IN THE
SUPREME COURT OF FLORIDA

DONALD JEROME ATWATERS,

Petitioner,

v.

CASE NO. 69,555

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, the prosecuting authority at trial and Appellee in the First District Court of Appeal, will be referred to as the State. The State accepts Petitioner's preliminary statement and will use the designations set out therein.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement of the case and facts subject to the following additions, corrections, and/or clarifications:

Neil Bernstein, the FDLE chemist, testified that the 384 packets he counted in exhibit 1-A, one plastic bag, contained no controlled substances. Exhibits 1-B through 1-I, which contained powder of a slightly different description than the packets in 1-A, had the following number of packets:

Plastic Bag	Tin Foil Packets
1-B	75
1-C	76
1-D	76
1-E	74
1-F	43
1-G	33
1-H	2
1-I	75
Total of 8 plastic bags	454 tin foil packets

In exhibits 1-B through 1-I only one packet in each ziplock bag was tested all the way for identification, i.e., specifically for the presence of heroin. Each of the eight tin foil packets tested (one from each ziplock bag) revealed the presence of heroin. The rest of the packets in each ziplock bag were spot checked. The spot check was done on one out of every 10 foil packets and this random checking revealed the presence of an opiate which could have been heroin. The substance in the tin foil packets in each plastic bag were combined and weighed. The total weight of exhibits 1-B through 1-I or the total weight of the 454 packets was 13.1 grams. (T 55-68). No test was conducted to determine the precise

amount of heroin in the 13.1 gram mixture due to the fact that the trafficking statute does not require that a certain concentration level of heroin be in the total mixture. (T 68-69).

After Petitioner was convicted, a scoresheet was prepared and a total of 159 points was calculated to place Petitioner in the recommended range of 4½-5½ years. At the sentencing hearing the trial judge emphasized the fact that he would have been required by statute to impose a minimum of ten years had Petitioner possessed as little as .9 more grams of the heroin mixture. The trial judge was also concerned that 838 or 836 small tin foil packets were found in Petitioner's possession, even though some of them did not contain heroin. (T 195-196).

SUMMARY OF ARGUMENT

The State submits that the trial judge did not err in exceeding the recommended guidelines range by 2½ years and in imposing an eight year sentence due to the fact that Petitioner was .9 grams short of being subjected to a 10 year minimum mandatory sentence and a $100,000 fine. Committee note (d)(11) states that factors consistent with the statement of purpose may be considered and utilized by a judge in determining reasons for departure. Rule 3.701(b)(3), one statement of purpose, provides that the penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense. When the legislature set minimum mandatory sentences which increased as the quantity of drugs increased, it indicated its intent to punish more severely defendants trafficking in greater amounts of drugs. The fact that it chose broad quantity categories for imposition of the mandatory minimum sentence did not likewise indicate an intent that the total sentences imposed be identical. Thus, because the legislature imposed the same 3 year minimum mandatory on a defendant trafficking 4 grams of heroin as one trafficking 13.1 grams of heroin did not mean the judge could not rely upon Rule 3.701(b)(3) to impose a greater total sentence due to the increased severity of the crime. Contrary to Petitioner's arguments, the fact that he had 13.1 grams of heroin was not factored in the scoresheet which accounted for only 4 grams, and was not an inherent component of the crime of trafficking.

Inasmuch as it is clear that the judge imposed an 8 year

sentence in an effort to punish Petitioner for the "aggravated" first degree felony of trafficking, the invalidity of the other reasons for departure would not, beyond all reasonable doubt, have affected the sentence imposed. Consequently, because quantity of drugs in this case was a proper departure reason, this Court should affirm the 8 year sentence imposed.

ARGUMENT

CERTIFIED ISSUE

MAY THE QUANTITY OF DRUGS INVOLVED IN A CRIME BE A PROPER REASON TO SUPPORT DEPARTURE FROM THE SENTENCING GUIDELINES.

