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app neg

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 77,074

FILED
SID J. WHITE
JAN 7 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

PHILLIP SALLAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

LOUIS O. FROST, JR.
PUBLIC DEFENDER
FOURTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont.):

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.):

TABLE OF CITATIONS (cont.):

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner, Phillip Sallas, was the Appellant before the First District Court of Appeal and the Respondent to the Petition for Involuntary Placement, pursuant to Section 394.467, Florida Statutes, filed in the Circuit Court of Duval County. Respondent, the State of Florida, was the Appellee in the First District Court of Appeal and prosecuted the Petition for Involuntary Placement. Petitioner will designate any references to the Record on Appeal filed in the First District Court of Appeal as "R.", followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The Administrator of the Jacksonville Mental Health Resource Center of Jacksonville (MHRC) filed a Petition for Involuntary Placement of Petitioner at the Northeast Florida State Hospital (R. 1-2). The Public Defender's Office was appointed to represent Petitioner (R. 6). The Public Defender's Office later withdrew from Petitioner's case due to a conflict (R. 7-10). A private attorney was appointed to represent him (R. 11). The case then proceeded to hearing on the Petition. The hearing was not transcribed so the parties, pursuant to Rule 9.200(a)(3), Florida Rules of Appellate Procedure, and this Court's order to supplement the record, agreed to the following stipulated set of facts (R. 23-25):

> 1. On May 10, 1990, a hearing was held by The Honorable Virginia Beverly upon a petition for involuntary placement.
>
> 2. The hearing commenced at 2:10 p.m. and concluded at 3:00 p.m.
>
> 3. Testimony was taken from Dr. Lepley as follows:
>
> a) Dr. Henry Lepley was declared an expert psychiatrist.
>
> b) Dr. Lepley examined Mr. Phillip Sallas on April 23, 1990, for 30-35 minutes; on May 4, 1990, for 10-15 minutes; on May 7, 1990, for 10-15 minutes and on May 10, 1990, for 20 minutes.
>
> c) Based upon the above-referenced examination and notations made by staff in Respondent's medical record, Dr. Lepley diagnosed Mr. Sallas as suffering from chronic schizophrenia, a mental illness.
>
> d) Dr. Lepley indicated that Mr. Sallas had: an inability to moderate disruptive behavior; poor judgment and reasoning.

e) Dr. Lepley indicated that Mr. Sallas had been seen naked in his apartment and had no electricity, water or telephone. Dr. Lepley has never visited Mr. Sallas at home.

f) Dr. Lepley stated that, in his opinion, Phillip Sallas was unable to determine for himself whether placement is necessary.

g) Dr. Lepley stated that, in his opinion, Phillip Sallas is incapable of surviving alone and would suffer from neglect or fail to care for himself if allowed to live alone.

h) Dr. Lepley advised Mr. Sallas best [sic] placement was in long term care and that less restrictive alternatives had been considered and judged to be inappropriate.

i) Dr. Lepley stated that Dr. Solloway agreed with his diagnosis and recommendations. There was no third opinion.

4) Mr. Phillip Sallas testified as follows:

a) He could take care of himself.

b) He wanted to go back to his apartment and he did not need to go to the hospital.

The Circuit Court entered an Order for Involuntary Placement on May 10, 1990 (R. 12). Petitioner was committed until November 10, 1990. The Public Defender's Office was appointed for appeal (R. 14). The preparation of the Record on Appeal in this cause was finished on August 30, 1990.

Petitioner filed his Initial Brief on September 28, 1990. Petitioner asked the First District to expedite his appeal. On October 23, 1990, the First District granted the Motion to Expedite its consideration of Petitioner's appeal. On October 23, 1990, Respondent filed her Answer Brief. Petitioner filed his Reply Brief on November 1, 1990.

