IN THE SUPREME COURT OF FLORIDA

EDDIE ROGER WILSON,

Petitioner,

v. Case No.: 74,872

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Petitioner, Eddie Roger Wilson, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R" and will be followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts as reasonably accurate.

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in upwardly departing from the sentencing guidelines. In departing, the trial court enunciated three valid reasons: (1) the vulnerability of the victim as a result of her mental retardation; (2) the familial relationship between the victim and petitioner; and (3) the excessive level of the victim's trauma.

The first reason, vulnerability based on mental retardation, is clearly valid. Petitioner was convicted under section **800.04** for a lewd assault on a child, a crime which does not contain as an inherent element mental retardation. The only vulnerability factored into section **800.04** is that of youthful age, as evidenced clearly by the statutory language.

The second reason, abuse of the familial relationship, is also clearly valid. Smith, Davis, Williams, Gopaul, and Handley all establish that familial authority is not an inherent element of section **800.04**. Laberge conflicts with these decisions in holding that trust was already factored into section **800.04**. This holding, however, is patently erroneous, as a reading of section **800.04** indicates.

Finally, the third reason, excessive trauma of the victim, is clearly valid. Casteel, Rousseau, and Barrentine carved out an exception to the general Lerma rule, i.e., emotional hardship

can never constitute a clear and convincing reason to depart from the guidelines because nearly all sexual battery cases inflict emotional hardship on the victims. In the present case, the record establishes not only discernible physical manifestations but extraordinary circumstances which are not inherent in the charged offense.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN UPWARDLY DEPARTING FROM THE SENTENCING GUIDELINES.

An appellate court's function in a sentencing guidelines case is merely to "review the reasons given to support departure and determine whether the trial court abused its discretion in finding those reasons 'clear and convincing.'" State v. Mischler, 488 So.2d 523, 525 (Fla. 1986).[1] In the present case, the trial court did not abuse its discretion in upwardly departing from the sentencing guidelines, as it provided three reasons which were clearly and convincingly supported by the evidence.

In upwardly departing, the trial court enunciated three reasons: (1) the vulnerability of the victim as a result of her mental retardation; (2) the familial relationship between the victim and petitioner; and (3) the excessive level of the victim's trauma. In Wilson v. State, 548 So.2d 874 (Fla. 1st DCA 1989), the First District upheld the first departure reason based on Hawkins v. State, 522 So.2d 488 (Fla. 1st DCA 1988);

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[1] For offenses committed after July 1, 1987, the level of proof necessary to justify a departure sentence is a preponderance of the evidence. Fla. Stat. §921.001(5) (1987). However, because the information alleged that petitioner committed the instant offenses between 1983 and 1986, the Mischler "clear and convincing" standard of proof is applicable in the present case. Felts v. State, 537 So.2d 995, 1006 (Fla. 1st DCA 1988).

upheld the second departure reason based on Smith v. State, 525 So.2d 477 (Fla. 1st DCA 1988), but certified conflict with Laberge v. State, 508 So.2d 416 (Fla. 5th DCA 1987) and certified a question as one of great public importance; and held the third reason to be invalid under the circumstances presented.

Departure Reason #1: Vulnerability[2]

The First District upheld the trial court's departure reason based on the victim's vulnerability due to her mental retardation, citing only to Hawkins. There the defendant was convicted of two counts of sexual battery using slight force. The victim was the defendant's 25 year old aunt who was mentally retarded, had an I.Q. of 55 and social age equivalent of six and one-half years, and was confined to a wheelchair by cerebral palsy. The trial court imposed an upward departure sentence, stating two reasons: (1) the particular vulnerability of the victim due to her mental retardation; and (2) the familial relationship between the victim and the defendant.

On appeal, the Hawkins court found both reasons to be valid departure reasons, but held that the first reason was invalid under the circumstances of that case. See also Helms v. State,

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[2] The First District simply held this reason to be valid and neither certified conflict nor a question of great public importance. Because petitioner has addressed this issue in his brief on the merits, respondent correspondingly addresses this issue.

522 So.2d 519 (Fla. 2d DCA 1988). Specifically, the state had charged the defendant under Fla. Stat. §794.011(4)(a) (1985), which proscribed the sexual battery of a victim physically helpless to resist, not under Fla. Stat. §794.011(4)(e) (1985), which proscribed the sexual battery of a victim who is mentally deficient. The trial court instructed the jury that it could find the defendant guilty under either section 794.011(4)(a) or 794.011(4)(e). Instead, the jury found the defendant guilty of section 794.011(5), a lesser included offense which proscribed sexual battery with slight force, apparently concluding that the state had not proven beyond a reasonable doubt that the victim's mental retardation was a factor in the defendant's commission of sexual battery upon his aunt.