Of the four reasons relied upon by the trial judge in departing from the recommended range of four and one-half to five and one-half years and in imposing an eight-year sentence, the First District Court of Appeal approved only the first two reasons, treating these two reasons as essentially one: a departure based on the quantity of drugs involved in the trafficking conviction. Petitioner's first request in his brief on the merits is that this Court should find that the second reason, i.e., 836 small foil packets, has no credible factual basis and should not be considered as a reason for departure. The State submits that it is clear beyond all reasonable doubt that 838 packets were tested, that 384 of them contained no controlled substance and that 454 of those packets combined contained 13.1 grams of a mixture containing heroin. The chain of custody was stipulated to, so it is clear that the police officer who first counted the packets made an inaccurate calculation as his count of 836 is not consistent with the total of the individual number of packets in each ziplock bag. (T 6). The State also submits it is not important to the resolution of the issue on appeal whether in fact 836 were found as opposed to 838 packets - - the point is that it is clear beyond all reasonable doubt that Petitioner had in his possession a significant number of foil packets which could have all been sold on the streets and which appeared to be ready for distribution or

sale due to the manner in which the mixture was divided and packaged. It is the State's contention, as it was the First District Court of Appeal's position that the large number of packets as well as the undisputed fact that Petitioner had 13.1 grams of a mixture of heroin together emphasized the trial judge's primary concern at sentencing, i.e., that Petitioner was trafficking cocaine in an amount greater than the threshold amount necessary to obtain a first degree felony conviction, i.e., 4 grams of heroin or of a mixture containing heroin.

The issue before this Court is whether the trial judge erred in imposing a sentence which exceeded the highest sentence available in the recommended guidelines range by only 2½ years on the grounds that possession of merely .9 grams more of the mixture of heroin would have subjected Petitioner to a mandatory minimum sentence of ten years and a mandatory fine of $100,000. See § 893.135 (1)(c)2, Fla. Stat. (1985). Petitioner apparently agrees that the minimum mandatory of 10 years would be more severe than a regular guidelines 10 year sentence inasmuch as under the latter sentence the inmate could earn gain time in amounts of 10-30 days a month, however, under the former sentence no gain time could be earned. § 944.275, Fla. Stat. (1985). Petitioner avoided the 10 year minimum mandatory sentence because he had slightly less than 14 grams of a mixture containing heroin, therefore, under the guidelines his sentence was the same as if he had only had 4 grams of heroin. Due to the fact that the judge felt Petitioner should receive more punishment for the greater quantity of heroin, yet less punishment than one carrying 14 grams, the judge imposed an eight year sentence. The

State argues that for the following reasons this departure sentence was valid.

First, the State submits the provisions of the sentencing guidelines rules and the committee notes support the trial judge's departure based on quantity. While committee note (d)(11) to Rule 3.701 of the Florida Rules of Criminal Procedure has been cited numerous times in cases involving the guidelines, the State submits the last sentence of that committee note has perhaps been inadvertantly overlooked, yet it is no less significance than any other provision in the committee notes. That last sentence provides:

> Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge.

This specific provision in committee note (d)(11) has been a part of the committee notes since their adoption by this Court in 1983 and it has remained unaltered through the subsequent amendments and through currently proposed amendments. In fact, in December of 1985, this Court expressly made all of the provisions of the committee notes a part of the rules. The Florida Bar Re: Rules of Criminal Procedure, 482 So.2d 311 (Fla. 1985). Thus, if a factor relied upon by a sentencing judge is consistent with and not in conflict with any one of the principles set forth in subsection(b) of Rule 3.701, the Statement of Purpose, then committee note (d)(11) expressly approves consideration of and utilization of that factor in departing from the guidelines sentence. The State submits trafficking an amount of drugs which exceeds the threshold amount necessary to obtain a 1st

degree trafficking conviction, i.e. 4 grams, and indeed, which more than triples the requisite amount of drugs for a first degree conviction is an appropriate departure factor that is entirely consistent with Rule 3.701(b)(3) which states: "The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense." (emphasis added). Inasmuch as a higher quantity of drugs increases the severity of the offense, committee note (d)(11) expressly permits utilization of that factor as a reason for departure.

