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IN "HE SUPREME COURT OF FLORIDA

JESSIE JOSEPH TAFERO,

Appellant,

v.

CASE NO. 75909

STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE
APR 27 1990
CLERK, SUPREME COURT
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ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Jessie Tafero, a state prisoner, has a lengthy history of litigation. A jury convicted Tafero of killing two men and recommended that he be sentenced to death. The trial court concurred and in **Tafero** v. **State,** 403 So.2d 355 (Fla. 1981), the Florida Supreme Court upheld the death penalty. Tafero later petitioned the Florida Supreme Court for permission to file a Writ of Error Coram Nobis, alleging newly discovered evidence, which was denied. **Tafero** v. **State,** 440 So.2d 350 (Fla. 1983). Tafero's first death warrant was signed in November, 1984, and as a result thereof, Tafero filed his first Rule 3.850 motion with the trial court. A two-day evidentiary hearing followed and as a result, all relief was denied. The Florida Supreme Court affirmed the denial of said motion. **Tafero** v. **State,** 459 So.2d 1034 (Fla. 1984). Tafero then filed a Petition for Writ of Habeas Corpus in the federal court which was denied. The Eleventh Circuit Court of Appeals granted a stay based on this first warrant to consider the case and ultimately affirmed the district court's denial of relief. **Tafero** v. **Wainwright,** 796 F.2d 1314 (11th Cir. 1986), cert. **denied,** 107 S.Ct. 3277 (1987).

Tafero filed a second Rule 3.850 motion in December, 1986. The trial court denied relief and the Florida Supreme Court concurred, that the second motion constituted an abuse of Rule 3.850 because he raised only grounds which could or should have been brought up in the original post conviction proceedings. **Tafero** v. **State,** 524 So.2d 987 (Fla. 1987). Tafero then filed a Writ of Habeas Corpus in the Florida Supreme Court asserting that

the United States Supreme Court's decision in **Hitchcock** v. **Dugger,** 481 U.S. 393 (1987), entitled him to relief. The Florida Supreme Court denied his petition. **Tafero** v. **Dugger,** 520 So.2d 287 (Fla. 1988). He then filed a second federal habeas corpus petition pursuant to 28 U.S.C. §2254. The district court denied relief. **Tafero** v. **Dugger,** 681 F.Supp. 1531 (S.D. Fla. 1988). The Eleventh Circuit, in **Tafero** v. **Dugger,** 873 F.2d 253 (11th Cir. 1989), concluded that:

> We affirm the district court and hold that: 1. Tafero's **Caldwell** claim is procedurally barred; 2. the effective assistance of counsel claim is barred; and **3.** the **Hitchcock** error is harmless.

Tafero v. Dugger, 873 F.2d 253 (11th Cir. 1989).

The successive pleadings in both the state and federal courts resulted from a second death warrant signed in 1987.

Tafero filed a Petition for Writ of Certiorari to the United States Supreme Court from the Eleventh Circuit's denial of relief. **Tafero** v. **Dugger,** filed July 17, 1989. Relief was denied April 16, 1990.

On August 1, 1989, Tafero filed a truncated Rule 3.850 motion. Relief was denied April 24, 1990. The trial court held that Tafero's three claims were procedurally barred.

On April 18, 1990, Governor Bob Martinez signed a third death warrant setting Tafero's execution for May 2, 1990, at 7:00 a.m.

The facts of the case may be found in **Tafero** v. **State,** 403 **So.**2d at 358-359. Other facts relating to the Rule 3.850 evidentiary hearing may be found in **Tafero** v. **State,** 459 So.2d at

1036-1037. In addition thereto, the record reflects that defense counsel, Robert McCain, at the state evidentiary hearing, testified on November 13, 1984, that he and Jessie Tafero reviewed the entire matter regarding the sentencing phase of his trial and that they agreed not to put on any witnesses. (TR 60). Mr. McCain also testified that he spoke with Mr. Tafero about the closing argument, in fact, specifically reviewed the language of his closing argument with Tafero. (TR 61, 66, 67, 70, 103, 107). Mr. McCain stated that Tafero could not provide any character witnesses and that after discussing the strategy at the penalty phase, agreed that no witnesses would be called to testify. (TR 89). Mr. McCain's testimony at the Rule 3.850 hearing reflects that he discussed strategy with Tafero, also reviewed the options of calling witnesses, knew about Jessie Tafero's background and his family, and did not feel restricted with regard to the presentation of any statutory or nonstatutory mitigating evidence. (TR 60).

