IN THE

SUPREME COURT OF FLORIDA

CASE NO. 72, ~~462~~ 529

CIRCUIT COURT CASE NO. 81-9310 CF

DANIEL LEE DOYLE,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner Daniel Lee Doyle ("Doyle"), pursuant to Rules 9.030(a) and 9.100, Florida Rules of Appellate Procedure, petitions this Court to issue its writ of habeas corpus. The grounds for this petition are:

JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 3(b)(9) of the Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure.

FACTS UPON WHICH PETITIONER RELIES

1. On May 6, 1988, Governor Martinez signed the Death Warrant for Doyle. The Death Warrant is valid from Noon, July 7, 1988 to Noon, July 14, 1988. Execution is scheduled for 7 A.M. on July 8, 1988.

In 1982, Doyle was convicted of first degree murder and sentenced to death. Doyle appealed, and his conviction and sentence were affirmed by this Court. See, Doyle v. State, 460 So.2d 353 (Fla. 1984). The judgment and sentence became final on February 6, 1985. Doyle timely filed a Verified Motion to Vacate Judgment and Sentence ("Motion to Vacate") pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in Broward County Circuit Court on February 6, 1987. The circuit court held an evidentiary hearing on the Motion to Vacate on September 13, 1987. No other post-conviction motion has been filed by Doyle. On May 11, 1988, immediately after being notified of the signing of the Death Warrant, Doyle

filed a Motion for Stay of Execution. The Motion to Vacate and Motion for Stay of Execution were denied by the circuit court on May 16, 1988. Doyle timely commenced an appeal from such denials on May 19, 1988, pursuant to Rule 3.851, Florida Rules of Criminal Procedure.

2. Doyle's trial counsel was handling his first capital case. Hearing Tr. 50-51.[1/] He had thus never handled a case where first guilt was decided, including resolution of issues of competency to stand trial and sanity, and then penalty was decided, where related, but different psychological issues might need to be resolved. Apparently because of that inexperience, although he requested that the court appoint medical experts to determine Doyle's competency to stand trial and Doyle's sanity or insanity at the time of the alleged defense, R. 1222, 1334, the subject of the penalty phase "wasn't something that I dwelled upon to any great extent." Hearing Tr. 49. In fact, the reports of the two psychologists he consulted with made no reference whatsoever to the penalty phase. See Evaluations of Seth R. Kreiger and John C. McClure, App. 1 and 2 respectively. Dr. Kreiger swore he was never even consulted regarding the penalty phase. See Kreiger Affidavit, App. 3. No investigation was requested by Doyle's trial counsel or made to determine whether Doyle was under

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[1/] "R. ___" shall refer to the record of the trial. "Hearing Tr. ___" shall refer to the transcript of the hearing on the Motion to Vacate. "App. ___" shall refer to the appendix to Doyle's brief filed in his appeal of the lower court's denial of his Motion to Vacate.

the influence of extreme mental and emotional disturbance and did not appreciate the criminality of his conduct or was able to conform his conduct to the requirements of law at the time of the crime. See Section 921.141(6)(b) & (f), Florida Statutes.

The examinations and the written reports of the two psychologists, which were court exhibits at the hearing on the Motion to Vacate, never addressed any issues relevant to mitigation, which simply reflects the inability of Doyle's inexperienced trial counsel to appreciate the issues. See Evaluations of Dr. Seth R. Kreiger and John C. McClure. Dr. Kreiger specifically said any conclusions he reached were not directed toward any mitigating circumstances relevant to the penalty phase and only reflected the purpose for which he was appointed, that is, Doyle's sanity and competency to stand trial and a related Baker Act issue. See Kreiger Affidavit, See also R. 1334 (testimony of Kreiger that the only purposes for which he examined Doyle were competency and sanity). The other psychologist, Dr. John McClure, who was never licensed in the State of Florida, could not be located by Doyle's present counsel, but his trial testimony was limited in the same way as Kreiger's. R. 1222 (testimony of McClure that the only purposes for which he examined Doyle were competency and sanity). The trial testimony of these two psychologists only vaguely referred to Doyle's retardation (Dr. Kreiger testified it was only his "impression" that Doyle was retarded, R. 1339-

40) and did not address the full range of mental health issues relevant to sentencing. At the hearing on the Motion to Vacate, Doyle's trial counsel claimed he considered the mitigation issues, but had no explanation for how he acted, and why he did nothing in this regard. When asked direct questions regarding his failure to assign the experts to investigate these mitigating circumstances, and faced with a record which categorically shows he made no effort to have those issues addressed, Doyle's trial counsel simply could not recall ever covering the penalty phase issues raised here with the psychologists. See Hearing Tr. 56-57.