This Court has recently relied on the principles espoused in Rule 3.701(b)(3) to support departure reasons in non-drug cases and those cases are applicable by analogy in this appeal. For example, in Vanover v. State, 11 F.L.W. 614 (Fla. November 26, 1986), the defendant, Vanover, was convicted of aggravated battery for shooting in the arm a visitor to his home. Vanover was found not guilty of shooting the visitor's brother in the mouth. Both victims apparently lived. To convict Vanover of the aggravated battery the State had to prove that Vanover, in committing the battery: (1) knowingly or intentionally caused great bodily harm, permanent disability or permanent disfigurement or(2) used a deadly weapon. § 784.045, Fla. Stat. (1985). Aggravated battery is a second-degree felony punishable by a maximum of 15 years. The guidelines sentence calculated for Vanover recommended a maximum sentence of 30 months incarceration. Because the aggravated battery was committed with a firearm, the three-year minimum mandatory was held to take precedence over the 30 month recommendation. Fla.R.Crim.P. 3.701(d)(9).

The trial judge departed from the guidelines beyond the 3 year minimum mandatory and imposed a sentence of 10 years. One of the five reasons for departure reviewed by this Court stated: "This was a particularly aggravated set of circumstances which sets this case far and above the average Aggravated Battery." Recognizing this Court's ability to "flesh out factual support" for this reason in the record, this Court upheld this reason on the following rationale:

> Noting that Florida Rule of Criminal Procedure 3.701(b)(3) allows departure based on "the circumstances surrounding the offense," and that the record on appeal in this case amply illustrates sufficient facts rendering the crime a highly extraordinary and extreme incident of aggravated battery, we find the reason a clear and convincing reason for departure in this case.

Id. at 615. In a sexual battery context, this Court held that excessive brutality could be a valid reason for departure as well as the fact that the defendant committed two separate acts of sexual battery: intercourse and fellatio. Lerma v. State, 11 F.L.W. 473 (Fla. September 11, 1986). Of course, this Court's rationale in approving those reasons for departure in Lerma, supra was set forth in Rule 3.701(b)(3), that the penalty imposed be commensurate with the severity of the offense and circumstances surrounding it. Most recently, this Court relied on Rule 3.701(b)(3) in upholding as a clear and convincing reason for departure the fact that a sexual battery victim's son witnessed the brutal sexual violation of his mother. Casteel v. State, Case No. 68,260 (Fla. December 11, 1986). This fact evidenced more than the "normal" emotional trauma associated with sexual offenses.

This very sentencing guideline rule which has recently persuaded this Court to approve departures due to "excessive" aggravated battery, due to "excessive" brutality in a sexaul battery offense, due to "extraordinary" emotional trauma resulting from a sexual battery, and due to an "aggravated" sexual battery that was factually premised on more than one requisite act of sexual battery, should convince this Court in the case sub judice to approve a 2½ year departure from the recommended guidelines where the quantity of drugs is three times the threshhold amount required for the first degree conviction and where the quantity of drugs is, to a de minimus extent, less than the quantity of drugs which would have subjected the Petitioner to a minimum mandatory sentence of ten years--in effect doubling his recommended sentence, but not allowing any gain time at all. Rule 3.701(b)(3), in conjunction with committee note (d)(11), applies to drug cases as readily as it applies to sexual battery and aggravated batteries. In fact, the district courts have relied on the principles in Rule 3.701(b)(3) to approve upward departures based on the large quantity of drugs. See, for example, Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984)(The guidelines sentence does not reflect the aggravation present in a given case because of large quantity of cannabis); Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985)(The guidelines treat 1 dose and 2,000 dosages of LSD the same, thus due to Rule 3.701(b)(3) and comment following (d) (1), departure is proper where defendant has 2,000 hits of LSD); Irwin v. State,479 So.2d 153 (Fla. 2d DCA 1985)(The quantity of drugs is a factor which relates

to the instant offense, relying on Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984) wherein that court permitted departure in an armed robbery case due to excessive use of force). Interestingly, Petitioner fails to acknowledge in his brief one of the cases the First District Court of Appeal cited to in its opinion where a downward departure was approved due to the small amount of contraband. In State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986) the defendant had only ½ gram of cocaine, subjecting him to a five year maximum, however, his prior record increased his points such that his recommended guidelines range was 22-27 years. Rather than just impose the five year maximum sentence for possession of cocaine, the judge focused on the small amount of cocaine, cited to Irwin, supra, and imposed a sentence of five years probation subject to 18 months community control. If a small quantity of cocaine can decrease the severity of the offense such that a lighter sentence is more commensurate with the particular offense, then logically, the converse must be true.

