similar clauses introduced by conjunctions indicating time or place. Commas are therefore needed. A non-restrictive clause is one that does not serve to identify or refine the antecedent noun.
>
> and
>
> In these sentences the clauses introduced by which, when or where are non-restrictive; they do not limit or define, they merely add something.

As is evident from the above, "that" and "which" are treated as equivalent terms and can be used interchangeably. It is tenuous to credibility to suggest that if the framers had used "which" then the people's right to appeal would be preserved, but that use of the word "that" does not grant such a right to appeal.

The basic test in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further

protecting the right or making it available, does not of itself prevent the provision from being self-executing. Gray v. Bryant, 125 So.2d 846, 851 (Fla. 1960) and cases cited therein. See, e.g., State ex rel Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561, 566 (Fla. 1980); Plante v. Smathers, 362 So.2d 933, 937 (Fla. 1979); Williams v. Smith, 360 So.2d 417, 420 (Fla. 1978); Alsdorf v. Broward County, 333 So.2d 457, 459 (Fla. 1976); Schreiner v. McKenzie Tank Lines and Risk Management Services, Inc., 408 So.2d 711, 714 (Fla. 1st DCA 1982). The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is true because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. Gray v. Bryant, supra.

The obligation of this Court in cases of constitutional interpretations is to give effect to the language of the constitutional provision in light of ". . . what the people must have understood it to mean when they approved [the provision]," City of St. Petersburg v. Briley, Wild and Associates, Inc., 239 So. 2d 817 (1970). The obligation involves a strictly limited process of judicial interpretation:

> If the language is clear and not entirely unreasonable or illogical in its operation we have no power to go outside the bounds of the

> constitutional provision in search of excuses to give a different meaning to the words used therein.
>
> Id. at 289 So.2d 822.

This Court in Creighton, Supra, opined that the common law rule (that a writ of error would not lie for the state in criminal cases), taken in conjunction with Sections 924.07 and 924.071, Fla. Stat. and the 'established understanding of their purpose', is incompatible with any suggestion that Article V, Section 4 confers a right of appeal to any litigant. However, if an appeal is a matter of right, this Court cannot justify a limit upon that right by reading into the Constitution a common law exception which was not part of the language in the State constitution approved by the voters. As was noted by former Chief Justice Ervin, it may be instructive to know the background to a constitutional passage, to be educated in the intent of the provision's framers, and schooled in the case law of the time prior to the vote, but history, intent and case law are not what the people ratified as part of their Constitution. In Re Advisory Opinion to the Governor, 223 So.2d 35, 40 (Fla. 1969). As to Article V, §4, the people of Florida voted to allow appeals, to be taken as a matter of right to the district courts of appeal unless the appeal lies in the Supreme Court, as per Article V, §3(b)(1), or the circuit courts, as per general law and Article V, §5(b). This is an interpretation which is clear, reasonable and logical. As noted in City of St. Petersburg v. Briley, Wild and Associates, Inc., supra, such an interpretation is not subject to an excuse, such as the rule at common law,

which exists outside the plain language of the constitutional provision. Id. at 822. "The Constitution must be given effect according to its plain meaning and what the people must have understood it to mean at the time they adopted it." In Re Advisory Opinion to the Governor, 223 So.2d 35, 39 (Fla. 1969).

Respondent's Motion to Dismiss this appeal on the basis of Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947) and State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976) is not persuasive on this point.

The Court's decision in Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947), holding that the right to the State to appeal from final judgments in criminal cases was statutory only, is not applicable to the current self-executing provisions of Art. V, §4(b)(1), Fla. Const. (1980). Whidden was decided in 1947, prior to the establishment of the District Courts of Appeal. Cases decided after the 1956 amendments to the Florida Constitution and creation of the District Courts of Appeal have acknowledged that Art. V enumerates a constitutional right of appeal. State v. Smith, 260 So.2d 489 (Fla. 1972); Robbins v. Cipes, 181 So.2d 521 (Fla. 1966), Accord Helker v. Gouldy, 181 So.2d 536 (Fla. 3d DCA 1966); see also City of Miami v. Murphy, 137 So.2d 825 (Fla. 1962); Marshall v. State, 344 So.2d 646 (Fla. 2d DCA 1977). The court's decision in State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1972) relied upon Whidden instead of subsequent authority. The importance of Whidden, however, is the recognition of the fact that the sovereign could provide the

State equal access to the appellate courts. It should be noted that at the time of the Whidden case, the legislature had the ability to limit access to the appellate courts in civil as well as criminal cases. Chapter 59.01(4), Fla.Stat. (1945), said:

> (4) Appeal as a matter of right -- Appeals except where otherwise expressly provided by law, shall be as a matter of right.

