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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case No. 90,566

THE FLORIDA BAR, :

Complainant, :

v. :

LYNN MOBLEY SUMMERS, :

Respondent. :

AMENDED INITIAL BRIEF OF RESPONDENT, LYNN MOBLEY SUMMERS

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PRELIMINARY STATEMENT

This is a Petition filed by Lynn Mobley Summers to review a Report of Referee dated February 5, 1998 in connection with a Bar disciplinary hearing. The transcript of the hearing will be denoted by the symbol ("T.__"). The Report of the Referee will be denoted as ("R.R. ___").

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STATEMENT OF THE CASE

On May 19, 1997 The Florida Bar filed a twelve (12) paragraph Complaint, against Lynn Mobley Summers ("Summers") for alleged misconduct arising from her service as Assistant United States Attorney in a single case, styled *United States of America v. $52,630 in United States Currency*, Case No. 90-0843-CIV-RYSKAMP, in the United States District Court, in the Southern District of Florida.

The Complaint alleged that, in that case, Summers failed to file findings of fact and conclusions of law, and failed to timely comply with various court orders in that case. The Complaint also alleged that Summers did not respond to The Florida Bar's request for information.

On August 13, 1997 a hearing was held before the Referee at which the Respondent appeared in person. At that hearing, The Florida Bar and the Respondent announced that the parties were working on a consent judgment. A proposed Consent Order was prepared by The Florida Bar but was never signed or filed.

On November 10, 1997, the Referee entered an order, finding that, since the Respondent had served no answer to the Request for Admissions propounded by The Florida Bar with the Complaint, the matters contained in the Request for Admissions were to be taken as admitted.

A final hearing was held on January 9, 1998 at which the Respondent was not present. No evidence or testimony was presented at the final hearing, and the Referee proceeded entirely upon the Order Deeming Matters Admitted.

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On February 5, 1998 the Referee issued her Report, tracking all of the allegations of the Complaint, and recommending that the Respondent be found guilty of all of the charges alleged in the Bar's Complaint. The Report of Referee concluded by recommending that the Respondent be *disbarred* based on the misconduct charged in the Complaint, the Respondent's purported pattern of not participating in and failing to cooperate with the disciplinary proceeding, and in consideration of unspecified "other aggravating factors".

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STATEMENT OF THE FACTS[1]

Respondent, Lynn Mobley Summers, has been a member of The Florida Bar since 1982. She served as an Assistant United States Attorney in the Southern District of Florida from December 1987 to October 1995 and had a completely unblemished disciplinary record with The Florida Bar until the matters arose which are described herein.

In October 1995, long prior to the institution of this grievance proceeding, Respondent resigned her position as an Assistant United States Attorney in order to take a new position as Executive Director of Community Partnership for the Homeless, Inc., a substantial and well respected not for profit corporation providing a myriad of services to the homeless.

Approximately eight months later, the Miami office of The Florida Bar sent the Respondent a letter requesting information about certain cases in which the Respondent was involved as the Assistant United States Attorney. The files of The Florida Bar do not indicate the origin of this inquiry except insofar as it is undisputed that there was no complaint or grievance instituted by any client or court against the Respondent.

Ultimately, in May of 1997, The Florida Bar filed its complaint against the Respondent focusing on her alleged activities in a single case. That case was *United*

[1] Because no testimony or evidence was submitted to the Referee below, the Record on Appeal is sparse. For this reason, and to assist the Court in understanding the events leading to the Referee's report and recommendation herein, the Respondent has attached hereto her Affidavit. All assertions in this Statement of Facts, not otherwise attributed, are supported by this Affidavit.

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States of America v. $52,630 in United States Currency, Case No. 90-0843-CIV-RYSKAMP, in the United States District Court in the Southern District of Florida. That case initially had been resolved in October 1991.