Moreover, the record reveals Tafero's collateral counsel, in 1984, argued that trial counsel rendered ineffective assistance for failing to present a number of witnesses at the penalty phase who would have testified to matters in mitigation. Specifically, Tafero argued in "1984" that Tafero's parents could have been called (regarding Tafero's upbringing, work history, ambitions and artistic abilities); Esther Cauliflower, a psychologist, could have testified (Tafero's volunteer work in an alternative learning program - Tafero designed his own college level curriculum; help administer the program for other inmates; that

Tafero was a loving and kind person); Rene Siebert could have been called to attest that Tafero was kind, a close family man and a good provider; and other persons (now deceased) could have been called such as Tafero's grandmother; his first employer, Irving Settler; Mr. & Mrs. Jacobs - co-defender's parents, to note just a few.

In Tafero v. Wainwright, 796 So.2d at 1320, the court opined:

> At the state habeas corpus hearing, Tafero presented the testimony of witnesses that could have been presented during the sentencing phase of the trial. This testimony, however, amounted to evidence merely as to Tafero's generally good nature and character. Because Tafero presented weak mitigating evidence and because of the overwhelming evidence of the aggravating circumstances surrounding the murder, we are convinced that no reasonable probability existed that the jury would have reached a different result had Tafero's counsel presented the mitigating evidence which was available, or had he presented a stronger closing argument . . ..

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING TAFERO'S THIRD RULE 3.850 MOTION FOR POST-CONVICTION RELIEF BASED UPON PROCEDURAL BAR

On August 1, 1989, Jessie Joseph Tafero filed his third Rule 3.850 motion raising three claims, (1) **Hitchcock** v. **Dugger, 481** U.S. **393** (1987), **(2) Caldwell v. Mississippi, 472 U.S. 320** (1985), and **(3)** a **Johnson v. Mississippi, 486 U.S. 578** (1988), claim.

The trial court, in reviewing these claims, found:

> (1) Claim number one, as set forth in the defendant's truncated motion to vacate sentence is procedurally barred. Moreover, in light of the prior rulings of the Florida Supreme Court and the federal court in the defendant's prior habeas corpus proceedings, this claim alleging a "**Hitchcock** error,''must also be denied as a matter of law on merits, as the facts detailed in the defendant's motion in support of this claim clearly indicate beyond any reasonable doubt that any alleged error committed with regard thereto was harmless.
>
> (2) Both the defendant second and third claims are clearly barred procedurally at this juncture. Moreover, the court finds that, with respect to claims two and three, the defendant's motion constitutes an abuse of the post-conviction process.
>
> (3) Accordingly, for the foregoing reasons, the defendant's truncated motion to vacate sentence is hereby denied . . ..

Order dated April **24, 1990.**

The State would urge the trial court was correct in *so* finding. All three issues have been resolved in previous Rule 3.850 motions or in Tafero's petition for writ of habeas corpus before the Florida Supreme Court. Moveover, the reassertion of

said claims, in particular claims two and three, **Caldwell** and **Johnson v. Mississippi,** respectively, constitute an abuse of the process. As such, the instant appeal is groundless and the trial court's denial of the third Rule 3.850 motion should be affirmed.

(A) Hitchcock v. Dugger

In **Tafero v. Dugger,** 520 So.2d 287 (Fla. 1988), this Court, in entertaining Tafero's petition for writ of habeas corpus, denied relief as to **Hitchcock.** This Court opined:

> In this petition, Tafero claims that he is entitled to relief under **Hitchcock v. Dugger,** ____ U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). He argues that the trial judge believed the mitigating circumstances which could be considered were restricted to those listed in §§921.141(6), Florida Statutes (1975), that the judge therefore restricted both his consideration and the jury's to the statutory list and that the prosecutor reinforced that limitation on mitigating evidence. Tafero has raised the restricted consideration of mitigating evidence before, and those claims have been denied. 459 So.2d 1036; 796 F.2d at 1321-1322. Again, even though now wrapped in the cloak of **Hitchcock,** we find no merit to the claim.
>
> Tafero presented no evidence, whether statutory or non-statutory, to mitigate his sentence. The waiver has been considered and found valid numerous times. 403 So.2d at 362. See 459 So.2d at 1036; 796 F.2d at 1319-1320.
>
> Tafero also now claims that, even though he presented no evidence at sentencing, the judge and jury could have gleaned certain non-statutory mitigating evidence from the guilty phase. This 'evidence' excludes residual doubt about the extent of Tafero's participation in the crime and his guilt, the disparate treatment of Tafero's co-defendants, and Tafero's being a father.
>
> Tafero's lawyer deliberately did not argue mitigating circumstances. This has been

> found to be based on tactical decisions. 459 So.2d at 1034, 1036. To suggest now that his strategy and argument would have been different if the judge had specifically informed the jury it could consider non-statutory mitigating circumstances, is at best speculative. Suggesting that the jury's recommendation or the judge's order would be different is contrary to reason.
>
> Given the four valid aggravating circumstances and the weakness of this mitigating evidence, we are convinced that the jury would have recommended, and the judge would have imposed, a death sentence even if all concerned knew the presentation and consideration of non-statutory mitigating evidence was unlimited. (cites omitted). Because of these facts, Tafero's waiver of presenting and arguing mitigating evidence, and the overwhelming evidence of guilt and substantial aggravating factors, we find that any Hitchcock error was harmless beyond a reasonable doubt.

520 So.2d at 288-289.

Tafero contends in light of this Court's recent decisions in **Hall v. State,** 541 So.2d 1125 (Fla. 1989), and **Adams** v. **Dugger,** 543 So.2d 1244 (Fla. 1989), he is entitled to reargue his Hitchcock claim in the state trial court although it had been disposed of post-Hitchcock, in a habeas corpus petition filed in the Florida Supreme Court. He argues that these cases afford him still another opportunity to raise his Hitchcock claim. In **Adams** v. **Dugger, supra,** the court recognized that the two-year time requirement of Rule 3.850, also applied to "new law" claims. The court found that it was reasonable to require capital defendants to raise "new law" claims within two years of a new law development. In **Adams,** the Florida Supreme Court permitted all capital defendants to raise their "Hitchcock" claims by August 1, 1989. Nowhere in the opinion, however, is there any language

that provides if a capital defendant has raised a **Hitchcock** claim either in a petition for writ of habeas corpus or a Rule **3.850** motion after **Hitchcock** was decided, that that capital defendant may reargue his **Hitchcock** claim simply because in Adams, the Florida Supreme Court has acknowledged a time constraint within which others who have not raised said claim may raise it.

Tafero, in his **1987** habeas petition, like many other capital defendants, quickly filed a petition for writ of habeas corpus in the Florida Supreme Court to air his claim. At that time, he asserted that there was non-statutory mitigating evidence that could been gleaned from the guilt portion of his trial that should have been considered by the jury and the trial judge. This Court concluded that even if this were so, "given the four valid aggravating circumstances and the weakness of this mitigating evidence, we are convinced that the jury would have recommended, and the judge would have imposed, a death sentence even if all concerned knew the presentation and consideration of non-statutory mitigating evidence was unlimited." **520** So.2d at **289.** The court further observed that based on the foregoing, it found that "any **Hitchcock** error was harmless beyond a reasonable doubt." In this instance, where Tafero elected to file a petition for writ of habeas corpus **instead** of a Rule **3.850** motion regarding his **Hitchcock** claim, he should not and cannot be heard to complain that he chose the wrong vehicle with which to air same. He is thus properly procedurally barred from raising this issue in his third Rule **3.850** motion.

Even assuming for the moment that this Court discerns that the bar is inappropriate, relief should not be forthcoming. The instant case is very similar to that of **Smith v. State, 556** So.2d **1096** (Fla. 1990), **Heiney** v. **Dugger,** ____ So.2d ____ (Fla. February **1, 1990), 15** F.L.W. **S47, Clark** v. **Dugger,** ____ So.2d ____ (Fla. February **1, 1990), 15** F.L.W. **S50,** wherein the court has found, after reviewing the record, that **Hitchcock** error was harmless beyond a reasonable doubt.