Petitioner raises the ludicrous argument here, as he did before the First District, that, while mental retardation may make an adult more vulnerable to a sexual battery, it does not make a child more vulnerable; after all, a child victim is "already statutorily defined as a child of tender years.'' Petitioner's Brief on the Merits at 10. Apparently, petitioner labors under the mistaken assumption that, because Fla. Stat. 8800.04 (1987) (R 94) accounts for one vulnerability--youthful age, it also accounts for another, wholly separate vulnerability--mental retardation.

A reading of the statute, however, quickly disposes of this argument. Section 800.04, Florida Statutes (1987), provides:

> Any person who:
>
> (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner;
>
> (2) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
>
> (3) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years
>
> without committing the crime of sexual battery is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

As is apparent, the only vulnerability incorporated in the statute is that of age. See Laberge, 508 So.2d at 417 n.1 (citations omitted) ("Because the particular vulnerability of children is covered by section 800.04, that vulnerability is not a valid reason for departure as when the victim is elderly."). Only Fla. Stat. §794.011(4)(e) specifically accounts for the vulnerability of mental retardation. That section proscribes the commission of a sexual battery on a person 12 years of age or older when "the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact." Fla. Stat. §794.011(4)(e) (1987) (emphasis added).

Petitioner also mistakenly assumes that the fact that the victim in Hawkins had the social equivalent age of a six and one-half year old child was the reason that court held that

vulnerability could be a valid departure reason. On the contrary, "[s]tanding alone[,] the tender age of the victim could be said to be an inherent component of the offense charged and thus an impermissible reason for departure." Jakubowski v. State, 494 So.2d 277, 279 (Fla. 2d DCA 1986). In any event, the Hawkins court explicitly grounded its holding on the fact that "the victim's vulnerability as a result of her retardation is a valid basis for departure . . . ." 522 So.2d at 490 (emphasis added). See (R 266) ("[w]ith this particular child[, the mental retardation] made her particularly vulnerable and therefore more exclusively and extremely traumatized by [the lewd assault].").

In the present case, the victim was the defendant's 10 year old, mildly retarded stepdaughter, who had an I.Q. of 66 (R 242). While her chronological age was 10 years old, the victim's mental age "was closer to 7 or 7½" (R 242). The state charged petitioner under Fla. Stat. §§794.011(2)[3] and 800.04 (R 1-7), neither of which account for the vulnerability of mental

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[3] This section provides:

> A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person less than 12 years of age in an attempt to commit sexual battery upon such person commits a capital felony, punishable as provided in ss. 775.082 and 921.141. If the offender is under the age of 18, that person is guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

retardation.[4] Thus, the same reasoning of the Hawkins court is applicable here, and vulnerability based on the victim's mental retardation should be upheld by this Court as a valid departure reason.

Departure Reason #2: Familial Relationship

The First District upheld the trial court's second departure reason, based on the familial relationship between petitioner and the victim,[5] citing Smith, 525 So.2d at 477, as authority. However, the First District certified conflict with Laberge and certified the following question as one of great public importance: "Whether abuse of a position of familial authority over a victim may constitute a clear and convincing reason justifying the imposition of a departure sentence for convictions of lewd and lascivious assault upon a child under 16 years of age?" Wilson, 548 So.2d at 876.

In Smith, the defendant was convicted under section 800.04, and the trial court imposed an upward departure sentence. As reasons for the departure, the trial court listed two reasons: (1) the extreme emotional trauma to the child victim; and (2) the familial relationship of the victim and the defendant. The First District upheld both reasons, noting simply that the

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[4] Petitioner was adjudicated guilty under only Fla. Stat. §800.04 (R 94).

[5] Petitioner is the victim's stepfather.

defendant apparently conceded to the validity of the second departure reason, and citing to Davis v. State, 517 So.2d 670 (Fla. 1987),[6] Hawkins, and Williams v. State, 462 So.2d 36 (Fla. 1st DCA 1985).[7]

In Laberge, the defendant, a teacher's aide at a school for mentally and emotionally handicapped children, was convicted under section 800.04 of lewd assault upon an eight year old autistic child. The trial court imposed a departure sentence, giving three reasons: (1) the defendant was a mentally disordered sex offender and treatment of the defendant under section 917.012 required a longer sentence than the guidelines recommendation; (2) the defendant violated a public and private trust which arose from the defendant's custodial control over

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[6] The defendant pled guilty to second degree murder of her husband. The trial court imposed an upward departure sentence, listing as one of its reasons abuse of trust of a family relationship. This Court held that, while abuse of such a trust may justify departure in some cases, this was not a clear and convincing reason under the facts of the case. "Were [the Supreme Court] to uphold a departure from the guidelines . . . based on abuse of trust of a family relationship, it would serve as authority to do the same in most cases involving the killing of a spouse or other family member." 517 So.2d at 574.

