IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JAMES A. COBAN

Respondent.

CASE NO. 70,278

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL,
STATE OF FLORIDA, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner will be referred to as the State.

Respondent will be referred to by his given name, James A. Coban.

STATEMENT OF THE CASE

Mr. Coban accepts the State's Statement of the Case.

STATEMENT OF THE FACTS

Mr. Coban accepts the State's Statement of the Facts, and would add the following additional facts. Mr. Coban was not made aware by trial counsel or the court, that by pleading guilty to first degree murder, his sentence would automatically contain a provision making him ineligible for parole consideration for twenty-five years. The first Mr. Coban heard of the mandatory twenty-five year requirement was when he reached the Reception and Medical Center (RMC) of the Florida Department of Corrections (DOC) (R 85). Immediately upon learning of the twenty-five year mandatory sentence, Mr. Coban wrote to his trial attorney, the clerk of the Hillsborough County Circuit Court, and the Hillsborough County Public Defender's office in an attempt to find out if some mistake had been made regarding his sentence (R 85-91). Mr. Coban received a response from his trial attorney several months later which stated that Mr. Coban may have had some misunderstanding of the sentence (R 24).

SUMMARY OF THE ARGUMENT

Because Mr. Coban was never apprised, before he plead guilty, of the requirement that he serve twenty-five years before becoming eligible for parole consideration, Mr. Coban's guilty plea cannot be considered a voluntary and knowing plea, or a plea that was entered based upon the advice of effective assistance of trial counsel. Because the trial judge did not inform Mr. Coban of the mandatory twenty-five year requirement, Mr. Coban was denied the due process of law guaranteed to him by the United States and Florida Constitutions. Additionally, because Mr. Coban's trial attorney failed to inform him of this automatic and mandatory consequence attendant to his guilty plea, Mr. Coban was denied the effective assistance of counsel.

ARGUMENT

The Second District Court of Appeal's three part Certified Question can best be answered, Mr. Coban submits, by reviewing the role of the trial court and trial counsel in connection with a criminal defendant's decision to plead guilty to first degree murder. Of the three choices presented by the Certified Question, Mr. Coban suggests that the third choice, that the plea must be set aside as involuntary, is the only one supported by the record.

The first choice of the Certified Question, that §775.082(1) Fla. Stat. (1983) has no applicability, would result in Mr. Coban receiving an illegal sentence. This was the State's position in requesting a rehearing, which then resulted in the instant Certified Question. Mr. Coban is in agreement with the State that to give him a "natural life" sentence would be illegal. A person convicted of first degree murder can receive one of only two punishments, death or life with the requirement that twenty-five years are served before being eligible for parole consideration, §782.04(1)(a) Fla. Stat. (1983); §775.082(1) Fla. Stat. (1983). To impose a "natural life" sentence upon Mr. Coban would be imposing a sentence which has not be legislatively provided.

The second choice of the Certified Question requires resolution of a factual issue. If the mandatory portion of §775.082(1) Fla. Stat. (1983) is to be applied to Mr. Coban, then Mr. Coban's plea must be judicially determined to have been voluntarily entered. Mr. Coban submits that the legal consequence

of not being informed of the twenty-five year requirement is of such a nature that not being made aware of it before pleading guilty makes the plea involuntary, or given with the advice of effective assistance of counsel. If this Court upholds the factual finding that Mr. Coban was not made aware of this requirement, then his plea must be set aside based upon either or both of the reasons discussed infra in more detail; voluntariness of the plea and the effective assistance of counsel. In essence, these are the considerations involved with the third choice of the Certified Question.

I. Denial of Due Process; Involuntary Plea

Florida Rule of Criminal Procedure 3.172(c)(i) requires that a defendant, when pleading guilty, be made aware of, inter alia, ". . . the mandatory minimum penalty provided by law . . . ". Two court decisions which have interpreted this rule of criminal procedure have held that it imposes upon the trial court an affirmative duty to inform the criminal defendant of the mandatory twenty-five year requirement attendant to a guilty plea for the crime of first degree murder. In State v. Turner, 492 So.2d 487 (Fla. 5th DCA 1986), cause dism. 496 So.2d 14 (Fla. 1986), the defendant was charged with first degree murder, amongst other crimes. In exchange for the State not to seek the death penalty, Turner was to receive a life sentence. The Fifth District Court of Appeal denied Turner's request for post conviction relief because Fla. R. Crim. P. 3.172(c)(i) was not in

effect at the time Turner plead guilty. In effect at the time of Turner's plea was Fla. R. Crim. P. 3.170(j), which stated in part:

> No plea of nolo contendre shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.