On November 87, 1990, counsel for Petitioner learned that he had been released from his Involuntary Commitment. Counsel then filed a Notice of Mootness with the First District which informed the court that Petitioner had been released. Petitioner asked the court to certify the question of mootness as it did in Godwin v. State, 557 So.2d 995 (Fla. 1st DCA 1990), rev. granted, No. 75,881 (Fla. October 29, 1990). On December 10, 1990, the First District dismissed the appeal and issued an opinion which certified the following question to this Court:

> "WHEN AN INDIVIDUAL SEEKING REVIEW OF AN ORDER OF INVOLUNTARY COMMITMENT HAS BEEN RELEASED FROM THAT COMMITMENT PRIOR TO DISPOSITION OF THE APPEAL ON THE MERITS, WHAT SHOWING MUST HE OR SHE MAKE TO AVOID DISMISSAL OF THE APPEAL ON GROUNDS OF MOOTNESS?"

Petitioner filed his Notice to Invoke Discretionary Jurisdiction on December 11, 1990. On December 18, 1990, this Court granted review in this cause.

SUMMARY OF ARGUMENT

This Court should answer the certified question by deciding that all appeals of involuntary commitments are not moot when the Appellant is released from commitment before the appeal is decided. Florida courts have previously held that an involuntary commitment appeal is moot after the citizen is released, unless there are adverse legal consequences. See Madden v. State, 463 So.2d 270 (Fla. 2d DCA 1984). This Court should reject this limited view of mootness. Most, if not all, state and federal courts have decided such appeals are not moot for the following four reasons:

1. An involuntary commitment involves a total loss of liberty akin to a criminal incarceration - public policy requires that such claims be adjudicated to avoid similar losses of liberty in the future.

The United State Supreme Court in O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), decided that an involuntary commitment is a deprivation of liberty, akin to incarceration for a crime, which requires a court to follow due process. Fundamental fairness requires a review of a case which results in a complete deprivation of liberty. If an appellate court does not review such a case because of mootness, a citizen could face several commitments without an opportunity to have his case reviewed on appeal. Public policy requires a review of any case where a person is deprived of his liberty. This Court in Kinner v. State, 398 So.2d 1360 (Fla. 1981), decided that a court

could consider a mental health case which was moot, if the case raises a question of great public importance and will affect a significant number of future cases. Several out-of-state jurisdictions have considered this issue and decided the significant loss of liberty, coupled with the possibility of future commitments based upon the unreviewed commitment, defeated a mootness claim. See People v. Nunn, 438 N.E.2d 1342 (Ill. App. 1st Dist. 1982); State v. Lodge, 608 S.W.2d 910 (Tex. 1980); In Re Hatley, 231 S.E.2d 633 (N.C. 1977).

2. An involuntary commitment creates severe adverse social consequences.

An involuntary commitment creates severe adverse social consequences such as a loss of employment or a damage to reputation. An Oregon Court in State v. Van Tassel, 484 P.2d 1117 (Or. App. 1971), specifically decided a case was not moot because the involuntary commitment could affect future employment. An Illinois appeals court in People v. Nunn, 438 N.Ed.2d 1342 (Ill. App. 1st Dist. 1982), also followed this principle. Although these consequences are not legal collateral consequences, they are pernicious enough to defeat a mootness claim.

3. An involuntary commitment creates a stigma which justifies an exception to the mootness doctrine.

The First District in In Re Sealy, 218 So.2d 765 (Fla. 1st DCA 1969), held that the stigma of an adjudication of incompetence was sufficient to overcome the technical mootness of an appeal. The First District Court of Appeal in this case and in Godwin v. State, 557 So.2d 995 (Fla. 1st DCA 1990), did not

expressly overrule nor discuss In Re Sealy. The principle enunciated in In Re Sealy is the better view of this issue because other state courts have followed it. See State v. Van Tassel, supra; State v. Lodge, supra; In Re D.B.W., 616 P.2d 1149 (Okla. 1980); Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wisc. 1972); Note, "Developments in the Law of Civil Commitment of the Mentally Ill," 87 Harv.L.Rev. 1190 (1974).

