IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 68,932

ROBERT EDWARD SPOONER,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

FILED
CLERK
BY

REPLY BRIEF OF PETITIONER ON CERTIFIED QUESTION

F. KENDALL SLINKMAN
1665 P.B. Lakes Blvd.
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioner

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PREFACE

This is an appeal from a final order dismissing the Department of Corrections from Plaintiff's cause of action for violation of his constitutional and civil rights protected by 42 USC §1983. Appellant is the Plaintiff in the trial court and Appellee/Department of Corrections was the Defendant. Herein the parties will be referred to as they stood in the lower court or by proper name. The following symbol will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner accepts DOC'S supplement to his Statement of the Case and Facts except for the editorializing comments stating that a negligence allegation as a matter of law cannot support a civil rights claim. As discussed, infra, the allegations of the Petitioner are sufficient to state a claim beyond simple negligence and, therefore should not be subject to dismissal on the pleadings.

POINT I

AS A MATTER OF LAW, THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION CANNOT IMMUNIZE THE STATE FROM SUIT IN STATE COURTS SINCE IT EXPLICITLY APPLIES SOLELY TO THE FEDERAL COURTS AND HAS BEEN SO APPLIED BY THE COURTS.

The DOC concedes on page 6 of its brief that the Eleventh Amendment is solely applicable to the federal judiciary.

Nonetheless, on page 16 the DOC goes on to state that "the State of Florida's traditional sovereign immunity, as guaranteed by the Eleventh Amendment, shields the State from suit pursuant to 42 USC §1983 under federal law as well as under state law." This ignores the clear language of MAINE v. THIBOUTOT, 448 U.S. 1, 9 fn. 7 (1980):

> No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only "the judicial power of the United States".

The Eleventh Amendment does not apply to legislation of Congress nor does it apply to state courts. What the DOC has done in Part A of its brief is to argue that the policy considerations underlying the Eleventh Amendment justify a conclusion that the state is immune from §1983 actions brought in state court. While the DOC is certainly permitted to make that type of argument, it must be made clear that the Eleventh Amendment immunity is not relevant to this case and that the only immunity at issue is the state's common law immunity. Spooner will address the common law immunity argument under Point II of this Brief, supra, since conceptually that is where that issue is properly addressed. As clearly stated in MAINE v. THIBOUTOT, supra, and the numerous cases cited in Spooner's opening brief, the Eleventh Amendment has no application in state court and it only results in sloppy terminology and reasoning to rely on it in an argument regarding traditional sovereign immunity in state court.

POINT II

THE STATE OF FLORIDA'S "COMMON LAW" SOVEREIGN IMMUNITY CANNOT AS A MATTER OF LAW BAR THE PLAINTIFF'S CLAIM UNDER 42 USC §1983 SINCE ONLY IMMUNITIES PROVIDED BY FEDERAL LAW CAN APPLY TO THE CIVIL RIGHTS ACT.

As noted, supra, Point I, the DOC relies heavily on the Eleventh Amendment and cases interpreting it to support its argument that the state's sovereign immunity operates as a complete bar to §1983 actions brought in state court. This reliance is misplaced for many reasons. First, as the United States Supreme Court clearly stated in NEVADA v. HALL, 440 U.S. 410, 420 (1979), the debates preceding the enactment of the Eleventh Amendment were solely addressed to federal court jurisdiction:

> [A]ll of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts.

The Court then held that the Eleventh Amendment was irrelevant to that case because it had been brought in a California state court. Thus clearly the policies underlying the Eleventh Amendment do not apply in this case.

The DOC'S attempt to apply the Eleventh Amendment immunity and its underlying policy considerations to congressional enactments is further weakened by the fact that since EX PARTE YOUNG, 209 U.S. 123 (1908) the federal courts have construed the Eleventh Amendment not to restrict a federal court's authority to entertain cases seeking prospective injunctive relief against the state and its officials acting in their official capacity. See

e.g. HUTTO v. FINNEY, 437 U.S. 678 (1978) (the court held that Congress intended that 42 USC §1988 authorizes attorney's fee award against the state's treasury as part of the cost of bringing a civil rights claim against the state for prospective injunctive relief).