Thus, the Turner court held that:

> . . . the trial judge met the requirements of the law and rules in force and effect at that time, and his determinations and actions are presumptively correct and should not be held in error ten years later based on changes in law and procedure occurring in the meantime.

Id. at 489.

Rule 3.170(j) was replaced by the current rule, Fla. R. Crim. P.3.172(c)(i), effective July 1, 1977, In Re: Florida Rules of Criminal Procedure, 343 So.2d 1247 (Fla. 1977). The Fifth District Court of Appeal gave the new rule only prospective effect. Retroactivity, however, is not a consideration in Mr. Coban's case because his crime was committed in 1983, several years after Fla. R. Crim P. 3.172(c)(i) became effective. On this basis alone, Mr. Coban should be given an opportunity to withdraw his guilty plea.

In another similar case, Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983), U.S. cert. denied, 464 U.S. 834, 104 S.Ct. 117 (1983), the Court of Appeals was faced with the same two claims

Mr. Coban raises; whether the guilty plea was voluntarily and knowingly entered, and also whether the plea was entered based on the advice of effective assistance of counsel. The Owens Court ruled against the defendant because it did not believe factually that Owens was given improper advice by his attorney. The testimony of Owens and his trial attorney at the evidentiary hearing apparently was in conflict. In dicta, the Owens court stated: ". . . a state trial judge need not inform the defendant of the requisite time of confinement prior to eligibility for parole." Id. at 1113.

Owens is, however, distinguishable from the case at bar on two grounds. First, unlike Owens, the record in the instant case does not show that Mr. Coban was made aware of the twenty-five year requirement, either by trial counsel or the trial court. Mr. Coban's trial attorney had no recollection whether he informed Mr. Coban of this matter or not (R 65). By way of distinction, the Owens court found Petitioner's testimony to be incredible, and placed some import on the fact that Owens waited nearly five years before raising his claim. Mr. Coban, on the other hand, promptly tried to contact his trial attorney as soon as he learned from his classification officer at RMC that he had a mandatory twenty-five year sentence (R 85-92). Additionally, the evidentiary hearing held on Mr. Coban's Rule 3.850 motion does not demonstrate any conflict in the testimony of Mr. Coban and his trial attorney, although it does indicate some uncertainties regarding what was specifically discussed between the two of

them. As with the waiver of any right, Mr. Coban submits that the waiver of a right cannot be presumed from silent record. Johnston v. Zerbst, 304 U. S. 458, 58 S.Ct. 1019 (1938).

The second distinction of the Owens case from Mr. Coban's is that the Florida Rules of Criminal Procedure were amended before Mr. Coban's crime was committed. The amendments specifically required the trial court to inform criminal defendants of any mandatory minimum sentences which would be imposed. As discussed supra, the rationale of Turner, supra, would require that Mr. Coban be given the opportunity to withdraw his guilty plea because his crime was committed in 1983, approximately five years after the effective date of Fla. R. Crim. P. 3.172(c)(i).

Thus far, Mr. Coban's argument has rested primarily on State grounds. There is, however, federal constitutional grounds that must be considered. Beginning with the seminal case of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), and Florida's counterpart Williams v. State, 316 So.2d 267 (Fla. 1975), a defendant's guilty plea must be voluntarily and intelligently made in order to be constitutionally valid. Williams set forth three essential requirements for taking a guilty plea:

> (1) the plea must be voluntary; (2) the defendant must understand the nature of the charge and the consequences of his plea; and (3) there must be a factual basis for the plea.

Id. at 271.

The crime charged in Mr. Coban's case is subject to the imposition of only two punishments, death by electrocution, or

imprisonment for life with the requirement of serving twenty-five years before being eligible for parole consideration, §775.082(1) (1983); §782.04(1), Fla. Stat. (1983).

Mr. Coban contends that this automatic and mandatory twenty-five year requirement is a direct consequence of his guilty plea, such that he must affirmatively be made aware of its application prior to entering his guilty plea. The State argues that such a consequence is too collateral to the plea that the defendant need not be informed of its existence. (State's Brief at pages 9-15). Mr. Coban has never suggested that the details of parole eligibility need be explained to him before pleading guilty, but under the facts of this case, because the ineligibility is for a significant period of time, twenty-five years, (and mandatory), that this consequence can only be construed as a direct consequence of the guilty plea.