The legislature's role as arbiter of the question of access to the appellate courts in criminal and civil matters was rooted in the case law of the time. Burnett v. State, 198 So.2d 500 (Fla. 1940) (Florida Declaration of Rights, Section Four, provided for "open" court system; however, access to those courts is controlled by acts of legislature.); DeBowes v. Debowes, 149 Fla. 545, 7 So.2d (1942) (statutes regulating the right to appeal should be construed liberally so as to preserve spirit of the constitution); and McJunkins v. Stevens, 88 Fla. 559, 102 So. 756 (1925). Keeping in mind that McJunkins was decided under the 1885 constitution, Article V, §5, the State directs attention to 102 So. 760:

> The constitution or Statute gives a court power to adjudicate litigated matters in classes of cause, and in appeal or writ of error or other authorized process duly taken gives a court jurisdiction to determine a particular case.
>
> While the constitution defines the appellate jurisdiction of the supreme court and the circuit courts, it does not prescribe the means by which such appellate jurisdiction is acquired in particular cases, therefore the legislature may prescribe such means. . .

This is the background upon which the Whidden opinion was issued. Review of the trial court was justified by resort to common law (writs of mandamus, certiorari and other original writs) or the sovereign, (appeals), through the Constitution or, in its silence, the legislature. Accordingly, in its time, Whidden was a proper reflection of the law.

All this changed with the people's ratification of a new constitutional provision, revised Article V, in 1956. Now, the sovereign vested both jurisdiction of the various courts and the method of access to those courts in the supreme court. The revision limited appellate jurisdiction of the Supreme Court under Article V, §4(2):

> Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or degrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or degrees in proceedings for the validation of bonds and certificates of indebtedness.

Second, newly-formed district courts of appeal were established:

> Jurisdiction. Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

This new provision also declared:

> The Supreme Court shall provide for expeditions and inexpensive procedure in appeals to the District Courts of Appeal and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the District Courts of Appeal.

These new provisions swept away all notions of who should have access to the courts. Now, "all final judgments and decrees" as a matter of right, and "interlocutory orders and decrees in matters reviewable by the district courts of appeal," when allowed by the supreme court. The old legislative control of access, §§59.01 and 924.07 was a thing of the past. This Court agreed with this analysis of the new Article V in Crownover v. State, 170 So.2d 299 (1964). In Crownover, it was held that the time limits on appeals imposed by statute, i.e., §59.01(4) and §924.07, were invalid.

In response, opponents of the constitutional right to appeal have been forced to rely on Harris v. State, 136 So.2d 633 (Fla. 1962), and certain language contained therein which suggested that the State's right to appeal could still be limited by the legislature through §924.07. Harris v. State, supra, 136 So.2d 634. A close review of the facts in that case and the issue on appeal demonstrates such a suggestion was gratuitous dicta contrary to the court's actual holding.

This Court, acting sua sponte, obtained supplemental briefs in Harris on the issue of whether the State could constitutionally obtain conflict certiorari review pursuant to Article V, §4(2), Florida Constitution (1957). Rejecting Harris' contention that the State could not seek conflict review, this Court

held Article V, §4(2) was self-enacting and operated completely apart from any provision in §924.07. Id., 136 So.2d at 634. In doing so, this Court stated:

> There can be no doubt that this Court has the authority to entertain a petition for certiorari filed by the state in a criminal proceeding if the requisite conflict of decisions exists. Article V, Section 4(2), Florida Constitution, F.S.A., empowers this Court to review by certiorari 'any decision' of a district court of appeal which is in conflict with a prior decision of this Court or of another district court of appeal. There is nothing in the constitution which limits the authority of this Court to entertain such petitions by the state in criminal proceedings, nor is the right of the state to file such a petition in a criminal proceeding limited by this or any other provision of the constitution. [Emphasis added].
>
> Id.

A number of conclusions are readily drawn from the Harris opinion. First, the issue on appeal was the State's appellate rights under Article V, §4(2), not Article V, §5(3). As such, any language suggesting that the legislature could in some way limit the State's right to appeal was gratuitous dicta on a question not briefed or before the court for resolution. Secondly, and more importantly, the analysis utilized by this Court in determining the State's appellate rights under Article V, §4(2), leads equally to the conclusion that it also has a constitutional right to appeal under Article V, §5. Nothing in the Constitution excludes applicability of the constitutional right to appeal to the State of Florida. As such, the State must stand before the court as any other ordinary litigant.

Alternatively, Petitioner contends that the State clearly has a statutory right to appeal the order in this case. Chapter 924, Fla.Stat. grants the State a right to appeal from an order dismissing an indictment and information. Rule 9.140(c)(1)(a) Fla.R.App.P. See State v. Neiman, 433 So.2d 572 (Fla. 3d DCA 1983). The semantic distinction between "discharge" and "dismissal" is inconsequential in this case, as the order discharging the affidavit is not unlike an order dismissing an information or indictment.