Additionally, in QUERN v. JORDAN, 440 U.S. 332, 345 (1979), in responding to an argument raised in the dissenting opinion, the Court noted that while it was simply holding that the monetary relief sought in that case was prohibited by the Eleventh Amendment based on the court's prior decision of EDELMAN v. JORDAN, 415 U.S. 651 (1974) and stated that "nor does our reaffirmance of EDELMAN render §1983 meaningless insofar as states are concerned [citing EX PARTE YOUNG, supra]." Therefore, it is clear that a party can still sue a state and its officials in federal court under §1983 seeking prospective injunctive relief. Therefore, DOC's reliance on the policy considerations underlying the Eleventh Amendment must mean that it is conceding there is no sovereign immunity in state court as to civil rights actions seeking prospective injunctive relief. Certainly the DOC has cited no cases supporting the proposition that a state would have greater immunity in state court than in federal court.

The DOC avoids the Supremacy Clause argument presented by Spooner in his opening brief by relying on the cases decided under the Eleventh Amendment, see DOC'S brief page 16-17. However, this argument is patently fallacious. The Eleventh Amendment is a federal constitutional provision and, therefore, it does apply to a federal statute without any question arising

regarding the Supremacy Clause. However, in a situation where the state attempts to assert its own common law immunity to a federal law, the Supremacy Clause is invoked. As originally stated in EX PARTE YOUNG, 209 U.S. at 161, the state does not have the power to immunize itself or its officials from federal law. This position was reiterated in OWEN v. CITY OF INDEPENDENCE, 445 U.S. 622, 674 fn. 30 (1980) (quoted in Spooner's opening brief, pages 13-14). See also HAMPTON v. CHICAGO, 484 F.2d 602, 607 (7th Cir. 1973); RANKIN v. COLEMAN, 476 So.2d 234, 238 (Fla. 5th DCA 1985). The DOC has failed to cite any authority for the proposition that state law can create a valid defense to a federal statute.

On page 7 of its brief, DOC quotes from PARKER v. BROWN, 317 US 341, 359-360 (1943) in which the Supreme Court stated:

> The governments of the states are sovereign within their territory save only as they are subject to the prohibition of the Constitution as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers. [Emphasis in DOC'S brief.]

Spooner has no argument with that quotation since it clearly supports his position. The Civil Rights Act was enacted by Congress for the express purpose of enforcing the provisions of the Fourteenth Amendment, see MITCHUM v. FOSTER, 407 U.S. 225, 242 (1972). Therefore, as clearly stated in EX PARTE STATE OF VIRGINIA, 100 US 339, 346 (1880), the statute does not constitute an invasion of state sovereignty:

> The prohibitions of the 14th Amendment are directed to the states, and they are to a degree restrictions of state power. It is

> these which congress is empowered to enforce, and to enforce against state actions, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of state sovereignty. [Emphasis supplied.]

The continued viability of the above quotation is clear from the fact that it was quoted in its entirety with approval in Judge Rhenquist's opinion in FITZPATRICK v. BITZER, 427 U.S. 445, 454 (1976).

Furthermore as stated in FITZPATRICK, 427 U.S. at 456:

> The Eleventh Amendment, and the principles of state sovereignty which it embodies, [citation omitted], are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment.

That this is equally true with respect to civil lawsuits is clear from MILLIKEN v. BRADLEY, 433 U.S. 267, 291 (1977):

> The Tenth Amendment's reservation of nondelegated powers to the states is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.

The argument which the state alludes to on page 8 of its brief to the effect that a state's immunity encompasses not only whether it may be sued but where it may be sued is also without merit in the context of this case. As clearly held in GENERAL OIL COMPANY v. CRAIN, 209 US 211 (1908), the state cannot assert its sovereign immunity to prevent an action in state court when the action is predicated upon federal law. The Court held there, as it did in CHAMBERS v. BALTIMORE AND OHIO RAILWAY COMPANY, 207 US 142, 149 (1907), that while a state has the authority to

determine the limits of its court's jurisdiction it cannot do so with reference to the requirements of the federal constitution. Similarly in TESTA v. KATT, 330 U.S. 386 (1947) the court held that a state could not refuse to enforce a federal statute in its state courts on the basis that it was contrary to state policy. The DOC has failed to address any of these cases.