The unavailability of parole for twenty-five years changes the character of a life sentence which otherwise is subject to earlier parole consideration. Mr. Coban maintains that under the limited circumstances of this case, due process should require that he be informed of the consequence that parole eligibility is impossible for twenty-five years.

Mr. Coban agrees that a criminal defendant need not be informed of every "but for" consequence of a guilty plea. However, as previously noted, there are only two punishments that a defendant is subjected to upon pleading guilty to first degree murder. To this end, some courts have held that a defendant needs

to be informed of only direct consequences, as opposed to collateral consequences, of a guilty plea. In Polk v. State, 405 So.2d 758 (Fla. 3rd DCA 1981), the defendant complained that his plea was involuntary because he was not informed of the consequence that as a convicted felon he would not be able to own or possess a firearm. The Polk court refused to add this consequence to the list of consequences which a criminal defendant needs to be advised of prior to pleading guilty. Mr. Coban suggests that the consequence of being ineligible for parole consideration for twenty-five years is a consequence which can hardly be considered collateral.

In Blackshear v. State, 455 So.2d 555 (Fla. 1st DCA 1984), the court distinguished direct consequences from collateral consequences, by stating: "whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." A direct consequence is one that has a definite, immediate and automatic effect on the punishment. Applying this rationale to the instant case, the consequence of parole ineligibility for twenty-five years can only be considered a direct consequence of a guilty plea to first degree murder. The trial judge has no discretion in making a defendant ineligible for parole for twenty-five years. This consequence is statutorily required, §775.082(1), Fla. Stat. (1983).

In an analogous set of circumstances, this Court in Green v. State, 421 So.2d 508 (Fla. 1982), imposed a requirement upon trial judges to affirmatively inform a defendant that the court

would be retaining jurisdiction over a portion of the sentence imposed pursuant to §947.16, Fla. Stat. (1979). Mr. Coban submits that a similar requirement should be made of trial courts when a criminal defendant pleads guilty to §782.04(1), Fla. Stat. (1983), because the harsh impact the ineligibility of parole has upon a defendant's punishment.

In Green, supra, the defendant plead guilty to two felonies with the understanding that the maximum possible sentence would be two consecutive life terms. However, he was not informed by the trial judge that jurisdiction over the sentence would be retained pursuant to §947.16, Fla. Stat. (1979). In holding that the trial judge must inform the defendant of his intention to retain jurisdiction over part of his sentence, this Court stated:

> Under the present parole system, even if sentenced to two life terms, Green would be eligible for parole in a significantly shorter period than the possible 47 years under the retention.

Id. at 509. Similarly, in the instant case, Mr. Coban plead guilty to one capital felony and was given a life term. Like Green, Mr. Coban was, and still is, ineligible for parole for a significant period of time. While not specifically imposed by the trial court, the twenty-five year parole ineligibility is statutorily mandated and its significance upon Mr. Coban's sentence is no less dramatic than in Green.

Mr. Coban does not maintain that there is a constitutional right to parole, Cochran, 476 So.2d 207 (Fla. 1985), but does

submit that a person otherwise eligible for parole should be made aware of grave consequences which affect its eligibility.

Under the facts of the instant case, it does not affirmatively appear that Mr. Coban was made aware that he would be ineligible for parole for twenty-five years prior to his entering his guilty plea (R 54-57).

Mr. Coban contends that the provision making him ineligible for parole for twenty-five years is the equivalent of a mandatory minimum sentence. As such, the trial judge must inform the defendant that he will be ineligible for parole consideration for the mandatory twenty-five year period. The State recognizes that the lower court considered the twenty-five year period of parole ineligibility to be the equivalent of a minimum mandatory twenty-five year sentence (States Brief at pages at 14-15). However, the State is apparently arguing that this "minimum mandatory twenty-five year sentence" is not governed by Fla. R. Crim P. 3.172(c)(i).

Florida courts have consistently held that the failure to inform a criminal defendant of the mandatory minimum 3-year sentence required by §775.087(2), Fla. Stat. (1983), invalidates a guilty plea. Absent an on-the-record showing that a defendant was advised of the 3-year mandatory minimum sentence, withdrawal of the guilty plea would be permitted. Unlike the record in State v. Wilson, 395 So.2d 520 (Fla. 1981), there is no affirmative showing that the Mr. Coban was advised of the minimum mandatory twenty five-year provision affecting his life sentence.

