IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

MARTIN GROSSMAN	*	
APPELLANT,	*	
VS.	*	CASE NO.: 68,096
STATE OF FLORIDA,	*	
APPELLEE.	*	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout this brief Defendant/Appellant, MARTIN GROSSMAN, will be referred to as Mr. Grossman. The State or Prosecution will be referred to as The State. All references to the record will be shown as (R).

Appellant relies on the arguments in his Initial Brief as to the issues not specifically set out in this Reply Brief.

ARGUMENT I

> The Trial Court erred in denying Defendant's Motion to sever his trial from that of Co-Defendant Taylor's where (a) Mr. Grossman was denied his constitutional right of confrontation when Co-Defendant Taylor's confession and statements to third parties were admitted at their joint trial and Mr. Taylor did not testify; and (b) Co-Defendant Taylor's entire defense rested on placing the responsibility for the homicide on Mr. Grossman rather than on himself, which resulted in Co-Defendant Taylor's acting as a second prosecutor against Mr. Grossman.

Appellee's statement in the Answer Brief that "Appellant has no complaint about the admissibility of these joint statements as to Brian Allen and Brian Hancock" is inaccurate. Appellant objected to introduction of those statements at trial (R1977-1990,2063,2278-2282, and 2284). Mr. Grossman also argued in his initial brief that those statements should not have been admitted against Mr. Grossman because Brian Allen and Brian Hancock both admitted that they could not specify which statements had been made by Mr. Grossman and which by Mr. Taylor. (R1961,2048).

Appellee argues, at page 8 through 9 of Appellee's Answer Brief, that Brian Hancock was able to specify statements made by Mr. Grossman and that those statements interlocked with Mr. Taylor's confessions. However, as

Appellee admits, Mr. Hancock's statements regarding Mr. Grossman's motives, which were relied on by the State to establish premeditation, were mere surmises by Mr. Hancock, and Mr. Grossman never made any statement to him regarding his motives. (R2014,2016-2017,2019-2020,2021). The record is absolutely clear that the testimony on which the State bases its argument that Mr. Hancock was able to differentiate which defendant was speaking when, was recanted by Mr. Hancock on cross examination. Mr. Grossman simply never made those statements to Mr. Hancock.

Appellant disagrees with Appellee's statement that "Allen was also able to tell which defendant was telling which part of the story.", at page 9 of the Answer Brief. Mr. Allen was able to say specifically that Mr. Grossman told him that Officer Park had said to him "Mr. Grossman, you are going back to prison." (R2046). However, during most of the following testimony, Mr. Allen was either unable to distinguish which defendant made which statement or specified that Mr. Taylor made the statement. (R2049-2051).

Mr. Grossman's and Mr. Taylor's out of court statements to third parties were not interlocking pursuant to Parker v. Randolph, 99 S.Ct. 2132, 442 U.S. 62, 60 L.Ed.2d 713 (1979); because Mr. Grossman's statements to

third parties were not identical in material respects with those of Mr. Taylor. The out of court statements made by Mr. Taylor and Mr. Grossman in the instant case are comparable to those in Lee v. Illinois, 106 S.Ct. 2056, ______________ US ____________________, L.ED.2d ____________ (1986). Therefore, Mr. Taylor's statements should not have been admitted.

Furthermore, it simply makes no sense to characterize confessions as "interlocking" when the alleged confessions were made jointly by both parties and the witnesses testifying to those statements were unable to specify which defendant made which statement during most of the conversations. The Parker v. Randolph decision was based squarely on the presumption that, where the confessions of co-defendants were clearly identical in numerous material respects, the jury would be able to follow the proper limiting instructions requiring that the jury consider one defendant's confession only against him and not against his co-defendant. Parker, 99 S.Ct. at 2140, 442 US at 74-75. Such a presumption simply cannot stand where the jury cannot distinguish which confession was made by which defendant.

The other cases cited by Appellee are simply not analogous to the instant case. In O'Callaghan v. State, 429

So.2d 691 (Fla. 1985); McCrae v. State, 416 So.2d 804 (Fla. 1982); Williams v. State, 383 So.2d 722 (Fla. 1st DCA 1980); Menendez v. State, 368 So.2d 1278 (Fla. 1979), either there was no confession by the co-defendant, or the co-defendant testified at trial and was subject to cross examination. Therefore, there was no Sixth Amendment confrontation issue.