Therefore, for the reasons stated above, it is clear that the states common law sovereign immunity cannot bar a §1983 action in state court.

POINT III

AS A MATTER OF FLORIDA LAW, SOVEREIGN IMMUNITY CANNOT BE A DEFENSE IN A CIVIL RIGHTS ACTION BROUGHT PURSUANT TO 42 USC §1983.

The Petitioner's position on this issue is that under Florida law, sovereign immunity was never intended to extend to conduct of the State or its officers which violated constitutional provisions. As a result, it is not necessary for the legislature to explicitly waive sovereign immunity as to §1983 since the State's sovereign immunity does not apply to such causes of action in the first place. As this Court stated in STATE ROAD DEPARTMENT OF FLORIDA v. THARP, 1 So.2d 868, 869 (Fla. 1941), with regard to whether the state could be sued without its consent:

> As to tort actions, the rule is universal and unqualified unless relaxed by the state, but in other fields, it is not universal in application and cannot be said to cover the field like the 'dew covers Dixie' [emphasis supplied]

This Court made it clear that sovereign immunity does not apply to an action relating to an unconstitutional statute or a statutory duty imposed upon a state officer or other forms of unconstitutional conduct. This Court stated (1 So.2d at 870):

> In the administration of constitutional guarantees, the state cannot afford to be other than square and generous.

The DOC attempts to minimize the holding in THARP by limiting it solely to situations involving eminent domain or inverse condemnation. However, as a review of the language in THARP clearly reveals, it was intended to be a broad statement of the scope of sovereign immunity and the opinion has never been overruled or limited in subsequent opinions.

In PAN-AM TOBACCO v. STATE DEPARTMENT OF CORRECTIONS, 425 So.2d 1167, 1170 fn. 1 (Fla. 1st DCA 1983), the court specifically noted that there were "situations in which justice requires that sovereign immunity not be applied" and quoted at length from THARP, where this Court stated that sovereign immunity does not apply to unconstitutional conduct. The First District concluded that the state could not assert sovereign immunity in that case, but ruled in favor of the state on the merits. While the First District's decision was vacated by this Court in PAN-AM TOBACCO CORPORATION v. DEPARTMENT OF CORRECTIONS, 471 So.2d 4 (Fla. 1984), this Court premised its decision on error in the First District's resolution of the merits and upheld the First District's conclusion that sovereign immunity did not apply in that case even absent an explicit waiver by the legislature.

It is respectfully submitted that under THARP, supra, this Court should hold that Florida sovereign immunity was never intended to apply to §1983 actions which are designed to be a remedy for unconstitutional conduct. It is anticipated that the DOC will raise the parade of horribles argument that allowing §1983 actions against the state will result in a flood of lawsuits and impose administrative burdens on the state. However, as noted in ALSDORF v. BROWARD COUNTY, 333 So.2d 457, 459 (Fla. 1976):

> We simply cannot abdicate our responsibility to follow the will of the people as expressed in the constitution on the grounds of administrative complexity.

Similarly here, where the statute at issue is intended to enforce the federal constitution, which of course represents the will of the people, the argument that allowing such actions might impose additional burdens on the state is simply unacceptable. It is clear from THARP that this Court has already considered that possibility and has concluded that the state will not be heard to claim that it is immune from actions seeking redress for its violations of the constitution.

POINT IV

FLORIDA HAS WAIVED ITS SOVEREIGN IMMUNITY AS TO §1983 ACTIONS.

Petitioner will rely on his initial brief as to this Point.

POINT V

THE STATE IS A PERSON FOR PURPOSES OF 42 USC §1983.