Doyle's counsel testified at the Rule 3.850 evidentiary hearing he asked both psychologists to explore mitigating evidence applicable to the penalty phase of the trial. Hearing Tr. 39-40;69. When asked for specifics, he had memory lapses. Hearing Tr. 56-57 He made no attempt prior to the hearing to review the reports, his file, or the record. His testimony is flatly contradicted by everything in the record, including Kreiger's affidavit and the reports issued by the psychologists, all of which show McClure and Kreiger were hired solely for sanity and competency purposes at the outset of the trial, and for no other reason. Kreiger has sworn in an affidavit that his examination did not relate to anything other than sanity and competency. See Kreiger Affidavit, App. 3. Finally, where Doyle's trial counsel was specific, he was often wrong. For example, he testified Kreiger

examined a lengthy confidential school file and listened to the taped confession Doyle gave before he examined Doyle. Hearing Tr. 40-42. Kreiger stated he did not review the school file until the day before he testified at the suppression hearing. R. 224. Neither McClure nor Kreiger were asked to interview Doyle after the initial examinations and after Doyle had been found guilty to address issues of mitigation. Hearing Tr. 67-68.

Doyle's trial attorney elicited no testimony from Kreiger or McClure regarding mitigating circumstances applicable to Doyle. Doyle's psychologists were never informed of the statutory mitigating circumstances that might be applicable to Doyle. See Kreiger Affidavit. No questions of the psychologists were asked regarding Doyle's mental or emotional disturbance at the time of the crime or whether Doyle was able to conform his conduct to the requirement of the law or appreciate the criminality of his conduct. See R. 1332-1354.

3. Doyle is retarded. Dr. Russel M. Bauer, Director of Neuropsychology Service for the Department of Clinical Psychology at Shands Hospital, conducted a comprehensive psychological evaluation of Doyle, including examination of general intellectual functioning, and neuropsychological examination consisting of testing memory ability, language skill, visuoperceptual and visuoconstructive ability, and frontal-subcotal functions. See Bauer Evaluation, App. 4. Dr. Bauer also conducted personality testing and collected

collateral information from interviews with family members and friends. Dr. Bauer concluded Doyle was in the borderline range of intellectual functioning, with a full scale IQ of 75, showing a verbal IQ of 70 and a performance IQ of 87. Bauer Evaluation at 9, App. 4. Dr. Bauer found significant substance abuse, multiple head injuries and organic brain damage. Bauer Evaluation at 9. Dr. Bauer found that Doyle had "significant deficits in memory and concentration and deficits in complex vasomotor and motor sequencing tasks." Bauer Evaluation at 8. Personality testing revealed "extremely primitive intellectual ability with few internal resources for coping with psychological stress." Doyle "is likely to become overwhelmed in stressful situations." Bauer Evaluation at 8. Dr. Bauer concluded that Doyle's intellectual deficits severely limit the range of situations with which he is able to effectively cope. Bauer Evaluation at 8. "In particular, he has difficulty thinking for himself, cannot effectively reason through complex problems, and has a severely limited fund of general information on which to draw." Doyle is largely dependent on others to do his thinking for him. Bauer Evaluation at 8.

Based on these results of his evaluation, Dr. Bauer unequivocally stated that Doyle met two statutory mitigating circumstances at the time of the crime. Bauer Evaluation at 9-10; Hearing Tr. 10-13. Regarding Section 921.141(6)(b) requiring that the felony be committed under the influence of extreme mental or emotional disturbance, Dr. Bauer wrote:

> It is my opinion that this statute is met by the facts of this case. There is evidence that in the year prior to the murder of Pamela Kipp, Mr. Doyle was emotionally disturbed by his brother's untimely death. He had become violent with his girlfriend on several occasions; she describes him as periodically "going berserk" and being remorseful afterwards. He had been drinking and taking drugs more heavily in the months before. His girlfriend had moved out the week earlier in the aftermath of a violent fight, and he was reportedly upset and angry about this, as well as fearful that he would do her further harm. He perceived the police to be harassing him, blaming him for nearly every offense committed in Miramar. Coupled with all of these stressors, Mr. Doyle has, on a developmental basis, suffered poor intellectual endowment, a reading disability, has had several minor head injuries, and has participated in significant substance abuse. These fact introduce possible organic factors which compound the effects of stress in this case.