Despite the unambiguous statements in Rule 3.701(b)(3) and committee note (d)(11), Petitioner asserts in his brief that the First District Court of Appeal completely ignored this Court's decisions in Hendrix v. State, 475 So.2d 1218 (Fla. 1985) and State v. Mischler, 488 So.2d 523 (Fla. 1986). Specifically, Petitioner argues that the quantity of the mixture of heroin he possessed, 13.1 grams, was "already factored into the scoresheet" itself which raises the crime from a second degree felony to a first degree felony at 4 grams, thereby elevating the points assessed against Petitioner on the category seven "drugs" scoresheet from 65 to 137

points. Petitioner also argues that the amount of heroin is an inherent component of the crime of trafficking. Were Petitioner guilty of trafficking only 4 grams of heroin mixture, his argument would arguably have merit. However, nowhere does the scoresheet account for amounts in excess of 4 grams. A defendant who is convicted with 4 grams of heroin receives the same number of points on the scoresheet as the defendant who is convicted with 13.1 grams of heroin, as the defendant who has 28 grams and as the defendant who has 1,000 grams of heroin. Although the minimum mandatory sentences required in the trafficking statute can result in a defendant being sentenced in a higher cell range where the quantity he possesses is above fourteen grams, this automatic elevation is not accomplished unless the defendant's points on the scoresheet fall below the point totals assigned to the ten and twenty-five year guidelines cell. The fact that the minimum mandatory takes precedence over a lower guidelines range has not prevented this Court in the past from allowing departures beyond the minimum mandatory due to aggravating factors. For example, in Vanover, supra, the defendant's aggravated battery conviction when calculated with other points resulted in a recommended range of 30 months. In order to prove aggravated battery and receive points for a second degree felony, the State had to prove battery with the use of a deadly weapon. The fact that a weapon was used also mandated that a three year sentence be given. Thus, the "use" of the firearm was used once to prove the aggravated battery charge which placed the defendant in the 30 month range and was used again to increase the defendant's

sentence to the 3 year minimum mandatory range. That situation did not prevent this Court from approving as a departure reason supporting the ten year sentence ultimately imposed, the fact that this incident constituted an "extreme" incident of aggravated battery. Vanover, supra at 165. Under the same logic, the fact that a minimum mandatory has been set by the legislature at certain quantities of heroin mixture does not mean that a judge can never depart due to "aggravated" quantities, i.e., an amount of drugs well beyond the quantity required to impose a specific mandatory minimum. In this case Petitioner's points placed him in the 4½-5½ guidelines range. Due to the fact that Petitioner trafficked heroin in an amount slightly less than 14 grams, Petitioner's minimum mandatory was only three years. Because Petitioner possessed a heroin mixture significantly greater than the threshhold amount of 4 grams, the judge was convinced that Petitioner's penalty should be commensurate with the aggravated circumstances surrounding his criminal offense. Consequently, the judge departed from the guidelines by 2½ years in an effort to follow Rule 3.701(b)(3) and attempted to punish Petitioner slightly more than if he had possessed 4 grams and slightly less than if he had possessed 14 grams. Under these unique circumstances the fact that Petitioner had 13.1 grams was not previously accounted for in the scoresheet, nor was it a fact that constituted an inherent component of the crime. These facts are distinguishable from the facts in Newton v. State, 490 So.2d 179 (Fla. 1st DCA 1986), a case relied upon by Petitioner to support his argument that if quantity is a departure reason, it is only valid if the quantity

