O/A 9-4-87

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,814

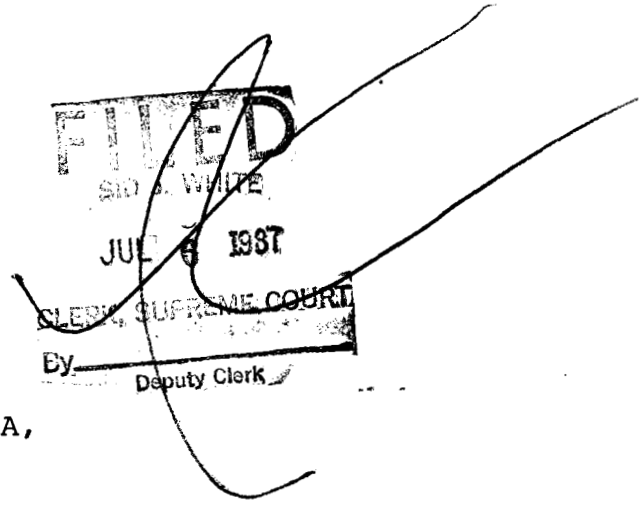
JAMES KEHOE and
MICKEY DeVIVO,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.



REPLY BRIEF OF PETITIONERS ON THE MERITS

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TOPICAL INDEX

	PAGES
PRELIMINARY STATEMENT	1-2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
THE TRIAL COURT CORRECTLY GRANTED THE DEFENDANTS' MOTION TO SUPPRESS WHERE THE POLICE STOP OF THEIR VEHICLE WAS BASED ON A BARE SUSPICION OR HUNCH OF ILLEGAL ACTIVITY PREDICATED ON A DRUG COURIER'S PROFILE AND WHERE THE STOP, OBJECTIVELY VIEWED, WAS BASED ON AN AFTER-THE-FACT PRETEXTUAL LICENSE TAG VIOLATION, CONTRARY TO THE DEFENDANTS' RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 12 AND 23 OF THE FLORIDA CONSTITUTION.	3-13
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

CASES	PAGES
COLLINS v. STATE, 65 So.2d 61 (Fla. 1953)	13
FLORIDA v. RODRIGUEZ, 469 U.S. 1, 105 S.Ct. 308 (1984)	6
HANSBROUGH v. STATE, 12 FLW 305 (Fla. June 18, 1987)	12, 13
JACOBSON v. STATE, 476 So.2d 1282 (Fla. 1985)	6, 8
KAYES v. STATE, 409 So.2d 1075 (Fla. 2d DCA 1981)	4, 8
KEARSE v. STATE, 384 So.2d 272 (Fla. 4th DCA 1980)	5
McNAMARA v. STATE, 357 So.2d 410 (Fla. 1978)	9
MAULL v. STATE, 492 So.2d 821 (Fla. 2d DCA 1986)	5
OESTERLE v. STATE, 382 So.2d 1293 (Fla. 2d DCA 1980)	5
ROMANELLO v. STATE, 365 So.2d 220 (Fla. 4th DCA 1978), rev.denied, 424 So.2d 762 (Fla. 1982)	4
SCOTT v. UNITED STATES, 436 U.S. 128 (1978)	11
SIMON v. STATE, 424 So.2d 975 (Fla. 4th DCA 1983)	5
STATE v. AUGUSTYN, 490 So.2d 104 (Fla. 2d DCA 1986)	5
STATE v. CASAL, 410 So.2d 152 (Fla. 1982), cert. dismissed, 462 U.S. 637 (1983)	7
STATE v. HOLMES, 256 So.2d 32 (Fla. 2d DCA 1971)	13

TABLE OF AUTHORITIES
(continued)