On page 24 of its brief, the DOC presents the argument that the State is not a person for purposes of 42 USC §1983, citing QUERN v. JORDAN, 440 US 342 (1979) and argues that this Court should "affirmatively follow QUERN". However, as discussed below, the court in QUERN did not hold that a State is not a person for purposes of §1983 and, in fact, a reasoned analysis of the legislative history of §1983 points clearly to the contrary.

On page 25, the DOC cites numerous cases which they claim hold that states are not persons for purposes of 42 USC §1983. However certain of those cases do not stand for that proposition. In THIBOUTOT v. MAINE, 405 A.2d 230 (ME. 1979), affirmed on other grounds, 448 US 1 (1980), the court specifically stated with respect to whether the state is a "person": "we consider the issue to be still not definitely resolved by the Supreme Court." The court in THIBOUTOT as in FETTERMAN v. UNIVERSITY OF CONNETICUT, 473 A.2d 1176 (Conn. 1984); did not reach the issue as to whether a state was a "person" for purposes of 42 USC §1983. Therefore, those cases do not support that proposition.

In MARRAPESE v. STATE OF RHODE ISLAND, 500 F.Supp. 1207 (D.C.R.I.P. 1980) the court specifically held that the state was a "person" for purposes of §1983. That case was cited with approval in DELLA GROTTA v. STATE OF RHODE ISLAND, 781 F.2d 343 (1st Cir. 1986) in which the First Circuit specifically held that a state is a "person" for purposes of 42 USC §1983. In DELLA GROTTA, the court clearly explained why QUERN, supra, cannot be

properly construed as holding that a state is not a "person" for purposes of the Civil Rights Act. The court stated (781 F.2d at 348 fn. 6):

> There are two questions: (1) is the state immune from suit under the Eleventh Amendment? and (2) is a state a "person" under the statute? That a state may be immune from suit does not require the conclusion that it is not a "person" under the statute and, therefore, is not suable in the event it has waived its immunity. In QUERN, the majority did not decide whether a state is a "person" although challenged to do so by Justice Brennan in his concurrence. [Citing MARRAPESE]. As noted in footnote 5, supra, QUERN was based entirely on the Eleventh Amendment...In EDELMAN as in QUERN, the court did not address the issue of whether states are "persons" within §1983.

As discussed in DELLA GROTTA, the Court in QUERN and EDELMAN was dealing solely with the issue of whether certain types of monetary relief against a state were barred by the Eleventh Amendment. In QUERN, the Court specifically noted that EDELMAN was not premised on any conclusions regarding the legislative history of §1983 (440 U.S. at 339 fn. 7):

> ... EDELMAN rests squarely on the Eleventh Amendment immunity, without adverting in terms to the treatment of the legislative history in MONROE v. PAPE [where the Court had held that a city was not a "person" for purposes of §1983].

Additionally, the Court in QUERN repeatedly stated that its decision was only a reaffirmation of EDELMAN, 440 U.S. at 336 fn. 5, 341 fn. 12, 345. Therefore it is clear that the Court in QUERN did not hold that a state is not a "person" for purposes of §1983.

In QUERN, Justice Brennan dissented and agreed that since the state was a "person" as defined by the Dictionary Act which was in effect at the time the Civil Rights Act was passed, that reflected congressional intent to abrogate the Eleventh Amendment through enactment of The Civil Rights Act. The majority opinion in QUERN simply rejected Justice Brennan's argument that because the states were included within the definition of "persons" Congress intended to override the Eleventh Amendment. In responding to Justice Brennan's dissent, the majority stated that they were simply reaffirming EDELMAN, which as noted previously was solely a case involving the Eleventh Amendment and did not address the definition of a "person" for the purposes of §1983, see 440 US at 341, fn. 12.

The only explicit discussion in a Supreme Court opinion regarding the proper construction of the term "person" in §1983 cases is in MONELL v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, 436 US 658 (1978). The Court in that case concluded that the term "person" included municipal corporations and thereby overruled the prior case holding to the contrary, MONROE v. PAPE, 365 US 167 (1961). The Court relied in part on The Dictionary Act which had been passed by the Congress only a few months prior to the Civil Rights Act. The Court stated (436 US at 688):

> That the "usual" meaning of the word "person" would extend to municipal corporations is also evidenced by an act of congress which had been passed only months before the Civil Rights Act was passed. This act provided that 'in all acts hereafter passed...the word 'person' may extend and be applied to bodies politic and corporate...unless the context

shows that such words were intended to be used in a more limited sense'.

