IN THE SUPREME COURT OF FLORIDA

TIMOTHY WILLIAM TRIPP,

Petitioner,

vs. : Case No. 79,176

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Second District Court of Appeal and the defendant in the trial court. Respondent was the Appellant in the Second District and the prosecuting authority in the trial court. The record on appeal will be designated "R".

STATEMENT OF THE CASE AND FACTS

On December 27, 1988, the State Attorney for the Tenth Judicial Circuit, in and for Polk County, Florida, charged Petitioner, Timothy William Tripp, with Burglary contrary to Section 810.02, Florida Statutes (1987); Grand Theft contrary to Section 812.014, Florida Statutes (1987); and Resisting An Officer Without Violence contrary to Section 812.019, Florida Statutes (1987). (R1-4)

On March 29, 1989, Petitioner entered pleas of guilty to the Burglary and Grand Theft charges. (R15) It was agreed that Appellant was to be sentenced within the guidelines. (R15) Mr. Tripp was subsequently sentenced to 4 years incarceration on Count I, Burglary. (R6-11) Mr. Trkpp was also placed on four years probation on Count II, Grand Theft, to commence upon his release from jail. (R12-14)

Mr. Tripp served the incarcerative portion of his sentence and was released. On March 9, 1990, an affidavit was filed alleging Mr. Tripp had violated his probation by committing the offenses of burglary and trespass. (R29) Petitioner, on September 10, 1990, admitted to being in violation of his probation. (R50-55)

The court sentenced Petitioner to four and one half years incarceration on Count 11. (R34) The court then gave Petitioner four years credit for his previous incarceration on Count I of the same case, (R34-35, 37-39) The recommended range under the guidelines at sentencing was 4 1/2 to 5 1/2 years with the one cell

bump for violation. (R39) However, the statutory maximum was 5 years incarceration.

On September 13, 1990, a timely appeal was taken by the State. The Second District Court of Appeal issued an opinion in this case on December 27, 1990. The court reversed the award of credit for time served and the majority certified the following question to this Court:

> IF A TRAIL COURT IMPOSES A TERM OF PROBATION CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER THE REVOCATION OF PROBATION ON THE SECOND OFFENSE?

Petitioner requested this court accept jurisdiction on December 31, 1991. On January 9, 1992, this Court issued an Order Postponing the Acceptance of Jurisdiction, but ordered Petitioner's Brief on the Merits to be filed by February 3, 1992.

SUMMARY OF THE ARGUMENT

Petitioner must be given credit for time previously served on Count I of the Information upon the revocation of his probation on Count II. This Court's rulings in the cases of Poore v. State, 531 So.2d 161 (Fla. 1988); Lambert v. State, 545 So.2d 838 (Fla. 1989), and State v. Green, 547 So.2d 925 (Fla. 1989), which require that when a probationary split sentence is imposed, full credit for time served must be awarded upon revocation apply to multi-count Informations. A contrary result would destroy the integrity of the guidelines and defeat the goal of sentencing uniformity across the State of Florida.

ARGUMENT

ISSUE I

IF A TRAI COURT IMPOSES A TERM OF PROBATION CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER THE REVOCATION OF PROBATION ON THE SECOND OFFENSE?

Petitioner was charged under one Information with two counts: one count of Burglary and one count of Grand Theft. He was sentenced to four years incarceration on the Burglary and placed on four years consecutive probation on Count 11, Grand Theft. Petitioner violated probation and admitted to such. Petitioner contends that he is entitled to receive four years credit for time served against his sentence imposed at the revocation hearing on the Grand Theft charges because he had previously been sentenced to, and served, four years on Count I. Petitioner contends that to do otherwise violates the sentencing guidelines and this Court's opinions in the cases of Poore v. State, 531 So.2d 161 (Fla. 1988), Lambert v. State, 545 So.2d 838 (Fla. 1989), and State v. Green, 547 So.2d 925 (Fla. 1989).

To deny Petitioner credit for time served runs directly afoul of the sentencing guidelines and the reasons for their existence. There can be no question that the guidelines apply to probation revocation proceedings. Florida Rule of Criminal Procedure 3.701(14) (1987) specifically provides that sentences imposed after revocation of probation must be within the recommended guidelines range and a one-cell bump.

The purpose behind the sentencing guidelines was to "establish a uniform set of standards" and to "eliminate unwarranted variation in the sentencing process." To permit a trial court to initially impose a sentence in a multi-count information which on one count meets the maximum incarcerative sentence under the guidelines and probation on subsequent counts and then, upon violation, to impose a sentence again meeting the maximum incarceration under the guidelines without awarding credit for time served destroys the integrity of the guidelines.