exceeds the outer quantity limit of the highest mandatory range. Newton was convicted of trafficking in cocaine in the amount of 170 grams. A first degree felony is proven if 28 grams are present. If the defendant has between 28-200 grams he faces a mandatory minimum of 3 years; if he has between 200-400 grams he faces a five year mandatory minimum and if he has over 400 grams he faces a 15 year mandatory minimum. Newton, of course faced the three year mandatory minimum. His recommended guidelines range was 7-9 years. This range exceeded not only the 3 year minimum, but also the five year minimum applicable to quantities of 200-400 grams. The trial judge noted 170 grams was close to 200 grams, however, in Newton's case, unlike the case sub judice, that fact did not make a difference in the sentence Newton was facing. The trial judge departed from the guidelines on that basis and imposed an 18 year sentence, three years greater than the sentence mandated for anyone with over 400 grams, excluding gain time factors. Obviously, the 170 grams was nowhere near 400 grams, which would have been the most relevant quantity under these facts. The trial judge in Newton gave a sentence that violates Rule 3.701(b)(3) because in those circumstances it was not commensurate with the severity of the offense in terms of quantity. Judge Barfield who participated in both Newton and Atwaters and the other judges on the panel below obviously were aware of this significant factual distinction. The mandatory minimum for the quantity Newton possessed and the mandatory minimum for the next closest quantity range, 200-400 grams, did not affect the sentence Newton's scoresheet recommended. In the case

sub judice, Petitioner was .9 grams away from losing his recommended guidelines range of 4½-5½ years to the 10 year minimum mandatory that would take precedence. Fla.R.Crim.P. 3.701 (d)(9). The judge below compromised and departed a little over half way to the 10 year mark. Significantly, the full 8 years Petitioner received were not mandatory, only 3 were. Petitioner's punishment was imposed in accordance with the severity of the offense for which he was convicted and in recognition of the severity of the penalty he could have faced had he reached the 14 gram mark. Under these circumstances, 13.1 grams was a factor that could have been considered inasmuch as it was consistent with Rule 3.701(b)(3).

In addition to the Newton case, Petitioner alleges the First District erred in not disposing of this issue in accordance with Santiago v. State, 478 So.2d 47 (Fla. 1985). Santiago was convicted of possession with intent to sell LSD, which violated section 893.13(1)(a)2. That section makes it unlawful for a person to possess a controlled substance named in § 893.03(1)(c) which includes cannabis and LSD. The trial judge, a North Florida judge, departed based on his personal concern that LSD in his community was more dangerous than a drug such as cannabis. This Court found that reason to be invalid due to the fact that the legislature had included LSD and cannabis in the same schedule and thereby had indicated one was not worse than the other. Specifically, this Court held that the nature and perceived danger of possession with intent to sell a Schedule I substance was already factored into the penalty recommended by the guidelines and therefore violated

Hendrix, supra. Despite Petitioner's attempts to equate Santiago with the case sub judice, the State submits that the facts are significantly different. In Santiago, the judge decided possession of LSD was more severe than possession of cannabis despite the fact that the legislature did not seem to think one was more severe than the other. In that case the judge's reason was not consistent with Rule 3.701(b)(3) because LSD was statutorily no more severe than cannabis. In the case of trafficking, the legislature has indicated in section 893.135 that the greater the amount of drugs, the more severe the penalty should be. While only four grams are necessary to prove a first degree felony, the legislature does not equate 4 grams with a greater amount of drugs (as it did in section 893.03 when it equated LSD with cannabis). Consequently, unlike Santiago, a quantity greater than 4 grams is not already accounted for on the scoresheet. One hundred and thirty-seven points are assessed against anyone convicted of a drug related first degree felony, no matter how great the quantity may be.