Severance should be liberally granted whenever potential prejudice is likely to arise during a joint trial. Menendez v. State, supra. In determining whether to grant a Motion for Severance, the fair determination of a defendant's innocence or guilt should have priority over all other relevant considerations. Crum v. State, 398 So.2d 810 (Fla. 1981).

In the instant case, Mr. Grossman was clearly prejudiced by the admission of Mr. Taylor's confession and out of court statements to Brian Hancock and Brian Allen. In addition to being denied his fundamental Sixth Amendment right to confrontation because he was unable to cross examine Mr. Taylor, Mr. Grossman was also prejudiced by the efforts of Mr. Taylor's counsel to place full blame on Mr. Grossman for the death of Officer Park. Therefore, Mr. Grossman's conviction of first degree murder should be reversed.

ARGUMENT II

> The Trial Court erred in refusing to suppress the items found in the warrantless search of Mr. Grossman's residence and automobile where Mr. Grossman had not consented to the search and had a reasonable expectation of privacy in the vehicle and in the portion of the premises where the items were found.

The Trial Court denied Mr. Grossman's Motion to Suppress the evidence seized in the search of his room and in the search of Mr. Grossman's car specifically and solely on the grounds that Mr. Grossman did not have standing to challenge either search. (R1289). The Court did not reach the issue of whether or not there was a valid consent to the search or the scope of that search because the Court found that Mr. Grossman did not have standing.

A defendant has standing to challenge the validity of a search of his dwelling place. Bumper v. North Carolina ______ S.Ct. ______, 391 U.S. 543 (1968); United States v. Lyons, 706 F.2d 321 (DCA Cir. 1983); United States v. Rettig, 589 F.2d 418 (9th Cir. 1979); United States v. Gilley, 608 F.Supp. 1065 (D.C. Ga. 1985); United States v. Prescott, 480 F.Supp. 554 (D.C. Penn. 1979); Walker v. State, 433 So.2d 644 (Fla. 2d DCA 1983); State v. Brown, 408 So.2d 846 (Fla. 2d DCA 1982). In the instant case, Mr. Grossman resided in his mother's home, specifically in the

bedroom, and clearly had standing to challenge the search of the entire premises, including his bedroom. Therefore, the trial court erred in finding that he did not have standing and denying his Motion to Suppress evidence found on the premises solely on that basis.

Furthermore, even aside from the standing question, it is absolutely crystal clear that consent given by a co-tenant to the search of mutually accessible premises, does not extend to closed or locked containers on the premises which are the property of the other tenant. Donavan v. A.A. Beiro Construction Company Inc., 746 F. 2d 894 (DC Cir. 1984); Gilley; Prescott; Walker; Wells v. State, Case No. 85-1630[11 FLW 1835] (Fla. 5th DCA August 21, 1986). The evidence presented at the suppression hearing simply could not support a finding that Mrs. Grossman had authority to consent to opening the locked trunk of the car which belonged to Mr. Grossman. Therefore, the trial court clearly erred in denying Mr. Grossman's Motion to Suppress the tires taken from the trunk of the car.

Even if the tires actually were not admitted in evidence, they were on display in the courtroom, in full view of the jury throughout most of the trial and were referred to in testimony. It is reversible error to permit

unintroduced incriminating objects to be displayed in the courtroom during a murder trial in sight of the jury. Williams v. State, 188 So. 2d 320 (Fla. 2d DCA 1966). In the instant case, Mr. Grossman was indeed prejudiced by the Court's denial of his Motion to Supress because the tires were incriminating and were in full sight of the jury throughout most of the trial. Therefore, his conviction should be reversed.

ARGUMENT III

The death penalty imposed on Mr. Grossman was invalid and a violation of the 8th amendment where the State repeatedly made statements to the jury to the effect that the jury was not the one who imposed sentence and that the ultimate responsibility for deciding whether or not to impose the death penalty was that of the judge, thereby minimizing the importance of the jury in making its recommendation of death or life, and where the Trial Court refused to give an instruction requested by Mr. Grossman to the effect that the jury's recommendation of life or death would be given great weight in the Court's ultimate decision as to whether or not to impose the death penalty.