In that case, the United States ultimately, and with court approval, voluntarily dismissed its claim to the funds which had been seized by the Government and returned the seized funds to the claimant, with interest, on December 3, 1992. (See Exhibit "C" to The Florida Bar's Complaint at p. 4). Thereafter, the claimant filed a demand for judgment of damages additur seeking hundreds of thousands of dollars in lost income, damage to reputation, an unspecified amount of punitive damages, and reimbursement of reasonable attorney's fees incurred in connection with the prior trial. The Respondent, on behalf of the Government, opposed this motion. On June 29, 1993, the Court entered its order denying all of the relief sought with the exception of an award of reasonable attorney's fees. (*Id.*). The Government determined not to appeal this ruling. However, despite the best efforts of the Respondent, the Department of Justice in Washington, D.C. (and not the Respondent) was dilatory in making payment of the attorney's fees leading to a series of motions and orders from the district court culminating in an order holding the Government in contempt as a result of the Respondent's client, the United States (in actuality the Department of Justice) to persuade the Government to make the necessary payments in a timely fashion.

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Although there were communication difficulties and various misunderstandings between the Respondent and The Florida Bar concerning The Florida Bar's Complaint against the Respondent, the Respondent did respond to the Bar in connection with this matter. The Respondent provided information to the Bar's investigators and to Bar staff counsel, and, on August 17, 1997 the Respondent appeared, with a witness, at a hearing scheduled before the Referee, in order to answer the charges against her. At that hearing, Bar staff counsel and the Respondent fully discussed this matter and reached a tentative agreement that the Bar Complaint would be resolved by a consent judgment imposing a suspension not to exceed ninety (90) days, with an automatic reinstatement immediately thereafter. Respondent announced her unqualified acceptance of this proposed settlement. However, Bar counsel announced that she would need the approval of her office in order to finalize the settlement. Both parties announced to the Referee that they were pursuing a settlement by way of consent judgment. Bar counsel advised that, after her final office approval was forthcoming, she would draft a proposed consent judgment and transmit it to the Respondent.

Thereafter, Bar staff counsel did draft the previously negotiated consent judgment and transmitted it to the Respondent. A copy of this consent judgment is attached as Exhibit C and a copy of the Affidavit of the Respondent is attached as Exhibit A. Upon receipt of the consent judgment, the Respondent timely contacted the office of The Florida Bar and unequivocally advised that the settlement was accepted.

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At that point the Respondent assumed and believed, albeit erroneously, that the Bar grievance against her had been resolved and that there would be no further proceedings in the matter other than an order affirming the consent judgment. However, instead, on October 23, 1997 the Bar filed a motion to deem admitted the contents of the Bar's Request for Admissions and proceeded to a final hearing which the Respondent had no actual knowledge of and did not attend.

No evidence whatsoever was presented at the final hearing and the Referee based her report and recommendation solely upon the allegations of the Complaint, having been deemed admitted by operation of law. The Referee's Report and Recommendation recommended discipline be imposed in the form of *disbarment* notwithstanding the fact that the alleged misconduct involved no illegality, dishonesty, or morale turpitude and notwithstanding the fact that there had been no client complaint ever filed with The Florida Bar against this Respondent.

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ARGUMENT

I. THIS COURT SHOULD REMAND THIS CAUSE TO THE REFEREE TO ENFORCE SETTLEMENT AGREEMENT

Respondent, Lynn Mobley Summers, is before this Court facing the potential of the most extreme possible disciplinary penalty: disbarment from the practice of law. She finds herself in this position based on a grievance arising out a single case, not involving any allegations of dishonesty, misapplication of funds, nor other illegal conduct, and without any evidence whatsoever in support of the grievance ever having been submitted to the Referee below. The Bar's agreed upon settlement of a ninety (90) day suspension with automatic reinstatement has now become escalated to recommendation of disbarment.