CASES	PAGES
STATE v. IRVIN, 483 So.2d 461 (Fla. 5th DCA 1986)	12, 13
STATE v. KEHOE, 498 So.2d 560 (Fla. 4th DCA 1987)	7
STATE v. NOVA, 361 So.2d 411 (Fla. 1978)	9
STATE v. OGBURN, 483 So.2d 500 (Fla. 3d DCA 1986)	12, 13
UNITED STATES v. CAUSEY, 818 F.2d 354 (5th Cir. 1987)	11
UNITED STATES v. CRUZ, 581 F.2d 535 (5th Cir. 1978)	8, 11
UNITED STATES v. SHARPE, 470 U.S. 675, 105 S.Ct. 1568 (1985)	6
UNITED STATES v. SMITH, 799 F.2d 704 (11th Cir. 1986)	10, 11, 13

OTHER AUTHORITIES

United States Constitution	
Fourth Amendment	4
Fourteenth Amendment	4
Florida Constitution	
Article I, Section 12	4
Article I, Section 23	4
Florida Statutes	
Chapter 86-35, §3	7
§327.11(5)	7
§327.73(1)(a)	7

PRELIMINARY STATEMENT

Defendants initially observe that the respondent-State, in its brief (hereinafter RB), accepts the defendants' Statement of Case and Facts, but feels compelled to add its own "additions and/or clarifications." See RB at 2. The State's factual recitation, however, requires some further "clarifications."

At RB.2, the State recites that the initial officer involved in this case, Sergeant Williams, "did not give the operator a citation at that time because the truck was parked and to be in violation, the truck would need to be in operation on the road." The State neglects to add Officer Williams' testimony immediately thereafter that even if the truck and trailer were in operation "on the road," the driver "may not have received a citation, since [the license tag] was readable." (R.18). [Emphasis added.][1]

The State, while reciting that Officer Williams "also told them [Detectives Null and Hurt] that he had problems reading the tag on the trailer," RB at 3, neglects to recite that Williams was able to read the trailer's license tag from thirty feet away at three o'clock in the morning. (R.49).

Finally, regarding Officer Dusenbery's stopping of the truck, the State recites at RB.4 that Dusenbery "had to make a U-turn to make the stop," that as he got behind the trailer, he observed the tag was bent such that he could not read the last digit, and that "had he not been directed to make the stop, but

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[1] Emphasis throughout this Reply Brief is added unless otherwise indicated.

simply had seen the tag, he would have made the stop anyway." However, the State neglects to include in its "additions and/or clarifications" that Dusenbery was going to stop this vehicle "no matter what" because that it is what Detectives Null and Hurt ordered him to do. (R.104, 106). Moreover, Dusenbery knew "ahead of time that Sergeant Williams had previously been able to visualize the tag and had already run a check on it." (R.106). Finally, the State omits from its factual recitation perhaps the most salient fact as it bears on the pretext issue in this case: had Dusenbery not been directed to stop the truck and trailer by the surveilling detectives, he would never had made his U-turn and been in position behind the trailer to observe its tag. In view of the State's factual recitation on this matter, the defendants will here set forth the pertinent testimony of Officer Dusenbery in its context:

> Q. So, then can the Court conclude that before you stopped that vehicle, A, you knew that they wanted to stop it, B, that there was a suspicious incident that they had been surveilling or investigating, and that C, that's the vehicle that they wanted to have stopped, not that you wanted but they wanted it stopped?
>
> A. Yes, sir.
>
> Q. And had you not made the U-turn as you indicated you did, you never would have been behind it to see the bent plate, would you?
>
> A. No, sir, I probably wouldn't have been in the area if I had not been requested to be there.
>
> Q. Exactly. (R.102).

SUMMARY OF THE ARGUMENT

The State has failed to overcome the presumption of correctness of the trial judge's order granting suppression on the ground that there was no reasonable suspicion of criminal activity to justify the stop in this case. The State's attempt to distinguish the factually similar cases relied upon by the defendant, and to avoid the obvious use by the police of a "drug courier profile" is to no avail. No court has sanctioned the use of a profile of smuggling activity to justify an investigative detention. All of the observations made in the case at bar viewed in their totality fail to demonstrate an articulable basis to justify the stop.