4. The issues presented in an appeal of an involuntary commitment are capable of repetition, yet could evade review.

The greater weight of authority in this country has decided appeals of involuntary commitments are not moot because the issues presented by such cases are capable of repetition, yet could evade review. Counsel has been unable to find a case which considered this issue and decided the appeal was moot. The following state and federal courts have used the capable of repetition, yet evading review doctrine to overcome a claim of mootness: California - Conservatorship of Manton, 803 P.2d 1147 (Cal. 1985); Massachusetts - Hashimi v. Kalil, 446 N.E.2d 1387 (Mass. 1983); Minnesota - In Re Cordie, 372 N.W.2d 24 (Minn. App. 1985); New Jersey - In Re Z.O., 484 A.2d 1287 (N.J. Super. A.D. 1984); New Mexico - In Re Bunnell, 668 P.2d 1119 (N.M. App. 1983); North Carolina - In Re Hatley, 231 S.E.2d 633 (N.C. 1977); Oregon - State v. Smith, 692 P.2d 120 (Or. App. 1984); Pennsylvania - In Re S.O., 492 A.2d 727 (Pa. Super. Ct. 1985); Tennessee - In Re Helvenston, 658 S.W.2d 99 (Tenn. App. 1983); Texas - Lodge v. State, 597 S.W.2d 773 (Tex.Civ.App. 4th Dist. 1980); Washington - In Re McLaughlin, 676 P.2d 444 (Wash. 1984); Wisconsin - In Re

W.J.C., 369 N.W.2d 162 (Wisc. App. 1985); and Federal - In Re Ballay, 482 F.2d 648 (D.C. Cir. 1973).

For all of the above-described reasons, appeal of involuntary commitments should never become moot when the citizen is released during the pendency of an appeal. Fundamental fairness and public policy require that this Court adopt a mootness principle which is identical to the mootness standard used in criminal appeals because involuntary commitment involves a similar deprivation of liberty and creates many of the same adverse social consequences arising from a criminal conviction and incarceration.

ARGUMENT

ISSUE I

THE RELEASE OF A CITIZEN FROM AN INVOLUNTARY HOSPITALIZATION DOES NOT RENDER A PENDING APPEAL MOOT BECAUSE AN INVOLUNTARY COMMITMENT TO A MENTAL HOSPITAL INVOLVES A SIGNIFICANT LOSS OF LIBERTY, CREATES SEVERE SOCIAL CONSEQUENCES, CAUSES A LIFE-LONG STIGMA FOR THE PERSON COMMITTED AND INVOLVES LEGAL ISSUES WHICH ARE CAPABLE OF REPETITION, BUT WHICH COULD EVADE APPELLATE REVIEW.

A. The issue in this cause.

The First District Court of Appeal in this cause and in Godwin v. State, supra, decided that an appeal of an involuntary commitment would not be moot following a release from commitment, if the appellant could demonstrate collateral legal consequences from the commitment. See also Taylor v. State, 536 So.2d 1050 (Fla. 1st DCA 1988); Westlake v. State, 440 So.2d 74 (Fla. 5th DCA 1983). As Florida courts have previously decided collateral legal consequences overcome mootness, the First District obviously was concerned about whether non-legal consequences could overcome mootness. In this cause and in Godwin, supra, there are no apparent collateral legal consequences. Therefore, the question for this Court is limited to whether non-legal consequences will defeat a mootness claim.

This Court should resolutely reject a principle of mootness limited only to the proof of adverse collateral legal consequences. The unique nature of an involuntary commitment based upon mental illness renders the collateral legal conse-

quences doctrine inappropriate because an involuntary hospitalization is a complete loss of liberty akin to incarceration for a crime. Moreover, the fact of an involuntary commitment can prevent individuals from holding/keeping certain professional jobs. The involuntary hospitalization can keep a citizen from having other jobs or renting/owning property. A lifelong stigma will usually follow an individual involuntarily committed to a state mental hospital.