This is the case because, as a result of the peculiar circumstances detailed in the Statement of Facts above, the final hearing before the Referee proceeded merely upon the allegations of the grievance complaint being deemed admitted. Although the Petition for Review herein was filed by the Respondent to preserve her rights, this Court should enforce the consent agreement or remand this matter back to the Referee for consideration of an application by the Respondent to enforce the consent agreement between the parties or for relief from the consequences of her inadvertent failure to respond to the Request for Admissions, for the reasons set forth herein.

The Respondent learned of these proceedings when she discussed the matter with Bar investigators and Bar staff counsel, to whom she explained her position

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with respect to the charges arising out of the single case of *United States of America v. $52,630 in United States Currency*, Case No. 90-0843-CIV-RYSKAMP.[2] At the time of her discussions with the Bar investigators and Bar staff counsel, and indeed at all times from October 1995 through and including the date of this motion, the Respondent was not engaged in the practice of law but, instead, had resigned her position as Assistant U.S. Attorney and taken a position as Executive Director at Community Partnership for Homeless, Inc., which position was consuming practically all of her time and attention. Because of the demands on her time, and because she was not practicing law and had no immediate plans to return to the practice of law during the next several months, Respondent agreed with bar counsel to the entry of a consent order imposing discipline in the form of a suspension from the practice of law for a period not to exceed ninety days.

Although the Report of the Referee recites that "the Respondent has shown no interest in the outcome of these proceedings" (R.R. at p. 2), that recitation is clearly inaccurate since the Respondent personally appeared before the Referee, at a scheduled hearing, together with Bar staff counsel, to announce the proposed settlement for the disposition of these charges. (See Affidavit at ¶2). At that hearing, on August 17, 1997, Bar staff counsel announced that she would prepare a

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[2]The underlying charges against the Respondent arose out of a series of Orders entered by United States District Court Judge Kenneth Ryskamp, directed against the Respondent, who was one of the Assistant United States Attorneys involved in the matter. Judge Ryskamp's orders ultimately concerned the Respondent's manifest inability to force her client, the Department of Justice, to make certain payments of fees and costs in a timely fashion as ordered by Judge Ryskamp.

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consent judgment to be submitted. Indeed, attached hereto as Exhibit "C" is the form of Consent Judgment prepared by Bar staff counsel, from the Bar's file in this matter.

The Respondent believed and understood that, once she had personally appeared before the Referee and acknowledged her agreement to the terms and discipline proposed by The Florida Bar, this matter would be disposed of in accordance therewith, without any further hearings. Simply stated, at that point, admittedly erroneously, the Respondent assumed and concluded that this disciplinary matter had been adequately dealt with and settled. Accordingly, the Respondent thereafter failed to devote the degree of attention to this matter which she would have otherwise afforded had she been aware that The Florida Bar did not consider the matter yet settled.

Indeed, while the Respondent does not know if the notice of the final hearing was actually received at the offices of Community Partnership for Homeless, Inc., where her mail was handled by others before it reached her desk, the Respondent simply was not aware that a final hearing had been scheduled. There is no dispute that she did not attend.

At the commencement of this final hearing, the Referee observed that she had a note in her file dated August 13, 1997 (the date of the prior hearing at which the Respondent had personally appeared), which note indicated that the parties were working on a consent judgment. (TR. 4). Bar counsel handling the hearing (a different attorney from the Bar counsel with whom the Respondent had negotiated

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the settlement) confirmed that the prior Bar counsel "had thought they had reached a settlement by way of consent judgment". *Id.*

It is in this fashion that a simple problem in a single case before Judge Ryskamp, involving no dishonesty, no misapplication of funds, and no personal benefit or illegality, snowballed into what should have been a ninety-day suspension with automatic reinstatement pursuant to a consent judgment agreed to by the Bar and the Respondent; and then, by virtue of a misunderstanding or miscommunication between the Respondent and Bar counsel, expanded into a Referee's extraordinary recommendation of *disbarment*.