[7] The defendant was convicted under section 800.04, and the trial court imposed an upward departure sentence, listing as one of its reasons the fact that the offense was committed by a stepfather on his stepdaughter. The First District upheld this reason, finding that "[a] lewd and lascivious assault upon a ten year old is bad enough. But for a child to be subjected to such by one in familial authority [upon] whom the child should be able to rely . . . for protection and sanctuary from such vile conduct constitutes, by any standard, a substantial aggravating circumstance." 462 So.2d at 37 (footnote omitted).

the victim; and (3) the extraordinary vulnerability of the child based upon his handicapped condition.

The Fifth District found all three reasons to be invalid. Specifically, as to the second departure reason, the Fifth District noted that statutes such as section **800.04**

> are most commonly violated by persons who take advantage of a trust position involving the care, custody, teaching, and training of children, such as educational, religious, social, and child care workers, relatives, stepparents, and babysitters (a true one to one trust relationship). Because it is only a difference in degree that all children are vulnerable to being victimized by lewd acts and because all who violate this statute also violate some degree of trust, departure from the recommended guidelines sentence for the basic offense of lewd acts on or in the presence of a child (section **800.04**, Florida Statutes), should not be based on these two particular factors.

Laberge, **508** So.2d at **417.**

Respectfully, the state disagrees completely with this rationale. The Fifth District, while noting correctly in a footnote that youthful age as a vulnerability was already factored into section **800.04,** erroneously held that trust was also factored into the statute. Again, a reading of the statute disposes of that holding. See supra (argument regarding the first departure reason); Gopaul v. State, 536 **So.2d 296, 298** (Fla. 3d DCA **1989)** (defendant convicted under section 794.011(2) and trial court imposed upward departure sentence based on

familial authority; the Third District held this was a valid reason because "this factor is not one which is common to virtually all sexual batteries."); Handley v. State, 542 So.2d 1045 (Fla. 3d DCA 1989) (defendant convicted under sections 794.011 and 800.04 and trial court imposed an upward departure sentence based on familial authority; the Third District held this was a valid reason).

The only statute in which trust is an explicit factor is Fla. Stat. §794.041 (1987), which provides:

> (1) For the purposes of this section, the term "sexual activity" means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.
>
> (2) Any person who stands in a position of familial or custodial authority to a child 12 years of age or older but less than 18 years of age and who:
>
> (a) Solicits that child to engage in sexual activity is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (b) Engages in sexual activity with that child is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) The willingness or consent of the child is not a defense to prosecution under this section.

(emphasis added). See Stricklen v. State, 504 So.2d 1248 (Fla. 1st DCA 1986); Collins v. State, 496 So.2d 997 (Fla. 5th DCA

1986); Coleman v. State, 485 So.2d 1342 (Fla. 1st DCA 1986). Thus, if the defendant in Laberge had been charged under section 794.041, a departure reason based on the trust of a custodial relationship clearly would have been invalid.

Contrary to petitioner's contentions, Hall v. State, 517 So.2d 692 (Fla. 1988) further supports the state's position. There, the defendants were convicted of aggravated child abuse.[8] The trial court imposed an upward departure sentence, citing three reasons: (1) emotional trauma of the victims; (2) premeditation; and (3) the familial relationship between the victims and the defendants.[9] This Court upheld the first two reasons, but invalidated the third reason:

> There are, of course, some cases of child abuse which occur outside the family unit.

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[8] Section 827.03, Florida Statutes (1987), provides:

> (1) "Aggravated child abuse" is defined as one or more acts committed by a person who:
>
> (a) Commits aggravated battery on a child;
>
> (b) Willfully tortures a child;
>
> (c) Maliciously punishes a child; or
>
> (d) Willfully and unlawfully cages a child.
>
> (2) A person who commits aggravated child abuse is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[9] The victims were the defendants' natural children.

> However, since the use of familial authority exists in so many child abuse cases, its adverse effect may have been taken into consideration in the setting of the guideline ranges for that offense. In any event, to permit a built-in basis for departure in so many child abuse cases would be contrary to the purpose and spirit of the sentencing guidelines. Thus, we find that the trial judge's third reason for departure was invalid.