Involuntary commitments to a state hospital, pursuant to Section 394.467, Florida Statutes, last for up to 6 months. It is almost impossible for busy courts and counsel to complete an entire appeal, from preparation of the record to the opinion of the court, in 6 months. In this case, the First District expedited the appeal by Petitioner. Despite this action, the case was still not decided within 6 months. Cases involving involuntary commitments involve significant legal and constitutional issues. The District Courts of Appeal and this Court has reviewed and reversed many cases involving such issues. See e.g. Welk v. State, 542 So.2d 1343 (Fla. 1st DCA 1989); Williams v. State, 522 So.2d 983 (Fla. 1st DCA 1988); Schexnayder v. State, 495 So.2d 850 (Fla. 1st DCA 1986); Reigosa v. State, 362 So.2d 714 (Fla. 1st DCA 1978); In Re Beverly, 342 So.2d 481 (Fla. 1977).

These issues are obviously capable of repetition because appellate courts have had to adjudicate similar issues on the legality of an involuntary commitment, despite prior precedent on the issue. See and compare Welk v. State, supra; L.A. v. State, 530 So.2d 489 (Fla. 1st DCA 1988); Schexnayder v. State, supra.

However, a narrow view of mootness, based upon release from the commitment, would cause these issues to escape appellate review. Courts from other jurisdictions have directly considered the doctrine of "capable of repetition, yet evading review" in involuntary commitment cases. Those cases decided an appeal of an involuntary commitment was not moot because of the capable of repetition, yet evading review principle. See e.g. Lodge v. State, 597 S.W.2d 773 (Tex.Civ.App. 4th Dist. 1980), aff'd, 608 S.W.2d 910 (Tex. 1980); In Re Ballay, 482 F.2d 648 (D.C.Cir. 1973).

The question certified by the First District asks what showing (other than legal consequences) must an appellant make to avoid dismissal of the appeal on the grounds of mootness. In light of this question and the above-described case law, this Court must decide what non-legal collateral consequences will overcome the technical mootness of an appeal. Petitioner will individually address each of these consequences to demonstrate that release from involuntary commitment should not make an appeal moot, despite of the lack of any collateral legal consequences.

B. An involuntary commitment involves a total loss of liberty akin to a criminal incarceration - public policy requires that such claims be adjudicated to avoid similar losses of liberty in the future.

An involuntary commitment to a state mental hospital involves a loss of liberty similar to incarceration for a crime. The United States Supreme Court in O'Connor v. Donaldson, 422 U.S.

563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), considered under what circumstances a state could incarcerate a mentally ill person. The Supreme Court found mentally ill persons could not be deprived of their liberty and constitutional right to freedom unless the person was dangerous and incapable of surviving safely by himself or with the help of willing and responsible family members or friends. 422 U.S. at 576, 95 S.Ct. at 2494.

Involuntary hospitalization involves a significant liberty interest protected by the Fourteenth Amendment to the United States Constitution. The practical reality of an involuntary commitment is that it is almost identical to a confinement for a criminal act. The state hospital has locked fences around it and inmates there are not free to come and go as they wish. They are literally imprisoned due to their mental illness.

The short period of a usual hospitalization (up to 6 months, unless there is a recommitment of up to another 6 months) makes it difficult to appeal the legality of an involuntary commitment. If discharge from commitment automatically makes a case moot, the legality of the commitment cannot be challenged. Prior commitments to a state hospital often serve as the basis for another future commitment. If a person is recommitted for the same reasons and is released before the adjudication of an appeal, the person could be caught in a revolving door of involuntary commitments without any opportunity to challenge the bases of such commitments and avoid future commitments.

Several out-of-state jurisdictions have considered this issue and decided that the significant loss of liberty, coupled

with the possibility of future recommitments based upon the unreviewed commitment, defeated a mootness claim in an involuntary commitment case. See People v. Nunn, 438 N.E.2d 1342 (Ill. App. 1st Dist. 1982); State v. Lodge, 608 S.W.2d 910 (Tex. 1980); In Re Hatley, 231 S.E.2d 633 (N.C. 1977). Public policy requires that individuals deprived of their liberty be given an opportunity to challenge their commitments. The extremely busy appellate dockets make it likely that many individuals may never have their cases heard.