Respondent respectfully suggests that it is in the interests of justice and without substantially prejudicing either party for this Court to relinquish jurisdiction and remand this matter back to the Referee for consideration to enforce the settlement agreement or for relief from the consequences of her inadvertent failure to respond to the Request for Admissions. Settlement agreements are highly favored in the law and should be enforced whenever possible. *Lotspiech Co. v. Neogard Corp.*, 416 So.2d 1163 (Fla. 3d DCA 1982); *Mortgage Corporation of America v. Inland Construction Co.*, 463 So.2d 1196 (Fla. 3d DCA 1985); this court stated in *Robbie v. City of Miami*, 469 So.2d 1384, 1385 (Fla. 1985) that "settlements are highly favored and will be enforced whenever possible".

In the instant case, the terms of the settlement are not in dispute and were reduced to writing by The Florida Bar (see Consent Judgment attached hereto as Exhibit "A"). Although, admittedly, the parties did not sign a written settlement

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agreement, there can be no doubt as to the Florida Bar's assent to the terms thereof. Bar counsel, at the final hearing, acknowledged on the record that "[bar counsel] had thought they had reached a settlement by way of consent judgment." T.R. 4. Moreover, it is well established that oral settlement agreements are enforceable where, as here, the terms and conditions thereof are definite and ascertainable. *Long Term Management, Inc. v. University Nursing Care Center, Inc.*, 704 So.2d 669 (Fla. 1st DCA 1997); *Dowie v. Dowie*, 668 So.2d 290 (Fla. 1st DCA 1996); *Sockolof v. Eden Point North Condominium Association Inc.*, 421 So.2d 716 (Fla. 3d DCA 1982).

It would be inequitable for The Florida Bar, which previously expressed its satisfaction with the terms of the settlement agreement it drafted itself (in the form of its consent judgment), providing for a suspension not to exceed ninety (90) days, to now oppose enforcement of that settlement and argue in favor of disbarment of the Respondent.

In the event Respondent's efforts to enforce the settlement before the referee are unsuccessful, the Respondent would, alternatively, seek relief from admissions. The opportunity to pursue such relief from admissions is expressly authorized on the face of Florida Rule of Civil Procedure 1.370(b) and is available "when the presentation of the merits of the action will be subserved by it and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits". See also *Ramos v. Growing Together, Inc.*, 672 So.2d 103 (Fla. 4th DCA 1996) ("This liberal standard favors amendment in most cases in order to allow

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disposition on the merits"); *Sterling v. City of West Palm Beach*, 595 So.2d 284 (Fla. 4th DCA 1992) ("The use of admissions obtained through a technicality should not form a basis to preclude adjudication of a legitimate claim"); *Sher v. Liberty Mutual Insurance Company*, 557 So.2d 638 (Fla. 3d DCA 1990) (withdrawal of technical admissions would serve to facilitate the presentation of the case on its evidentiary merits); *De Atley v. McKinley*, 497 So.2d 962 (Fla. 1st DCA 1986) (same); *Melody Tours, Inc. v. Granville Market Letter, Inc.*, 413 So.2d 450 (Fla. 5th DCA 1982) (withdrawal of unintended technical admissions would, of course, serve to facilitate the presentation of the case on its evidentiary merits).

The Respondent recognizes that it is highly unusual to seek such relief at this stage of the proceedings, however, it must be borne in mind that the Respondent did not actually learn that The Florida Bar was not proceeding in accordance with the agreed settlement, and instead was proceeding based upon these technical admissions, until after the referee had entered her Report and Recommendation.

The Respondent has not been engaged in the practice of law since October 1995, and will not engage in the practice of law until this matter is concluded. No client or member of the public will be prejudiced in any respect by enforcing the previously agreed upon consent judgment.

This result will also be in accordance with the long standing policy of the courts of this State favoring settlements, disfavoring adjudications by default and encouraging disposition of claims on their merits.

