SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC01-172

J.B.PARKER,

Appellant,

- versus -

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST
Attorney General
Tallahassee, Florida

MELANIE ANN DALE
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive
Suite 900
West Palm Beach, Fl 33401

Counsel for Appellee

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Preliminary Statement

Appellant, defendant in the trial court below, will be referred to as “Appellant”, “Defendant” or “Parker”. Appellee, the State of Florida, will be referred to as the “State”. References to the record will be by the symbol “R”, to the transcript will be by the symbol “T”, to any supplemental record or transcript will be by the symbols “SR” or “ST”, and to Parkers’ supplemental initial brief will be by the symbol “SIB”, followed by the appropriate page numbers.

Statement Of The Case and Facts

Parker was convicted of kidnaping, robbery with a firearm, and first-degree murder. In 1982, Parker and three other defendants, John Earl Bush, Alphonso Cave, and Terry Wayne Johnson, robbed a convenience store. Money was taken from the store and the female store clerk (the victim) was also taken from the store and placed in Bush's car. The victim was later found dead; she had been shot and stabbed. Death was caused by a gunshot wound to the back of the head. Bush's girlfriend testified that Parker had admitted to her that he shot the victim and that Bush had stabbed her. State v. Parker, 721 So.2d 1147 (Fla. 1998). In the instant case, a re-sentencing hearing was held in October 2000. On October 25, 2000, the jury recommended death by a vote of 11-1 (R. p. 1161). On December

13, 2000, the trial court entered an order sentencing Parker to death. (R. pp. 1328-1336).

After oral argument, this Court relinquished jurisdiction directing the trial court to conduct an evidentiary hearing on appellant's motion to suppress the May 7, 1982 statement filed October 1, 1999 (SR. pp. 14-15).[1] In this case, the parties entered into a stipulation to establish the evidentiary record (SR. pp. 16-18). On January 13, 2003, the State filed a written argument opposing Parker's motion to suppress (SR pp. 692-707). On January 15, 2003, Parker filed a memorandum of law in support of his motion to suppress (SR pp. 675-691). On February 12, 2003, the trial court denied Parker's motion to suppress finding that Parker initiated contact with Detective Powers (SR pp. 709-715).

In the instant case the record reflects that Parker initiated contact with Sheriff Holt on May 5, 1982 (SR pp. 24,

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[1] In the instant case, at the re-sentencing, the state did not seek to introduce Appellant's May 5, 1982 statement based upon the Eleventh Circuit's ruling in Parker v. Singletary. Specifically, in Parker v. Singletary, 974 F. 2d 1562, 1574 (11th Circuit 1992), the Court found that the May 5, 1982 statement was taken in violation of Parker's Fifth Amendment right to counsel, however, the Court further found that the admission of the statement was harmless and upheld Parker's conviction and sentence. The Court did not address the propriety of the May 7th statement finding that Parker was procedurally barred from raising the claim in federal court. Id. at F.N. 72.

27, 313, 666). At the motion to suppress hearing held on September 3, 1982, Art Jackson testified that Parker asked to speak with the Sheriff (SR p. 25). Sheriff Holt testified that Art Jackson contacted him on May 5th, 1982 and indicated that Parker had requested to see him (SR. pp. 27-28). At the hearing in 1982, Lieutenant Powers ("Powers") testified that Captain Crowder told him to go and see Parker at the jail because he wanted to cooperate (SR p. 50). However, at his deposition, which was taken on July 21, 1982, Powers could not recall who told him that Parker had contacted someone at the sheriff's office and indicated that he wished to cooperate with the investigation (SR. p.625). In his affidavit filed on December 12, 2002, Powers clarified his responses and indicated that he had no personal knowledge as to how anybody knew that Parker wished to cooperate and that Captain Crowder did not instruct him to go to the jail on May 7, 1982 (SR p. 672). However, Powers clarified that the only two people who were superior to him in the chain of command were Captain Crowder and Sheriff Holt, therefore, Sheriff Holt must have given him the command (SR p. 672). Moreover, Powers has consistently testified that when he met with Parker at the jail, he had him sign a rights waiver form prior to touring the crime scene (SR. 50, 672). At the motion to suppress hearing in 1982, Powers testified that

when he arrived at the jail, he asked Parker if he wished to cooperate (SR p. 50-51). Parker indicated that he wanted to cooperate, but first he wanted to call his mother (SR p. 51). Parker was allowed to call his mother (SR p. 51). After the telephone call Parker waived his rights (SR p. 53, 655). Parker signed a rights waiver form and agreed that Powers had advised him that he had a court appointed attorney who had advised him not to speak with members of the sheriff's department yet Parker wished to cooperate anyway (SR p. 655).