On the pretext issue, the State's entire premise is based upon a fundamental misreading of the record and ignores the trial judge's rejection of the testimony of the officer who effectuated the stop of the defendants' truck and trailer. The point in time when the "objective assessment" of the facts must be made is that point when the surveilling officers determined to stop the defendants' vehicle, and not <u>after</u> the stopping officer made his observation of a "bent tag" on the trailer. This case demonstrates a classic pretext stop.

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED THE DEFENDANTS' MOTION TO SUPPRESS WHERE THE POLICE STOP OF THEIR VEHICLE WAS BASED ON A BARE SUSPICION OR HUNCH OF ILLEGAL ACTIVITY PREDICATED ON A DRUG COURIER'S PROFILE AND WHERE THE STOP, OBJECTIVELY VIEWED, WAS BASED ON AN AFTER-THE-FACT PRETEXTUAL LICENSE TAG VIOLATION, CONTRARY TO THE DEFENDANTS' RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE

AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 12 AND 23 OF THE FLORIDA CONSTITUTION.

The Police Lacked a Reasonable Suspicion of Criminal Activity

The State, after setting forth the undisputed law requiring courts to evaluate the "whole picture" in determining whether police conduct meets the requirements of the Fourth Amendment, asserts that the defendants' analysis "seeks to view each factor in isolation of each other." RB at 10. Of course, the defendants do no such thing but repeatedly argue in their Initial Brief in this Court that "each of [the observed] factors, and all of them viewed in their totality, cannot constitute a reasonable, articulable basis for concluding that the defendants were involved in criminal activity." See Defendants' Initial Brief at 30. See also Initial Brief at 31: "[T]he factors observed by the police, even viewed in their totality, are simply insufficient to justify the unlawful stopping of the defendants' vehicle."

The State expends considerable effort in attempting to distinguish the cases relied upon by the defendants in their brief. See RB at 10-12, 15-16. While it is certainly true that each search and seizure case decided by an appellate court will contain its own unique facts, the defendants submit that such cases as Romanello v. State, 365 So.2d 220 (Fla. 4th DCA 1978)(awkward attempts of defendants to trailer "heavily loaded" boat at a boat ramp held insufficient to justify reasonable suspicion notwithstanding police "hunch"); Kayes v. State, 409 So.2d 1075 (Fla. 2d DCA 1981)(experienced narcotics officers lacked reasonable

suspicion where "weighted" van exited warehouse, defendants "appeared nervous" and police knew of "drug smuggling operation"), rev. denied, 424 So.2d 762 (Fla. 1982); Oesterle v. State, 382 So.2d 1293 (Fla. 2d DCA 1980)(no reasonable suspicion where truck with blackened windows observed driving within view of marijuana laden plane in nearby pasture); see also Simon v. State, 424 So.2d 975 (Fla. 4th DCA 1983); Kearse v. State, 384 So.2d 272 (Fla. 4th DCA 1980), are far closer to the facts in the case at bar, and thus more persuasive authority, than are the decisions relied upon by the State. Thus, the facts in Maull v. State, 492 So.2d 821 (Fla. 2d DCA 1986), see RB.12, are entirely unrelated and incapable of analogy to the case at bar; moreover, Maull was not an appeal of a presumptively correct order suppressing evidence. Similarly, the State's reliance on State v. Augustyn, 490 So.2d 104 (Fla. 2d DCA 1986), is misplaced for there, a detailed tip by an informant who also related his basis of knowledge was held sufficient to justify an investigative detention.[2]

Next, the State attempts to diffuse the defendants' "drug courier profile" analogy. See RB at 13-14. The State argues that this case is not a profile case since "none of the officers testified that Petitioner [sic] was stopped on the basis of a drug courier profile." RB at 13. Of course, the record belies this claim. The testimony of Detectives Hurt and Null is rampant with indicia of their use of a drug profile. See defendants' Initial

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[2] Even so, Judge Lehan's twelve page dissent is far more persuasive than the majority's decision in Augustyn. (The State incorrectly names the case Austin).