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II. DISBARMENT IS FAR TOO SEVERE A SANCTION FOR ALLEGED MISCONDUCT INVOLVING NO DISHONESTY OR MORALE TURPITUDE

In the event this Court determines not to enforce the settlement agreement between the parties or to remand for such a Recommendation to be entered on for consideration of a motion for relief from admissions, this Court should nevertheless reject the Referee's recommendation of disbarment as excessive, and instead impose discipline similar to ninety (90) days agreed to in the settlement agreement.

Disbarment is the ultimate sanction in these proceedings. *The Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla. 1977):

> Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part.

Here, the Referee has recommended that Ms. Summers' professional status be sentenced to "death" for disciplinary violations all arising from a single case, none of which violations involved dishonest or illegal conduct. Ms. Summers' behavior simply does not rise to the level necessary to justify the harshest sanction in The Florida Bar's arsenal; in short, the punishment does not fit her actions and is grossly disproportionate and unfair.

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See In re LaMotte, 341 So.2d 513 (Fla. 1977)("Lawyers are disbarred only in cases where they commit extreme violations involving moral turpitude, corruption, defalcations, theft larceny or other serious or reprehensible offenses"); *The Florida Bar v. Davis*, 361 So.2d 159, 162 (Fla. 1978)(rejecting Bar request for disbarment where respondent was convicted of uttering worthless check, finding that there was no intent to defraud and thus "the act itself is not so base as to fall into the category of illegal conduct involving moral turpitude"). *See also Hirsch*, 342 So.2d at 971, citing Drinker, Henry S., *Legal Ethics*, 46, 47:

> Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only where a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged.

Here, the Referee has recommended that Respondent be found guilty of a charge not involving deceit or personal gain. At most, the record before the Referee reflected neglect in one single case. No misconduct involving moral turpitude was alleged. The only aggravating factor recited in the Referee's report was what she termed a "pattern of not participating in and failure to cooperate with the disciplinary proceedings" as a result of a prior suspension for failing to respond to The Florida Bar's inquiry concerning her CLER and dues requirements in case No.

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96-71,116.[3] Although appearing on the record, the Referee did not consider Respondent's unblemished years of public service law practice prior to the single case giving rise to these proceedings. *The Florida Bar v. Grosso*, 647 So.2d 840, 841 (Fla. 1994)(where this Court considered respondent's "fifteen year unblemished record as a mitigating factor. . . .")

The misconduct alleged, at worst, deserves a suspension, not disbarment. *See e.g., The Florida Bar v. Morrison*, 669 So.2d 1040 (Fla. 1996)(imposing a one-year suspension, restitution and ethics school, for neglect in two cases where a client was harmed as a result, in light of "respondent's prior disciplinary offense, a pattern of misconduct, multiple offenses, obstruction of the disciplinary proceeding, refusal to acknowledge the wrongful nature of conduct, and indifference to making restitution"). This Court has previously recognized that even three separate cases of neglect will not support disbarment. *See The Florida Bar v. Schneideerman*, 385 So.2d 392 (Fla. 1973)(where this Court rejected the Referee's recommendation of disbarment and instead imposed three-year suspension as a result of respondent's neglect in three separate cases over a two-year period, the respondent having closed his Florida office, moved to New York and neither responded to the complaint or admissions served upon him nor appeared at the final hearing). *See also The Florida Bar v. Valladares*, 798 So.2d 823 (Fla. 1997)(imposing three-month suspension and three-year probation effective *nunc pro tunc*, for neglect, failure to

[3] While it appears that Respondent did not at any time lack the requisite number of CLE credits, she was suspended until she responded to The Florida Bar concerning the same. However, Respondent did respond thereto. Respondent's letter to The Florida Bar in connection with this prior action, Exhibit "B" attached hereto.

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maintain trust account and failure to respond in writing to the Bar's inquiries, where there were two prior suspensions as well as a consent order imposing a three-month suspension for unidentified misconduct).