Furthermore, at the February 1988 evidentiary hearing held on Parker's motion for post-conviction relief, Robert Makemson ("Makemson") testified about the 1982 motion to suppress. Makemson, who had been Parker's trial counsel, testified that he had met with Parker many times with respect to the motion to suppress, and Parker always indicated that he wanted to tell the Sheriff his side of the story because John Earl Bush was telling lies (SR p. 192-193, 404-406). During the evidentiary hearing, Makemson testified to the following in response to the state's questions:

> Q: Why didn't you call the Defendant to the stand and that's the allegation here that you were ineffective for not doing so to explain to the judge, "That I really wanted an attorney and that I had asked my mother and I really wanted the sheriff to come in just so I could

get an attorney."?

A: Because that was contrary to what Mr. Parker had told me about the statement. His [Parker's] position was and what he told me and he never changed the position was that he wanted to talk to the sheriff. He wanted to tell the Sheriff his side of the story.

(SR p. 195).

During cross examination by Parker, the following occurred:

Q: That's–that's correct. Did you ask Mr. Parker why he changed his mind and then made a statement?

A: Yes.

Q: And what did he tell you?

A: Because he wanted to tell the Sheriff that what John Bush was saying about him was a lie, it was not true. He wanted to tell the Sheriff what happened that night. He wanted to tell the Sheriff that what John Bush was saying was not true. And that is the very testimony that I did not want to have Judge Trowbridge hear.

(SR p. 406).

Additionally, Steve Green, the intern from the Public Defender's office, also testified at the same evidentiary hearing that Parker insisted on telling his side of the story (SR p. 234-241). Parker never testified at the 1982 motion to suppress hearing. However, he did testify at the 1988 evidentiary hearing held on his post-conviction motion. Parker

testified that in May of 1982[2], he was brought to the Fort Pierce State Attorney's Office (SR p. 307-308). Parker said that a tape of John Bush was played wherein, Bush stated that Parker had stabbed Francis Slater (SR p. 309). At that time Parker told the Detective that he had nothing to say (SR p. 310). Parker voluntarily went to Martin county to take a lie detector test, when he and the Detective arrived Parker changed his mind and refused the lie detector and then he was arrested (SR p. 311). At the evidentiary hearing, Parker admitted that he asked Mr. Jackson to contact the Sheriff (SR p. 313). Parker testified that when Sheriff Holt arrived, he asked to make a phone call and the Sheriff took him to a small room (SR p. 315). Parker said that two other detectives arrived and also Steve Green (SR. p 315). Green informed Parker that he was representing him and he was from the public defender's office (SR p. 316). Green also told Parker not to say anything (SR p. 316). Parker subsequently confessed, and as previously noted the Eleventh Circuit found that this statement was taken in violation of Parker's 5th Amendment right to counsel as Steve Green was an intern and the Public Defender's office had ascertained that there was conflict of interest to represent Mr.

[2] May 5, 1982 was the date.

Parker.

During cross-examination by the state, Parker admitted that he was mad about the statement that Bush had made (SR. p. 329). Parker testified that he knew the importance of an attorney and that he did not recognize Steve Green as his attorney (SR p. 331, 333, 341). Parker also testified that on May 7th, Detective Powers came to see him at the jail and Parker agreed to show him the road where they took Francis (SR p. 344). During the statement given on May 5th, Parker said he would be willing to show the police where he thought the knife was thrown (SR p. 493).

At the re-sentencing trial, Terry Wayne Johnson testified that he was close with Parker while growing up because Johnson's sister had kids with Parker's brother (T. Vol. 28 p. 1903). Johnson testified that on the night Francis Slater was murdered, he was with Parker, Bush, and Cave (T. Vol. 28 p. 1908). Johnson testified that they went to the Lil General Store twice on that night (T. Vol. 28 p. 1912). Johnson testified that when they went back to the store the second time, Parker gave Cave the gun and when they came out of the store Cave held Francis at gun point and made her get in the car (T. Vol. 28 p. 1918). The record also reflects that Francis was frightened and she was begging for her life (T. Vol. 28 pp 1919-1922). Johnson

testified that they drove to western Martin County and Bush got out of the car first, then Bush told Francis to get out (T. Vol. 28 p. 1924). Bush cut around the car and stabbed her. Cave had the gun at this time and Parker got out of the car, prior to shooting Francis, Parker told Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson heard a shot but did not see who shot her (T. Vol. 28 p. 1925). Cave was in the car when Johnson heard the shot (T. Vol. 28 p. 1926). Johnson testified that they split the money they stole from the Lil General Store (T. Vol. 28 p. 1932). Johnson said that after Francis was killed, Parker told Bush to throw the knife away and Bush threw it out the window (T. Vol. 28 p. 1928).