Brief at 4 and 19. Moreover, this Court in Jacobson v. State, 476 So.2d 1282, 1286 (Fla. 1985), observed that "[w]hile the detectives in this case did not explicitly state that their suspicions were based on a 'profile,' their testimony clearly shows that this is exactly what triggered their investigation." Cf. Initial Brief at 21 n.11. Quite clearly, the surveilling detectives here relied upon a profile of suspected drug smuggling activity at the Pioneer Park Boat Ramp. See R.27, 30, 40, 71.

Contrary to the State's argument, no drug courier or other criminal profiles "have been upheld" by the United States Supreme Court. In United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 1573 n.3 (1985), the Supreme Court assumed for purposes of decision that the conduct exhibited by the defendants in that case constituted a reasonable suspicion; there, the decisive factor was that the vehicles being surveilled "took evasive action and started speeding as soon as" their drivers became aware of the police surveillance. In Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308 (1984), the bizarre and unique facts observed by the police justified an investigative detention; no drug courier profile was "upheld" in that case.

Finally, the State asserts that the defendants' "unique conduct" in this case, apart from any purported profile behavior, created "a justifiable suspicion of criminal activity in the minds of the officers." RB at 15. The State sets forth three observed factors: first, defendant Kehoe "was observed furtively looking around as he approached the boat ramp." RB at 15. In reply, it must be noted that no such characterization of Kehoe's looking

around appears in the record, either from any of the testifying officers (R.35), or even by the Fourth District in its factual recitation. See State v. Kehoe, 498 So.2d 560, 561 (Fla. 4th DCA 1987).

Second, the State points to the fact that the defendants' boat "contained no registration numbers on the only side of the boat [Detective] Null could observe." RB at 15. The State notes that the lack of decal numbers was a violation of section 327.11(5), Florida Statutes, which constituted a second misdemeanor at the time of the events in question. See RB at 15 n.3. In reply, the defendants would observe that lack of decal registration numbers on one side of the vessel, even viewed together with every other observed fact in this case, simply bears no relation to suspected drug smuggling activity. This Court in State v. Casal, 410 So.2d 152 (Fla. 1982), cert. dismissed, 462 U.S. 637 (1983), held that a violation of the identical predecessor statute cited by the State in the case at bar (the Casal defendants could produce no registration certificate whatsoever for their vessel), did not constitute probable cause to believe that the defendants were committing any crime so as to justify even a safety inspection of the vessel. 410 So.2d at 155-6. Moreover, while it is true that violation of the decal statute was a second degree misdemeanor at the time of the events in the case at bar, the legislature has subsequently decriminalized the offense by making it a "noncriminal infraction," see Chapter 86-35, §3, creating section 327.73(1)(a), Florida Statutes (1986), perhaps in response to this Court's Casal decision. In any event, the defendants submit that the lack of

registration numbers adds little, if anything, to the profile characteristics so obviously utilized by the police in this case. See Jacobson v. State, supra at 1287.

Finally, the State points to the defendants' actions which "indicated they wanted to make haste" such as their "creat[ing] a wake in a no wake zone,"[3] driving some 75-100 yards up the ramp before stopping, and failing to drain or secure the vessel. See RB at 16. The defendants submit that these indicators of "haste" are also totally consistent with innocent boating activity. "In short, while a profile of a smuggling operation may help identify criminal activity, it can also encompass innocent citizens." Kayes v. State, supra at 1078.

Above all else, the State has ignored the fact that the trial judge in this case granted suppression of the evidence after "carefully consider[ing] the testimony of the law enforcement officers who stopped and detained the Defendants. . .". (R.145). The trial judge was in the best position to assess the weight afforded to each and every observation made by the detectives prior to their ordering the stop of the defendants' truck and trailer. As once observed by the en banc Fifth Circuit in United States v. Cruz, 581 F.2d 535, 541 (5th Cir. 1978)(en banc):

> The trial judge has observed the appearance and demeanor of the witnesses and heard their voices; he has breathed in the atmosphere of the courtroom and

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[3] The State, in reciting the fact that the defendants' "boat created a wake," RB at 16, fails to accurately recite Detective Null's testimony that the vessel was "creating somewhat of a wake." (R.34).