It should be further noted that in **Tafero** v. **Dugger, 873** F.2d **249,** 252 (11th Cir. **1989),** the Eleventh Circuit also found based on this record that any **Hitchcock** error was harmless beyond a reasonable doubt.

> **. . .** The district court, however, found the error harmless beyond a reasonable doubt when it weighed Tafero's alleged mitigating factors against the cases aggravating circumstances. Contrary to Tafero's contentions, **Hitchcock** error can be harmless. (cites omitted). We agree with the district court that '[t]he mitigating circumstances in no manner ameliorate the enormity of Tafero's guilt.' **Tafero** v. **Dugger, 681** F.Supp. at **1536.** We have held as much before. **Tafero** v. **Wainwright, 796** F.2d at **1320** ('because Tafero presented weak mitigating evidence and because of the overwhelming evidence of the aggravating circumstances surrounding the murders, we are convinced that no reasonable probability existed that the jury would have reached a different result had Tafero's counsel presented the mitigating evidence which was available, or had he presented a stronger closing argument.')

Tafero v. Dugger, 873 F.2d at 252.

Tafero now presents a collection of affidavits from family members and friends. Each would have testified, if asked, that Tafero was a gentle, kind, non-violent person who had a difficult

childhood, was sexually abused, used drugs, had a previous criminal record and was dominated by his girlfriend, Sonia Lender Jacobs. His appendix also contains a report from Dr. Brad Fisher, who evaluated Tafero last year. After reviewing the background information and conducting tests, Dr. Fisher concluded that Tafero had a difficult childhood and was involved in drugs at the time of the crime and as a result of drug usage, suffered other tragedies. None of the information contained in the appendix to the truncated motion were "unavailable" either at trial or as attachments to previously filed collateral motions before the courts. Certainly, Dr. Fisher's report provides no additional information which could not have been obtained on a previous occasion. Indeed, in **1984**, in Tafero's first Rule **3.850** motion and in his first federal habeas corpus petition, in challenging the effectiveness of trial counsel at the penalty phase, Tafero asserted that a number of witnesses could have been called in Tafero's behalf in mitigation. Specifically, he speculated at that time his parents could have been called to testify about his upbringing, his work history, his ambitions and his artistic abilities. Ms. Esther Cauliflower, a psychologist, with whom Tafero worked as a volunteer in an alternative learning program, would have testified that Tafero was helpful and had assisted her in administrating the learning program. Tafero helped other inmates and she knew him to be a loving and caring person. Rene Siebert, a friend of Tafero's since their teens, could have testified at the penalty phase that Tafero had a good character, was close to his family and was a good provider.

In 1984, Tafero asserted that there were many other people who could have come forward at the penalty phase and testified to Tafero's lifestyle and character had Tafero's lawyer called them. Specifically, he argued that Tafero's father (deceased) could have testified; Mary Jones, who died in 1982, Tafero's grandmother, could have testified; Irving Settler, who died in 1978, Tafero's first employer, could have testified; Mr. & Mrs. Jacobs, Tafero's co-defendant's parents, who died subsequent to the trial, could have testified; Lucy Batchlor, an associate of Tafero at the operation teenager center, could have testified; Gregory Smith, an acquaintance, could have testified; James Beckett, an acquaintance, could have testified; a Mrs. Lowenstein, Tafero's art instructor, could have testified if they had been called in 1976.

Tafero has done nothing more in 1989 than he did in 1984. He has merely changed the names of the persons and provided affidavits of persons who would have testified if called by trial counsel. The record reflects, as previously noted, that trial counsel's effectiveness has been resolved adversely to Tafero. The the **Hitchcock** claim does not revolve around **what could have been presented** (the recent affidavits), but was not because counsel failed to call these witnesses. Note: ***Heiney* v.** State, **supra.** Rather, the question is, whether, beyond a reasonable doubt, what was presented at trial would not have changed the outcome. Thus far, all courts who have reviewed this issue have found **Hitchcock** to be harmless beyond a reasonable doubt. See especially **Tafero** v. **Dugger,** 873 F.2d 252, n.4, and **Tafero** v. **Dugger,** 520 So.2d at 287.