None of the six cases cited in the Referee's Report support disbarment in the case *sub judice*. Each of the cases cited concerned dishonest or fraudulent conduct, factors completely absent here. *See The Florida Bar v. Friedman*, 511 So.2d 986 (Fla. 1987)(disbarment where there were dishonest acts of knowing and willful "fraud, misrepresentation . . . [and] conversion of funds"); *The Florida Bar v. Smith*, 512 So.2d 832 (Fla. 1987)(disbarment based upon "twenty-three counts of failing to perform services for clients after being retained," following temporary suspension in a separate proceeding "on the ground that he appeared to be causing great harm to his clients or to the public"); *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997)(disbarment based upon three separate Bar complaints, including, inter alia, "conduct involving dishonesty, fraud, deceit, or misrepresentation"); *The Florida Bar v. Williams*, 604 So.2d 447,451 (Fla. 1992)(disbarment where there were multiple offenses, dishonest motive, submission of false or deceptive statements during the disciplinary process, and the victims were particularly vulnerable); *The Florida Bar v. Catalano*, 685 So.2d 1299 (Fla. 1996)(disbarment where there were multiple dishonest acts); *The Florida Bar v. Setien*, 530 So.2d 298 (Fla. 1988)(disbarment where there were multiple acts of dishonest conduct).

This Court has "broad latitude" in reviewing a referee's recommended discipline, since it is this Court's ultimate responsibility to order an appropriate

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punishment. *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989). We urge this Court to reject the referee's recommendation of disbarment and impose a suspension instead. We urge that the appropriate suspension is that to which the parties had agreed to: a ninety (90) day suspension. *See* Florida Standards for Imposing Lawyer Sanctions, § 4.42 (indicating suspension to be appropriate even where "a lawyer knowingly fails to perform services for a client" or "engages in a pattern of neglect" and "causes injury or potential injury to a client.")

CONCLUSION

Under the unique circumstances of this case, the Florida Supreme Court should remand the case to a referee to permit consideration of a motion to enforce the settlement agreement or, alternatively, motion for relief from admissions. Since the misconduct alleged arose out of a single case, and there is no allegation of illegal conduct, dishonesty, personal benefit to the Respondent or other indicia of morale turpitude, the recommended ultimate sanction of disbarment is excessive and should be rejected by this Court. This is particularly true in light of The Florida Bar's original agreement to a consent judgment imposing a ninety (90) day suspension with automatic reinstatement. It is within the power of this Court, and would serve the interests of justice for this Court to enforce that agreement and impose that sanction at this time.

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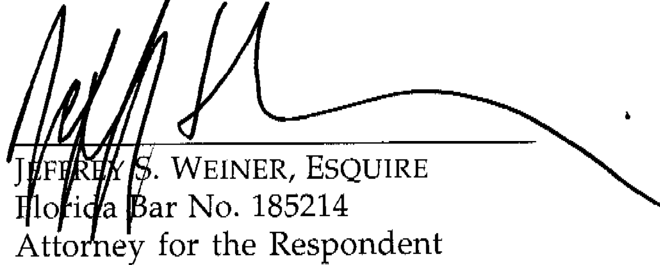
By: 

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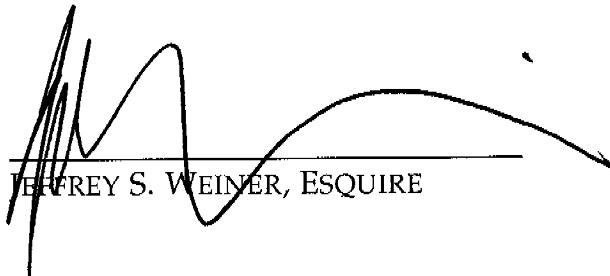
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 3rd day of November, 1998 to Gregg Wenzel, Esquire, Assistant Staff Counsel, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, Florida 33131.



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