Id. at 9.

Furthermore, regarding Section 921.141(6)(f) requiring that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law be substantially impaired, Dr. Bauer wrote:

> The weight of the evidence suggests that the requirements of this statute are also met . . . [T]he factors described above (intellectual impairment, organic factors, recent stressors) would in my opinion combine to substantially impair Mr. Doyle's appreciation of the consequences of his conduct or his ability to control his behavior.

Id. at 9.

4. Doyle made three confessions. On the morning of September 6, 1981, police asked Doyle to make a statement. R. 30; 1012-13. A tape recorded statement was made. R. 1024-41. Doyle was read his Miranda rights and requested counsel, which request was ignored by the interrogators. Immediately after the taped statement was made, Doyle made an unrecorded confession. R. 247; 1042-47. On September 8, 1981, a taped confession was given by Doyle which the police initiated. R. 1120-31. On September 11, 1981, a second taped confession was given by Doyle, when the police again initiated a discussion with Doyle. R. at 1133-48. At no time did Doyle initiate any discussions with the police or waive his request for counsel made during the first interrogation.

After Doyle's first confession was made two more confessions were elicited. Under Fla.R.Crim.P. 3.130 (First Appearance) every arrested person must be taken before a judicial officer within 24 hours of his arrest. Doyle was arrested on September 6, 1981. Doyle's right to an attorney attached 24 hours after his arrest at his first appearance. Consequently, Doyle's confessions on September 8 and 11, 1981 violated his constitutional right to an attorney.

SUMMARY OF ARGUMENTS

1. Doyle's Fifth and Fourteenth Amendment right to due process and equal protection of the law at the penalty phase of the trial was violated by incompetent examinations of Court appointed psychologists. Additionally, Doyle's Sixth and Fourteenth Amendment right to effective assistance of counsel was violated by defense counsel's failure to investigate and present available mitigating evidence. Doyle's counsel, who was defending his first capital case, failed to present testimony that Doyle's retardation and organic brain damage were mitigating circumstances allowed by law that showed: (1) the capital felony was committed while the defendant was under the influence of extreme mental and emotional disturbance; and (2) the capacity of Doyle to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. See, Section 921.141(6)(b) & (f), Florida Statutes. The court appointed psychologists only evaluated Doyle for competency to stand trial and sanity at the time of the offense, making this medical testimony incompetent at the sentencing phase. Doyle's appellate counsel was ineffective for failing to raise these issues on direct appeal.

2. Doyle's Sixth Amendment right to counsel was violated by failure of police to provide him with an attorney at arraignment. Doyle's appellate counsel was ineffective

for failing to raise this issue on direct appeal. The court should vacate Doyle's sentence and order a new trial.

3. Execution of retarded persons, including Doyle, is cruel and unusual punishment prohibited by the Eighth Amendment. Doyle's appellate counsel was ineffective for failing to raise this issue on direct appeal. The Court should vacate Doyle's death sentence and enter a life sentence.

I

THE DEFENDANT WAS DENIED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW BECAUSE OF INCOMPETENT MEDICAL EVALUATIONS AND DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY FAILURE OF HIS COUNSEL TO RAISE THIS ISSUE ON DIRECT APPEAL.

Under Florida law and the United States Constitution, as articulated in Ake v. Oklahoma, 465 U.S. 1099, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), Doyle was entitled to the independent and competent assistance of a mental health expert during the sentencing phase of the trial. As the Supreme Court stated in Ake:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern.
>
> . . . .
>
> Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.
>
> . . . .
>
> These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere,

> that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question.

Ake at 1094-95 (footnotes omitted, Rule 3.216 cited in footnote) (emphasis added).

When the state makes "mental condition" relevant to either guilt or sentencing in a capital case, an indigent defendant is entitled to competent and independent assistance by a psychiatrist and/or psychologist. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). The State of Florida has made mental state relevant to guilt and punishment in capital punishment cases. Three statutory mitigating circumstances and numerous unenumerated non-statutory mitigating circumstances are mental health based. Yet, because of his trial attorney's inexperience and inability to even identify the need for the mental health experts for the sentencing phase, Doyle did not receive competent assistance by his mental health expert at the sentencing phase of his trial. In State v. Sireci, 502 So.2d 1221 (Fla. 1987), this court upheld the trial court's determination, in a second post-conviction relief motion, that:

> a limited evidentiary hearing [was] necessary to address the claim that Sireci was deprived of his rights to due process and equal protection because the two psychiatrists appointed before trial to evaluate his sanity at the time of the offense failed to conduct competent and appropriate evaluations. The trial court

> further held that the hearing is necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically found, and we agree, that the alleged violation of due process/equal protection has no bearing on the prior determination of Sireci's guilt.