As the Second District recognized, this Court's decision in Lambert v. State, 545 So.2d 838 (Fla. 1989), limits the sentence upon a revocation of probation to the guidelines sanction. Petitioner, if he is not awarded gain time, will serve an 8 1/2 year sentence - 3 1/2 years beyond the recommended sentence and the one cell bump. The provisions of Lambert should apply to multi-count information. The desire for uniformity in sentencing does not apply to only single-count information, it applies to all sentencing proceedings whether the Information has multi-counts or only one.

In Poore v. State, 531 So.2d 161, 165 (Fla. 1988), this Court addressed the function of probation revocation under the guidelines and the policies for limitations on revocation. In Poore, this Court held that the court, upon a revocation of probation, may impose any sentence up to the maximum for which the defendant stands convicted, subject to credit for time served and within the recommended guidelines range. Although Poore involved a single-

count Information, it's reasoning is no less applicable to the instant situation involving a two-count Information.

Petitioners sentence is a "probationary split-sentence" as defined in the third sentencing alternative of Poore. In Poore this Court expressly rejected the concept that a trial court could ignore the guidelines after a violation of probation in a probationary split sentence:

> We stress, however, that the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation. We reject any suggestion that the guidelines do not limit the cumulative prison term of any split sentence upon a violation of probation. To the contrary, the guidelines manifestly are intended to apply to any incarceration imposed after their effective date, whether characterized as a resentencing or revocation of probation. See § 921.001(4)(a), Fla. Stat. (1987). They thus must be applied to the petitioner in this instance, albeit within the context of the previously imposed true split sentence.
>
> To hold otherwise would permit trial judges to disregard the guidelines merely by imposing a true split sentence, as provided in alternative (2). For example, in a case where the statutory maximum was 25 years and the guidelines range was 5 to 7 years, a trial court could impose a split sentence of 25 years, with the first 7 years to be served in prison and the remaining 18 suspended, with the defendant on probation. Upon violation of probation, the trial court then simply could order the incarceration of the defendant for the balance of the 18-year probationary period, notwithstanding any lesser recommended guidelines range. Such an analysis not only would defeat the purpose of the sentencing guidelines, but would destroy them altogether. Obviously, this result never was intended when the guidelines permitted the probationary portion to exceed the recommended range.

Poore, 531 at 165.

This Court did not limit this language to only one charge, so there is no reason to believe this language shuold not apply to Petitioner. Inasmuch as this Court is concerned with the integrity of the sentencing guidelines, it would only be reasonable to assume that the guidelines should limit sentencing after violation of probation on any type of probationary split sentencing scheme--be it only one charge or multiple charges in one information.

The Fifth District in Fullwood v. State, 558 So.2d 168 (Fla. 5th DCA 1990), applied Poore to a case involving one information with 3 counts. The defendant had originally received straight probation on Counts I and II and a Villery sentence of probation preceded by 24 months incarceration as a condition of probation. The guidelines recommended 2 1/2 to 3 1/2 years incarceration. When the defendant violated his probation, the trial court sentenced the defendant to 22 to 24 months prison on Count II, modified probation Count I, and left Count III alone. The court held that the combined sentences of incarceration for Counts II and III, past and present, exceeded the guidelines range:

> Since the guidelines require a sentence as to each offense and also require that the total sentence not exceed the guidelines range, Count III should have been considered in determining Fullwood's total sentence even though probation as to Count III was not revoked. In other words, the offenses from one scoresheet must be treated in relation to each other. The portion imposed shall not be less than the minimum of the guidelines range, nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law).

Fullwood, 558 So.2d at 170. The case was reversed for resentencing of Count II so that the combined sentence of Counts II and III did not exceed the guidelines.[1]

Petitioner submits that Fullwood is the correct approach. To do otherwise is to destroy the integrity of the sentencing guidelines, to defeat their purposes.

The Second District is correct that the courts may impose a separate sentence for each count in a multi-count information. However, the total sanction must be within the sentencing guidelines.

Florida Rule of Criminal Procedure 3.701(d)(12) provides as follows:

> Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guidelines sentence unless a written reason is given.

The Committee Note to rule 3.701(d)(12) provides as follows:

> The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guidelines sentence, unless the provisions of paragraph 11 (pertaining to written reasons for departure) are complied with.
>
> If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guidelines range nor exceed the maximum of the range. The total sanction (incarcerative

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[1] Although a different three-judge panel in Sylvester v. State, 572 So.2d 947 (Fla. 5th DCA 1990), issued an opinion conflicting with Fullwood, the court did not cite to Fullwood or give any explanation as to the reason for the conflict. Sylvester refuses to apply credit upon a violation.

and probation) shall not exceed the term provided by general law.