Summary Of The Argument

Point I:

The trial court properly denied Parker's motion to suppress the May 7, 1982 statement to Detective Powers. The trial court properly ruled that there was no Fifth or Sixth Amendment violation because Parker initiated the contact with Detective

Powers and freely and voluntarily waived his Miranda rights.

Argument

POINT I

THE TRIAL COURT PROPERLY DENIED PARKER'S MOTION TO SUPPRESS THE MAY 7, 1982 STATEMENT. (RESTATED)

Parker citing to Edwards v. Arizona, 451 U.S. 477 (1981)and Michigan v. Jackson, 475 U.S. 625 (1986), claims that his Fifth and Sixth amendment rights were violated because he did not initiate contact with the state on May 7, 1982. These claims are meritless, as the trial court properly denied Parker's motion to suppress finding that Parker initiated contact with Detective Powers on May 7, 1982. [3]

A motion to suppress involves mixed questions of fact and law. United States v. Harris, 928 F.2d 1113, 1115-16 (11th Cir.1991). A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and a reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.

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[3] Although not addressed by the trial court, Parker's Sixth amendment claim is meritless because the decision in Jackson is not retroactive to Parker's statement. In Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988), this Court found that the rule set forth in Jackson does not represent the type of major constitutional change in the law contemplated by Witt as proper for retroactive application. Hence, this Court need not reach the merits and relief must be denied.

San Martin v. State, 717 So. 2d 462 (Fla. 1998).

If the evidence shows, as it does here, that a defendant voluntarily seeks out law enforcement to make a statement, after being fully advised of his rights, he may do so, thereby, waiving the Fifth and Sixth amendment protections. See Michigan v. Jackson, 475 U.S. 625 (1986)(holding that where the right to counsel has been asserted and attached, there can be no police initiated interrogation, and any waiver of the Sixth Amendment right to counsel is invalid); Michigan v. Mosley, 423 U.S. 96 (1975)(holding statement given by defendant to investigating officer was admissible even though defendant had asserted his right to remain silent during earlier interrogation same day); Jackson v. State, 359 So. 2d 1190, 1194 (Fla. 1978). Moreover, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis,446 U.S. 291, 300 (1980); Arizona v. Mauro, 481 U.S. 520, 526-27 (1987); Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997).

Additionally, whether a waiver of Miranda rights was voluntarily made is reviewed de novo. United States v. Barbour, 70 F.3d 580, 584 (11th Cir. 1995) (stating that the district

court's ultimate conclusion on the voluntariness of a confession or a waiver of Miranda rights raises questions of law to be reviewed de novo); United States v. Schwensow, 151 F.3d 650, 659 (7th Cir. 1998) (district court's determination of whether a Miranda waiver was knowing and voluntary is reviewed de novo). To determine if a waiver is valid a court must make two inquiries. First, the court must determine if the waiver was voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Fare v. Michael C., 442 U.S. 707, 725 (1979); see also State v. Mallory, 670 So.2d 103, 106 (Fla. 1st DCA 1996). Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment. Fare, 442 U.S. at 725; Mallory, 670 So.2d at 106. As with determining the voluntariness of a confession, a court must use a totality-of-the-circumstances analysis to determine whether a waiver of Miranda rights meets these criteria and is thus valid.

A reviewing court should not substitute its judgment for that of a trial court, but, rather, should defer to the trial court's determination of disputed issues of fact in a motion to suppress, as the trial court is vested with the authority to determine the credibility of the witnesses and the weight of the

evidence. See State v. Brown, 592 So.2d 308 (Fla. 3d DCA 1991) (Gersten, J., dissenting); Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987) DeConingh v. State, 433 So.2d 501 (Fla.1983).

It is apparent from the record in this case that there is competent substantial evidence to support the trial court's conclusion that Parker initiated the contact with Powers. Here, after a complete review of the historical facts the trial court made the following finding:

> The facts show that after Defendant initiated contact with Lieutenant Powers, he was read his Miranda rights and that he understood them. He further acknowledged that the Public Defender had advised him not to speak with any member of the Sheriff's Department and that he was going to make a statement and cooperate of his own free will. The statement taken by Lieutenant Powers does not violate either the Fifth Amendment or the Sixth Amendment of the United States Constitution.