After noting that municipal corporations were included within the phrase of "body politic" and that The Dictionary Act, while phrased in terms of "may", did in fact intend its definitions to be mandatory, the Court concluded that local government bodies were to be included within the ambit of "persons" for the purposes of §1983. The court in MONELL also specifically noted that there was nothing in the context of the Civil Rights Act which justified a restricted interpretation of the word "person", 436 US at 689 fn. 53.

DOC's statement that in Footnote 54 of MONELL the Court "strongly inferred that a state is not a "person under §1983" (DOC's brief p. 11) is without any justification. In that footnote, the Court simply noted that its holding did not contravene the Eleventh Amendment because local governmental units have no Eleventh Amendment immunity. That footnote says nothing about the parameters of the term "person".

In addition to the clear holding in MONELL that local government bodies are "persons" for purposes of §1983, there are also the statements of the Congressman who debated the issue, including the chairman of the committee that wrote the Civil Rights Act, that reflect that it was intended to apply to the states. Certain of those statements are quoted on pages 12 and 13 of the brief of amicus curiae, National Emergency Civil Liberties Committee.

To hold that the state is not a "person" for purposes of §1983 would be contradictory to numerous holdings of the United

States Supreme Court which provide that an individual can bring an action for prospective injunctive relief under §1983 against a state because that type of relief does not violate the Eleventh Amendment. The seminal case authorizing prospective injunctive against a state and its officials is EX PARTE YOUNG, 209 US 123 (1908); see also ROSADO v. WYMAN, 397 U.S. 397 (1970). In QUERN, supra, after concluding that congress did not intend to override the limitation of the Eleventh Amendment in passing the Civil Rights Act, the Court stated (440 US at 345):

> Nor does our reaffirmance of EDELMAN render §1983 meaningless insofar as states are concerned. See, EX PARTE YOUNG, [supra]. [footnote deleted].

Since prospective injunctive relief against a state and its officials can be obtained under §1983, it is obvious that states must be considered "persons" for purposes of that statute. In ALABAMA v. PUGH, 438 U.S. 782 (1978), in addressing an action brought pursuant to §1983, the court dismissed the case as to the State of Alabama based on its determination that Alabama had not waived its Eleventh Amendment immunity. The court then stated (438 US at 782):

> There can be no doubt, however, that suit against the state and its board of corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. [Citing, inter alia, EDELMAN, supra].

This language would be meaningless if in fact a state was not a "person" for purposes of 42 USC §1983, see MARRAPESE, supra, 500 F.Supp. at 1212 fn. 12.

Based on the reasoning discussed above, numerous courts have held that states and state agencies are "persons" for purposes of §1983, MARRAPESE, supra; DELLA GROTTA, supra; SMITH v. MICHIGAN, 333 N.W. 2d 50 (Mich. App. 1983); LOWERY v. DEPARTMENT OF CORRECTIONS; 380 N.W. 2d 99 (Mich. App. 1985); ATCHISON v. NELSON, 460 F.Supp. 1102 (D.C. Wyo. 1978); STANTON v. GODFREY, 415 N.E.2d 103 (Ind. 1981); See also HODGES v. TOMBERLIN, 510 F.Supp. 1280 (S.D. Ga. 1980) (dicta); IRWIN v. CALHOUN, 522 F.Supp. 576 (D. Mass. 1981) (holding state is allowed to waive immunity to §1983 actions and citing MARRAPESE, supra with approval); PICARD v. STATE, 390 So.2d 882 (La. 1980) (upholding award of compensatory damages against state in §1983 action).

POINT VI

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CANNOT BE PROPERLY AFFIRMED ON THE BASIS THAT AN ACTION UNDER 42 USC §1983 CANNOT BE PREMISED SOLELY ON NEGLIGENCE.