The Florida Supreme Court in Kinner v. State, 398 So.2d 1360 (Fla. 1981), recognized this public policy interest exception to mootness in the mental health field. The Supreme Court decided to consider the constitutionality of Section 393.11, Florida Statutes, despite the fact that Kinner had been discharged from his confinement at a residential retardation facility. The Kinner court noted the court would not determine a moot issue, unless the questions presented were of general public interest and importance or unless the judgment would affect the rights of the parties. 398 So.2d at 1362. The Court then noted:

> "We feel that this case raises a question of great public importance, the resolution of which will affect a significant number or retarded citizens who are presently institutionalized as a result of the application of the predecessor statute." (Id.)

The adjudication of an issue which could prevent or allow the involuntary commitment of a mentally ill citizen is obviously an issue of general public interest. The resolution of such issues also affect a significant number of individuals who

are or might be institutionalized. Fundamental fairness requires the opportunity for a person incarcerated or committed to challenge his or her confinement. The Supreme Court in O'Connor v. Donaldson, supra, acknowledged this principle and decided:

> "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." (Citations omitted) 422 U.S. at 580, 95 S.Ct. at 2496.

This Court should adopt the mootness and due process doctrines enunciated by Kinner, supra, and O'Connor v. Donaldson, supra, and hold that release from involuntary commitment does not make moot a pending appeal on the legality of the confinement.

C. An involuntary commitment creates severe adverse social consequences.

A mootness doctrine limited solely to collateral legal consequences will not take into account the pernicious social affects of an involuntary commitment. The commitment could prevent an individual from keeping/getting a professional license to practice a certain profession. The undersigned counsel handled two such appeals before the First District Court of Appeal. In these cases, a lawyer and nurse faced the loss of their professional licenses due to an involuntary commitment. See Forness v. State, 533 So.2d 932 (Fla. 1st DCA 1988), and MacIntyre v. State, 505 So.2d 2 (Fla. 1st DCA 1986). In each case, the

Appellant had been released prior the adjudication of the appeal. In each case, counsel argued the possible loss of a professional license was a collateral consequence which would overcome a mootness claim. The First District apparently agreed because it summarily reversed the commitment orders in each case.

A loss of a professional license is probably a collateral legal consequence. See Madden v. State, 463 So.2d 270 (Fla. 2d DCA 1984). However, an involuntary commitment could easily prevent individuals from getting more ordinary jobs which are not licensed by law. An Oregon Court of Appeal in State v. Van Tassel, 484 P.2d 1117 (Or. App. 1971), directly considered this point. The Van Tassel, supra, court rejected a mootness claim and found:

> "...inquiry into a person's history of mental health by, for example, a prospective employer or bonding agency would be legitimate. ORS 426.160 would not prohibit defendant from disclosing anything in the court record of his commitment. In fact, if he refused to give a prospective employer or surety such information, he could very well be turned down for that reason." 484 P.2d at 1121-22.

An Illinois court also adopted this in People v. Nunn, 438 N.E.2d 1342 (Ill. App. 1st Dist. 1982).

Involuntary commitments could also affect a person's ability to rent a place to live or buy certain items. These impediments may not be legal consequences because there will be no legal right/duty to enforce. A prospective employer may simply refuse to hire a person with a prior involuntary commitment. Most employment applications contain a question concerning mental ill-

ness and prior commitments to a hospital or mental health institution. Consequently, a person wrongfully committed who is released before her appeal is decided may not be able to remove this crippling disability.

D. An involuntary commitment creates a stigma which justifies an exception to the mootness doctrine: In Re Sealy, 218 So.2d 765 (Fla. 1st DCA 1969).

The First District Court of Appeal in In Re Sealy, 218 So.2d 765 (Fla. 1st DCA 1969), reversed an adjudication of incompetence even though Sealy had been released from the hospital and his judicial sanity had been restored. The Sealy court recognized that the only apparent purpose of the appeal was to remove the stigma of an incompetency adjudication from Sealy's record. 218 So.2d at 768. The First District reversed the funding of incompetence, despite the technical mootness of the issue; the Court obviously found that the social stigma from an adjudication of incompetency defeated a mootness claim. In this cause and Godwin v. State, supra, the First District did not explicitly overrule nor discuss In Re Sealy. Therefore, In Re Sealy is valid Florida precedent for the principle that the mere stigma of a past commitment, with its attendant finding of incompetency, is sufficient to overcome a mootness claim.

