W00A 017

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DONALD WALKER,

Respondent.

CASE NO. 78,193

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Donald Walker, was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner, the State of Florida, was the appellee in the appellate court and the prosecution in the trial court. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R" Record on Appeal

STATEMENT OF THE CASE

Mr. Walker accepts the State's statement of the case.

STATEMENT OF THE FACTS

Mr. Walker supplies this statement of the facts, as no such statement is contained in the State's initial brief on the merits.

On September 22, 1989, Daniel Rusignolo went to a high crime area in Ft. Pierce in order to purchase some drugs. He was seen in a red and white car, taking drugs from one of several black men standing nearby (R 209). Something went wrong with the payment, however. One witness, Corinne Fillmore, heard someone say, "Give me the drugs or give me the money." (R 257). Diane Walker heard someone say that it was not real money (R 229). When Rusignolo's car began to drive away, shots were fired (R 209, 258). Rusignolo was hit once in the chest, and he died from that wound (R 166, 168-169).

Both Ms. Walker, who is unrelated to Mr. Walker, and Ms. Fillmore identified Mr. Walker as the person who fired the shots (R 210, 258). But Ms. Walker admitted that she herself had already ingested some cocaine that evening and was in the process of getting more cocaine ready to smoke at the moment when she heard the shots from her position in a car parked near Rusignolo's vehicle (R 209, 223). She said that Rusignolo was buying the drugs from Roosevelt Walker, Mr. Walker's brother (R 207, 228), a former boyfriend of hers (R 211). Three people were standing by Rusignolo's car, according to Ms. Walker: the two Walker brothers and a third man whose name she could not remember (R 229).

Corinne Fillmore said she saw four men standing at the red and white car (R 257). Roosevelt Walker was present, but did not personally give the man any drugs (R 259, 267). Ms. Fillmore

denied smoking any crack cocaine that evening, although she conceded she had used the drug before (R 271-272). A defense witness, Von Evans, testified, however, that he had sold twenty dollars worth of cocaine to Ms. Fillmore that day (R 449). The defense was precluded from introducing his testimony (R 464-466) and that of two other witnesses (R 467-468) that she was an addict who bought drugs three or four times each day (R 457-458), as a side effect of which she suffered from paranoia (R 459).

Another witness for the State, Sheila Anderson, testified that she saw Mr. Walker and his brother standing in the area of the shooting just before Rusignolo was killed (R 177-178). Ms. Anderson admitted that she was high that night from a combination of marijuana and alcohol (R 191-192). She, too, had smoked crack cocaine, but claimed not to have done so on the night Rusignolo died (R 193).

There was some question about how much light was available for Ms. Walker and Ms. Fillmore to make their identifications, and the jury was taken to a view of the scene (R 395).

Mr. Walker testified that he was at home with his brother and their girlfriends on the evening of the fatal incident (R 484-485). The two women confirmed this account (R 434-437, 471-473).

SUMMARY OF THE ARGUMENT

1. In the absence of any statutory authorization for treatment as a habitual offender of defendants convicted of a life felony, Mr. Walker's enhanced sentence of life in prison for second degree murder with a firearm is illegal and must be vacated.

2. Corinne Fillmore's history of chronic, daily drug abuse was directly relevant to the jury's determination of whether she was being truthful when she denied using cocaine on the day of the shooting, in contradiction to a defense witness who testified that he sold her drugs on that day. The trial court therefore erred in limiting defense evidence to Ms. Fillmore's use of cocaine on the day of the shooting. Because the State's case hinged on the credibility of Ms. Fillmore's identification of Mr. Walker as the person who fired the fatal shot, the error in refusing to permit proper impeachment of this witness was reversible, requiring that Mr. Walker be granted a new trial.

3. Where all of Mr. Walker's prior convictions relied on for enhancement of his sentence in the instant case were entered contemporaneously, the State failed to establish a sufficient predicate for sentencing him as a habitual offender.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN SENTENCING MR. WALKER AS A HABITUAL OFFENDER FOR A LIFE FELONY.