> observed the multitudinous details that do not appear on the record. We see but the insentient notations on a typed manuscript.

It is, no doubt, for these reasons that this Court has consistently held that a trial judge's ruling on a motion to suppress "is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling." McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). See also State v. Nova, 361 So.2d 411 (Fla. 1978). The State has ignored this settled rule. The trial judge correctly assessed the testimony of the surveilling detectives and concluded that they lacked any reasonable, articulable basis upon which to justify their decision to stop the defendants' truck, trailer and vessel. The State has failed to demonstrate otherwise.

The Classic Pretext: The Bent License Tag

The State's argument on this issue both evinces a fundamental misreading of this record and resurrects a fact expressly laid to rest by the fact-finder, the trial judge. Virtually the entire premise upon which the State's argument rests is that Officer Dusenbery "would have stopped the vehicle for the tag violation alone." RB at 22. The State thus observes that since the "objective facts" known to Dusenbery "at the time he stopped" the defendants' truck and trailer, RB at 21, were that the trailer's license tag was bent, he could lawfully arrest the defendants for this infraction. As is made clear throughout the defendants' Initial Brief, Dusenbery admitted that he would never

have been in a position to see any "bent tag" had he not been ordered to stop the vehicle by the surveilling detectives. (R.102). Moreover, Dusenbery also conceded that he was going to stop this vehicle "no matter what" because that is what he was ordered to do. (R.104, 106). The trial judge expressly rejected any notion that Dusenbery properly arrested the defendants for the bent tag violation. See R.109, 121-2, 124.[4] It is undisputed on this record that at the time Detectives Null and Hurt ordered Dusenbery to effectuate a "traffic stop" (R.101), none of the surveilling or stopping officers were aware that the tag had been bent obscuring the last digit. (R.46-8, 81, 89). Thus, precisely as in United States v. Smith, 799 F.2d 704, 710 (11th Cir. 1986),

> what turns this case is the overwhelming objective evidence that [the officer] had no interest in investigating possible drunk driving charges: he began pursuit before he observed any "weaving"... .

Similarly, in the case at bar, Officer Dusenbery "began pursuit" of the defendants' truck and trailer before he observed any bent tag. The pretext here is equally as obvious as it was to the Eleventh Circuit in Smith.[5]

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[4] As defense counsel argued before the trial judge after the testimony at the suppression hearing, it would be "legal fiction to suggest that that [the bent tag] was the true basis of the stop of this vehicle" and that the surveilling officers "knew that the tag was legitimate. . .or nothing unusual about it five hours earlier." (R.117-118).

[5] This is the salient point of Smith, that even before observation of any purported weaving, the officer there intended to stop the car based upon suspicion of drug activity. The State's attempt to distinguish Smith from the case at bar (see RB.22) fails.

The State, like the defendants, cites Scott v. United States, 436 U.S. 128 (1978), for the rule that courts, in assessing the legality of police action, first undertake "an objective assessment of an officer's action in light of the facts and circumstances then known to him." Id. at 137. Where the State and the defendants part company is the point in time when that assessment must be made. The defendants submit that the salient "point" at which the objective facts must be assessed is when police first determine to undertake a seizure of a person or vehicle. This is clearly the view of the Eleventh Circuit in Smith, supra. The State, ignoring Officer Dusenbery's admission that he would never have been behind the trailer to observe its tag had he not been ordered to make the stop, focuses on the point in time after Dusenbery began to effectuate the stop. As earlier observed, however, the trial judge, as was his prerogative, clearly rejected this rationale. See R.109, 124. Once again, it is well to remember that it is the trial judge who "has observed the appearance and demeanor of the witnesses and heard their voices. . .[and] has breathed in the atmosphere of the courtroom and observed the multitudinous details that do not appear on the record." United States v. Cruz, 581 F.2d 535, 541 (5th Cir. 1978)(en banc).[6]