In the instant case, the remarks made by the Prosecutor during voir dire regarding the jury's rule in imposing the death sentence, like the Prosecutor's comments in Caldwell v. Mississippi, 472 U.S. ____________, 105 S.

CT. _______________, 86 L.ED. 2d 231 (1985), did indeed tend to minimize their role. It is immaterial whether the jury was led to believe that it would be an Appellate Court or the Trial Judge who would make the ultimate decision. The Prosecutor's comments were made in response to jurors who expressed doubts regarding their ability to recommend a death sentence and suggested to the jury that someone else would be reviewing their sentence and making the ultimate decision as to whether or not Mr. Grossman should be sentenced to death.

The Court's refusal to give a curative instruction as requested by Mr. Grossman that the jury's recommendation of life or death would be given great weight in the ultimate decision as to whether or not to impose the death penalty, left the jury with the impression that they were not really responsible for deciding Mr. Grossman's fate. That impression was not adequately corrected by the standard jury instructions.

ARGUMENT IV

The Trial Court's denial of Mr. Grossman's Motion to Continue the Trial because his attorney was involved in a Federal Trial which was expected to last about a month and lasted six months, and because Mr. Grossman's attorney had discovered only days before the Trial that there was an additional witness previously unknown to him who was

> allegedly present during an alleged confession made by Mr. Grossman, prevented Mr. Grossman's attorney from preparing a competent and effective defense, particularly as to the penalty phase of the Trial.

It is not correct that co-counsel for Mr. Grossman was appointed in March, 1985, "in response to a Motion to remove McCoun from the case". Co-counsel was appointed in March, 1985, but Mr. McCoun did not file his Motion to Withdraw from the case until August 7, 1985, at which time he was still actively involved in the case of <u>United States vs. George Meros, et al</u>.

Attorney McCoun had no control over the totally unexpected length of the federal trial, and could not adequately investigate and prepare Mr. Grossman's case because of that and other prior commitments. (R123-126). Although the trial court did grant Mr. McCoun a continaunce in August, 1985, the court denied Attorney McCoun's Motion to Withdraw and appoint substitute counsel who would be able to adequately prepare for trial and represent Mr. Grossman. (R132).

Appellee is correct that a deposition of Mr. Brewer was scheduled for September 18, 1985, but was continued due to the volume of other testimony and because Mr. Brewer's counsel was not present, (R1229-1230), but

Appellant has found nothing in the record to support Appellee's statement that Mr. Brewer's deposition was not taken the following week because Mr. McCoun was unprepared. Appellee's reference to (R754) is to comments made five months before in a deposition of Mr. Hancock. (R754).

The fact is that Mr. Grossman's attorney and co-counsel were simply unable to adequately prepare for trial, particularly the penalty phase of the trial, because of circumstances beyond their control. Mr. Grossman sought only a two week continuance. Mr. Grossman's attorney had previously asked the court for permission to withdraw so that other counsel could be appointed who would have the time to adequately prepare and to competently represent Mr. Grossman at trial. Under these circumstances it was an abuse of discretion for the trial court to deny Mr. Grossman's request for a continuance.

ARGUMENT V

> The Trial Court erred in (1) denying Defendant's Motion to Exclude Cameras from the Court Room where the Court Room was unusually small, the camera was directly in the jurors line of vision and close to them, and the camera was extremely obtrusive; and (2) releasing to the press a videotape of the crime scene during the course of the trial when the jury was not sequestered.

In the instant case, unlike that in Maxwell v. State, 443 So.2d 967 (Fla. 1983), Mr. Grossman's reason for requesting exclusion of the television cameras was because of their location in the court room. Obviously, that was something which could not be known to Defendants until the beginning of the trial.

The oral motion, made immediately prior to the beginning of trial, specifically alleged that the placement of the camera was intrusive. Television cameras must be placed in the court room in locations which will not interfere with or disrupt the conduct of a trial. In re: Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979). In the instant case, the television camera was extremely conspicuous and intrusive and should have been excluded.

Furthermore, the State has cited no cases which would justify releasing the video tape which was a trial exhibit, of the crime scene to the press. Releasing an exhibit is different from permitting the press to video tape the trial or otherwise report the trial proceedings.

ARGUEMENT VI

The Trial Court erred in (A) refusing to issue a Subpoena Duces Tecum for Officer Park's Personnel File, and (B) in allowing the State to introduce evidence at Trial regarding Officer Park's demeanor and prior conduct record over Mr. Grossman's objections.