In Cassidy v. State, 464 So.2d 580 (Fla. 2d DCA 1985), the Second District defined the term "the total sentence" as used in the guidelines as referring to the actual time required to be served, not the mathematical total of the two sentences. In Petitioner's case, if no credit for time served is awarded, the time he will serve is 8 1/2 years incarceration. The "total sentence" is 8 1/2 years. This "total sentence" exceeds the recommended sentencing range of 4 1/2 to 5 1/2 years incarceration.

The Second District Court's reliance on State v. Perko, 16 F.L.W. S637 (Fla. October 3, 1991), is misplaced. In Perko, the defendant was seeking credit for time he had served on an old case that he was on probation for against a wholly separate new set of charges. He wanted credit for time he had served in an auto theft case on a new drug case. Petitioner's case is factually different from Perko. Petitioner's case involves a multi-count information where the same factual basis gave rise to two separate counts: the entering of an establishment, Stereo Town, and the theft of several items from that store. The underlying basis of the charges Petitioner is being sentenced for at his violation of probation is the same set of facts which sent him to prison previously. Thus, unlike Perko, this court's prior decision in State v. Green, 547 So.2d 925 (Fla. 1989), applies and Petitioner is entitled to credit for time served on his revocation sentence.

Neither do gain-time or jail credit regulations prohibit the award of credit in Petitioner's case. The cases relied on by the

Second District, in particularly Daniels v. State, 491 So.2d 543 (Fla. 1986), are not applicable. Daniels holds in part, that when a defendant does not receive concurrent sentences on multiple charges, he cannot pyramid his jail credit. Petitioner, at the original sentencing proceeding, was not given a "sentence" on Count II, as probation is not considered a sentence. Section 948.01(3), Florida Statutes (1987), provides that the court "shall stay and withhold the imposition of sentence upon such defendant and shall place him upon probation." Petitioner did not receive a sentence on Count II until his revocation. This revocation sentence reaches back to the original hearing and requires that credit for the first four years given on Count I be applied so the sentence remains within the guidelines.

The policy reasons for the result Petitioner urges are clear. To preserve uniformity in sentencing and to maintain the integrity of the guidelines the principles of Poore, Lambert, and Green must apply to multi-count informations involving probationary split sentences.

If Poore, Lambert and Green do not apply, the potential for abuse is frightening. Trial judge can easily circumvent the guidelines by stacking probationary periods is a multi-count Information and imposing the maximum prison time for each violation resulting in that total length of time being served would be far in excess of the permitted guidelines range. The guidelines presume that by the time a defendant is within the range calling for prison, he is not a good candidate for probation. See Florida Rule

of Criminal Procedure 3.701(b)(4). The trial courts should not be permitted to set up situations where the likelihood of success on probation is small they can later avoid the sentencing guidelines by imposing successive incarcerations upon revocation. Neither should the trial court be permitted to devise games to avoid the structures of the guidelines. The same concerns of uniformity in sentencing apply to those charged in multi-count informations as well as single count informations. Thus, the Second District's ruling must be reversed and Petitioner must be awarded credit for time served.

CONCLUSION

Reversal of the Second District's holding is required. The holding of the trial court awarding Petitioner credit on his probationary split sentence should be upheld.

APPENDIX

PAGE NO.

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

TIMOTHY WILLIAM TRIPP,

Appellee.

Case No. 90-02699

Opinion filed December 27, 1991.

Appeal from the Circuit Court for Polk County; J. David Langford, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, and Andrea Norgard, and William Pena Wells, Assistant Public Defenders, Bartow, for Appellee.

ALTENBERND, Judge.

The state appeals the defendant's sentence imposed after a revocation of probation. It argues that the trial court improperly awarded jail credit to the defendant for time that he

had served on a separate conviction. We agree. Consistent with our decisions in Pacheco v. State, 565 So. 2d 832 (Fla. 2d DCA 1990), review denied, 576 So. 2d 289 (Fla. 1991), and Harris v. State, 557 So. 2d 198 (Fla. 2d DCA 1990), we reverse the sentence and remand for resentencing without jail credit for time served on the separate conviction.

