Reg App.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner

vs.

PAUL A. WELKER,

Respondent.

_____/

FILED

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CASE NO. 70,510

INITIAL BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

vs. CASE NO. 70,510

PAUL A. WELKER,

RESPONDENT.

_____/

INITIAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Paul A. Welker, the criminal defendant and Appellant below, will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to as the State.

As the trial transcript, sentencing transcript, and record are all consecutively numbered, any references thereto will be indicated parenthetically as "R" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State relies on the facts as set forth in the lengthy opinion of this First District Court of Appeal. Welker v. State, 504 So.2d 802 (Fla. 1st DCA 1987). The First District vacated Respondent's departure sentence finding all four reasons given for departure invalid. Acknowledging the conflict among the district courts and the diversity of views on the subject, the court certified the following question of great public importance:

> MAY THE AMOUNT OF DRUGS POSSESSED BY THE DEFENDANT BE USED AS A REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES IN A PROSECUTION FOR UNLAWFUL POSSESSION OF DRUGS, AND IF SO, UNDER WHAT CRITERIA OR CONDITIONS?

The Court also reversed Respondent's conviction and remanded the cause for a new trial finding that it was error for the trial court to admit a tape recording (of a conversation between Respondent and a confidential informant) without testimony from the confidential informant establishing his consent. However, the Court found it necessary to also certify the following question of great public importance:

> HAS THE REQUIREMENT, ENUNCIATED IN TOLLETT V. STATE, 272 So.2d 490, (FLA. 1973), THAT CONSENT TO THE TAPING OF A CONVERSATION MUST BE ESTABLISHED BY THE TESTIMONY OF THE PERSON WHO CONSENTED, BEEN SUPERSEDED BY THE 1982 AMENDMENT TO ARTICLE I, §12, OF THE FLORIDA CONSTITUTION AND UNITED STATES

SUPREME COURT DECISIONS CONSTRUING THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION?

The undersigned invoked the discretionary jurisdiction of this Court on May 1, 1987 and this brief follows.

SUMMARY OF ARGUMENT

As it is uncontroverted that Respondent was in possession of 42 grams of cocaine, well in excess of the threshold amount needed for a conviction of trafficking in more than 28 grams, such a finding should be held as a clear and convincing reason to depart from the recommended guidelines sentence for a conviction of the lesser-included offense of sale or possession with intent to distribute.

The recent amendment to Article I, Section 12 of the Florida Constitutions, which provides that the right to protection against unreasonable search and seizure found in the Florida Constitution is now governed by federal law, has rendered the requirement in Tollett no longer viable. Moreover, the giving of consent is a verbal act, and therefore such can be testified to by the recipient without violation of the hearsay rule. The First District's decision herein should be quashed.

ARGUMENT

CERTIFIED ISSUE I

MAY THE AMOUNT OF DRUGS POSSESSED BY THE DEFENDANT BE USED AS A REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES IN A PROSECUTION FOR UNLAWFUL POSSESSION OF DRUGS, AND IF SO, UNDER WHAT CRITERIA OR CONDITIONS?

Of the four reasons relied upon by the trial judges in departing from the recommended sentence of any nonstate prison sanction and in imposing a four year prison sentence followed by two years probation, the First District Court of Appeal found them all to be invalid. Pertinent to the certified question on review, the trial court departed for the following reason:

> 1. The amount of cocaine involved in the actual delivery to the undercover officer was 35 grams, well in excess of the threshold amount needed to sustain conviction for a lesser included offense to trafficking in cocaine. This circumstance justifies departure. Pursell v. State, 483 So.2d 94 (2DCA 1986); Seastrand v. State, 474 So 2d 908 (5DCA 1985). (R 258)

As this Court is well aware, the issue presented herein has been addressed too numerous a number of times to mention in the district courts of appeal creating a diversity of views on the subject. This court, in Atwaters v. State, Case No. 69,555, heard oral arguments on this precise question on July 1, 1987, and is therefore, well aware of the State's position thereon.

Sub judice, it is uncontroverted that Respondent sold 35 grams (1 1/4 ounces) to an undercover deputy sheriff (R 46). An additional 1/4 ounce of cocaine was found in the back seat of Respondent's vehicle at the time of his arrest (R 54) bringing the total amount of cocaine seized to 42 grams. Mysteriously, the jury exonerated Respondent of the charge of trafficking in cocaine, which charge requires a threshold amount of at least twenty-eight (28) grams, §893.135(b)1, Fla. Stat. (1985), and found him guilty of the lesser included offense of sale, delivery or possession with the intent to distribute cocaine, which requires no threshold amount. §893.13(1)(a), Fla. Stat. (1985). Thus, Respondent escaped the 3 year mandatory minimum sentence under the trafficking statute and received a departure sentence of four years imprisonment followed by two years probation based on the excessive amount of cocaine needed to sustain a conviction for the offense of sale or possession. 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 contends the last sentence of that committee note has perhaps been inadvertantly overlooked, yet it is no less