Mr. Walker was convicted of second degree murder, Section 787.04(2), Fla. Stat. (1987) with a firearm, a life felony by operation of Section 775.087(1)(a), Fla. Stat. (1987). The trial court found him to be a habitual violent felony offender,[1] and sentenced him to serve life in prison, under the purported authority of Section 775.084, Fla. Stat. (1988 Supp.), which, after defining the characteristics of such a felon, provides for the following sentencing scheme:

> 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
>
> 2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offenders shall not be eligible for release for 10 years.
>
> 3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

It is, however, evident after a reading of this statute that no provision has been made for enhanced sentencing where the

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[1]Mr. Walker notes that, in addition to the defect raised in this point, the notice filed by the State did no more than allege generally that it sought "habitual penalties pursuant to Florida Statute 775.084," without specifying the underlying facts which formed the basis for its assertion that Mr. Walker's sentence should be aggravated, and without even stating whether it was seeking enhancement because of his status as a habitual felony offender or a habitual violent felony offender (R 566). Where no advance written notice is served on the defense, an enhanced sentence is illegal, Nunziata v. State, 561 So.2d 1330 (Fla. 5th DCA 1990), and the same rule should apply where the notice is as defective as that filed in the present case.

defendant is convicted of a life felony, as in the present case. This was recognized in Barber v. State, 564 So.2d 1169, 1173 (Fla. 1st DCA 1990), which rejected a challenge to the constitutionality of the habitual offender statute on the grounds that it excluded offenders convicted of the most serious crimes, so that it did not bear a reasonable and just relationship to a legitimate state interest. The appellate court held:

> Although subsection (4) makes no provision for enhancing sentences if the original sentence falls into one of the above categories, this is not a basis for finding that the statute fails to bear a reasonable and just relationship to a legitimate state interest. The legislature may have determined that these punishments are already sufficiently severe to keep the felon in prison for an extended period of time.

Thus, Barber agreed that habitualization is not a statutorily authorized option for offenses which are first degree felonies punishable by life in prison, life felonies like the present case, and capital felonies. Barber's conclusion with respect to life felonies has been endorsed in subsequent decisions of the district courts of appeal, McKinney v. State, 585 So.2d 318 (Fla. 2d DCA 1991); Walker v. State, 580 So.2d 281 (Fla. 4th DCA 1991) [the instant case]; Johnson v. State 568 So.2d 519 (Fla. 1st DCA 1990), Power v. State, 568 So.2d 511 (Fla. 5th DCA 1990), although its extension of the principle to first degree felonies punishable by life has been receded from. Burdick v. State, 16 F.L.W. D1963 (Fla. 1st DCA July 25. 1991)(en banc) [question certified]; Lock v. State, 582 So.2d 819 (Fla. 2d DCA 1991).

The State seeks to distinguish the instant case by arguing that second degree murder with a firearm is both a life felony and

a first degree felony for the purpose of the habitual offender statute. Thus, it states, in a puzzling sentence, that "since the two statutes (s.775.084 and s.775.087) have mutually consistent fields of operation, and therefore are not mutually exclusive, s. 775.084 and s. 775.087 can and must be construed in pari materia with each other and the other subsections therein, thereby allowing the purpose of both sections to be given effect at sentencing." State's initial brief on the merits, at page 6.

But a crime cannot be both a first degree felony and a life felony, depending on the State's whim or wish. The legislature has determined that, as a matter of substantive law, whenever a firearm is used during the commission of a felony, except a felony for which the use of a firearm is an essential element, it is automatically reclassified to the next higher degree. No judicial discretion is involved in this process. Craiger v. State, 503 So.2d 968 (Fla. 4th DCA 1987). Since the reclassification is automatic, the State cannot later cancel it when it suits its purposes to do so. If the State is unhappy with this situation, its proper forum for redress is the legislature, which devised the scheme, and not this Court, which merely interprets what the legislature has done.

