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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

ANTHONY LANCASTER,

Respondent.

CASE NO. 86,312

RESPONDENTS ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the 19th Judicial Circuit, In and For Indian River County Florida. Respondent, Anthony Lancaster, was the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

The symbol "T" will denote Respondent's probation revocation hearing and sentencing hearing.

The symbol "A" will denote the appendix attached to the Answer Brief.

The symbol "PB" will denote Petitioner's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Respondent, Anthony Lancaster, accepts Petitioner-States Statement of the Case and Facts with the following addition or clarifications:

Respondent, Anthony Lancaster, was charged by way of an information filed on May 26, 1997, in the Nineteenth Judicial Circuit, in and for Indian River County, Florida, with second degree murder. This offense was alleged to have occurred on May 3, 1987.

Respondent was sentenced to seventeen (17) years in prison to be followed by twenty(20) years probation. T 71, 72. He was subsequently released from prison after completion of the incarceration portion of his " split-sentence". He commenced serving the probationary portion of his "split sentence" on July 7, 1993. However, on May 17, 1994, an affidavit of violation of probation was filed against Respondent. On August 3, 1994, Respondent was found guilty of violating his probation and said probation was revoked by the trial judge.

The trial judge then sentenced Respondent Lancaster to thirty (30) years in prison with credit for 344 days "county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number [87-00351]."

On appeal to the Fourth District Court of Appeal, Respondent Lancaster argued

that the trial judge erred in failing to award him the full seventeen (17) years in prison as credit for time served against the thirty (30) year sentence imposed upon Respondent for violating his probation. As previously noted, Respondent had originally been sentenced to seventeen(17) years in prison to be followed by a term of probation for this identical offense. T 71.

The Fourth District in, *Lancaster v. State* 656 So. 2d 533 (Fla. 4th DCA 1995)[See Appendix 1] initially held that Respondent's thirty (30) year sentence which exceeded the applicable Florida guidelines range had to be reduced on remand to twenty seven (27) years in prison. *Id.* at 534.

As to the proper credit for "time served" to be awarded, the Fourth District ruled on the basis of the *ex post facto* clause and this Court's decision in *Orosz v. Singletary*, 655 So. 2d 1112 (Fla. 1995), that "if upon remand it is determined that defendant completed his original sentence *prior* to 1993, when the legislature enacted section 944.278 and *retroactively canceled all awards of gain time and provisional credits* defendant should properly be credited not only with earned gain time but with administrative gain time and provisional credits." *Id.* at 535. [Emphasis Supplied]. The Fourth District explained:

> To retroactively cancel administrative gain time and provisional credits would unconstitutionally violate a defendant's constitutional rights against ex post facto laws and bills of attainder.
>
> *Id.* at 534-535.

Respondent-State of Florida obtained discretionary review of the district court's opinion to this Honorable Court. This Court in *State v. Lancaster*, 687 So. 2d 1299 (Fla. 1997) [Appendix 2], reversed the decision of the Fourth District Court of Appeal on the authority of its own recent decision in *Calamia v. Singletary,* 686 So. 2d 1337 (Fla. 1996), wherein this Court stated that:

> "Administrative gain time and provisional credit statutes were not enacted for the benefit of prisoners; those statutes were enacted merely to afford the Department a procedure to alleviate prison overcrowding. We further concluded in *Calamia* that the retroactive cancellation of administrative gain time and provisional credits does not run afoul of ex post facto proscriptions. Because the unique circumstances presented in *Orosz* are not applicable to Lancaster and because Lancaster has no vested interest in any previously awarded administrative gain time or provisional credits, we conclude that Lancaster is not entitled to credit for any such time awarded during the incarcerative portion of his initial sentence. Accordingly, we quash the district court's decision to the extent it holds that all inmates who committed an offense before October 1, 1989, and who complete their sentences prior to the 1993 enactment of section 944.278 have a vested right in previously awarded administrative gain time and provisional credits, and we remand this case for further consideration."
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> *Id.* at S53.

On February 19, 1997, the United States Supreme Court issued its decision in *Lynce v. Mathis,* 519 *U.S.*--, 117 S. Ct. 891 (1997). See Appendix 3. The United States Supreme Court in *Lynce* held that the retroactive cancellation of administrative and provisional credits awarded to inmates **violates** the *expost facto* clause of the United

States Constitution. 117 S. Ct. at 897-898.

Respondent Lancaster filed a writ of certiorari in the United States Supreme Court which was granted and this case was remanded to this Honorable Court for further consideration in light of the *Lynce* decision. *Lancaster v. Florida,* -U.S.-, 118 S.Ct. 37, 139 L. Ed 2d 5 (1997).

SUMMARY OF THE ARGUMENT

POINT I

In the instant cause, in light of the decision in *Lynce v. Mathis, supra,* the retroactive application of Section 944.278, *Florida Statute* (1993) to Respondent would unquestionably disadvantage him because it would result in the cancellation of previously **awarded** administrative and provisional credits to Respondent and will thereby prolong his actual imprisonment in the Florida Department of Corrections by approximately six (6) years. The Respondent- State of Florida has not disputed that a lengthening of Respondent's actual period of incarceration will occur through the retroactive application of Section 944.278 to Respondent who committed his offense prior to its effective date.

In addition, a critical fact in the instant case is that Respondent's offense of second degree murder occurred on May 3, 1987, prior to the effective date, October 1, 1989, of the statute that added revocation of probation to the statutory circumstances that allowed forfeiture of gain- time. See Section 944.278, *Florida Statutes* (1989).

Because the retroactive application of this 1993 statute to Respondent, Anthony Lancaster, who committed his offense, second degree murder, on May 3, 1987, **prior** to its enactment, has resulted in his present prison sentence being lengthened it results in a prohibited *ex post facto* law on the authority of the United States Supreme Court's decision in *Lynce* v. *Mathis, supra.* Therefore in light *Lynce v. Mathis, supra,* the

retroactive cancellation of previously awarded administrative and provisional gain time credits to Respondent, Anthony Lancaster violates the *Ex Post Facto* clause.

POINT II

Contrary to the arguments advanced by Petitioner-State, the law at the time of the **offense** controls for *ex post facto* purposes not the applicable law at the time of the subsequent revocation of probation. In addition, Respondent Lancaster was already awarded the administrative credits and said credits could not be forfeited for a violation of the probationary portion of his "split-sentence" because Respondent committed his offense prior to the enactment of Section 944.278, *Florida Statutes* (1989) (effective October 1, 1989) which authorized the forfeiture of all gain time earned for a violation of probation. Therefore, in these circumstances the failure to apply previously awarded administrative credits to Respondent after his resentencing upon a revocation of the probation portion of his split sentence violates the *ex post facto* clause.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO AWARD RESPONDENT CREDIT FOR ALL TIME SERVED PLUS ALL AWARDED GAIN TIME ON HIS SPLIT SENTENCE AFTER HIS REVOCATION OF PROBATION [RESTATED].

Respondent, Anthony Lancaster, was convicted of second degree murder and was sentenced to seventeen (17) years in prison to be followed by ten (10) years probation. This offense was alleged to have **occurred** on May 3, 1987. He was subsequently released from prison after completion of the incarceration portion of his "split-sentence". He commenced serving the probationary portion of his "split sentence" on July 7, 1993. However on August 3, 1994, Respondent was found guilty of violating his probation and said probation was revoked by the trial judge.

The trial judge sentenced Respondent Lancaster to thirty (30) years in prison with "credit for all time [he] served previously in the Department of Corrections." See *Lancaster v. State,* 656 So. 2d 533, 534 (Fla. 4th DCA 1995).

On appeal to the Fourth District Court of Appeal, Respondent Lancaster argued that the trial judge erred in failing to award Respondent the **full** seventeen (17) years in prison as credit for time served against the thirty (30) year sentence imposed upon Respondent for violating his probation. As previously noted, Respondent had originally been sentenced to seventeen (17) years in prison to be followed by a term of probation

for this same offense.

The Fourth District Court of Appeal addressed the very narrow issue whether a defendant who is being sentenced following a revocation of his or her probation, had a vested interest in the administrative gain time and provisional credits **previously awarded** by the Department of Corrections during the incarcerative portion of the defendant's initial sentence. See *Lancaster* v. *State*, 656 So. 2d 533, 534-535 (Fla. 4th DCA 1995). Judge Pariente now Justice Pariente writing for the Fourth District held it would violate the *ex post facto* clause to retroactively cancel previously awarded administrative and provisional gain time credits that had been granted to Respondent. *Id.* at 934-935.[1] After accepting jurisdiction, this Honorable Court rejecting Respondent's *ex post facto* argument on the authority of *Calamia* v. *Singletary*, 686 So. 2d 1337 (Fla. 1996):

> As we emphasized in our recent decision in *Calamia* v. *Singletary*, 22 Fla. Law W. S7 (Fla. Dec. 19, 1996), administrative gain time and provisional credit statutes were *not enacted for the benefit of prisoners; those statutes were enacted merely to afford the Department a procedure to alleviate*

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[1]In *State ex. rel Florida Department of Corrections v. Stevenson*, 695 So. 2d 727 (Fla. 5th DCA 1996), review pending, Case No. 89,279 (Fla. 1997), the Florida Fifth District Court of Appeal held that the application of Section 944.278, *Florida Statutes* (1993), to inmates who committed their offenses **prior** to its effective date violated the *ex post facto* clause. The district court noted that the "provisional credit" previously awarded to the inmate (599 days) was a "quantifiable expectation" at the time the inmate was later resentenced for violating the probation portion of his previously imposed split- sentence.

> *prison overcrowding.* We further concluded in *Calamia* that the retroactive cancellationof administrative gain time and provisional credits does not run afoul of ex post facto proscriptions. Because the unique circumstances presented in *Orosz* are not applicable to Lancaster and because Lancaster has no vested interest in any previously awarded administrative gain time or provisional credit. We reverse.
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> *Id.* at 53. [Emphasis Supplied].

The United States Supreme Court in *Lynce* v. *Mathis,* 591 U.S.- , 117 S.Ct. 891, 137 L. Ed2d 63 (1997), has issued an opinion on the same *Ex Post Facto* issue raised by Respondent before this Honorable Court. The United States Supreme Court held that the retroactive cancellation of administrative and provisional credits awarded to inmates **violates** the *ex post facto* clause of the United States Constitution. The Court initially noted:

> In this case the operation of the 1992 statute to effect the cancellation of overcrowding credits and the consequent reincarceration of petitioner was clearly retrospective. The narrow issue that we must decide is thus whether the consequences disadvantaged petitioner by increasing his punishment.
>
> * * * * *
>
> According to petitioner, although this case involves overcrowding credits, it is essentially like *Weaver* because the issuance of these credit was dependent on an inmate's good conduct. Respondents on the other hand submit that *Weaver* is not controlling because it was the overcrowded condition of the prison system, rather than the character of the prisoner's conduct, that gave rise to the award. In our view, both of these submissions place undue emphasis on the legislature's subjective intent in granting the credits rather than on the consequences of their revocation. In arriving at

> our holding in *Weaver*, we relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute "lengthened the period that someone in petitioner's position must spend in prison." *Id.*, at 33.
>
> * * * *
>
> Similarly, in this case, the fact that the generous gain-time provisions in Florida's 1983 statute were motivated more by the interest in avoiding overcrowding than by a desire to reward good behavior, is not relevant to the essential inquiry demanded by the Ex Post Facto Clause: whether the cancellation of 1,860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration.

Id. at 896, 897.

Further, the United States Supreme Court made clear that they did not imply in *California Dept. Of Corrections* v. *Morales*, 514 U.S.--, 115 S .Ct. 1997 (1995) "that the constitutionality of retroactive changes in the quantum of punishment depended on the purpose behind the parole sentencing system." The United States Court explained that in *Lynce* unlike " *Morales*, there is no evidence that the legislature's change in the sentencing scheme was merely to save time or money. Rather, it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits." . . . "As we recognized in *Weaver*, retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial

sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed." *Lynce,* 117 S.Ct. at 898. Thus the United States Supreme Court held for ex post facto purposes that there is no distinction between earned gain time or credit statutes or administrative/ provisional credit gain time. Therefore, the essential holding by this Court in *State v. Lancaster, supra,* "that retroactive cancellation of administrative credits does not run afoul of ex post facto proscriptions" is no longer good law in light of *Lynce.*

In *Britt v. Chiles*, 22 Fla. Law Weekly S584 (Fla. Sept. 25, 1997), this Court found that the United States Supreme Court's decision in *Lynce* prohibited the Department of Corrections from retroactively applying a statute and department rule which required mandatory forfeiture of incentive gain-time for six months when an inmate committed a particular type of disciplinary infraction. This Court applied the *Lynce* decision as follows:

> In Lynce, the United States Supreme Court reaffirmed the standard to be used in reviewing a statute for an ex post facto violation. "To fall within the ex post facto prohibition, a law must be retrospective--that is 'it must apply to events occurring before its enactment'--and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." 117 S. Ct. at 896 (citations omitted).
>
> The statute at issue, section 944.281, changes the method of determining what punishment is to be imposed for a

> disciplinary infraction during an inmate's confinement by allowing the department to eliminate an inmate's opportunity to earn incentive gain-time for up to six months following the offense. This is similar to the situation at issue in Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981), because "by curtailing the availability of future credits it effectively postpones the date when [an inmate] would become eligible for early release." Lynce, 117 S. Ct. at 896. In Weaver, the United States Supreme Court unanimously reversed this Court, finding that the department could not retroactively decrease the amount of gain-time awarded for an inmate's good behavior. Morales, 514 U.S. 499, 509, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995), a court must determine whether a statute "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes."
>
> Applying these directives to the instant case, we must disagree with the department's contentions. Under the prior statute, eligibility for future credit was potentially subject to revocation; under the current statute and rule, revocation has become mandatory. Consequently, the latter statute works to the disadvantage of the prisoner by potentially lengthening the period that an inmate spends in prison in the face of a disciplinary action. The distinctions in the consequences of the two statutes become clear when the applicable administrative rules are examined.
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> *Id.* at S584.

In addition, a critical fact in the instant case is the Respondent Lancaster was alleged to have committed his original offense on May 3, 1987. R 15. Pursuant to *State v. Green*, 547 So. 2d 925 (Fla. 1989), upon revocation of his probation, Respondent was entitled to credit for all time served, including gain time he was awarded prior to being placed on probation.

In *Green,* this Court stated:

> A prisoner who is released early because of gain-time is considered to have completed his sentence in full.[n1] See @ 944.291, Fla. Stat. (1987). Receipt of gain-time is dependent on a prisoner's behavior while in prison, not on satisfactory behavior once the prisoner has been released from incarceration. Therefore, accrued gain-time is the functional equivalent of time spent in prison.
>
> *Id.* at 926

As this Court stated in another part of the decision in *Green:*

> *Because of that accumulated gain-time, Green was released early, and the incarceration part of his split sentence was finished,* although he was still required to serve the probation part of his split sentence.
>
> Id. at 926 [emphasis added].

Thereafter in *Huering v. State,* 559 So. 2d 207 (Fla. 1990) , this Court further held that "once a prisoner is released from the remaining period of incarceration due to gain-time, that remaining period of the sentence is *extinguished.*" *Huering,* 559 So. 2d at 208. [Emphasis Added]

This Court also noted in *Green* that revocation of probation was not one of the statutory circumstances that authorized the forfeiture of gain-time pursuant to Section 944.28, *Florida Statutes* (1987). This deficiency in the law was later addressed by the Florida Legislature in 1989 in Section 944.278, *Florida Statute* (1989), effective October 1, 1989, which added the revocation of a defendent's probation to the various statutory circumstances that allowed there be a forfeiture of gain-time. See

Section 944.278, *Florida Statutes* (1989). See *Tripp v. State*, 622 So. 2d 941 (Fla. 1993). As this Court recently made clear in *Dowdy v. Singletary*, 23 Fla. L. Weekly S19 (Fla. Jan. 8, 1998), " the decisions in *Green* and *Huering* were concerned only with inmates specifically meeting the criteria set forth in *Green* (violation of probation, offense date before October 1, 1989)." *Id.* at S20. Therefore, because Respondent's offense was committed **prior** to the effective date of Section 944.278(Oct. 1, 1989) he should be granted **both** gain-time credit on the authority of *Green* and the provisional credits or administrative gain time previously awarded to him as credit against his instant sentence of 27 years in prison upon revocation of probation on the authority of *Lynce.*

In *Lynce* citing *Weaver v. Graham,* 450 U.S. 24, 101 S. Ct. 960 (1981), the United States Supreme Court found that "retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Fact Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitioners's effective sentence is altered once this determinant is changed." *Lynce,* 117 S.Ct. at 898 .

Likewise, in the instant case, the retroactive application of Section 944.278, *Florida Statute* (1993) to Respondent would unquestionably disadvantage him because it would result in the cancellation of previously **awarded** administrative and provisional credits to Respondent and will thereby prolong his actual imprisonment in the Florida Department of Corrections by approximately six (6) years. The Respondent- State of

Florida has not disputed that a lengthening of Respondent's actual period of incarceration will occur through the retroactive application of Section 944.278 to him who committed his prior to its effective date.

Because the application of this 1993 statute to Respondent, Anthony Lancaster who committed his offense on May 3, 1987, **prior** to its enactment has lengthened his prison sentence it results in a prohibited *ex post facto* law on the authority of the United States Supreme Court's recent decision in *Lynce* v. *Mathis, supra.* Therefore in light *Lynce v. Mathis, supra,* the retroactive cancellation of previously awarded administrative and provisional gain time credits to Respondent violates the *Ex Post Facto* clause.

POINT II

THE FAILURE TO APPLY PREVIOUSLY AWARDED ADMINISTRATIVE CREDIT TO RESPONDENT WHEN RESENTENCING AFTER REVOCATION OF THE PROBATION PORTION OF HIS SPLIT-SENTENCE DOES VIOLATE RESPONDENT'S EX POST FACTO CLAUSE.

Petitioner-State initially maintains that it was not until Respondent Lancaster "committed a new substantive offense and was given a new sentence upon revocation of his probation, that consistent with the law in place at the time, the sentencing court did not award credit for overcrowding credits, but directed only credit for time served and unforfeited gain-time." PBp.8. However for *ex post facto* purposes it is the law at the time the offense was committed that control. See *Weaver v. Graham*, 450 U.S. at 30, 101 S.Ct. At 965; *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446(1987). The law applicable at the time of a subsequent revocation of probation would be irrelevant.

Petitioner also argues that the decision in *Lynce* "does not compel Florida courts to convert time not served as a result as a result of overcrowding into actual time served when a new sentence is imposed upon revocation of probation. There is no forfeiture which occurs as a result, because Lancaster has essentially 'used up' the credits he was awarded when he was released from custody as a result of overcrowding." PBp.11. By making this argument Petitioner overlooks the fact the Respondent was already awarded these credits and said credits could not be forfeited for a violation of probation because Respondent committed his offense **prior** to the enactment of Section

944.28(1) which authorized the forfeiture of all gain time earned for a violation of probation.

And finally, Petitioner citing *U.S. v. Reece,* 71 F.3d 582 (6th Cir. 1995) argues that the Sixth Circuit Court of Appeals has "recognized the critical distinction between laws which change the penalty imposed for the original offense as opposed to laws which change the penalties for new behavior which results in the revocation of post-release supervision" PBp.12. However, Petitioner concedes that this argument as been rejected by the Ninth Circuit in *U.S. v. Paskow,* 11 F. 3d 873(9th Cir. 1993), the Eight Circuit in *U.S. v. St. Johns,* 92 F.3d 854(8th Cir.1996), the Second Circuit in *U.S. v. Meeks,* 25 F. 3d 1117(2d Cir. 1994) and the Seventh Circuit in *U.S. v. Beals,* 87 F. 3d 854 (7th Cir. 1996).

In any event, this issue has already been decided in the seminal case of *Greenfield v. Scafati,* 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), *aff'd mem.*, 390 U.S. 713, 88 S. Ct. 1409 (1968).[2] In *Greenfield*, the defendant was sentenced to 5-7 years in prison for his original crime. At the time of sentencing, Massachusetts law allowed for the accumulation of "good-conduct" credits while in prison, by which a defendant was able to advance his prison release date. While Greenfield was serving

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[2] Although the United States Supreme Court affirmed *Greenfield* in a memorandum opinion, 390 U.S. 1409, 88 S. Ct. 1409 (1968), its decision is controlling authority. In fact, the United States Supreme Court has cited its memorandum opinion with approval, *Weaver v. Graham,* 450 U.S. at 34, 101 S. Ct. at 966, and has described it as one of "the Court's precedents," 450 U.S. at 37, 101 S. Ct. at 969 (Blackmum, J., concurring).

his sentence, Massachusetts amended the relevant statute to provide for the forfeiture of good-conduct credits for parole violations. Greenfield was eventually paroled, violated that parole, and forfeited the good-conduct credits he had accumulated. The court concluded that by changing the consequences of a parole violation, Massachusetts had increased the punishment of the defendant's original sentence and thus violated the *Ex Post Facto* Clause of the Constitution. *Greenfield,* 277 F. Supp. at 646. The Supreme Court affirmed the decision without issuing an opinion. *Greenfield,* 390 U.S. 713, 20 L. Ed. 2d 250, 88 S. Ct. 1409. Several courts have subsequently followed *Greenfield* and held that statutes forfeiting good time credits for parole violations cannot be applied to those defendants whose underlying offenses took place before the statutes' enactment. See, e.g.,*Williams v. Lee*, 33 F.3d 1010 (8th Cir. 1994), *certiorari denied*, 115 S. Ct. 1393(1995); *Fender v. Thompson,* 883 F.2d 303 (4th Cir. 1989); *Beebe v. Phelps*, 650 F.2d 774, 775-776 (5th Cir. Unit A July 1981) (per curiam); *Shepard v. Taylor*, 556 F.2d 648 (2d Cir. 1977). Therefore, Petitioners arguments advanced in opposition to Respondent's position that he is entitled to the application of the previously awarded administrative/provisional credits against his present sentence should be rejected by this Honorable Court.

CONCLUSION

Wherefore, based on the arguments contained herein, Respondent requests this Honorable Court to award Respondent the full seventeen(17) years in prison as credit for time served against the twenty seven(27) year sentence imposed upon Respondent for violating his probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by mail this 4th day of February, 1998.

Attorney for Anthony Lancaster