significant 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 appoves consideration of the utilization of that factor in departing from the guidelines sentence. The State submits that sale or possession with intent to distribute 35 grams of cocaine which far exceeds the threshold amount necessary to obtain a conviction for trafficking in more than 28 grams of cocaine is clearly 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, 498 So.2d 899 (Fla. 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. More 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, 498 So.2d 1249 (Fla. 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 sexual 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 3 cell departure from the recommended guidelines where the quantity of drugs is well in excess of the threshold amount required for a conviction and where the quantity of drugs is far more than the quantity of drugs which would have subjected the Petitioner to a minimum mandatory sentence of three years--in effect tripling his recommended sentence, but not allowing any gain time at all, if he was convicted of the crime charged. 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 guide ines 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).

On the flip side of the coin, it is interesting that the First District would approve a downward departure due to the small amount of contraband. For instance, in State v. Villalovo, 481 So.2d 1303 (Fla. 3d DCA 1986) the defendant had only 1/2 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.

Here, it is totally inconsistent for a defendant who is convicted of sale or possession of 35 grams of cocaine to receive the same number of points on the scoresheet as the defendant who is convicted of sale or possession with intent to distribute 1 or

2 grams of cocaine, which is precisely what occurs under the present system. Therefore, the trial judge, who is well aware of the foregoing scenario, should be able to exercise his discretion in departing from the recommended guidelines sentence for a drug-related conviction when the amount of drugs possessed by the defendant is determined to be well in excess of the amount required for a conviction.

Although the District Court found the other departure reasons to be invalid, the State contends review of those reasons is not necessary due to the fact that it is clear beyond all reasonable doubt that the 4 year sentence was imposed in a deliberate effort to equate Respondent's punishment as closely as possible to a defendant guilty of selling more than 28 grams of cocaine. Pursuant to Albritton v. State, 476 So.2d 18 (Fla. 1985) and more recently, Casteel v. State, 498 So.2d 1249 (Fla. 1986), the State submits the departure sentence should be affirmed and not remanded despite the possible invalidity of the remaining reasons.

CERTIFIED ISSUE II

HAS THE REQUIREMENT, ENUNCIATED IN TOLLETT V. STATE, 272 SO. 2D 490, (FLA. 1973), THAT CONSENT TO THE TAPING OF A CONVERSATION MUST BE ESTABLISHED BY THE TESTIMONY OF THE PERSON WHO CONSENTED, BEEN SUPERSEDED BY THE 1982 AMENDMENT TO ARTICLE I, §12, OF THE FLORIDA CONSTITUTION AND UNITED STATES SUPREME COURT DECISIONS CONSTRUING THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION?

In certifying the foregoing question of great public importance, the First District concluded that this Court's decision in Tollett is not a "purely" constitutional decision which was superseded by the 1982 amendment to the Florida Constitution - the decision "appears" to be based on this Court's interpretation of the constitution, its construction of chapter 934, Florida Statutes,[1] and on general rules of evidence. Welker, supra, at 806. The State submits that regardless of what principles the decision in Tollett was based on, the requirement mandated therein has been terminated by the constitutional amendment adopting federal standards for the following reasons.

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[1] To the extent that Tollett construes chapter 934, it is merely to demonstrate that the pre-requisites which govern the method used to obtain the oral communications were met.

In Tollett, this Court[2] held that wiretap evidence could not be admitted without establishing consent by competent and relevant testimony of a party to the communication, subject to cross-examination. Here, as in Tollett, the only showing of consent was the testimony of a police officer that the consent was given to him by an informant, who was unavailable for trial. It is the State's position that the requirement in Tollett did not survive the recent amendment to Article I, Section 12 of the Florida Constitution, which provides that the right to protection against unreasonable search and seizure found in the Florida Constitution is now governed by federal law:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

This same argument was first recognized by the Fifth District Court of Appeal in Palmer v. State, 448 So.2d 55 (Fla. 5th DCA 1984). In that case, Judge Cobb correctly determined that:

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[2] The State wishes to point out that no member of the panel which participated in the Tollett decision remains on the bench today. Therefore, this Court is urged to recede from a decision which is now controlled by federal case law.