Tafero is attempting to do that which he is not permitted. He has lost on his **Hitchcock** claim and he should not be permitted to raise a successive motion asserting **only** additional names to support said claim. This is especially true where there has been no external forces that would have prevented Tafero from previously raising or presenting the affidavits attached to his third Rule 3.850 motion or obtaining Dr. Fisher's report. Tafero, throughout his lengthy litigation, has made choices as to how to prosecute claims. He chose via a petition for writ of habeas corpus to challenge his **Hitchcock** claim, fully aware that as far back as 1984, he had available to him witnesses and other materials regarding Tafero's character, et al. The fact that he now attempts to bring additional witnesses and their affidavits[1] years later, neither makes his case nor provides a foundation upon which any court would conclude that his **Hitchcock** claim is anything but harmless error beyond a reasonable doubt.

(B) Caldwell v. Mississippi

This Court, in **Tafero** v. **Dugger,** 520 So.2d 287 (Fla. 1988), rejected Tafero's **Caldwell** v. **Mississippi** claim. The trial court, in finding that this issue was procedurally barred was correct in that this Court, as well as the trial court in a previous Rule 3.850 motion, concluded that Tafero's **Caldwell** issue had not been preserved and was thus procedurally barred. Following Tafero's unsuccessful assertion of this claim in the

[1] A casual review of these affidavits reveals cumulative evidence, that trial counsel knew about but elected not to present. Mr. McCain's recent affidavit notwithstanding.

state courts, Tafero raised his Caldwell claim in his successive federal habeas corpus petition. The federal district court, as well as the Eleventh Circuit Court of Appeals, similarly found that pursuant to Dugger v. Adams, 109 S.Ct. 1211 (1989), Tafero was not entitled to relief. This Court's most recent pronouncements in King v. Dugger, 555 So.2d 355 (Fla. 1990), and Provenzano v. Dugger, ____ So.2d ____ (Fla. April 26, 1990), continue to support a determination that, unless an objection occurred at trial, Caldwell-type claims are procedurally barred in post-conviction proceedings.

(C) Johnson v. Mississippi

Tafero also asserts that an unconstitutionally obtained underlying felony was used as an aggravating factor, that he was previously convicted as a prior violent felony. That conviction is still valid and indeed was the subject matter of such challenge in Tafero v. State, 406 So.2d 98 (Fla. 3rd DCA 1981). Moveover, Tafero raised this claim in his previous Rule 3.850 motion and this Court, on appeal from the denial therefrom, observed, in Tafero v. State, 459 So.2d 1034, 1036 (Fla. 1984):

> As an aggravating factor, the trial court found that Tafero had previously been convicted of a violent felony. Tafero asserts that another person later confessed to the crime underlying this aggravating factor and that, therefore, he is entitled to resentencing because the court should have found a lack of previous criminal history in mitigation. In 1979, Tafero brought these confessions to a trial court as newly discovered evidence. The trial court found 'that neither the third party confessor nor the third party witness was worthy of belief,' and that the district court affirmed the denial of Tafero's motion to vacate.

Tafero v. State, 406 So.2d **93, 98, n.9** (Fla. 3rd DCA **1981).**

Tafero has raised this issue previously and simply because he now can assign a case name, **Johnson** v. **Mississippi, 486 U.S. 578 (1988),** to his contention, should not and cannot, serve as the basis to reargue this claim. **Bundy** v. **Dugger, 538** So.2d **445** (Fla. **1989); Eutzy** v. **State, 541** So.2d **1143** (Fla. 1989), and note **Duest** v. **Dugger, 555** So.2d **849, 851** (Fla. **1990).**

Based on the foregoing, the trial court did not err in denying Tafero's third Rule **3.850** motion.

POINT II

OTHER ISSUES

The trial court, on April **27, 1990,** summarily denied Tafero's petition for rehearing, amended motion to vacate judgment and sentence, and request for stay of execution. Contained in said rehearing were three specific grounds, a reargument of Tafero's **Hitchcock** claim, an alleged "newly discovered evidence" claim and a reargument from earlier collateral pleadings, that Tafero did not commit the **1967** prior violent felony for which he remains convicted.

The foregoing are not matters properly before the court, in that a rehearing petition is not and cannot be the vehicle within which to either simply reargue that previously raised and rejected or raise new claims not presented in the original motion.