The same response must be made to the State's rhetorical question, "Why should a defendant sentenced to life not be subject to the punitive restrictions of the habitual offender statute, and therefore receive a less severe sentence than other recidivist defendants who, in fact, received less severe sentences for less

severe crimes?"[2] State's initial brief on the merits, at page 7-8. Such a result may indeed by "totally illogical," as the State laments, but it is certainly the "intent of the legislature," since that is the only meaning which can be attached to the habitual offender statute as it is written. The State's argument notwithstanding, State's initial brief on the merits, at page 8, it cannot be clear that "the legislature intended that habitual offender classification apply to all felony offenses," since the habitual offender statute on its face and by its own terms, includes only third, second, and first degree felonies. Section 775.084(4)(a), Fla. Stat. (1989). The best evidence of what the legislature intended is what it said, and it provided enhanced penalties only for defendants convicted of first, second, and third felonies.

The State's cited case of Watson v. State, 504 So.2d 1267 (Fla. 1st DCA 1986) does not offer compelling support for its position that the statute's express terms should be ignored. In Watson, the defendant was convicted of a life felony, sexual battery with great force. Upon the State's application, the trial court found him to be an habitual offender, but declined to impose the mandatory life sentence provided for first degree felonies under the habitual offender statute in effect at that time. Instead, the trial court exercised its discretion to impose a lesser sentence which was, however, a departure from the sentencing guidelines. The First District Court of Appeal rejected the

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[2]Appellant assumes that Appellee means that the "other recidivist defendants" actually receive more severe sentences for less serious crimes.

defendant's argument that the habitual offender statute was inapplicable to life felonies, on the basis that the sexual battery statute, Section 794.011(3), Fla. Stat. (1985) provided for sentencing pursuant to Sections 775.082, 775.083, or 775.084, the habitual offender statute.

> While the legislature did not directly set out how a life felony is to be enhanced in Section 775.084, presumably it was their intent that it be enhanced in the same manner as a first degree felony, the highest offense covered.

Id. at 1270.[3]

Initially, Mr. Walker observes that the First District Court of Appeal's conclusion on this issue was itself not necessary to the disposition of the case, since the defendant was not sentenced as a habitual offender, nor could the trial court rely on its finding that Watson was a habitual offender as a reason for departing from the guidelines sentence. Id. at 1270. Thus, the habitual offender finding in that case had no practical effect on the defendant's sentence at all, so that any determination as to its validity must be deemed dicta and not controlling.

On the merits, too, the Watson court's reasoning does not require great deference. Omissions in sentencing statutes cannot be supplied by presumption or inference. It is, after all, a fundamental rule of statutory construction that criminal statutes shall be strictly construed in favor of the person against whom a

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[3]The second degree murder statute, which defines the crime, without enhancement, as a first degree felony punishable by life in prison, also provides that sentence may be imposed under Sections 775.082, 775.083, or 775.084. Section 775.082(2), Fla. Stat. (1989). However, no specific reference to the habitual offender statute is contained in the firearms enhancement statute, Section 775.087, Fla. Stat. (1989).

penalty is to be imposed. Ferguson v. State, 377 So.2d 709 (Fla. 1979). In any sentencing issue, then, the absence of an express authority for an enhancing interpretation of the statute requires that such an interpretation cannot be indulged. E.g., Palmer v. State, 438 So.2d 1 (Fla. 1983) [imposition of consecutive mandatory minimum terms upon multiple convictions of offenses involving use of a firearm improper, where there was no express authority for denying defendant eligibility for parole for more than three years].

The fact that no enhancement is provided for life felonies in the habitual offender statute therefore precludes the courts from curing that omission, if omission it is, by presumption or inference.[4] Watson's conclusion as to the applicability of the habitual offender statute to life felonies is thus not well founded. Indeed, the First District Court of Appeal, which decided Watson, itself appears to have rejected the rationale of that case by its express holding in Johnson v. State, supra, that the habitual offender does not apply to life felonies.