The DOC suggests on page 28-29 of its brief that the court could affirm the decision of the First District below on the basis that the United States Supreme Court has held in DANIELS v. WILLIAMS, 106 S. Ct. 662 (1986); and DAVIDSON v. CANNON, 106 S. Ct. 668 (1986) that an action cannot be maintained under §1983 premised solely on negligence. This assertion is in error since it is premised on a narrow reading of the allegations of the complaint below and, furthermore, neither DANIELS nor DAVIDSON sets forth any new rule regarding the requirements of pleading as opposed to the proof of a §1983 claim.

In DANIELS, supra, the plaintiff, an inmate in a Virginia state jail, brought an action claiming that he had slipped on a pillow negligently left on the stairway by a sheriff's deputy and that the injury suffered thereby constituted a violation of the Due Process Clause of the Fourteenth Amendment. The District Court granted the defendant's motion for summary judgment, the Court of Appeals affirmed, and the United States Supreme Court subsequently upheld that decision. The court stated that the Due Process Clause was not implicated by the negligent act of an official but also stated that §1983 "contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right", citing PARRATT v. TAYLOR, 451 US 527, 534-535 (1981). The court specifically referred to its holding in ESTELLE v. GAMBLE, 429 US 97 (1976) that deliberate indifference to a prisoner's illness or injury was sufficient to constitute cruel and unusual punishment under the Eighth Amendment.

It should be noted that the DANIELS case was not decided on the pleadings but on a motion for summary judgment after all the facts had been developed. Simple negligence was the only claim at issue. The case sub judice is before the court solely on the pleadings which, if broadly construed as they must be for purposes of a motion to dismiss, are consistent with a conclusion that the state and its agents acted with deliberate indifference to the plaintiff's danger resulting in serious injuries to him. Therefore, it would be inappropriate to concluded that the

complaint states solely a cause of action in simple negligence and that dismissal is justified.

In DAVIDSON, supra, the court applied its decision in DANIELS to a situation in which a prison inmate claimed that the prison officials had negligently failed to protect him from another inmate. That case was also resolved on summary judgment and the Supreme Court specifically noted that (106 S. Ct. at 670):

> In this case, petitioner does not challenge the district court's finding that respondents 'did not act with deliberate or callous indifference to [petitioner's] needs,' app. 89. Instead, he claims only that respondents 'negligently failed to protect him from another inmate' (brief of petitioner 2). DANIELS therefore controls.

Therefore, it is clear that DAVIDSON simply applied the holding of DANIELS and again involved a situation where the facts had been developed and it was undisputed that only simple negligence was at issue. In the case sub judice, that is not the situation and therefore neither DANIELS nor DAVIDSON justify dismissing the complaint.

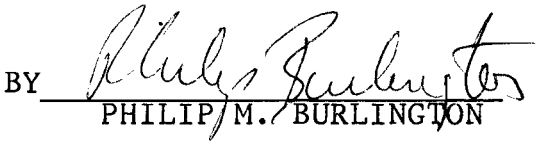
CONCLUSION

For the reasons stated above, this Court should hold that, as a matter of law, the State of Florida cannot assert the Eleventh Amendment immunity to actions brought in state court, that the defense of sovereign immunity, as a matter of law, cannot be a defense to an action brought pursuant to 42 USC §1983 and answer the certified question in the affirmative that Florida has waived its sovereign immunity to federal civil rights actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to: DAVID P. HEATH, P. O. Box 1879, Tallahassee, FL 32302; LOUIS F. HUBENER, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, FL 32301; SHARON WOLFE, 500 Roberts Bldg., 28 W. Flagler Street, Miami, FL 33130; MICHAEL EGAN, P. O. Box 1836, Tallahassee, FL 32302; and to JOEL V. LUMER, 1002 Concord Bldg., 66 W. Flagler Street, Miami, FL 33130; this 9 th day of October, 1986.

F. KENDALL SLINKMAN
1665 P.B. Lakes Blvd.
West Palm Beach, FL 33401
and
EDNA L. CARUSO, P.A.
Suite 4B-Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
305-686-8010
Attorneys for Petitioner

BY 
PHILIP M. BURLINGTON

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