Petitioner makes the additional argument in his brief that quantity is not relevant in grand theft cases, therefore it is not relevant here. In support of this proposition, Petitioner cites to Dawkins v. State, 479 So.2d 818 (Fla. 2d DCA 1985) and Knowlton v. State, 466 So.2d 278 (Fla. 4th DCA 1985). Neither case involves grand theft. In Dawkins, a departure in a possession of cocaine case was held to be invalid where based on the amount of money involved. In Knowlton, the defendant committed a robbery and took over $10,000. That fact was held not to support a guideline departure. Knowlton relied upon the lower court's Mischler opinion. One of the reasons

in Mischler was that the grand theft involved sizeable funds from a nonwealthy victim. In rejecting that reason, this Court did not say sizeable funds did not increase the severity of the crime. The concern was that the focus was on the economic status of the victim. Committee note (d)(11) allows departures based on factors not in conflict with the purpose of the guidelines. Rule 3.701(b)(1) states that sentencing should be neutral with respect to social and economic status. Consequently, the impropriety of the departure was due to the fact that the reason violated one of the statements of purpose. Furthermore, even if departures based on "aggravated" or "excessive" grand thefts were impermissible it would not affect departures based on the quantity of drugs in the trafficking statute because the legislature has expressly indicated its opinion that the severity of the crime increases as the number of grams increases. Rule 3.701(b)(3) and committee note (d)(11) allow departures on this basis.

Finally, Petitioner makes the argument that if the legislature had intended 13.1 grams to be more severe than 4 grams it would have distinguished among the quantities more narrowly. Petitioner even suggests that the guidelines commission should come up with extra points if 13.1 grams should be treated differently than 4 grams. Petitioner's argument fails to recognize an increased quantity of drugs is directly related to the severity of the trafficking crime and that the legislature has demonstrated such. The only equal treatment a defendant with 4 grams must get with a defendant

with 13.1 grams is the 3 year minimum mandatory and the $50,000 fine. The same is true for the 14-28 category and the 28-plus category. The difference a defendant with 13.1 grams has with a defendant with 4 grams is that the former is still able to receive a longer sentence which is eligible for gain time. By enacting mandatory minimums at the chosen ranges the legislature did not likewise equate the different amounts for all sentencing purposes. Some discretion was left with the sentencing judge.

Petitioner complains that the quantity issue can become too subjective and thwart the purpose of the guidelines. The State notes that "excessive" brutality, "extraordinary" emotional trauma and "extreme" aggravated battery also tend to be more subjective than objective, yet this Court has not found such departures to be in conflict with the guidelines. To the contrary, Rule 3.701(b)(3) and committee note (d)(11) expressly permit departures based on the individual circumstances surrounding the offense as they pertain to the severity of the offense. Each quantity of drugs departure must be viewed individually. The State agrees that amounts which clearly exceed the top threshhold of the minimum mandatory ranges (28+) almost always will support a departure based on "aggravated circumstances." In this category, as it pertains to trafficking heroin, the minimum mandatory is 25 years and the maximum sentence is 30 years. Consequently, departure at this level will only result in a one cell increase. As this case demonstrates, the 13.1 grams considered in light of Petitioner's 4½-5½ recommended sentence and in light of the fact that he was .9 grams shy of being sent to

prison for 10 years without gain time eligibility supported a clear and convincing reason for departure inasmuch as the 8 year sentence imposed was consistent with the severity of his criminal action. Rule 3.701(b)(3), Fla.R.Crim. P.

The District Court found the two other departure reasons to be invalid, however the State contends review of those reasons is not necessary due to the fact that it is clear beyond all reasonable doubt that the 8 year sentence was imposed in a deliberate effort to equate Petitioner's punishment as closely as possible to a defendant guilty of trafficking 14 grams. While other reasons were provided on the scoresheet, it is obvious the 10 year minimum mandatory was "prorated" so to speak and an eight year sentence was imposed to punish Petitioner for the quantity of drugs. Pursuant to Albritton v. State, 476 So.2d 18 (Fla. 1985) and more recently pursuant to Casteel, supra, the State submits the departure sentence should be affirmed and not remanded despite the possible invalidity of the last two reasons. Contrary to Petitioner's assertion, Albritton has not been receded from, as is evidenced in Agatone v. State, 487 So.2d 1060 (Fla. 1986) and Casteel, supra. See also Daniels v. State, 492 So.2d 449 (Fla. 1st DCA 1986).

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court to affirm Appellant's eight year sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Douglas P. Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida, 32302, on this the 16th day of December, 1986.

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