> Tollett was a four-three opinion wherein the majority relied on the language of Article I, Section VII of the 1968 Florida Constitution, in effect at that time, and section 934.01(4), Florida Statutes, relating to the interception of wire or oral communications. Tollett, as pointed out in the dissenting opinion by Justice Adkins therein, was an aberrant departure from all past law in holding that the issue of consent necessitated testimony from the consentor rather than the consentee alone. Moreover, unlike the instant case, it dealt with construction of the Florida Amendment to the United States Constitution. Lastly, the questionable viability of Tollett in regard to its interpretation of the search and seizure provisions of the Florida Constitution was terminated by the recent constitutional amendment adopting federal standards. See Art. I §12, Fla. Const., as amended in 1982.
>
> Palmer at 56.

A footnote to the above quotation stated:

> Given this constitutional amendment, a different result in Tollett would be mandated today by United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).
>
> Palmer at 56.

In the majority opinion quashing the decision rendered by the First District in Tollett v. State, 244 So.2d 458 (Fla. 1st DCA 1971), this Court declined to follow cases cited by the State which, although not controlling at that time, were directly on point factually, to-wit: United States v. Kaufer, 406 F.2d 550

(2d Cir. 1969), aff'd, 394 U.S. 458 (1969); United States ex rel. Dixon v. Pate, 330 F.2d 126 (7th Cir. 1964), cert. denied, 379 U.S. 891 (1964); United States v. White, 401 U.S. 745 (1971); and, On Lee v. United States, 343 U.S. 747 (1952). The Court did so on the grounds that the Fourth Amendment did not contain language as comprehensive as Art. I, §12 of the Florida Constitution (1968). In doing so, the Court misconceived the scope of the Fourth and Fourteenth Amendments as interpreted by the United States Supreme Court and found a distinction that simply did not exist.

Under the United States constitutional provisions referred to, it is illegal to intercept the telephonic communications where neither party to the conversation consents thereto, and any evidence secured under such circumstances is inadmissible in a criminal proceeding in any court, state or federal. Lee v. Florida, 392 U.S. 378 (1968). Under those same provisions where the consent of one party is obtained, the recording is admissible in a criminal case in any court, state or federal. United States v. White, supra.

Under Art. I, §12 of the Florida Constitution (1968), where the consent of neither party is obtained, a recording of the conversation was not admissible in any criminal proceeding in this state, and this court so held. See also: Chapter 934.06, Fla. Stat. Where, however, the consent of one party has been

obtained such evidence is admissible. Griffith v. State, 111 So.2d 282 (Fla. 1st DCA 1959); Barber v. State, 172 So.2d 857 (Fla. 1st DCA 1968); and Walker v. State, 222 So.2d 760 (Fla. 3d DCA 1969).

Thus, although the Fourth Amendment does not forbid expressly "unreasonable interception of private communications by any means" that amendment as interpreted by Lee v. Florida, supra, protects against such improper pratices. Accordingly, the protection under federal law was precisely the same as that provided by Art. I, §12, and they were legally indistinguishable. Moreover, in its interpretation of Art. I, §12 of the Florida Constitution with respect to oral communications, this court totally overlooked its own decisions with reference to unreasonable searches and seizures covered by the same section of the Constitution. The Tollett decision ignores the third party consent-to-search cases which have long been in existence in the State of Florida, and of which the same rationale should apply sub judice. See Carlton v. State, 149 So. 767 (Fla. 1933); Tomlinson v. State, 176 So.2d 543 (Fla. 1937); Rivers v. State, 226 So.2d 337 (Fla. 1969); Spinkellink v. State, 313 So.2d 666 (Fla. 1975), all decided by the Florida Supreme Court. See also Myrick v. State, 177 So.2d 845 (Fla. 1st DCA 1965). It should be noted that there is no requirement in the above case law that the third party granting the police the consent to search the suspect's property be produced at trial to establish that

consent. The State would have to establish that consent through some admissible evidence at a determination hearing. But there is no exclusion of that evidence without the testimony of the third party granting his consent. The State submits that the rules of evidence normally applicable in criminal trial's do not operate with full force at such determination hearings.

Section 90.105, Florida Evidence Code, makes it very clear that the judge, and not the jury, shall determine questions concerning the admissibility of evidence and, therefore, in making his determination, he is not bound by the rules of evidence, except those with respect to privileges. See Rule 104, Fed, Evid. Code. Here, Respondent objected to the "hearsay nature of the question and answer dealing with whether or not the informer consented to the bugging of the telephone call." (T 27). This objection and subsequent argument occurred outside the presence of the jury and therefore, should be considered as a hearing before the judge to determine the admissibility of evidence, to-wit: the tapes of the oral communications between Respondent and the confidential informant.

As stated above, the undersigned respectfully urges this Court to apply the same rationale used in the federal and state consent-to-search cases to establish binding precedent that the testimony of the confidential informant is not crucial to the determination of whether a recording between the informant and a

defendant violated the defendant's Fourth Amendment rights.