As to Tafero's "**Hitchcock**" claim and his **Johnson** v. **Mississippi, supra,** claim, no further discussion is necessary and the State would rely on the arguments asserted in Point I.

As to Tafero's newly discovered evidence claim, this record discloses that as early as 1979, Tafero and his attorneys were aware of trial counsel McCain's criminal prosecutions and convictions. Indeed, in 1984, at the evidentiary hearing before the state trial court and later in federal litigation in Tafero's habeas corpus action, mention was made of McCain's disbarment and criminal convictions. Certainly, at every juncture prior to the third Rule 3.850 motion, with the slightest due diligence, Tafero could have asserted the instant claim that "this attorney acted as an undercover agent against his own clients . . .", or at the very least, speculated to same.

Tafero's newly discovered evidence consists of an affidavit (whose origins is at best suspect and verification of the highest unreliability, see: Joseph B. Laski's declaration regarding resigning and notarizing said statement made to a third party), from a dead inmate named H.B. Sandini who was told by unknown officers of the Broward County Sheriff's Office:

> that McCain was a confidential informant working for the Florida State Attorney's Office and was informing to them on his own clients. The Ft. Lauderdale officer, whose name I cannot recall, was an undercover detective and the Broward County deputy (name *not* recalled), was in the Organized Crime Division. Right after this, I confronted McCain with this information. McCain was scared and blustery, and said the information was erroneous; that he was not an informant and the State Attorney's Office was trying to get even with him.

With the exception of this incredible statement from Sandini, all other "pieces of evidence" concerning McCain's criminal charges were items of public record readily discernible

prior to Tafero's first Rule **3.850** motion (wherein McCain's competency was assailed).

While newly discovered evidence is now properly a subject to be reviewed via Rule **3.850,** the standard for reviewing said evidence has not changed. Due diligence and materiality are essential in determining whether such "newly discovered evidence" rises to a level to challenge the integrity of the verdict which was previously entered.

Tafero's reliance on **Harich** v. State, **542** So.2d **980** (Fla. **1989),** provides no comfort. Tafero would have this Court order an evidentiary hearing predicated on a dead man's hearsay statements where no names of the persons making the accusations are recalled and there is no "earthly" way of verifying or rebutting the truth or falsity of same.

Moreover, it is noteworthy that while Mr. McCain did within the last year execute an affidavit regarding his representation of Tafero re: "penalty phase strategy", he nowhere provides any statement regarding his confidential informant status. Certainly, it will be interesting to see whether an affidavit of this ilk will be forthcoming.

The State would submit that a petition for rehearing is not the proper means to raise this matter and the court was correct in denying it. Moreover, even assuming the matter was presented in a fourth Rule **3.850,** it would be procedurally barred because the evidence "supporting" the newly discovered evidence is not newly discovered. The evidence merely attempts to embellish evidence previously reviewed having to do with McCain's

effectiveness of representation. These "facts" do not constitute evidence which was unavailable through due diligence and material to the outcome. See **Lightbourne** v. **Dugger,** 549 So.2d 1364 (Fla. 1989).

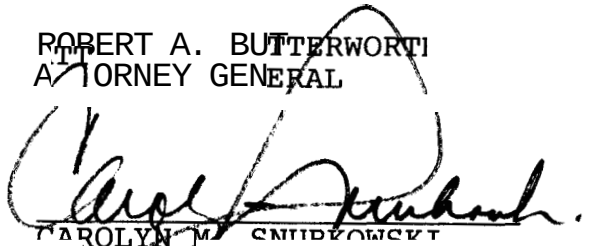
Terminally, Tafero is time-barred, pursuant to Rule 3.850, from arguing this issue. McCain's status was known, indeed, he had been convicted and suspended from the practice of law by late 1979. Here, just as in **Lightbourne,** 549 So.2d at 1366, that information was public record and could have been presented before 1987.

CONCLUSION

WHEREFORE, based on the foregoing, the trial court's denial 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 furnished by hand delivery to Mr. Mark Evan Olive, Esq., c/o Volunteer Lawyers Resource Center, 805 N. Gadsden Street, Suite A, Tallahassee, Florida 32301, this 27th day of April, 1990.

CAROLYN M. SNURKOWSKI
Assistant Attorney General