Id. at 695.

Implicit in this reasoning was the fact that familial authority is an inherent element of the crime of aggravated child abuse. Both case law and other statutory provisions support this conclusion. See Fla. Stat. §§415.502-415.514 (1987); Fla. Stat. §827.07 (1987). Significantly, however, Hall did not involve a conviction under section 800.04.

The state respectfully asks this Court to adopt the rationales of Smith, Davis, Williams, Gopaul, and Handley, and disapprove the erroneous reasoning of the Laberge decision. Petitioner was convicted under section 800.04, a statute which does not contain as an inherent element familial authority. Thus, the upward departure based on this reason should be upheld by this Court.

Departure Reason #3: Excessive Trauma[10]

The First District invalidated the trial court's third departure reason, which stated that "[t]he trauma suffered by the victim was of such an aggravated nature as to exceed that which is inherent in the usual case of a lewd and lascivious act and demonstrable physical manifestations resulted from the trauma." Wilson, 548 So.2d at 875. In declaring the reason invalid, the First District did not hold that the reason was not clear and convincing. Instead, it held simply that, "[a]lthough the victim in the instant case was very severely traumatized, we believe this case is more properly aligned with those applying the general rule, rather than the exception thereto, that emotional trauma is not a valid reason for departure." Id.

In invalidating this third departure ground, the First District cited to Lerma v. State, 497 So.2d 736 (Fla. 1986). In Lerma, the defendant pled guilty to sexual battery with slight force. The trial court upwardly departed from the guidelines sentence, listing four reasons: (1) victim injury and excessive brutality; (2) premeditation; (3) the commission of two separate acts of sexual battery; and (4) the dangerousness of the defendant and the helplessness of the victim.

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10 The First District held this reason to be invalid, with discussion and lengthy citations, but neither certified conflict nor a question of great public importance. Because petitioner has addressed this issue in his brief on the merits, again respondent correspondingly addresses this issue.

This Court in Lerma upheld the first three reasons but found that the fourth reason was not clear and convincing, based on Hankey v. State, 485 So.2d 827 (Fla. 1986). Thus, this Court noted in Lerma that its

> holding in Hankey was premised upon the fact that emotional hardship is not an inherent component of the crime of burglary. In contrast, emotional hardship can never constitute a clear and convincing reason to depart in a sexual battery case because nearly all sexual battery cases inflict emotional hardship on the victim. This same reasoning forces us to conclude that physical trauma cannot support a departure sentence in a sexual battery case.

Id. at 739.

One year later, this Court issued its State v. Rousseau, 509 So.2d 281 (Fla. 1987) decision, in which this Court receded from its decision in Lerma:

> Unfortunately, however, certain dicta contained in our decision in Lerma suggested that Hankey "was premised upon the fact that emotion hardship is not an inherent component of the crime of burglary." 497 So.2d at 739. As stated, Hankey accepted the proposition that emotional hardship may be a valid reason for departure if justified by the facts in a given case; in Hankey we found no facts were present which supported that reason. 485 So.2d at 828. There was no issue presented as to whether emotional hardship was inherent in the crime of burglary. We, therefore, expressly recede from the dicta in Lerma on this point and hold that the type of psychological trauma to a victim that usually and ordinarily results from being a victim of the charged crime is inherent in the crime and may not be used to justify departure.

> In addition to the extraordinary circumstances clearly not inherent in the crime charged, we perceive that there may be another situation where psychological trauma to the victim may be utilized to depart from a guidelines sentence. We hold psychological trauma to the victim may constitute a clear and convincing reason for departure when the victim has a discernible physical manifestation resulting from the psychological trauma.

Id. at 284.

Still one year later, this Court issued its decision in Barrentine v. State, 521 So.2d 1093 (Fla. 1988). There, the defendant was convicted under section 800.04 and the trial court imposed an upward departure sentence based on the victim's psychological trauma. This Court disapproved the First District's attempt to distinguish sections 794.011(1)(h) and 800.04 on Lerma principles, finding that Lerma's general rationale applied to both sections. In *so* holding, this Court did not

> modif[y] or overlook[] State v. Rousseau, 509 So.2d 281 (Fla. 1987), and its holding that there might be some circumstances in which the emotional trauma of the victim is clearly not inherent in the crime charged or is *so* substantial that it results in a discernible physical manifestation and consequently may be an appropriate basis for departure.