The case of Imparato v. Spicola, 238 So.2d 5Ø3 (Fla. 2d DCA 197Ø), is simply irrelevant to the the instant case. In Imparato, the State Attorney had served corporate officers and directors with a Subpoena Duces Tecum in a criminal matter requiring them to produce literally every book, paper, document and record of the corporations in questions from the time of their creation to the date the Subpoena's were issued. The Court held that issuing a Subpoena Duces Tecum by the Government was analogous to a search warrant under the Fourth and Fifth Amendment. Therefore, the books and papers to be produced must be specifically described. Id.

In the instant case, Mr. Grossman was not an agent of the Government seeking to prosecute the party from whom production was sought. Mr. Grossman sought only Officer Park's personnel file, not a huge body of documents. Although the personnel file was a matter of public record available to the Defense, the Defense would have had to travel to Tallahassee in order to obtain access to the file.

The comments by Mr. Grossman's attorney during opening argument at pages 1828 through 1829 of the record did not place the demeanor or character of the victim in dipute. He merely stated that Mr. Grossman and Mr. Taylor

were attempting to prevent Officer Park from drawing her gun. (R1828-1829). There is nothing in this statement to suggest that Officer Park was overly aggressive or should not have drawn her gun, merely that Mr. Grossman and Mr. Taylor were reacting to her actions and trying to prevent the gun from being drawn. Mr. McCoun's statements did not suggest that Officer Park was the aggressor.

Appellant also disputes Appellee's statement that "the jury was allowed to hear the reasons Defense counsel objected to evidence of Officer Park's demeanor". (R1835). The discussion of Mr. McCoun's objection (R1833-1836), took place at a side bar conference outside the presence of the jury. Even if the jury had heard Mr. McCoun's reasons for his objections, Appellant fails to see how that discussion would have cured the trial court's error in admitting the evidence.

ARGUMENT VII

The Trial Court erred in denying Mr. Grossman's Motion to Exclude Testimony regarding the alleged prior burglary of the home of Brian Hancock's parents, regarding other crimes for which Mr. Grossman had been convicted and placed on probation, regarding Mr. Grossman's alleged threats to kill Brian Hancock, and regarding Mr. Grossman's alleged orders to Brian Hancock to bury the guns involved in the crime.

In the instant case, it was not necessary to permit testimony establishing that the nine millimeter gun in Mr. Grossman's possession was stolen in order to establish that Mr. Grossman was in violation of parole and therefore in danger of going back to jail. Mere possession of the gun was a violation of probation and how Mr. Grossman obtained the gun was irrelevant to establishing his motive.

The facts in the instant case are not similar to those in the cases in which courts have found that evidence of other crimes might be admitted to show the "entire context" in which a crime occurred. In Rufin v. State, 397 So.2d 277 (Fla. 1981), evidence of a subsequent murder committed by the Defendant was found to be admissible because it was relevant to proving identity and the fact that it linked the Defendant to the victim's automobile, explained where the murder weapon was located and how the Defendant was aprehended.

In Smith v. State, 365 So.2d 704 (Fla. 1978), evidence of a second homicide was admissible because the second murder was part of an unbroken chain of circumstances, evidence of the second murder placed the Defendant at the scene of the first and in a car directly linked to the scene of the first murder, the same vehicle and the same weapon were used in both murders and in the

robbery which was the motive for both homicides. In Heiney v. State, 447 So.2d 210 (Fla. 1984), evidence of a previous murder was admissible because it was relevant to show the Defendant's motive as he committed the second murder in order to avoid aprehension for the initial murder and also because it was relevant to show the circumstances of the Defendant's flight from the location of the first murder in Texas to Florida where the second murder occurred.

Admission of evidence regarding the theft of the nine millimeter gun in the instant case was simply not relevant to show motive or any other essential elements of the crime. Further, it was not part of a closely related series of transactions or an unbroken chain of events which led to the instant crime. The only effect of this evidence was to place Mr. Grossman's character in question and to suggest that he had a propensity for crime.

ARGUMENT X

The trial court erred in admitting the testimony of Larry Bedore regarding blood spatters where he was not adequately qualified as an expert and in permitting him to testify as to his opinion when he had made no expert analysis of the blood spatters at the scene of the crime and where his only observation and conclusions were those which could be made by an ordinary person using common sense.