In Frazier v. Cupp, 394 U.S. 731, ___ L.Ed.2d ___, ___ S.Ct. ___ (1969), Frazier and his cousin, Jerry Lee Rawls, were jointly indicted for second-degree murder. During the investigation, Rawls consented to a search of a duffel bag that he and Frazier used jointly. 394 U.S. at 740. Because Rawls, during Frazier's trial, pled the Fifth Amendment the only testimony concerning his consent came from police authorities. The United States Supreme Court upheld that search on the grounds that Rawls consented--without his so testifying. The Court did so on the basis that ". . . in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. . ." 394 U.S. at 740. Under the logic of Respondent's contentions below, the items seized in the Frazier v. Cupp case would not have been admissible in evidence because Rawls did not testify.

In United States v. Matlock, 415 U.S. 164, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974), Matlock was indicted for robbery of a federally insured bank. During the investigation, Mrs. Graff, an occupant of the house in which Matlock resided, consented to a search of the house. The United States Supreme Court upheld the search where the officers testified at the suppression hearing that Mrs. Graff consented to the search. The Court reasoned that the rules of evidence normally applicable in criminal trials do

not operate with full force at hearings before the judge to determine the admissibility of evidence. Id. at 250. Likewise, as argued above, in the instant case, although the hearing was held during trial, it was held outside the presence of the jury and should, therefore, be afforded the same considerations as a suppression hearing before the judge to determine the admissibility of evidence. The determination of consent to record oral communications is a decision to be made by the judge, not the jury.

Finally, in United States v. White, supra, the Court concluded:

> [t]he issue of whether specified events on a certain day violate the Fourth Amendment should not be determined by what later happens to the informer. His unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights.

Id. at 460.

If an officer can validly testify that a third person consented to a search of a home or effects, jointly used, owned or occupied by the defendant, thereby obviating the necessity to obtain a search warrant from a magistrate as required by Art. I, §12, then why can't an officer testify that a third person

jointly using a telephone with the defendant consented to an electronic monitoring of the conversation thereon, thereby obviating the necessity of obtaining a court order authorizing such under the provisions of §934, Fla. Stat.

The State would ask what result would obtain if the officer at a suppression hearing testified Baggett consented and Baggett testified he didn't, but the trial judge chose to believe the officer? Would the trial judge have erred in not suppressing the tape recording because the party consenting didn't so testify? In light of Myrick v. State, supra, that seems unlikely since this Court has followed that decision in Rivers v. State, 226 So.2d 337 (Fla. 1969).

As a final argument, the State would urge this Court to disapprove the decision below in light of the well-established doctrine that the giving of consent is a verbal act, and therefore testimony that someone has given consent is not hearsay. See Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). As acknowledged by the lower court, Welker at 806, f.n. 3, this court apparently overlooked said doctrine when deciding Tollett and should therefore revisit Tollett in light of the aforementioned decisions.

In the unfortunate event that this Court should answer the certified question in the negative, the effect would be that a subsequent disappearance of a witness or his unwillingness to testify, because of self-incrimination or threats of revenge, would render the transcription inadmissible in court. What makes this principle so illogical and absurd is that when the consent is obtained, the officer has no way of assuring the consenting party won't "cop out." Such contingencies would eliminate electronic surveillance pursuant to the consent of one party to the conversation for no competent law enforcement officer would be willing to allow the admissibility of his evidence rest upon the subsequent mental state of his consenting informant.

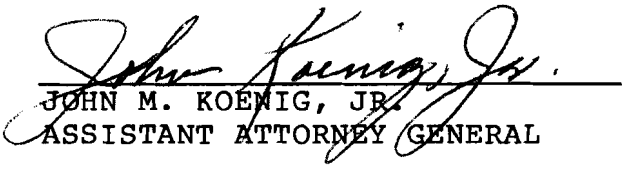
In sum, the United States Supreme Court, this Court, and the district courts of appeal addressing the issue have recognized the binding precedent established in the White and other federal decisions. As a result, Tollett unquestionably is no longer viable.

CONCLUSION

Based upon the foregoing arguments and the authority cited therein, the lower court's decision to reverse and remand this case for a new trial should be quashed and the judgment and sentence imposed herein should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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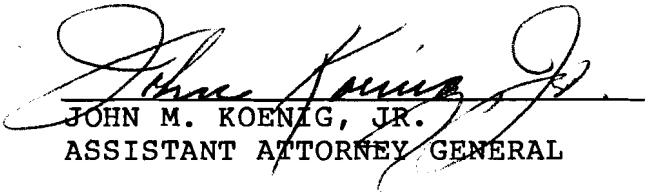
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Leo A. Thomas, Esq., Post Office Box 12308, Pensacola, Florida 32581 on this 17th day of July, 1987.



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