521 So.2d at 1094.

In Smith v. State, 526 So.2d 1060 (Fla. 1st DCA 1988), the defendant was convicted of armed robbery and the trial court imposed an upward departure sentence. As reasons for the departure, the trial court listed severe victim injury (the injuries rendered the victim a quadriplegic) and physical and psychological trauma. The First District upheld both reasons, noting as to the second reason both Lerma and Rousseau, and observing this Court's "carving out" of an exception to the Lerma rule in Casteel v. State, 498 So.2d 1249 (Fla. 1986).

In Smith, 525 So.2d at 477, the First District also upheld emotional trauma as a departure reason. There, the defendant argued, as petitioner does here, that the victim's emotional trauma arose from crimes for which he was not convicted, thereby violating Fla. R. Crim. P. 3.701(d)(11). The First District noted the defendant's correct statement of the law, but disagreed with his application of the law to the facts:

> It is well settled that emotional or psychological trauma is a clear and convincing reason for departure where there is evidence that the trauma result from "extraordinary circumstances which are clearly not inherent in the offense charged," Casteel v. State, 498 So.2d 1249, 1253 (Fla. 1986), or where there is "a discernible physical manifestation resulting from the trauma." State v. Rousseau, 509 So.2d 281, 184-185 [sic] (Fla. 1987). See also Tillman v. State, 525 So.2d 862 (Fla. 1988); Hall v. State, 517 So.2d 692, 694 (Fla. 1988).
>
> The record in this case reflects that the emotional trauma suffered by the victim constitutes trauma with discernible physical

> manifestations, as contemplated by Rousseau. In addition, the trauma is related to extraordinary circumstances which are not inherent in the convicted offenses of lewd act upon a child and lewd conduct in the presence of a child. Moreover, Dr. Biggers testified that her opinions and conclusions regarding the child's severe emotional trauma would be the same if based solely on the offenses for which [the defendant] was convicted.

Smith, 525 So.2d at 480-81.

Thus, Casteel, Rousseau, and Harris v. State, 531 So.2d 1349 (Fla. 1988) all establish firmly the modification of the strict Lerma rule. Thus, the question is not whether emotional or psychological trauma is a valid departure reason, but "whether the record establishes a discernible physical manifestation resulting from the trauma," Harris, 531 So.2d at 1351, or whether "extraordinary circumstances which are clearly not inherent in the offense charged" exist, Casteel, 498 So.2d at 1253.

Again, in the present case, the First District did not hold that this departure reason was not clear and convincing, and, contrary to petitioner's contentions, did not hold that severe trauma was inherent in the offense of lewd assault. Rather, the court chose to align itself on the "general rule" side of the issue. In so holding, however, the First District unjustifiably limited the modification of the Lerma rule as noted in Casteel, Rousseau, and Harris. These three cases did not carve out a

narrow exception, but specifically enunciated the circumstances under which emotional or psychological trauma could constitute a valid departure sentence. The state contends that this departure reason is clearly and convincingly supported by the record in the present case, and should have been upheld by the First District.

Dr. Goslin testified that, out of 20 to 21 specific attributes which are seen frequently in victims of trauma, the victim in the instant case exhibited **17,** "an extraordinarily high [number] of symptoms," which indicates "**a** child who has been severely traumatized and who has emotional distress" (R 254). The victim exhibited such trauma through disturbing pictures (R 251), play with children and dolls (R **193, 199,** 252, **258),** performance in school (R **252-53),** sleep disturbances (R **192, 197-98,** 253, 257-58), and nervousness around males (R **187, 196,** 200). Thus, the record establishes discernible physical manifestations as noted in Rousseau.

Additionally, Dr. Goslin testified that the victim's "still having nine [out of the **21** symptoms] two years [after counselling began] is still above the average for children in this situation" (R 260); that the victim was "probably one of the most severely traumatized of all of the **[80** to 100 sexually abused] children I have seen" (R **260-61);** and that "[w]ith this particular child[, the mental retardation] made her particularly vulnerable and therefore more exclusively and extremely

traumatized by [the lewd assault]" (R 266). Dr. Goslin concluded that this was one of the worst cases she had seen (R 286). Thus, the record also establishes extraordinary circumstances not inherent in the charged crime as noted in Casteel.

This is not a case like Hankey, where no factual record supported the departure reason. On the contrary, clear and convincing facts support departure in this case. Thus, the First District should have affirmed the trial court's third departure reason.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the decision of the First District and the judgments and sentences rendered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to KATHLEEN STOVER, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 4th day of December, 1989.

Gypsy Bailey

GYPSY BAILEY
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