In the intant case, Mr. Bedore admitted both at his deposition and in his trial testimony that his observations and conclusion regarding the blood spatters at the scene of the crime were not based on any special expertise and that the conclusions that he drew were solely based on common sense and could have been drawn by an ordinary person. He also testified that he performed no technical calculations or analysis of the blood spatters. Therefore, regardless of whether or not Mr. Bedore considered himself to be an expert, his own testimony established that his opinion was not that of an expert. Therefore, he should not have been permitted to testify as to his opinion.

ARGUMENT XII

There was insufficient evidence in the instant case to support a conviction for first degree murder.

Appellant strongly disagrees with Appellee's assertion that Officer Park's statement over the police radio that "I'm hit", followed by a scream, at 8:18p.m., and the discovery of her body at 8:26 p.m., was evidence of premeditation on Mr. Grossman's part. There is absolutely no connection between the issue of premeditation and the

lapse of time between Officer Park's scream over the radio and the finding of her body. There is simply no evidence that Mr. Grossman had a "premeditated design to affect the death" of Officer Park as required by Section 782.04 (1) (A), Florida Statutes (1985).

ARGUMENT XIII

The Trial Court erred in refusing to give Defendant's requested jury instruction that the testimony of an accomplice should be received by the jury with great caution.

Although Mr. Hancock may not have been subject to prosecution as a principal to the murder, he certainly was an accessory after the fact and to that extent was an accomplice. A.Y.G. v. State, 414 So.2d 1158 (Fla. 3rd DCA 1982) [assisting the perpetrator of a crime in fleeing or avoiding detection, is sufficient to make one an accessory after the fact]. Furthermore, of course, Mr. Taylor was clearly an accomplice as he participated in the crime. Therefore, the jury instruction regarding accomplice testimony should have been given.

ARGUMENT XIV

The Trial Court erred in denying Mr. Grossman's Motion for Special Penalty Phase Jury Instructions.

Appellant was entitled to a jury instruction to the effect that the jury's recommendation of life or death was entitled to great weight in order to cure the impression left by the Prosecutor's repeated remarks during voir dire that it was the judge who made the ultimate decision regarding the death penalty.

The evidence did not establish that Mr. Grossman was under arrest or had been taken into lawful custody at the time the incident occurred. Therefore, pursuant to State v. Ramsay, 475 So.2d 671 (Fla. 1985), there was no evidence that this crime occurred during an escape.

The case of Yacker v. Teitch, 330 So.2d 828 (Fla. 3d DCA 1976) is inapplicable to the instant case because it involved a civil action for defamation of character, not a criminal prosecution.

ARGUMENT XV

> There was insufficient evidence in the instant case to support a finding that there were sufficient aggravating factors to support a sentence of death and no mitigating factors.

Appellant strongly disagrees that it was proven beyond a reasonable doubt that Mr. Grossman ever had specific intent to deprive Officer Park of any property owned by her or to commit a crime inside her vehicle.

Appellant also strongly disputes Appellee's statement that "the victim lingered for several minutes, conscious of impending death". There was no evidence that this crime took more than a few seconds, as to how long Officer Park was conscious after the first time she was struck, that Mr. Grossman intended to inflict pain or was especially pitiless and conscienceless, or of exactly how the struggle between Mr. Grossman and Officer Park began. It is clear, however, that any beating which occurred was in the course of the struggle, during which Officer Park attempted to and succeeded in drawing her weapon. That situation is not even remotely comparable to that in Christopher v. State, 407 So.2d 198 (Fla. 1981), where the Defendant shot a defenseless victim sitting on the edge of a bed or in Wilson v. State, 436 So.2d 908 (Fla. 1983), where the defendant, prior to any physical struggle or confrontation, took a hammer and beat two victims with it, whom he later shot, and stabbed a third victim, a five year old child.