The State's final argument that "as part of the sentencing process, the legislature determined that the degree of some offenses committed by the habitual offender should be enhanced," State's initial brief on the merits, at page 8-9, is factually incorrect. The habitual offender statute does not enhance the degree of felony for which the defendant is to be convicted. It

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[4]It is, after all, just as likely that the legislature provided for possible habitualization of the sexual battery life felony should such a sanction be included at some future point in the habitual offender statute.

is a sentence-enhancement, not a conviction-enhancement statute. That is, the sentence which may be imposed upon conviction of the first, second or third degree felony has been extended, but the degree of conviction itself does not change. Section 775.084(4)(a), Fla. Stat. (1989). No support for the State's position can be gleaned from its argument in this respect, therefore.

In conclusion, the State has provided no legal basis for ignoring the express terms of the habitual offender statute and allowing the judicial amendment of that statute in terms the State finds more agreeable. This Court should therefore feel entirely comfortable in approving the unanimous precedent of those district courts of appeal which have decided this issue under the 1989 version of the habitual offender statute, and hold that it does not apply to convictions for life felonies.

Enhancement of a sentence beyond the ordinarily applicable sentencing guidelines recommendations is permissible only as expressly authorized by Section 775.084, Fla. Stat. (1988 Supp.). For instance, in Abner v. State, 566 So.2d 594 (Fla. 1st DCA 1990), the appellate court held that a defendant could not be sentenced to an enhanced term as a habitual violent felony offender based on his prior conviction for aggravated battery, which is not one of the enumerated qualifying offenses for which such an aggravated sentence may be imposed. Since there is no provision in the habitual offender statute for enhanced sentencing for a life felony, the trial court below erred in imposing the life sentence in the present case pursuant to that authority. As a result, Mr. Walker's sentence must be reversed and the instant cause remanded

for resentencing within the sentencing guidelines range of seventeen to twenty-two years in prison (R 585).

POINT II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW MR. WALKER TO PRESENT EVIDENCE OF THE COCAINE ADDICTION OF THE STATE'S KEY WITNESS.

The State's key witness against Appellant was Corinne Fillmore, who testified that, although she had used cocaine before, she was not under the influence of any drugs on the night she saw Daniel Rusignolo shot (R 271-272) by a man she identified as Mr. Walker (R 258). Another witness, Diane Walker, also identified Mr. Walker as the perpetrator (R 210), but she admitted that she had already ingested cocaine once that evening and was in the very process of preparing to smoke more crack at the time that Rusignolo was shot (R 207, 223), so that her ability to observe the events leading to Rusignolo's death could easily have been seriously impaired. Indeed, when the jury asked that a witness's testimony be played back, it was Ms. Fillmore's testimony that they requested (R 529), indicating just how crucial they believed it to be to the State's case against Mr. Walker.

Contrary to her own statements, however, Ms. Fillmore may have been no more reliable than Ms. Walker in her recounting of what happened the night of the offense. In his own case, Mr. Walker called Von Evans, a witness who testified that Ms. Fillmore had in fact bought crack cocaine from him the very day of the shooting (R 449). Mr. Walker was not allowed to adduce testimony from Von Evans and two other witnesses that Ms. Fillmore was in actuality a cocaine addict, who used drugs three or four times daily, and who suffered from paranoia as a result (R 457-459, 464-466, 467-468).

Under the circumstances of the instant case, this was error, requiring that Mr. Walker be granted a new trial.

An accused has an absolute right to full cross examination of the witnesses against him. Davis v. Alaska, 415 U.S. 308 (1974); Coco v. State, 62 So.2d 892, 894 (Fla. 1953). Wide latitude is given in the cross examination of a witness to ascertain his opportunities for observation, attention, interest, and truthfulness. Killingworth v. State, 105 So. 834 (Fla. 1925). This Court has recognized that drug use may have an adverse effect on a witness's ability to observe an event and testify about it. Thus, in Edwards v. State, 548 So.2d 656 (Fla. 1989), this Court held that evidence of a witness's drug use may be used to impeach him if it is shown that the witness was using drugs at the time of the incident about which he was testifying, or that the witness was using drugs at the time he testified, or if other evidence shows that the witness's prior drug use affects his ability to observe, remember, and recount.