As further support that an order dismissing an affidavit is appealable by the State, the language of §924.37, Fla.Stat. is quite clear:

> 1) When the State appeals from an order dismissing an indictment, information, or affidavit, or a count of it, or an order granting a new trial and the order is affirmed, the appellate court shall direct the trial court to implement the order. If an order dismissing an indictment, information, or affidavit, or a count of it, is reversed, the appellate court shall direct the trial court to permit the defendant to be tried on the reinstated indictment, information, or affidavit. . . (emphasis supplied)

Thus, the State may appeal an order dismissing an affidavit. See Balikes v. Speleos, 173 So.2d 735 (Fla. 3d DCA 1965), cert. discharged, 193 So.2d 434. It is obvious from §924.37, Fla. Stat., that the State can appeal from an order dismissing an affidavit of violation of probation.

ISSUE II

IF THE ANSWER TO THE FIRST QUESTION IS IN THE NEGATIVE, MAY THE DISTRICT COURT OF APPEAL UTILIZE THE COMMON LAW WRIT OF CERTIORARI TO REVIEW THE FINAL JUDGMENT ASSUMING THE ELEMENTS OF THE WRIT ARE SATISFIED?

If this Court should ascertain that the provisions of Art. V, §4(b)(1) are not self-executing so as to afford the State the right to appeal from final judgments, and that there is no other basis upon which the State can appeal, it is urged that this Court find that a writ of common law certiorari can be utilized to facilitate review. This question is also presently being considered by this Court. See State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983), petition for review granted. Also see, State v. J.P.W., 433 So.2d 616 (Fla. 4th DCA 1983), question certified.

Since the time when the district courts of appeal were first established, Art. V has always authorized the district courts to issue writs of certiorari and other writs necessary or proper to the exercise of their jurisdiction. See Art. V, §4(b)(3), Fla. Const. (1980); See also Art. V, §5(3), Fla.Const. (1957). There is no valid reason for limiting the use of the writ of certiorari to only decisions of a lower court sitting in an appellate capacity, as espoused by the Third District in State v. G.P., supra. In fact, both the Third District and Second District

Courts of Appeal have in the past used writs of common law certiorari to review appeals from interlocutory orders. The lack of authorization for an appeal from an interlocutory order was not found to be a bar to the district court's power to grant certiorari review. State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982); State v. Latimore, 284 So.2d 423 (Fla. 3d DCA 1973); State v. Williams, 227 So.2d 253 (Fla. 2d DCA 1969). See also, State v. Joseph, 419 So.2d 391 (Fla. 3d DCA 1982); State v. Hughes, 212 So.2d 65 (Fla. 3d DCA 1968); State v. Coyle, 181 So.2d 671 (Fla. 2d DCA 1966).

The district courts have equally reached findings to the effect that lack of authorization for an appeal from final orders does not preclude the State from having its intended appeal treated as a petition for common law certiorari. See, State v. I.B., 366 So.2d 186 (Fla. 1st DCA 1979); State v. Gibson, 353 So.2d 670 (Fla. 2d DCA 1978); State v. D.C.W., 426 So.2d 970, n. 1 (Fla. 2d DCA 1982). See also, State v. Jones, 433 So.2d 564 (Fla. 4th DCA 1983), pet. rev. granted; State v. Harris, 439 So.2d 265 (Fla. 2d DCA 1983); and State v. Strouse, 177 So.2d 724 (Fla. 2d DCA 1965). In State v. Harris, 136 So.2d 633 (Fla. 1967), the court specifically found that §924.07, Fla.Stat., does not and was not intended to proscribe the authority of the State to seek common law certiorari by the district court.

It is readily apparent that this situation is clearly one in which the writ of common law certiorari should be available. If no other viable means of review of a trial court's legal

determinations is available to one of the party litigants, policy reasons suggest that utilizing the writ of common law certiorari will indeed further the ends of criminal justice as it is a means of helping to insure fairness and legal propriety in decisions in the trial court. As quoted by this Court in State v. Jones, 204 So.2d 515 (Fla. 1967), Justice Cardozo noted the following in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338 (1934):

> But justice, though due to the accused, is due to the accusar also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Likewise, concepts of fairness and justice will support a determination that district courts are empowered and should be empowered to treat intended, yet frustrated State appeals from final judgment or orders in criminal cases (including delinquency proceedings) as petitions for common law certiorari. The decision of the First District declining to treat the instant case as either a viable appeal or petition for common law certiorari should therefore be reversed, regardless of this Court's ruling as to whether or not the State has the right to an appeal.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been forwarded by hand delivery to Counsel for Respondent, Carl McGinnes, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 18th day of June, 1985.

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