Our decision follows similar decisions of the Fourth and Fifth Districts. Sylvester v. State, 572 So. 2d 947 (Fla. 5th DCA 1990); Ford v. State, 572 So. 2d 946 (Fla. 5th DCA 1990); State v. Folsom, 552 So. 2d 1194 (Fla. 5th DCA 1989); State v. Rodgers, 540 So. 2d 872 (Fla. 4th DCA 1989). Because the sentencing method approved in this case is not expressly recognized in Poore v. State, 531 So. 2d 161 (Fla. 1988), and may conflict with the spirit of the sentencing guidelines and the limitations imposed in Lambert v. State, 545 So. 2d 838 (Fla. 1989), and State v. Green, 547 So. 2d 925 (Fla. 1989), we certify the propriety of this sentencing method to the Florida Supreme Court.

Timothy William Tripp was charged with burglary, grand theft, and resisting an officer without violence for events occurring on November 24, 1988. The three offenses were charged in a single information. The burglary and grand theft offenses were third-degree felonies, and the resisting offense was a misdemeanor. §§ 810.02(3), 812.014(2)(c), 843.02, Fla. Stat. (1987).

Mr. Tripp and the state entered into a plea agreement. They agreed that he would plead guilty to the two felony charges, the state would dismiss the misdemeanor charge, and he would receive a sentence within the guidelines. Mr. Tripp's scoresheet recommended 3 years' incarceration and permitted up to 4 1/2 years' incarceration. For *the* burglary, the trial court adjudicated him guilty and sentenced him to 4 years' imprisonment. For the grand theft, the trial court withheld adjudication and placed him on 4 years' probation. The probation was consecutive to *the* imprisonment and was to begin upon Mr. Tripp's release from prison for the burglary.

Mr. Tripp served his four-year sentence on the burglary in less than ten months. He then began his term of probation on the grand theft. On January 6, 1990, at 2:33 a.m., Mr. Tripp allegedly trespassed on railroad property. On February 25, 1990, he allegedly burglarized a home. As a result, the state sought to revoke his probation.[1] Mr. Tripp admitted the violations and his probation was revoked. During resentencing, Mr. Tripp argued that the trial court had no authority to sentence him to more than 4 1/2 years' imprisonment with credit for the 4 years that he had served on his original burglary sentence. The trial court reluctantly agreed.[2]

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[1] The record does not disclose the outcome of the trespassing and second-degree burglary charges.

[2] We note that the maximum sentence that Mr. Tripp could have received upon a revocation of probation was not 4 1/2 years' incarceration, but 5 years' incarceration. The high end of the permissive range of the next higher cell was 5 1/2 years' incarceration, which was limited by the 5-year maximum sentence

The dispositive issue is whether the sentencing method in this case produces a split sentence, as described in Poore, for which jail credit, including accumulated gain time, is mandatory under Green, or whether it produces a separate sentence of probation that is legally consecutive to the sentence of incarceration. As previously mentioned, this court and two other district courts have ruled that this sentencing method produces two separate sentences and that a defendant in this situation is not entitled to jail credit from the first sentence concerning any revocation of probation for the second offense. See Pacheco; Harris; Sylvester; Ford; Folsom; Rodgers. Our decision is also supported in part by the supreme court's recent decision in State v. Perko, 16 F.L.W. S637 (Fla. Oct. 3, 1991).

In addition to the reasons explained in those opinions, our decisian is supported by the rules relating to jail credit for presentence imprisonment when a defendant receives consecutive sentences of imprisonment. § 921.161, Fla. Stat. (1987); Daniels v. State, 491 So. 2d 543 (Fla. 1986); Keene v. State, 500 So. 2d 592 (Fla. 26 DCA 1986); Yohn v. State, 461 So. 2d 263 (Fla. 2d DCA 1984); Martin v. State, 452 So. 2d 938 (Fla. 26 DCA 1984); Miller v. State, 297 So. 2d 36 (Fla. 1st DCA 1974). It is well established that a "defendant 'is not entitled to have his jail time credit pyramided by being given credit on each (consecutive) sentence for the full time he spends in jail awaiting

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for third-degree felonies. Fla. R. Crim. P. 3.701(d)14; Lambert v. State, 545 So. 26 838 (Fla. 1989).

disposition.'" Daniels, 491 So. 2d at 545 (quoting Martin which quoted Miller) (emphasis original).

On the other hand, unless the trial court is attempting to bring the sentence within the guidelines recommendation, it cannot impose consecutive sentences of incarceration at a single sentencing hearing absent a valid written reason for departure. See Branam v. State, 554 So. 2d 512 (Fla. 1990), approving, 540 So. 2d 158 (Fla. 2d DCA 1989); § 921.16, Fla. Stat. (1987); Fla. R. Crim. P. 3.701(d)12. By contrast, the sentencing method authorized by this case allows trial courts to greatly exceed the incarceration contemplated by the guidelines and Lambert upon a single violation of probation. Sylvester; Ford.[3]

There may be situations in which a term of probation consecutive to a sentence of imprisonment would be a valid and appropriate sentence, There are other situations in which this sentencing method could be abused. It may be that there should be some limitation on a trial court's authority to impose a term of probation consecutive to a sentence of incarceration. We, however, are unaware of any such restriction and are not authorized to create one. Because of this concern, we certify the following question to the supreme court:

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[3] Although not presented in this appeal, one can easily imagine a multiple-count information, resulting in numerous consecutive terms of probation. This situation could allow for imprisonment far beyond the permitted guidelines range if a defendant violated each of his probations,

IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?

Reversed and remanded for resentencing.[4]

FRANK, J., Concurs.
CAMPBELL, A.C.J., Concurs specially.

CAMPBELL, Acting Chief Judge, Specially concurring with opinion.

I concur with the result reached, the reasoning employed, and even, as far as it goes, the certified question posed by the majority. I write because I have concern that an answer to the question as posed and certified by the majority may not sufficiently address the problem presented by the circumstances of this and similar cases.

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[4] The majority has no objection to the certified question suggested by Judge Campbell in his special concurring opinion. We have not incorporated that question into this opinion because we believe the supreme court will be further assisted by the comments and additional analyses which accompany his proposed question.

It does not appear to me that any of the cases cited in the majority opinion, whether in support of or in opposition to the conclusions of that opinion, adequately address the problem as I see it. Neither have I independently discovered any other cases that provide a comprehensive discussion or definitive solution to the problem as perceived. Most of the cases fall into two categories, those that deal with the proper application of credit for time served or gain time earned to subsequently imposed sentences and those that deal with the application of proper guidelines sentencing principles to sentences imposed after revocation of probation in a split sentence situation.

The problem that should be more clearly addressed is the proper application and interaction of gain time principles and sentencing guidelines principles when those two principles coincide or collide. This usually will occur in the situation of a sentence being imposed on an original or underlying offense upon revocation of the probation imposed for that offense when that original sentence was a split sentence context involving multiple offenses and where the original sentence contained an incarcerative portion equal to the maximum permissible under sentencing guidelines.

In order to appropriately focus the problem as I see it, and at the sure risk of continuing to be perceived as redundantly superfluous, I find it necessary, and hopefully helpful, to rather painstakingly elaborate the scenario that causes the problem I would address. In order to evoke an answer

beneficial to our trial judges, the question certified must be carefully and precisely premised and posed. Certain necessary assumptions must be detailed to properly pose the certified question. It must first be assumed that a trial judge has, in sentencing a defendant for multiple offenses to a recommended guidelines sentence, imposed the maximum incarcerative sentence permissible for one offense and consecutive probationary sentences for the remaining offenses. It must further be assumed that the defendant has satisfied the incarcerative term imposed by serving a portion of the sentence while actually incarcerated and satisfied the remainder of the incarcerative term by gain time earned during his actual incarceration. After beginning to serve the consecutive probationary sentences, the defendant violates probation and is being sentenced on the original underlying offense for which probation was imposed. That sentence upon revocation of probation cannot exceed the original recommended guidelines sentence plus a one-cell increase absent a departure sentence upon revocation which is supported by reasons that existed but were not utilized at the original sentencing. Williams v. State, 581 So.2d 144 (Fla. 1991); Ree v. State, 565 So.2d 1329 (Fla. 1990); Lambert v. State, 545 So.2d 838 (Fla. 1989). Of course, if the original split sentence was in itself a departure sentence, the sentencing court could not again depart upon revocation of probation.

The question thereby presented and that I would certify is:

IF, IN A GUIDELINES SENTENCING CONTEXT INVOLVING MULTIPLE OFFENSES THERE HAS BEEN IMPOSED UPON THE DEFENDANT A TERM OF PROBATION FOR ONE OFFENSE CONSECUTIVE TO A MAXIMUM PERMISSIBLE GUIDELINES SENTENCE OF INCARCERATION FOR ANOTHER OFFENSE, UPON A VIOLATION AND REVOCATION OF THE PROBATIONARY SENTENCE MUST GAIN TIME CREDIT EARNED ON THE INCARCERATIVE SENTENCE BE GRANTED ON THE SENTENCE THEN BEING IMPOSED FOR THE SEPARATE UNDERLYING OFFENSE FOR WHICH PROBATION IS BEING REVOKED?

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 29th day of January, 1992.

Respectfully submitted,

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