In the instant case, the point at issue was whether Ms. Fillmore was under the influence of drugs at the time she witnessed the shooting. She testified that she was not. Von Evans' testimony that she had purchased drugs from him on that day was thus direct impeachment of Ms. Fillmore's own testimony on an issue which was clearly relevant to the jury's consideration of her credibility.

Moreover, since Von Evans' testimony directly conflicted with Ms. Fillmore's on the issue of her own drug usage, it was for the jury to determine which witness was more likely to be telling the

truth on this important matter. Thus, the evidence that Ms. Fillmore was a habitual drug user whose addiction led her to ingest cocaine on a regular basis of three or four times daily supported the likelihood that it was Von Evans who was telling the truth about Ms. Fillmore's drug use on the day of the shooting. Since Ms. Fillmore used drugs on several occasions each day, it would surely be too remarkable a coincidence that she singularly did not use drugs on the one day about which she was asked to testify.

The instant case is therefore to be distinguished from Edwards, supra; Eldridge v. State, 27 Fla. 162, 9 So.448 (1891); and Nelson v. State, 128 So. 1 (Fla. 1930), in each of which the witness had indisputably not used drugs at the time that the offense in question was being committed. Evidence of general drug usage was held inadequate in those cases to justify its admission into evidence, since a witness's past use of drugs, standing alone, does not establish that his faculties of perception and memory have been so damaged that his testimony should be viewed with suspicion.

Sub judice, the evidence was conflicting on whether the witness, Ms. Fillmore, was under the influence of cocaine at the time the events occurred about which she was testifying, and the testimony concerning her continuous and ongoing drug usage was relevant to a determination of the reliability of her statement that she had not, in fact, used drugs at that particular time. The error in restricting Mr. Walker's right to present evidence in his defense was thus neither irrelevant or harmless. It was Mr. Walker's position that Ms. Fillmore was not present at all on the evening the instant offense occurred, or that, if present, she was

so far under the influence of the drugs she had taken earlier that her ability to observe and understand what she observed was, to say the least, suspect. As such, it was important for the defense to establish that Ms. Fillmore was indeed using drugs on the day in question, and Mr. Walker was, in fact, allowed to call one witness, Von Evans, who testified to that effect.

It was to further establish the truth of this scenario, in contrast to Ms. Fillmore's own testimony denying the use of drugs, that Mr. Walker offered the testimony of Rodney Ellis and Corwin McNeil that Ms. Fillmore was a regular drug user who rarely, if ever, spent a day without her fix, and that she remained inside the house when high. This testimony was relevant to the defense in two ways: first, it tended to support the credibility of Von Evans that Ms. Fillmore used cocaine on the day of the shooting; and second, it suggested that having used cocaine, she was unlikely to have remained outside, either to "rake her yard," as she explained, or for any other reason.

Mr. Walker has therefore demonstrated that, under the unique facts of the instant case, the evidence of McNeil and Ellis was relevant and material to the defense, and should have been admitted.

Finally, Mr. Walker did not, by stipulating with the State as to the contents of a proffer,[5] waived his right to present the

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[5] MR. SIDAWAY [defense counsel]: You don't have any problem stipulating that that is what my proffer would be as to those witnesses, do you?

MS. CRAFT [prosecutor]: No, no I don't.