Id. at 1223. (emphasis added). Doyle is entitled to the same protection in having competent medical experts testify at his sentencing hearing.

There is no doubt that Doyle met two of the statutory criteria for mitigating circumstances. Dr. Bauer testified he was under the influence of extreme mental or emotional disturbance because of the death of his brother and his mental retardation and organic brain damage impaired his capacity to appreciate the criminality of the act or to conform his conduct to the law. However, Doyle's retardation, his emotional distress and brain damage were only touched upon at the sentencing phase of the trial and were never fully presented to the jury. This was because Doyle's attorney never had psychologists appointed to examine him for mitigating circumstances. Doyle's psychologists only examined him for competency and sanity, issues not relevant to mitigating evidence. These facts would have been extremely relevant to the jury's deliberations and, in all probability, would have tipped the balance in favor of life imprisonment, especially in view of the fact that the vote was 8 to 4. It is intolerable that this state can execute a mentally retarded individual

without permitting his jury to consider the individual factors upon which his life hinges.

Doyle was denied due process and equal protection of the law and is entitled to a new sentencing trial. Furthermore, no reason can be advanced for Doyle's trial counsel's failure to raise these issues at Doyle's sentencing trial. Doyle's appellate counsel should have raised this issue on direct appeal. Any attorney whose client is retarded and suffers from brain damage would immediately recognizes the lack of such mitigating testimony. It is incredible that any attorney should ignore mitigating circumstances spelled out in the law. Doyle's appellate counsel's performance undoubtedly fell below the "wide range of professionally competent assistance" as demanded by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). For the foregoing reasons, the Court should vacate Doyle's sentence and order an new sentencing hearing.

II

DEFENDANT WAS DEPRIVED OF COUNSEL AFTER FIRST APPEARANCE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AND HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

The Supreme Court has ruled that the Sixth Amendment right to an attorney attaches at the time of arraignment. Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 1407, 89 L.Ed.2d 631 (1986). After attachment of the right to counsel, the accused must make an intentional relinquishment or abandonment of his privilege of counsel. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). Merely informing an accused of his right to counsel is not sufficient, even if the accused understands these rights. Id. at 1242. Under Fla.R.Crim.P. 3.130 (First Appearance), every arrested person has a right to be taken before a judicial officer within 24 hours of his arrest. At this time counsel must be appointed, although counsel may be appointed for the limited purpose of the first appearance or at subsequent proceedings. Id. At least two courts, including the Eleventh Circuit, have ruled that, in Florida, the right to an attorney attaches at the time of first appearance. Thus, Doyle's interrogation of September 8, 1981, was illegal because his right to an attorney had attached.

In Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), the Eleventh Circuit ruled that the accused's right to an attorney attaches after his first appearance. Id. at 1073.

However, the court upheld admission of the confession based on the district court's finding that he had made a voluntary, knowing and intelligent waiver of his right to counsel. Id. The accused in Witt had initiated the contacts leading up to his confession. Id. The court, however, found that the accused's right to an attorney had attached based upon the First Appearance right to counsel under Florida criminal procedure rules. In State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984), the Fourth District ruled that Florida's constitution and state law affords greater protection than the federal constitution. Id. at 1185. In Douse, the accused was represented by retained counsel at the first appearance. Id. at 1184. The next day, police elicited incriminating statements. The court found that the right to an attorney had attached, and the police could not deliberately elicit statements through surreptitious means. Id. at 1185. Article I, Section 16 of the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. This constitutional right coupled with Rule 3.130 mandating an attorney at first appearance caused the right to an attorney to attach. Id. at 1185. Doyle was deprived of an attorney in violation of his constitutional right and Doyle's appellate counsel was ineffective for failing to raise this issue on direct appeal. Doyle's conviction and sentence should be vacated and a new trial ordered.

III

EXECUTION OF THE MENTALLY RETARDED IS CRUEL AND UNUSUAL PUNISHMENT AND DOYLE'S APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL.