It seems anomalous to allow a defendant who is not informed of a 3-year mandatory minimum sentence to withdraw his plea on the one hand, when on the other hand, a defendant who is not informed of a twenty five-year mandatory minimum provision is not allowed to withdraw his plea. Under these limited circumstances, Mr. Coban submits that due process requires that he be informed of the significant consequences the twenty five-year parole provision has on his sentence, and because he was not so informed, that he be provided an opportunity to withdraw his plea.

It is also noteworthy that Fed. R. Crim. P. 11(c)(1) was amended in 1982 to specifically require the magistrate to inform the defendant of not only the mandatory minimum penalties and the maximum possible penalties provided by law, but also the effect of any special parole term which may be applicable.[1] USCS Rules

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[1] Rule 11(c) provides: **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; . . . .

of Criminal Procedure, Rule 11, Notes of Advisory Committee states:

> The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure.

Mr. Coban maintains that the "rules" regarding guilty pleas have become more formalistic, Williams, supra, almost to the point of contract negotiation. The State makes reference to "specific performance of a plea bargain," (State's brief at page 9), and cites the general rule that criminal defendants are not entitled to specific performance. In this light, however, the Rules of Criminal Procedure have advanced to the point of attempting to prevent surprises to all those concerned. The Notes of Advisory Committee, albeit in the Federal system, indicate this trend of fully informing criminal defendants of consequences which have an automatic, mandatory and significant impact upon their sentences. While Mr. Coban does not contend he is entitled to specific performance of his plea bargain (a life sentence without any impediments of parole consideration), he does urge this court to strictly enforce the already existing requirement of Fla. R. Crim. P. 3.172(c)(i), and afford him the opportunity to withdraw his guilty plea. This is the only remedy possible under the circumstances, as the failure to inform Mr. Coban of the twenty-five year requirement infected not merely the sentence he received, but the voluntariness of the plea itself.

II. Ineffective Assistance of Counsel

The second ground for reversal of Mr. Coban's Judgment and Sentence is premised on the rendition of ineffective assistance of trial counsel.

Trial counsel, William T. Fussell, testified that he did not inform Mr. Coban that a life sentence imposed as punishment for a first degree murder conviction carried with it the mandatory prohibition from parole eligibility for twenty-five years (R 54). Mr. Coban testified that he would not have plead guilty to first degree murder if he knew that the life sentence he was to receive would make him ineligible for parole for twenty-five years (R 92). Based upon the failure of trial counsel to make sure his client was aware of this grave consequence, Mr. Coban has been denied the effective assistance of counsel.

The standard for determining whether a defendant has been provided reasonably effective assistance of counsel was provided by the Florida Supreme Court in Knight v. State, 394 So.2d 997 (Fla. 1981). The Court adopted the following four principles as a standard for determining whether a defendant has been provided effective assistance of counsel:

> First, a specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when

> considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

Id. at 1001.

The constitutional standards for determining whether there has been a Sixth Amendment violation were established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Strickland articulated a two-part standard for determining whether a defendant's trial counsel's assistance was so defective as to require a reversal of his conviction:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. 104 S.Ct. at 2064.

This Court has held that the Strickland standard does not significantly differ from the Knight standard, Jackson v. State, 452 So.2d 533 (Fla. 1984).

The United States Supreme Court has recently adopted the Strickland two-part test to claims of ineffective assistance of counsel in connection with guilty pleas, Hill v. Lockhart, ___ U.S. __, 106 S.Ct. 366 (1985).

In Hill, the petitioner contended that his attorney was ineffective because he misinformed him about his parole eligibility date. Petitioner had been told by the trial judge that he would be required to serve at least one-third of his sentence before becoming eligible for parole. This same advice was given to petitioner Hill by his trial attorney. However, Petitioner was in fact required to serve one-half of his sentence before becoming eligible for parole. The United States Supreme Court held that Petitioner failed to satisfy the prejudice component of the Strickland standard.

Mr. Coban's case is distinguishable from Hill. In Hill, the petitioner was given erroneous advice concerning parole eligibility. In the instant case, Mr. Coban was not given any advice whatsoever about parole from his trial attorney, the assistant state attorney, or the trial court. The distinction between erroneous advice and no advice at all is all important to this case. Indeed, the court in Hill did not rule out the possibility that the defendant could receive ineffective assistance of counsel if given erroneous advice about parole.

> We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that

> petitioner's allegations are insufficient to satisfy the Strickland v. Washington requirement of "prejudice."

Id. at 371.

Because a life sentence with parole is much different than a life sentence without parole for twenty-five years, the instant case is distinguishable from Hill not merely in degree, but in kind.