In reviewing a death sentence, the Florida Supreme Court has the duty to make a proportionality determination in light of decisions in other death penalty cases. McCaskill v. State, 344 So.2d 1276 (Fla. 1977). Imposition of the death penalty on Mr. Grossman was entirely

disproportionate to life sentences imposed in other capital murder cases in this State. See Brown v. State, 367 So.2d 616 (Fla. 1979) [Defendant, and two Co-Defendants, during the course of a robbery, killed the victim by beating him, locking him up in the trunk of a car, driving him to a lake, beating him again with his fist and with boards, shooting him with a gun, and finally drowning him by holding him under the water until he was dead.]; McCaskill, Supra [Defendant killed victim while fleeing from a robbery creating great risk of death to approximately 35 to 40 bystanders and even though the victim could not have prevented their escape.]; Chambers v. State, 339 So. 2d 204 (Fla. 1976) [Defendant beat victim to death from cerebral and brain stem contusion.]; Halliwell v. State, 323 So. 2d 557 (Fla. 1975) [Defendant killed victim by beating him over the head with a nineteen inch metal breaker bar and continued beating and cutting victim's body, and later used a saw, machete and fishing knife to dismember the body. The Court found "nothing more shocking ... than in a majority of murder cases".] Even assuming, therefore, that the State did prove beyond a reasonable doubt the aggravating factors relied on by the trial court in opposing the death sentence, the death sentence in the instant case was simply disproportionate to the circumstances of the crime when

compared with other cases in which Defendants were sentenced to life. The death sentence imposed on Mr. Grossman should be reversed and vacated.

ARGUMENT XVI

> Mr. Grossman's death penalty sentence should be reversed because the Trial Court failed to enter written findings regarding the aggravating circumstances on which he was relying to impose the death sentence until after Notice of Appeal had been filed and the Trial Court had lost jurisdiction of the case, and the Trial Court did not orally recite the findings on which the death sentence was based into the record at the time of hearing.

The entry of a written order specifying the aggravating and mitigating factors to support the death sentence, pursuant to Section 921.141 Fla. Stat., is clearly not simply a procedural matter. Furthermore, under this Statute the entry of specific written findings of fact regarding aggravating and mitigating circumstances is mandatory and the failure of the court to enter such a written order requires that the Defendant be sentenced to life imprisonment. This statutory requirement is certainly not an arbitrary application of the death penalty.

Furthermore, in the instant case, the trial judge did not enter the written order and findings of fact

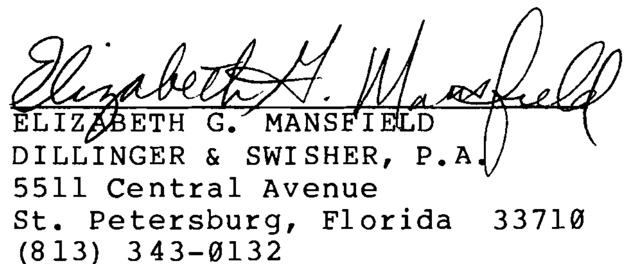
regarding aggravating and mitigating circumstances until three months after sentencing. This was long after the trial court had lost jurisdiction, not only by filing of the Notice of Appeal but because the time for appeal had run two months before. Ferguson v. State, 417 So.2d 639 (Fla. 1982), cited by Appellee is not dispositive in the instant case. In Ferguson, there is no indication of when the trial judge's written findings had been entered, only that they had been provided to the Court in a supplemental record.

Section 921.141 Fla. Stat., states that entry of the written order specifying the trial judge's findings of fact is required in all cases, not merely in cases where the judge overrides the jury's recommendation. The death sentence imposed on Mr. Grossman should be vacated and a sentence of life imprisonment imposed instead.

CONCLUSION

Mr. Grossman's conviction of first degree murder and the death sentence imposed on him by the trial court should be reversed and vacated.

Respectfully submitted,



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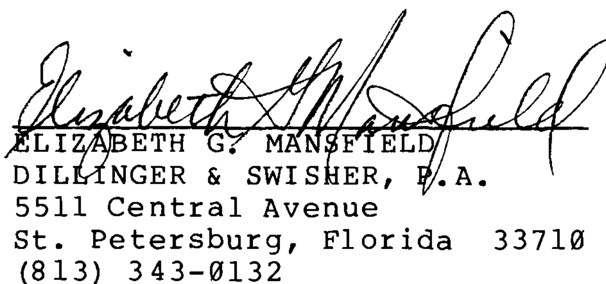
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished upon the Office of the Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida, 33602, by placing same in the United States Mail with sufficient postage affixed thereon, this 6th day of January, 1987.



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