Daniel Lee Doyle is mentally retarded. At best, he is in the borderline range of intellectual functioning ("[H]e was at the cutting point between the mentally retarded range and borderline retarded range.") His IQ has been measured as low as 57. He cannot read or write, and has a limited vocabulary. He is barely able to sign his name. A thorough psychological evaluation conducted after Doyle's conviction and direct appeal by Dr. Bauer revealed Doyle has "an extremely primitive intellectual ability."

The Eighth Amendment prohibition against imposition of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Gregg v. Georgia, 428 U.S. 153, 172-73, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is necessary in determining whether a punishment is cruel and unusual to assess contemporary values by looking at objective indicia that reflect the public attitude toward a given sanction. Id. at 2925. A death penalty must also accord with the dignity of man, which is a basic concept underlying the Eighth Amendment. Id.

The execution of the mentally retarded is neither approved by society or accords with the dignity of man. Florida voters overwhelmingly oppose execution of the mentally retarded.

See, An Analysis of Political Attitudes Towards the Death Penalty in the State of Florida, Prepared for Amnesty International, Cambridge Survey Research, (May, 1986), App 5. This is true even if the retarded person to be electrocuted is found guilty beyond a reasonable doubt. In a recent survey conducted by Cambridge Survey Research 71% of the Florida voters polled opposed such execution. Only 12% favored executing the mentally retarded and 17% did not know. The same survey revealed overwhelming support of the death penalty in general. 84% of the Florida voters polled either strongly favored or somewhat favored capital punishment. Regarding execution of the mentally retarded, Cambridge Survey Research asked voters the following question:

> [I]'d like you to imagine you are a member of a jury. The jury has found the defendant guilty beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. How would you feel about recommending the death penalty if . . . [t]he convicted person was mentally retarded?

Id. at 60. This overwhelming response of 71% of Florida voters who would not vote for execution shows that if Doyle's jury had been fully informed of his retardation they would not have imposed the death penalty. See discussion infra at 36-48. Even as it was, the jury was badly split with an 8 to 4 vote in favor of the death penalty. Two votes represent death for Doyle, two votes that would have been for life had the jury known the full facts of his retardation.

Mental retardation is often confused with mental illness. Mental retardation impairs a person's ability to learn and to adapt to social norms. One of the primary characteristics of the retarded is cognitive disintegration or the breakdown in the ability to think and reason and a breakdown in the perception of reality during periods of stress. See, Sovner and Hurley, Four Factors Affecting The Diagnosis Of Psychiatric Disorders In Mentally Retarded Persons, 5 Psychiatric Aspects of Mental Retardation Reviews 45 (Sept. 1985), App. 6. Another characteristic is that the retarded have stunted moral development. James Ellis and Ruth Luckasson, Mentally Retarded Criminal Defendants, 53 Ga.L.Rev. 414 at 429-30 (1985), App. 7. Studies on the moral development of people with mental retardation reveal that they have incomplete or immature concepts of blameworthiness and causation. Id. Indeed, the factors that appear to be related to moral development include intelligence, opportunity for interaction with others, living in an enriching environment, chronological age and mental age, all of which are missing for the mentally retarded. Doyle's retardation has in many ways stunted his ability to cope with the pressures of living every day life. It is without a doubt that his mental retardation played a crucial role in the events of his life. It is inconceivable to any of us what it would be like to be retarded.

On March 7, 1988 the Georgia legislature decided that the death penalty could not be imposed on a victim of

mental retardation, regardless of the crime committed. Act of March 7, 1988, No. LC 10 8070S (to be codified at Ga.Code.Ann. § 17-7-131), App. 8. The Georgia legislature, in concluding executing a retarded offender destroys public confidence in the criminal justice system, relied on survey results showing two-thirds of Georgia's citizens opposed applying the death penalty to the mentally retarded. Amendment to Act of March 7, 1988, No. LC 18-26395, App 9. Here, this Court must recognize that execution of the mentally retarded in Florida violates the Eighth Amendment's prohibition against cruel and unusual punishment. Doyle's appellate counsel was ineffective for failure to raise this issue on direct appeal.

For the foregoing reasons, Doyle's conviction and sentence should be vacated and a new trial ordered.

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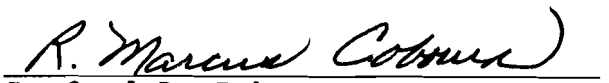

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by hand on John Teiterman, Assistant Attorney General, Suite 204, 111 Georgia Avenue, West Palm, Florida 33401 this 6th day of June, 1988.

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