Most state courts which have considered the issue have held that the social stigma of an involuntary commitment justified an exception to the mootness doctrine. An Oregon appeals court in

State v. Van Tassel, supra, explicitly found that an involuntary commitment created a social stigma which affected a person's reputation and earning potential. The Van Tassel court expressly found a substantial interest in a person's reputation as demonstrated by tort laws which allow libel and slander actions. It would be cruelly ironic if a person could sue for libel and slander for a false statement that she had been involuntarily committed to a mental hospital, but could not legally challenge an actual illegal commitment.

The Texas Supreme Court in State v. Lodge, 608 S.W.2d 910 (Tex. 1980), affirmed a lower decision which found that the stigma of involuntary commitment defeated a mootness claim. See also Lessard v. Schmidt, 349 F.Supp 1078 (E.D.Wisc. 1972); Note, "Developments in the Law of Civil Commitment of the Mentally Ill," 87 Harv.L.Rev. 1190 (1974). The Oklahoma Supreme Court in In Re D.B.W., 616 P.2d 1149 (Okla. 1980), also rejected a claim of mootness because of the consequences of the social stigmatization and legal disabilities of involuntary commitments.

The stigma of mental illness has been a curse throughout history. The Texas Court of Appeals in Lodge v. State, supra, at 776, decided the stigma flowing from a judicial determination of metal illness was too well-known to require repetition in the court's opinion. Therefore, this Court should take judicial notice of the stigma which flows from an involuntary commitment. This Court should decide that all cases in this class are not moot, even if the person has been released before the appellate decision is rendered by the court.

E. The issues presented in an appeal of an involuntary commitment are capable of repetition, yet could evade review.

The greater weight of authority in this country has decided that appeals of involuntary commitments are not moot, when the citizen had been released from confinement, because the issues presented by such cases are capable of repetition, yet could evade appellate review. Counsel has been unable to find an opinion which considered this issue and decided the appeal was moot. The following state and federal courts used the capable of repetition, yet evading review doctrine to defeat a mootness claim:

1. California - Conservatorship of Manton, 803 P.2d 1147 (Cal. 1985);
2. Massachusetts - Hashimi v. Kalil, 446 N.E.2d 1387 (Mass. 1983);
3. Minnesota - In Re Cordie, 372 N.W.2d 24 (Minn. App. 1985);
4. New Jersey - In Re Z.O., 484 A.2d 1287 (N.J. Super. A.D. 1984);
5. New Mexico - In Re Bunnell, 668 P.2d 1119 (N.M. App. 1983);
6. North Carolina - In Re Hatley, 231 S.E.2d 633 (N.C. 1977);
7. Oregon - State v. Smith, 692 P.2d 120 (Or. App. 1984);
8. Pennsylvania - In Re S.O., 492 A.2d 727 (Pa. Super. Ct. 1985);
9. Tennessee - In Re Helvenston, 658 S.W.2d 99 (Tenn. App. 1983);
10. Texas - Lodge v. State, 597 S.W.2d 773 (Tex.Civ.App. 4th Dist. 1980);
11. Washington - In Re McLaughlin, 676 P.2d 444 (Wash. 1984);
12. Wisconsin - In Re W.J.C., 369 N.W.2d 162 (Wisc. App. 1985); and
13. Federal - In Re Ballay, 482 F.2d 648 (D.C. Cir. 1973).

In light of the above-cited authority, this Court should follow the dominant trend in this country and find that all

appeals of involuntary commitments are not moot because the issues presented in such appeals are capable of repetition, yet could evade appellate review.

CONCLUSION

This Court should answer the certified question by deciding that all appeals of involuntary commitment are not moot when the Appellant is released during the pendency of the appeal. This cause should be remanded to the First District Court of Appeal for a consideration of the merit of this cause.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capitol Building, Tallahassee, Florida 32399-1050 this 4th day of January, A.D. 1991.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER