ORIGINAL

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

Petitioner,

vs. Case No. 87,172

SHARON HOUSE and SBJM, INC., d/b/a QUINCY PAWN AND GUN SHOP,

Respondents.
_____/

ANSWER BRIEF OF
RESPONDENT SBJM, INC.

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PRELIMINARY STATEMENT

Petitioner herein, The Florida Department of Law Enforcement, is a defendant in the lower court. Petitioner will be referred to as "FDLE".

Respondent SBJM, Inc. is also a defendant in the lower court. SBJM, Inc. will be referred to as "SBJM".

Respondents Sharon House, individually, and Gregory House, Jr., Sharica L. House and Lakemia House, are plaintiffs in the lower court. All shall be collectively referred to as "House".

Reference to the record on appeal shall be by "R" followed by the appropriated page citation.

Reference to items of special significance and attached in Respondent SBJM's Appendix, shall be referred to as "A" followed by the appropriate page citation.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner FDLE's Statement of the Case and Statement of the Facts are reasonably accurate but leave out all reference to the role played in this matter by Respondent SBJM. Respectfully, SBJM would add the following short addition to the Statement of the Case and Statement of the Facts:

Respondent House's Complaint (A 1-8) alleged that Respondent SBJM sold a firearm to Gregory House, a convicted felon. It was also alleged that SBJM[1] sold the firearm to Gregory House after SBJM had been advised by FDLE that it was appropriate to do so (A 4-5). Several months after the sale, Gregory House allegedly utilized this firearm to shoot his wife, Respondent Sharon House (A 4). It was also alleged that Respondent SBJM subscribed to the procedure set out in Section 790.065 et seq. whereby merchants proposing to sell firearms are required to so inform Respondent FDLE about the particulars of the sale and then await either a "confirmation" to sell or a "non-confirmation" whereby the firearm cannot lawfully be transferred to the prospective purchaser (A 3, A 9-11).

It was alleged as to Respondent FDLE, that FDLE negligently informed SBJM that Gregory House was eligible to purchase the firearm and that FDLE failed to take steps to recover the firearm (A 5). SBJM was sued because SBJM allegedly knew or should have

[1]SBJM, Inc. does business under the trade name of Quincy Pawn and Gun Shop, and is located in Gadsden County, Florida.

known that House was a convicted felon and was legally prohibited from possessing that firearm[2].

[2]If SBJM followed the statutory procedure set out in Section 790.065 as alleged by House, it would appear to be immune from suit. See §790.065(11), Florida Statutes (A 11).

SUMMARY OF ARGUMENT

POINT I: The rationale expressed by this court in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) does not relate to interlocutory review of orders denying motions to dismiss based upon sovereign immunity. Sovereign immunity is not an absolute immunity and the State of Florida has consented to suit in its own courts pursuant to Section 768.28, Florida Statutes. Interlocutory review of orders denying motions to dismiss based upon sovereign immunity under the present circumstances does not pass muster under the "collateral order doctrine" expressed by Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Sovereign immunity in Florida is immunity from liability or the payment of damages. Sovereign immunity in Florida is not immunity from suit.

POINT II: There is no overriding public policy requiring modification of the "Final Judgment Rule", to allow for interlocutory review of orders denying motions to dismiss based upon sovereign immunity. Such a change in procedure would not be based upon sound legal reasoning and is an attempt to shift expense off of the executive branch of government and onto the judiciary. If interlocutory review is allowed under the present circumstances, then there is nothing to recommend against similar review of dozens of other similar immunities from liability enacted throughout the Florida Statutes.

POINT III: Given the present factual development of this lawsuit, it is not possible to conclude, at this juncture, that FDLE is immune from suit. This sovereign immunity issue is fact sensitive and cannot be resolved as a matter of law at this time.

ARGUMENT

POINT I

> Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), and the rationale expressed therein does not permit or even relate to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity. The First District did not err in determining that it lacked jurisdiction to review an order denying a motion to dismiss based on the defense of sovereign immunity.[3]

This matter was originally before the First District Court on Respondent FDLE's Notice of Appeal (A 12-14). This was a notice of appeal concerning an interlocutory matter. It is apparent that if the trial court erred in denying Petitioner FDLE's motion to dismiss based upon the defense of sovereign immunity, then that is a matter which could be reached on plenary appeal.

Insofar as reaching the issue by "interlocutory appeal", the denial of a motion to dismiss is not one of the enumerated nonfinal orders set forth in Rule 9.130, Florida Rules of

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[3]The undersigned counsel for SBJM is also counsel of record for Respondents Leon County School Board and Richard Merrick, in Department of Education ("DOE"), Petitioner, v. Sally Roe, et al, Case No. 86,061, presently pending before this court. Point I in the present case and Point I in Department of Education v. Sally Roe, et al are identical. The office of the Attorney General represents petitioners in both cases, as well. With regard to Point I, the briefs of FDLE and DOE are nearly verbatim with the exception of a few minor cosmetic changes. As SBJM in this case, and the Leon County School Board and Merrick in Case No. 86,061 occupy substantially identical positions as well, Respondent SBJM's argument in Point I, is nearly identical with that of the Leon County School Board and Merrick in Case No. 86,061.

Appellate Procedure, and which qualify for interlocutory review. In this context, an order denying a motion to dismiss based upon the defense of sovereign immunity has not yet been found to be a proper subject of interlocutory appeal in this state. Page v. Ezell, 452 So. 2d 582 (Fla. 3d DCA 1984); State Road Department v. Brill, 171 So. 2d 229 (Fla. 1st DCA 1964). Accord, Florida Dept. of Highway Safety v. Desmond, 568 So. 2d 1354 (Fla. 2d DCA 1990).[4]

Despite and contrary to the above historical background, FDLE asserts that the rationale set forth by this court in Tucker v. Resha is a sufficient basis for appellate courts to review trial court orders denying motions to dismiss based upon the defense of sovereign immunity. FDLE misconstrues the thrust of Tucker v. Resha. Moreover, review of the philosophical underpinnings of Tucker v. Resha, and the federal cases which Tucker relies upon, most notably Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1986) and (implicitly) Cohen v. Beneficial Industrial Loan Cor., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1258 (1949) fails to lend any support to FDLE's argument. In fact, analysis of these cases require the conclusion that FDLE's arguments are entirely misplaced.

The certified question reached and answered by this court in Tucker v. Resha was the following:

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[4]But see Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995).

> "Is a public official asserting qualified immunity as a defense to a federal civil rights claim entitled in the Florida Courts to the same standard of review of denial of her motion for summary judgment as is available in federal court?"

648 So. 2d at 1187. That question was answered in the affirmative.

In the present case, FDLE is not seeking interlocutory review of a denial of a motion for summary judgment. FDLE is not seeking interlocutory review of a denial of a motion for summary judgment based upon the defense of qualified immunity, either. FDLE does assert that under the "collateral order doctrine" of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, it should have the right to obtain interlocutory appeal of an order denying a motion to dismiss based upon the defense of sovereign immunity. According to Cohen, the collateral order doctrine allows appeals from "a small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

The specific issue raised by FDLE in this matter has been reached by other courts. The consensus is that the nature of orders denying motions to dismiss on the basis of sovereign immunity are so far theoretically removed from orders denying

summary judgment on the basis of qualified immunity (or any other "absolute immunity"), that interlocutory review of the former is wholly inappropriate.

In Pullman Construction Industries v. United States of America, 23 F.3d 1166 (7th Cir. 1994), the United States raised the identical issue, seeking interlocutory review of a lower court order denying a motion to dismiss based upon the defense of sovereign immunity. The Seventh Circuit recognized that certain "immunities" carry with them the right to interlocutory appeal. These included, for example, the right of a state to not be sued in the courts of another sovereign pursuant to the 11th Amendment or the right of a foreign nation or foreign national to not be sued in courts of the United States under the Foreign Sovereign Immunities Act (FSIA), 28 USC §§1602-05. The notion that sovereign immunity was a right to be free from suit (as asserted by FDLE) was soundly rejected, especially where the sovereign had previously consented to suit in its own court.[5] Instead, sovereign immunity is to be regarded as a right to be free from payment of damages based upon a liability:[6]

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[5]See Section 768.28, Florida Statutes. The State of Florida has consented to be sued in its own courts, under the circumstances set out in that statute.

[6]Respondent is aware that extensive citation from opinions is often cumbersome. However, the Pullman court performed an indepth analysis of the issue presently pending before this court and Respondent cannot analyze the issue with any more insight or clarity than the 7th Circuit. The opinion is quoted only sparingly and the opinion should be read in its entirety.

The United States candidly admits that its appeal cannot be sustained under 28 U.S.C. §158(d) as one from a "final decision." Instead, it argues, an opinion denying a motion asserting the sovereign immunity of the United States may be appealed as a collateral order under a series of cases permitting interlocutory appeal when the defendant asserts a "right not to be sued." Descriptions of the United States' sovereign immunity often refer to freedom from suit as well as freedom from an obligation to pay damages. E.g., FDIC v. Meyer, --- U.S. ---, ---- - ---, 114 S.Ct. 996, 1000-02, 127 L.Ed.2d 308 (1994); Minnesota v. United States, 305 U.S. 382, 387, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). We know from Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., --- U.S. ---, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), that states may take interlocutory appeals to vindicate their immunity from suit under the eleventh amendment, and from Segni v. Commercial Office of Spain, 816 F.2d 344, 346-47 (7th Cir. 1987), that foreign nations likewise may obtain interlocutory review of decisions denying their claims of immunity from suit. See also Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 576 n. 2 (7th Cir. 1989); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C.Cir. 1990). The United States insists that it deserves no lesser protection.

If this is all so clear, one wonders why, in the entire existence of the United States, the federal government has never before taken an interlocutory appeal to assert sovereign immunity. Our case appears to be the first. Before today the United States has occasionally sought and received permission to take an interlocutory appeal on this question under 28 U.S.C. §1292(b)(2), a puzzling step if the federal government could appeal of right. E.g., South Delta Water Agency v. Department of the Interior, 767 F.2d 531, 535 (9th Cir. 1985). Perhaps the explanation lies in the newfangled nature of the doctrine permitting appeals based on

> claims of rights to be free from litigation, a doctrine that acquires its first purchase in Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Metcalf & Eddy extends Abney to a governmental body's right to avoid litigation in another sovereign's courts -- an important qualifier, because the United States is no stranger to litigation in its own courts. Congress has consented to litigation in federal courts seeking equitable relief from the United States, see 5 U.S.C. §702; Bowen v. Massachusetts, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988); and 11 U.S.C. §106 gives consent in limited circumstances to litigation seeking money. Indeed, the United States Code is riddled with statutes authorizing relief against the United States and its agencies -- the Federal Tort Claims Act, 28 U.S.C. §§2671-80; the Tucker Act, 28 U.S.C. §§1346(a), 1491(a); the whole jurisdiction of the Court of Federal Claims, 28 U.S.C. §§1491-1509; dozens if not hundreds of sue-and-be-sued clauses; the list can be extended without much effort.
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> * * * *
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> Federal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it, in line with Art. I, §9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law".[7] Instead of exposing the United States to suit under the general federal-question jurisdiction of 28 U.S.C. §1331, Congress has elected to be more specific. An elaborate system permitting some monetary claims and limiting or forbidding others does not imply that the United States

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[7]Article VII, Section 1(c), Constitution of the State of Florida, is literally identical:

> "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

retains a general "right not to be sued" in its own courts, for civil litigation in general or taxation in particular.

* * * *

Does the word "immunity" in "sovereign immunity" itself support interlocutory appeal? Surely not, as the Court held in Van Cauwenberghe v. Biard, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988). Defendant in that case insisted that a treaty immunized him from service of process, and when the district court rejected that argument he immediately appealed. The Court held that the collateral order doctrine did not authorize such an appeal, distinguishing among kinds of immunities. Sometimes the word connotes a right not to be tried, which must be vindicated promptly. Sometimes the word means only a right to prevail at trial -- a right to win, indistinguishable from all the other reasons why a party may not have to pay damages. Confusing the two would undermine the final decision requirement.

Since Abney it has been necessary to distinguish between a right not to be sued and a right the vindication of which ends the litigation. United States v. Hollywood Motor Car Co., 458 U.S. 263, 269, 102 S.Ct. 3081, 3084, 73 L.Ed.2d 754 (1982); United States v. MacDonald, 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n. 7, 56 L.Ed.2d 18 (1978). Only an "explicit statutory or constitutional guarantee that trial will not occur" creates the sort of right that supports immediate review. Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989). See also, e.g., Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989). The eleventh amendment and the FSIA create genuine rights not to be sued in federal court. "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive power of judicial tribunals at the instance of private parties." In re Ayers, 123 U.S. 443, 505, 8 S.Ct. 164, 182, 31 L.Ed. 216 (1887).

> So too with the FSIA, which is designed to promote harmonious international relations by respecting governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities. See Saudi Arabia v. Nelson, --- U.S. ---, 113 S.Ct. (emphasis added)

Pullman is directly analogous to the present case. The State of Florida has consented to a limited waiver of sovereign immunity by enacting §768.28, Fla.Stat. Surely the state is no stranger to litigation in its own courts. There is nothing in the clear and unambiguous language of §768.28, Fla.Stat., which remotely suggests that sovereign immunity is a right to be free from suit[8] as opposed to a right to prevail at trial. Instead, the sovereign immunity law specifies that such immunity is a right to be free from liability as opposed to a freedom from suit. Section 768.28 states the following:

> "(1) In accordance with s. 13, Art X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to be the extent specified in this act." (emphasis added).

The present issue was again raised and squarely faced in State of Alaska v. United States of America, 64 F.3d 1352 (9th Cir. 1995). In relying upon Pullman and extending its analysis further, the 9th Circuit held that sovereign immunity is not

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[8]FDLE asserts that sovereign immunity claims under Florida law "unquestionably are premised upon a right not to stand trial." (Petitioner's Brief, p. 15) FDLE cannot follow this assertion with a single reference to even one Florida appellate decision on point.

freedom from suit, and the fact that an order denying federal sovereign immunity imposed a hardship on the federal government of having to prepare for trial did not justify immediate appeal of the order under the collateral order doctrine.

Instead, the Ninth Circuit held that:[9]

> We hold that, despite the label "immunity," federal sovereign immunity is not best characterized as a "right not to stand trial altogether." The only other case to consider the issue, Pullman Construction, concluded that federal sovereign immunity was more accurately considered a right to prevail at trial, i.e., a defense to payment of damages. 23 F.3d at 1169. Like immunity from service of process (leading to lack of personal jurisdiction), federal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial. See Van Cauwenberghe v. Biard, 486 U.S. 517, 524, 108 S.Ct. 1945, 1950, 100 L.Ed.2d 517 (1988).
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> * * * *
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> Federal sovereign immunity does not implicate the sovereignty concerns that motivate immediate appeal of orders denying Eleventh Amendment immunity or foreign sovereign immunity. Likewise, denial of federal sovereign immunity need not be reviewed with the same urgency as the denial of official immunity or double jeopardy claims. The interest served by federal sovereign immunity (the United States' freedom from paying damages without Congressional consent) may be served equally well if review follows a final judgment on the merits. Because there is no sufficiently important interest in immediate review, the third prong of the Cohen test is not satisfied, and the order denying federal

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[9]Please see footnote 6 which applies with equal force to the opinion rendered in State of Alaska by the 9th Circuit.

sovereign immunity is not an immediately appealable collateral order. This result is confirmed when one considers the relative inefficiency of applying the collateral order doctrine to federal sovereign immunity cases.

* * * *

Because federal sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed. The United States argues that this is not the case and that its claim would, in fact, be "effectively unreviewable" at a later point: If this case goes to trial, the United States will have to decide whether to claim or disclaim the lands in question. According to the United States, doing so will moot the argument that the courts lack jurisdiction because the United States has never claimed or disclaimed the lands. The United States claims that the essence of its sovereign immunity is freedom from having to appear in court and take a position, and hence the benefits of immunity will be irretrievably lost if immediate appeal is denied.

This argument fails to two reasons. First, the argument is too particularized to affect our inquiry. "[T]he issue of appealability under §1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." Digital Equipment, --- U.S. at ---, 114 S.Ct. at 1996 (internal quotation omitted). The issue, therefore, is whether denial of federal sovereign immunity in general is immediately appealable, not whether immediate appeal is appropriate when construing the waiver embodied in the Quiet Title Act.

Second, "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third Cohen requirement." Id. at ---, 114 S.Ct. at 1998. The interest that would be lost must also be

"important," which in this context means "weightier than the societal interests advanced by the ordinary operation of final judgment principles." Id. at ---, ---, 114 S.Ct. at 2001, 2002. No such weighty interest is present in orders denying sovereign immunity.

The only foreseeable hardship inflicted on the United States by postponing review of sovereign immunity issues is the need to prepare for trials. That hardship alone is generally not sufficient to justify immediate appeal, as the Supreme Court has pointed out:

> "Admittedly, there is value...in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Van Cauwenberghe, 486 U.S. at 524, 108 S.Ct. at 1951 (quoting United States v. MacDonald, 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n. 7, 56 L.Ed.2d 18 (1978)).

* * * *

The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States that is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or res judicata, both of which have been held to be effectively reviewable following trial. See United States v. Weiss, 7 F.3d 1088 (2d Cir. 1993) (statute of limitations); In re Corrugated Container Antitrust Litigation, 694 F.2d 1041 (5th Cir. 1983) (res judicata).

* * * *

For the reasons above, we hold that the district court's order denying the United States' motion to dismiss based on sovereign

> immunity is not immediately appealable under the collateral order doctrine. (emphasis added)

There is no legal or logical reason to agree with FDLE's conclusion that any "absolute immunity" including qualified immunity of an individual can somehow be equated with the sovereign immunity of the state. That view has never been adopted by any court and, in fact, that the two are separate and apart from each other is a view apparently adopted by this court. Office of State Attorney v. Parrotino, 628 So. 2d 1097 (Fla. 1993).[10]. Qualified immunity of public officials involves immunity from suit rather than a mere defense to liability. Tucker v. Resha, citing Mitchell v. Forsyth, 648 So. 2d 1187. Sovereign immunity is a defense to liability rather than a right to be free from suit. State of Alaska; Pullman Construction Industries. In qualified immunity matters, officials are sued in their individual capacities, this is not so in tort actions against the state. FDLE's assertion that social and personal costs in either instance are no different, is presumptive and speculative at best, and irrelevant at worst.

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[10]"It may be true that in its earliest manifestation judicial immunity emanated from the English sovereign's absolute immunity, because early English judges sat at the pleasure and as legal appendages of the Crown. However, in time even England began recognizing that judges held an office that was to an increasing degree distinct from and beyond the Crown's reach. Floyd. Continuing this same trend, judicial immunity and sovereign immunity completely ceased to be coextensive as conceived in most American states, and in Florida in particular." 628 So. 2d at 1099 (emphasis added).

FDLE asserts that "on the basis of Cohen collateral order doctrine requirements, federal courts permit interlocutory review of orders determining a wide variety of immunity claims" (Petitioner's Brief, p. 12), and "federal jurisprudence contains innumerable cases in which interlocutory review has been permitted of orders determining immunity claims on motions to dismiss" (Petitioner's Brief, p. 20). This may be so but it is also true that none of the cases cited by FDLE involve interlocutory appeal of claims of sovereign immunity. Instead, those cases cited above (Pullman, State of Alaska) hold that interlocutory review of sovereign immunity claims under the present circumstances is contrary to law and that no such interlocutory review is allowable. There are no decisions to the contrary on this issue.

FDLE asserts that "[o]ther jurisdictions permit interlocutory review of sovereign immunity claims" (Petitioner's Brief, p. 19). This is a misleading statement. Several of the cases cited by FDLE for this proposition are actually interlocutory appeals of orders denying motions for summary judgment on the defense of qualified immunity (Blevins v. Denny, 443 S.E.2d 354 (North Carolina App 1994); City of Mission v. Ramirez, 865 S.W.2d 579 (Tex. App. 1993).

Further, Griesel v. Hamlin, 963 F.2d 338 (11th Cir. 1992), also cited by FDLE, certainly does not stand for that proposition either. In Griesel it was apparent that the State of Georgia did

not have any applicable waiver of sovereign immunity in place at that time. See Gilbert v. Richardson, 452 S.E.2d 476 (Ga. 1994). When a state has not consented to suit and has no applicable waiver of sovereign immunity, it is in the same position as a state which has an 11th Amendment right to not stand trial in the federal court, or a foreign government which may not stand trial in federal court under the FSIA. Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) and Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994), both note that there is an immediate right of interlocutory appeal on sovereign immunity claims for Indian tribes under the Indian Gaming Regulatory Act ("IGRA") because the Indian tribe has not consented to suit and Congress has not consented to suit for the tribe, either. In the absence of any waiver of sovereign immunity, that sovereign immunity is a right to be free from trial. In the presence of an applicable waiver of sovereign immunity, that sovereign immunity is not construed as freedom from suit but rather freedom from liability. The distinction is significant in the present case.

FDLE also asserts that Colorado and Mississippi permit interlocutory review of sovereign immunity claims (Petitioner's Brief, p. 19). However, Colorado has done so by legislative enactment and not by concluding that the "collateral order doctrine" of Cohen applies to claims of sovereign immunity. See Richland Dev. Co. v. East Cherry Creek Valley Water and San.

Dist., 899 P.2d 371 (Colorado App. 1992). Colorado courts also recognize, significantly, that if the issue of sovereign immunity depends upon a factual dispute (which could be applicable in the present case), then the trial court cannot resolve that issue on a pretrial basis, Richland Dev. Co. Presumably there would then be no right of interlocutory appeal on the existence of the sovereign immunity defense under that circumstance.

FDLE's reference to Mississippi allowing interlocutory review of sovereign immunity claims is also misleading. There is no such rule of court or statute. Instead, Rule 5, Mississippi Rules of Appellate Procedure, permits interlocutory review on questions of law which may:

> (1) Materially advance the termination of litigation and avoid exceptional expense to the parties; or,
>
> (2) Protect a party from substantial and irreparable injury; or,
>
> (3) Resolve an issue of general importance in the administration of justice.

It was under one of these appellate provisions that interlocutory review was granted in Lee County Board of Supervisors v. Fortune, 611 So. 2d 927 (Miss. 1992), and not because Mississippi equated sovereign immunity with immunity from suit or accepted review under the "collateral order doctrine" of Cohen.

Curiously while FDLE argues vigorously that this matter should fall under the doctrinal law espoused by the federal court in Mitchell v. Forsyth and Cohen v. Beneficial Industrial Loan

Co., the only federal cases construing this specific question both conclude that FDLE is not entitled to interlocutory appeal of an order denying a motion to dismiss based upon the defense of sovereign immunity.

Insofar as this issue is concerned, the application of sound legal reasoning requires rejection of the position taken by FDLE. Sovereign immunity cannot be equated under the present circumstances with any other absolute immunity to not stand trial -- 11th Amendment immunity, immunity under the FSIA or IGRA, prosecutorial immunity, judicial immunity or any other form of "absolute immunity" including qualified immunity as spoken to in Tucker v. Resha. This is true of many other forms of immunity under Florida law, as well, as noted below.

Point II

No public policy justifies modification of the Final Judgment Rule to allow for interlocutory appeal of orders denying motions to dismiss based upon sovereign immunity.

The application of sound legal reasoning as set forth by Pullman and State of Alaska suggests that granting interlocutory review of orders denying motions to dismiss based upon sovereign immunity is not appropriate, as noted in Point I above. If sovereign immunity is separate and distinct from those "absolute" immunities such as judicial immunity, prosecutorial immunity or even qualified immunity, a view apparently adopted by this court in Parrotino, this confirms that allowing for interlocutory review of such orders lacks justification under the law.

FDLE has argued that two (2) jurisdictions actually allow for such interlocutory review, Colorado and Mississippi. It has also been pointed out, above, that such review in Mississippi is really premised upon particular rules of appellate procedure which are not directly related to interlocutory review of sovereign immunity denials, per se. Additional research indicates that Pennsylvania has a similar appellate provision, which also allows for interlocutory appeals by permission on controlling questions of law (and not relating to interlocutory review of orders denying motions to dismiss based upon sovereign immunity or any other specific defense). See 42 Pa. C.S. §702(b) and Pennsylvania Turnpike Commission v. Jellig, 563 A.2d 202 (Comm.

Ct. Pa. 1989). These types of court rules appear to be in a distinct minority. Respondent SBJM would respectfully suggest that application of such rules lead to review of various questions on an ad-hoc basis, something not preferable and better avoided.

A related procedure exists in Texas but is unrelated to a motion to dismiss. Instead, under Tex.Civ.Prac. & Rem. Code §51.014, a person may appeal from an interlocutory order that denies a motion for summary judgment based upon an assertion of "immunity" by an individual who is an officer or employee of the state or a political subdivision of the state. However, §51.014(5) makes it clear that the "immunity" must be an assertion of "qualified immunity". See also City of Houston v. Kilburn, 849 S.W.2d 810 (Texas 1993) which indicates, consistent with Tucker v. Resha, that qualified immunity is an affirmative defense available for governmental employees sued in their individual capacities. 849 S.W.2d 811, fn. 4.

The Colorado statute (§24-10-108) indicates that sovereign immunity is to be equated with subject matter jurisdiction, a view not yet universally adopted in Florida. Compare Florida Med. Malpractice v. Indem. Ins., 652 So. 2d 1148 (Fla. 4th DCA 1995) with Sebring Utilities Commission v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). Regardless, nonfinal orders which concern the presence or absence of subject matter jurisdiction are not within

the list of those enumerated nonfinal orders subject to interlocutory review under Rule 9.130, Fla.R.App.P.

FDLE argues that there is policy justification for interlocutory review of orders denying motions to dismiss based upon sovereign immunity, and that that policy is one related to the expense of litigation imposed upon the state and its subdivisions. State of Alaska rejects expense as a basis sufficient to allow for interlocutory review of orders denying motions to dismiss based upon the sovereign immunity. 64 F.3d at 1356.

Regarding review by writ of certiorari, this court has likewise stated that the expense and other hardships of litigation is not a sufficient basis to grant certiorari review. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987). If that is so (and it is) then there is no reasonable justification for the position that expense and the other hardships of litigation on the State of Florida should allow it to obtain interlocutory review.

There clearly is expense involved to all public and private persons involved in meritorious as well as nonmeritorious litigation. Substantial expense is also incurred by the judiciary at the trial court and appellate levels.

FDLE goes so far as to argue that the right to interlocutory appeal in this context "rationally should have the effect of decreasing the work of both trial and appellate courts."

(Petitioner's Brief, p. 14) This is not only a cavalier statement, it is one not justified by any available data and it certainly does not appear to have any logical appeal, either.

In reality, what FDLE requests is more an attempt to shift expense from the executive branch of government to the judiciary. It is neither wise nor a savings of judicial resources to review orders denying motions to dismiss, including those based upon the grounds of sovereign immunity. Unquestionably, the State of Florida, its agencies and subdivisions are involved at all times in an enormous volume of tort litigation. As a matter of course, sovereign immunity is raised as an affirmative defense, and just as invariably the state (or whomever) moves for dismissal on the very same grounds. Review of orders denying motions to dismiss based upon sovereign immunity will simply flood all of the appellate districts at an early stage in litigation where the underlying facts have yet to be fully developed. The "final judgment rule" is specifically adhered to, to avoid just such an expenditure of judicial resources and to avoid the wasteful pitfalls of piecemeal litigation and piecemeal appellate review. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97 (Fla. 1974); Employers Overload of Dade County v. Robinson, 642 So. 2d 72 (Fla. 1st DCA 1994); BE&K, Inc. v. Seminole Kraft Corp., 583 So. 2d 361 (Fla. 1st DCA 1991).

In reviewing the specific question at issue, the Ninth Circuit in State of Alaska observed:

> Appellate courts might routinely be asked to review the same basic claim at two different times with reference to two different sets of facts: once on immediate appeal, assuming the facts on the face of the complaint, and (if dismissal is unwarranted on those facts) again after trial on appeal of the denial of a motion for judgment as a matter of law.

State of Alaska, at 1357-58.

In Johnson v. Jones, -- U.S. --, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), the United States Supreme Court stated:

> . . . [R]ules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job -- supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

In her dissenting opinion in Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995), Judge Sharpe opined that:

> If anything, the Court in Tyson restricted its opinion in Mitchell and stepped back from its broad justification for appealability in that case, which was based on "the need to protect officials against the burdens of further pre-trial proceedings and trial" ... . It held in Tyson that only cases posing "neat abstract issues of law" should be allowed to be appealed prior to a final judgment. Appeal should not be allowed if the issue involves controversy about facts, sufficiency of factual evidence, and issues which are inseparable from those that underlay the basic case. Id. at 432.

This court has long recognized the danger of squandering judicial resources inherent in an overly permissive rule allowing interlocutory appeals. As the court stated in Travelers Insurance Company v. Bruns, 443 So. 2d 959, 961 (Fla. 1984):

> The thrust of Rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delays final judgment.

If interlocutory review is allowed for sovereign immunity claims, not an absolute immunity, then there is little to recommend against similar review of other immunity claims under Florida law, which are also not regarded as absolute. A short list might include the following:

1. Interspousal immunity.

2. Interfamily immunity.

3. Merchants/Retailers immunity under §812.015, Fla.Stat.

4. Good Samaritan immunity under §768.13, Fla.Stat.

5. Immunity granted to retailers of firearms under §790.065(11), Fla.Stat.

6. Immunity granted under the "condominium" statute, §718.116(8)(a) and (b), Fla.Stat.

7. Limited tort immunity under §627.737, Fla.Stat.

8. Insurance company reporting immunity under §626.989(6), Fla. Stat.

9. Immunity granted to review committee members under §766.101, Fla.Stat.

This list is hardly exhaustive. Review of the term "immunity" in the General Index to the Florida Statutes (1993) lists no less than seven (7) full columns of specific statutory entries relative to immunities provided for by statute under Florida law. There are literally hundreds of different immunities provided for in the Florida Statutes relative to civil liability. This list is incorporated in Respondent's Appendix (A 15-19).

This court has the absolute, unfettered right to do what FDLE requests, by court rule. However, there is no overriding policy justifying the present request for interlocutory review. There is no reason to vary from the present "final judgment rule."

Point III

> Given the present status of this case including the lack of factual development, it cannot be concluded as a matter of law, at this juncture, whether FDLE is immune from suit.

In its Issue II, FDLE vigorously asserts that it is sovereignly immune from suit. This cannot be so simply gleaned from the present record, which for all intents and purposes, consists of a complaint and FDLE's Motion to Dismiss and no factual development whatsoever. Indeed, seeking dismissal on the basis of a sovereign immunity defense, and then compounding the matter further by seeking interlocutory review of a matter wherein there has been no factual development, was addressed in the well reasoned dissent of Judge Sharp in Department of Transportation v. Wallis, 659 So. 2d 429, 431 (Fla. 5th DCA 1995):

> Finally, it is not clear at this stage in the proceeding (Motion to Dismiss addressed to the complaint) whether the issue is purely and simply a question of law. Indeed, most of the kinds of cases involve the resolution of factual issues. See Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983).

(emphasis in original).

In the present case the facts alleged in the Complaint of Respondent House (A 1-8), do not necessarily relate to FDLE's decision to respond to SBJM's inquiry under Section 790.065, Fla.Stat., as to whether this firearm could lawfully be sold and transferred to Gregory House. Rather, the Complaint can certainly

be read to suggest that once FDLE made the decision to investigate (such a decision is obviously mandatory and operational), FDLE was negligent when confirmed that the firearm could be sold to a convicted felon.

It has been previously recognized that an agency's decision to act is "a fundamental policy determination such that the agency is shielded from tort liability by the doctrine of sovereign immunity." Parrotino v. City of Jacksonville, 612 So. 2d 586 (Fla. 1st DCA 1992), reversed on other grounds, Office of the State Attorney v. Parrotino, 628 So. 2d 1097 (Fla. 1993). However, once the decision to act has been made, the activities of the agency become operational. Parrotino.

A similar analysis has been included in decisions of this court. As noted in Department of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258, 260 (Fla. 1988), "discretion in the Commercial Carrier sense refers to the policy making or planning level." (referring to Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979)). In Kaiser v. Kolb, 543 So. 2d 732, 737 (Fla. 1989), the court defined "discretionary" in the context of sovereign immunity to mean "that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning." The court also stated that "[a]n 'operational' function . . . is one not necessary or inherent in

policy or planning, that merely reflects a secondary decision as to how those policy or plans will be implemented." Id.

The evaluation of the activities of government to determine whether they are planning level, discretionary activities or operational activities must proceed on a case by case basis. Yamuni at 259. FDLE cannot cite a single case which is on point with the facts alleged in Houses' Complaint, or which compels the conclusion that the activities alleged were or were not exclusively discretionary. The determination of whether sovereign immunity is applicable as a defense to a particular claim is complex and requires "minute examination of the alleged negligent actions of the governmental unit to determine if they are operational or planning level as each case comes to court." Yamuni, at 260. See also Seguine v. City of Miami, 627 So. 2d 14, 16 (Fla. 3d DCA 1993) ("Florida law on sovereign immunity is immensely complex, has lent itself to multifaceted formulations and rules over the years, and has generally been developed by the courts on a case-by-case basis depending on the particular fact pattern and policy concerns presented.")

FDLE cannot, based on nothing more than the allegations stated in Houses' Complaint, establish that it is shielded from liability under the doctrine of sovereign immunity because its activities were discretionary as a matter of law. Consequently, FDLE has not shown that, in this respect, the trial court's order violated "a clearly established principle of law resulting in a

miscarriage of justice." Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

Further, FDLE has also failed to show that, under a "clearly established principle of law," it had no duty to properly investigate the applicant for purchase of this firearm or to properly inform SBJM that it could not sell and transfer this firearm to Mr. House, when a proper investigation would have revealed that Gregory House was a convicted felon.

It is well established that a governmental agency is not liable in tort if "no duty of care existed," Kaisner, 543 So. 2d at 734. However, the allegations of the Complaint taken as true, are sufficient to establish the "minimal threshold legal requirement for opening the courthouse doors" with respect to the duty element of a negligence cause of action. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (footnote omitted). In McCain, the court cited Kaisner when it held that a duty exists when "the defendant's conduct foreseeably create[s] a broader 'zone of risk' that poses a general threat of harm to others." Id. This applies as well to the failure to act reasonably to protect others from harm. Id.

Indeed, §790.23, Fla.Stat., specifically prohibits convicted felons from possessing or controlling firearms[11], and Florida

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[11]Section 790.23(1), Florida Statutes, states:

> It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States

courts, among others, have specifically found that a viable cause of action exists where gun control statutes have been violated, and innocent persons have been harmed as a result of the statutory violation. E.g. KMart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. 3d DCA 1983); Decker v. Gibson Products Co. of Albany, Inc., 679 F.2d 212 (11th Cir. 1982); Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (2d Cir. 1979).

In the present matter, when a licensed firearm dealer seeks to complete a transaction, it must contact FDLE and obtain a "unique approval number" before the transaction can lawfully be consummated. FDLE is statutorily required to review criminal history records, to determine if the buyer is prohibited from obtaining the firearm, pursuant to state or federal law. Even if the purchase is prohibited, FDLE is required to provide the licensed firearm dealer a "nonapproval number" which negates the transaction. Section 790.065(2)(b), Fla.Stat. Firearms are considered dangerous instrumentalities in Florida. Skinner v. Ochiltree, 5 So. 2d 605 (Fla. 1941).

FDLE argues in pages 31-36 of its Brief that no private cause of action exists under §790.065, Fla.Stat. Its analysis is

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> which is designated as a felony or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

faulty and thus leads to an erroneous conclusion. In Murthy v. N. Singha Corp., 644 So. 2d 983 (Fla. 1994), it was held that legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one. 644 So. 2d at 985. FDLE gives lip service to this standard (Petitioner's Brief, p. 32-33), and then brushes it aside by citing pre-Murthy cases implementing the "class benefit" analysis in determining whether a statute provides for a private cause of action.

However, under a proper Murthy analysis, focusing on legislative intent, a sound argument can be advanced that a private cause of action exists for FDLE's violation of §790.065, Fla.Stat. The clear wording of §790.065(11), Fla.Stat., is the following:

> (11) Compliance with the provisions of this chapter shall be a complete defense to any claim or cause of action under the laws of any state for liability for damages arising from the importation or manufacture, or the subsequent sale or transfer to any person who has been convicted in any court of a crime punishable by imprisonable for a term exceeding 1 year, of any firearm which has been shipped or transported in interstate or foreign commerce. The Department of Law Enforcement, its agents and employees shall not be liable for any claim or cause of action under the laws of any state for liability for damages arising from its actions in lawful compliance with this section.

(emphasis added).

It is axiomatic that the intent of a statute is determined primarily from the language of the statute. The plain meaning of the statutory language is the first consideration. Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1992); St. Petersburg Bank and Trust Co. v. Hamm, 414 So. 2d 1071 (Fla. 1981); Thayer v. State, 335 So. 2d 815 (Fla. 1976).

In the present instance it is reasonably clear that the legislature intended that FDLE wold not be civilly liable for any damages "arising from its actions in lawful compliance with this section." In other words, that FDLE made an investigation and a proper determination under the unique responsibility it is granted under Chapter 790, and did not allow for a prospective purchaser to lawfully obtain a firearm, would appear to be acts, decisions and determinations free from liability. A prospective purchaser who could not obtain a firearm, for example, could not properly sue FDLE for defamation or slander when he/she is turned down on the sale and transfer. Or if the prospective purchaser could not lawfully obtain a firearm and was injured or damaged because he/she could not defend himself/herself, then FDLE would remain immune from civil suit.

However, the phrase "in lawful compliance" likely has some reason to be in this subsection. And it is likewise apparent that the alternative also exists. If FDLE's actions are not "in lawful compliance with this section" then FDLE does not have civil immunity and a private cause of action can ensue. If the

legislature had intended for FDLE to remain immune from suit for its operational acts under Chapter 790, then presumably the legislature would have so stated. Instead, the legislature chose to qualify the blanket grant of immunity to those actions "in lawful compliance with this section."

Whatever "lawful compliance" may mean, certainly being in the unique and sole position of either allowing or disallowing sale and transfer of a firearm by a licensed firearms dealer to a prospective purchaser and then in positively allowing for that sale and transfer to a convicted felon, in direct contravention of §790.23, Fla.Stat., is not an action "in lawful compliance" with Chap. 790. It is a fact that FDLE is required by statute to provide a licensed firearms dealer with a non-approval number under the circumstances set forth in Respondent Houses' Complaint.

Department HRS v. B.J.M., 656 So. 2d 906 (Fla. 1995) is right on point. In B.J.M., HRS was found to be immune from a negligence cause of action because placement of a juvenile with a particular residential treatment facility was a discretionary function of government. Germane to that case, §39.455, Fla.Stat., stated:

> **39.455. Immunity from liability**
>
> (2) The inability or failure of the social service agency or the employees or agents of the social service agency to provide the services agreed to under the performance agreement or permanent placement plan shall

> not render the state or the social service agency liable for damages unless such failure to provide services occurs in a manner exhibiting wanton or willful disregard of human rights, safety, or property.

Notably, this court pointed out that the above-cited language did not absolutely bar a civil action for damages:

> Rather, these statutory provisions implicitly bar any action against HRS and its employees except where the agency or its employees act willfully or wantonly.

656 So. 2d at 917 (emphasis in original). This was so despite the obvious lack of any specific enabling legislation vis-a-vis the right to bring a civil action against the agency for violation of this statutory provision.

FDLE also asserts that its actions are discretionary governmental functions for which no liability can attach. FDLE applies the categories set out by this court in Trianon Park, and argues that its actions in this case were licensing or law enforcement functions.

Yet, Categories I and II of the Trianon analysis relating to licensing and law enforcement functions are directed only towards discretionary activities in those areas. 468 So. 2d at 919. There is not the most remote possibility in this case that FDLE has discretion in determining whether a convicted felon may purchase and possess a firearm. Such operational decisions are not immune from suit.

Moreover, §790.065(11), Fla.Stat., appears to set out a statutory duty of care. That duty of care, applicable to FDLE and

possibly breached in this case, is that FDLE act, at all times, "in lawful compliance" with §790.065, Fla.Stat. Not only did FDLE act in something other than "lawful compliance" when it gave its approval for sale and "unique confirmation number", it also totally breached its statutory obligations under §790.065(7):

> 7. The department shall continue its attempts to obtain the disposition information and may retain a record of all approval numbers granted without sufficient disposition information. If the department later obtains disposition information which indicates:
> a. That the potential buyer is not prohibited from owning a firearm, it shall treat the record of the transaction in accordance with this section; or
> b. That the potential buyer is prohibited from owning a firearm, it shall immediately revoke the conditional approval number and notify local law enforcement.

(emphasis added). There is nothing discretionary in the above-cited statutory language.

For all of the foregoing reasons, Respondent SBJM, Inc. respectfully requests that trial court order denying FDLE's motion to dismiss be affirmed.

CONCLUSION

Application of accepted legal reasoning leads to the conclusion that under the present circumstances sovereign immunity is not an absolute immunity from suit. Instead, sovereign immunity in the present context is an immunity from liability. As a result, FDLE is not entitled to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity.

There is no overriding public policy which justifies circumvention of the "final judgment rule" and the application of a new court rule allowing interlocutory review of orders denying motions to dismiss on the defense of sovereign immunity or any other immunity (except for immunities regarded as "absolute"). Allowing interlocutory appeals under the present circumstances shifts substantial expense from the executive branch of government to the judiciary.

It cannot be concluded in this case that FDLE is sovereignly immune as a matter of law, especially in view of ongoing factual development of this particular lawsuit.

McCONNAUGHHAY, ROLAND,
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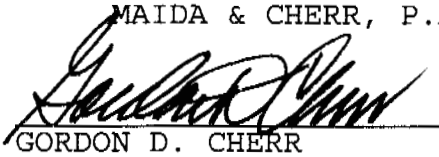

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to:

L. William Porter, II, P.A.
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Wendy S. Morris, Esquire
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this 22nd day of April, 1996.

Gordon D. Cherr