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[6] The Fifth Circuit recently demonstrated its adherence to the pretext rational espoused in Cruz in United States v. Causey, 818 F.2d 354 (5th Cir. 1987). There, even though police "had a legal basis on which to make the arrest" on a valid seven year old city warrant, it was undisputed that the officer's sole reason for that arrest was to gain the opportunity for custodial interrogation of the defendant; the court held that if police make an arrest or detain a suspect as a pretext to conduct a search for which

This Court's recent decision in Hansbrough v. State, 12 FLW 305 (Fla. June 18, 1987), cited by the State in its Notice of Supplemental Authority, is easily distinguishable. There, police first observed the defendant make an illegal turn in a car with a broken windshield before they stopped him, although they also suspected him of involvement in a murder. This Court expressly found that the two observed infractions were such that "any citizen could have been stopped," Id. at 306, notwithstanding police suspicion of more serious crime. Here, in sharp contrast to Hansbrough, police had already effectuated the stop of the defendants' truck and trailer when they thereafter observed the bent license tag and admitted they had no knowledge of any bent tag until after deciding to make the stop. (R.46-8, 81, 89, 106, 108-9). Moreover, as the Fourth District in this very case expressly found, the bent tag infraction was of such minor significance that any citizen would not have been stopped for it absent suspicion of more serious crime. 498 So.2d at 565.

This Court in Hansbrough does not answer the question left open in State v. Irvin, 483 So.2d 461, 462 n.2 (Fla. 5th DCA 1986), as to whether a stop is pretextual where, although a citizen "could" have been stopped, he "would not" have been stopped for a trivial infraction absent ulterior police motives.

In both State v. Ogburn, 483 So.2d 500 (Fla. 3d DCA 1986), cited by this Court in Hansbrough, id. at 306, and in Irvin, the observed infractions were sufficiently serious such

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[6] (continued) probable cause is lacking, the subsequent search is unconstitutional.

that any citizen would indeed be routinely stopped for committing them. In Ogburn, the defendant's car was obstructing traffic on a major Miami expressway (the Dolphin Expressway) and he then veered back into traffic after first moving to an exit lane.[7] In Irvin, as noted in defendants' Initial Brief at 34 n.21, the defendant was speeding 70 mph in a 50 mph zone. In Hansbrough, the defendant made an illegal turn in a car with a broken windshield. Thus, in all three cases, it can easily be said both that "any citizen could have been stopped," Hansbrough, supra at 306, and that "any citizen would routinely be stopped," State v. Holmes, 256 So.2d 32, 34 (Fla. 2d DCA 1971), for committing the observed infractions. Such, as the Fourth District here conceded, is not true in the case at bar.

Thus, unlike the situations in Hansbrough, Ogburn, and Irvin, any objective assessment of the officers' conduct here clearly reveals the pretextual nature of their stop. Accord United States v. Smith, supra; Collins v. State, 65 So.2d 61 (Fla. 1953).[8]

As with the issue on reasonable suspicion, the State has failed to overcome the presumption of correctness afforded the trial judge's order in suppressing evidence predicated upon an unlawful pretext.

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[7] Thus, the Third District's language that the stop was not "invalidated by the fact that an officer would not have stopped a defendant but for the suspicion that the defendant was involved in criminal activity," 483 So.2d at 501, is obiter dicta.

[8] For a discussion of this Court's remarkably prescient decision in Collins, see defendants' Initial Brief at 38-40. The State's brief is notably silent on Collins.

CONCLUSION

Based upon the above and foregoing argument and citation of authority, as well as that contained in defendants' Initial Brief, the defendants respectfully request this Court to quash the decision of the Fourth District with directions that the decision of the trial judge suppressing evidence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Amy Lynn Diem, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 1st day of July, 1987.

Mark King Leban