MR. SIDAWAY: Okay.

witness's testimony to the jury, as argued by the State in the Fourth District Court of Appeal. The function of a proffer, which is to put in the record, but not before the jury, evidence which may be necessary to explain on appeal the relevance and importance of evidence which has been excluded from the jury's consideration, should not be confused with the introduction of testimony into evidence at the trial, so that it may be used by the jury in its deliberations in the case. A stipulation as to what a witness would say if he were allowed to testify obviously cannot operate to waive the offering party's objection to not being allowed to present the testimony to a jury. After the proffer of what Ellis and McNeil would say in the present case was appropriately presented to the trial judge, he made a legal ruling that the testimony would not be admitted into evidence. See, Argument, supra, at note 2. It was this ruling which precluded Mr. Walker from admitting the evidence, not any voluntary decision on his own part not to do so.

Consequently, under the facts presented in the instant case, it was error to preclude Mr. Walker from adducing his proffered evidence concerning the State witness's habitual use of drugs. And because the testimony of that witness was crucial to the State's case against Mr. Walker, as evidenced by the jury's express

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THE COURT: Okay, the state has stipulated.

MR. SIDAWAY: The Judge is denying --

THE COURT: I'm denying you ... on the basis that the testimony doesn't relate to the day in question of September 22nd, 1989. (R 469.)

reliance on it during the course of its deliberations, the error was reversible, so that Mr. Walker's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN SENTENCING MR. WALKER AS A HABITUAL OFFENDER WHERE ALL HIS PRIOR CONVICTIONS WERE ENTERED THE SAME DAY.

In Joyner v. State, 158 Fla. 806, 30 So.2d 304 (Fla. 1947). This Court held that a second conviction relied upon to sentence a defendant as an habitual offender must be subsequent to the defendant's previous conviction. The purpose of the habitual offender statute is, after all, "to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed," Id. A defendant who has not already served his sentence before committing another crime has not persisted in the commission of crime after being given an opportunity to reform, and the purpose of the habitual offender statute would not be served by imposing an enhanced sentence against him. See also, Ruffin v. State, 397 So.2d 27 (Fla. 1981), receded from on other grounds, Scull v. State, 533 So.2d 277 (Fla. 1988).

This rule continues to be applied to habitual offender sentencing, as recently noted in Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990). In that case, the State proved that the defendant had previously been convicted of twelve felonies, but each was contained in the same judgment of conviction. Thus, none of them could have been committed after the defendant's conviction for the initial felony, and the trial court was held to have erroneously enhanced the defendant's sentence. See also, Walker v. State, 567 So.2d 546 (Fla. 2nd DCA 1990).

In the present case, the trial court enhanced Mr. Walker's seventeen to twenty-two year guidelines sentence to a term of life imprisonment on the basis of its finding that he was a habitual offender (R 589). This finding was based on prior convictions for uttering a forgery, possession of cocaine, and armed robbery. But each of those judgments of conviction, as reflected in the record on appeal, was entered on the same day, March 14, 1988 (R 573-583). At the sentencing hearing, the trial court found that Mr. Walker's convictions for uttering a forgery and possession of cocaine arose from offenses for which he had been placed on probation on September 27, 1987 (R 544). However, Section 775.084(c)(2), Fla. Stat. (1988 Supp.) specifically defines when a case for which the defendant has been placed on probation may be considered as a prior qualifying conviction:

> For purposes of this section, the placing of a defendant on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which he is to be sentenced was committed during such probationary period.

Mr. Walker was on probation only for the armed robbery offenses at the time that the instant homicide occurred (R 547). Consequently, the convictions for uttering a forgery and possession of cocaine may not be considered, for purposes of the habitual offender statute, as if they occurred earlier than their record dates of March 14, 1988, since Mr. Walker was not on probation for those offenses at the time the Rusignolo shooting took place. As a result, all of Mr. Walker's prior convictions were entered on the same day, and he does not meet the criteria for sentencing as a habitual offender. His enhanced sentence must therefore be

reversed and this cause remanded for resentencing within the sentencing guidelines term of seventeen to twenty-two years in prison.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Walker requests that this Court affirm the order of the Fourth District Court of Appeal vacating his sentence as a habitual offender or, in the alternative, reverse the judgment and sentence below and remand this cause with directions to grant Mr. Walker a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 31st day of DECEMBER, 1991.

Of Counsel