Petitioner acknowledges that parole eligibility, in most instances, is not a consequence which a defendant must be informed of before pleading guilty. Cochran, supra. However, under the circumstances of this case, the failure to so advise constitutes conduct which "fell below an objective standard of reasonableness." Hill, supra at 369.

This Court in Cochran, supra, while stating that the failure to inform a defendant of parole eligibility does not make the guilty plea constitutionally invalid, did acknowledge in a footnote that "such a showing, however, would be beneficial for appeals on post-conviction collateral attacks." Id. at 208[2].

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[2] Mr. Coban submits that this holding was premised on the fact that the then newly adopted sentencing guidelines, §921.001(8), Fla. Stat. (1983), abolished parole for most crimes, capital felonies being the exclusive exception. Thus, while ineffective assistance is one basis for challenging his guilty plea, Mr. Coban asserts that the holding in Cochran would not preclude this Court from holding that Fla. R. Crim. P. 3.172(c)(i) requires that the trial court also inform him of the mandatory minimum twenty-five year requirement, as discussed in Point I supra.

The footnote in Cochran, Mr. Coban contends, separates the duties this Court imposes upon the trial court from those duties imposed upon the trial attorney. While due process may not be violated if the court fails to inform a defendant of the waiver of parole, a trial attorney can render ineffective assistance if the attorney does not make the client aware of the consequence of no parole for twenty-five years. Mr. Coban would not, however, concede that the trial court is not required to inform him of this consequence under these limited circumstances.

Because there are only two penalties for someone convicted of first degree murder, reasonably competent counsel should be required to fully explain the penalties to the defendant before that person pleads guilty. Section 775.082(1), Fla. Stat. (1983) provides:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedures set forth in s.921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

Mr. Coban does not deny that he realized that he was avoiding the electric chair by pleading guilty (R 93), however, Mr. Coban believed, mistakenly, that the life sentence he would receive would make him eligible for parole much sooner than twenty-five years (R 95).

In an analogous situation, a criminal defendant has been deemed to have been rendered ineffective assistance of counsel

when his trial attorney failed to inform him of potential deportation consequences as a result of his guilty plea, Edwards v. State, 393 So.2d 597 (3rd DCA 1981), Pet. for rev. denied, 402 So.2d 613 (Fla. 1981). The Edwards court limited its holding to the unique collateral consequence of deportation because of the grave consequences it produces. The court stated that "labeling the consequence as collateral does not diminish its significance," and further held:

> It is a lawyer's duty to ascertain that his client's plea of guilty is entered voluntarily and knowingly, that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice to plead guilty or not.

Id. at 599.

Similarly, because of the limited penalties provided by §782.04, Fla. Stat. (1983), for a person convicted of a capital felony, §775.082(1), Fla. Stat. (1983), the trial attorney's duty should include informing his client that a life sentence would prohibit his being eligible for parole for twenty-five years. Mr. Coban submits that a requirement that the defendant be informed of the twenty-five year parole ineligibility is of such a grave consequence that it affected the voluntariness of his plea. Accordingly, the failure of Mr. Coban's trial counsel to ensure that he understood this consequence deprived him of the effective assistance of counsel. In Strader v. Garison, 611 F.2d 61 (4th Cir. 1979), the court held that grossly erroneous advice

regarding parole eligibility amounted to ineffective assistance of counsel, although recognizing that:

> Ordinarily, parole eligibility is such an indirect and collateral consequence, of which a defendant need not be specifically advised by the court or counsel before entering a plea of guilty.

Id. at page 63.

In the instant case, Mr. Coban's trial counsel failed to advise him of this grave consequence, and when considered in conjunction of the possible range of punishments, amounted to inadequate assistance of counsel.

Additionally, there is a line of cases which hold that when a plea is induced based upon an honest misunderstanding or failure of communication between client and counsel, that the court should allow the defendant to withdraw the guilty plea. See Tobey v. State, 458 So.2d 90 (Fla. 2nd DCA 1984); Thomas v. State, 386 So.2d 859 (Fla. 2nd DCA 1980); Norris v. State, 343 So.2d 964 (Fla. 1st DCA 1977). Mr. Coban submits that the record in the instant case shows that there was at least a misunderstanding as to the direct consequences of his plea.

CONCLUSION

Based upon the foregoing authority and argument, Mr. Coban respectfully requests this Court to grant him an opportunity to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by U.S. Mail, to Mr. CHARLES CORCES, JR., Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, on this 11th day of May, 1987.

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