(SR p. 714).

Moreover, the record reflects that Powers was directed down to the jail by one of his supervisors, who advised him that Parker wished to cooperate (SR p. 50, 672). Powers went to the jail and asked Parker if he wanted to cooperate and Parker indicated that he did but first wanted to speak to his mother (SR p. 50, 625). Powers let Parker call his mother (SR p. 50, 625). After Parker spoke with his mother, he waived his rights.

The written waiver contained the following statement:

> I have been advised by Lt. Powers that my court appointed attorney, the public Defender has advised me not to speak with members of the Sheriffs Dept ref my case. I wish to do so of my own volition and I wish to show Lt. Powers where I believe the knife which was used in the robbery/homicide may be located. This is done of my own free will and is voluntary.

(SR p. 655).

At the 1988 evidentiary hearing on his post-conviction motion, Parker testified that he understood the importance of an attorney (SR p. 331). Parker also testified that he heard the tape of Bush's statement where he said Parker shot Francis (SR p. 309). Parker was mad about the statement that Bush had made implicating him in the crime (SR p. 329). Parker also testified in 1988 that he did not initiate contact with Powers (SR p. 344). In his affidavit, signed December 18, 2002, Parker maintains that he did not initiate contact with Powers (SR pp. 669-671).

During the 1988 evidentiary hearing, Robert Makemson, Parker's trial attorney testified that Parker had always represented that he wanted to talk to the police and tell his side of the story because Parker believed that Bush was telling lies (SR pp. 195, 405-406). Steve Green also testified at the 1988 evidentiary hearing that on May 5, 1982, Parker insisted on

telling the Sheriff his side of the story, even after Green advised him not to talk (SR pp. 234, 241).

In the instant case, the trial court, as the factfinder found Power's testimony credible and properly ruled that Parker initiated contact on May 7, 1982. Although there is a conflict in the record between Parker's testimony and Power's testimony this Court should defer to the trial court's determination of disputed issues and affirm the denial of the motion to suppress. See Jones v. State, 569 So.2d 1234 (Fla. 1990) (finding that the trial court properly denied defendant's motion to suppress after determining defendant's testimony was incredible); Curtis v. State, 748 So.2d 370, 371 (Fla. 4th DCA 2000) (finding that appellate court is required to accept the trial court's determination of disputed issues of fact in a motion to suppress, as the trial court is vested with the authority to determine the credibility of the witnesses and the weight of the evidence.); Thomas v. State, 456 So. 2d 454 (Fla. 1984) (finding that where the evidence is conflicting, the trial court's finding will not be disturbed).

In this case, the record reflects that Powers was told to go to the jail because Parker wanted to cooperate. When Powers asked Parker if he wanted to cooperate, Parker indicated that he did but he wanted to call his mother first. Powers allowed

Parker to contact his mother, thereafter Parker toured the crime Scene with Powers. Moreover, with respect to Parker's Fifth Amendment rights, Powers question to Parker about cooperation was not the functional equivalent of express questioning about the crime, nor is there anything in this record that will show that Powers question was reasonable likely to elicit an incriminating response. Hence, it cannot be considered initiation of contact.

Additionally, it is the states position that Parker's reliance on Owen v. State, 596 So. 2d 985 (Fla. 1992) and Phillips v. Florida, 612 So. 2d 557 (Fla. 1992), is misplaced because contrary to the facts of those cases, here there is record evidence that Parker initiated contact with the state on May 7, 1982. Hence, it is apparent that Parker initiated the contact, therefore, the trial court's ruling must be affirmed.

Lastly, Parker claims that because the Public Defender was not actually representing Parker at the time of the May 7 statement, Parkers written waiver of his Miranda rights was invalid. Parker seemingly claims that the situation on May 7th was identical to the situation on May 5th, therefore since the Eleventh Circuit found the May 5th statement involuntary, then this Court must find that the May 7th waiver was involuntary as well. This claim is meritless as Parker initiated the contact

with Powers, the Public Defender had not yet been relieved from representing Parker and he voluntarily waived his Miranda rights.

In the instant case, based on the totality of circumstances surrounding Parker's waiver, it is apparent that it was a free on deliberate choice, and Parker was fully aware of the nature of the rights being abandoned and the consequences of that abandonment. The record reflects that Powers did not know that Public Defender has filed a Motion to be removed from Parker's case (SR p. 57). Moreover, the original direct appeal records show that on May 6, 1982, Judge Cianca withdrew his motion appointing Robert Udell and the Public Defender's Motion for Appointment of Counsel because of Conflict with his representation of other Defendant's was submitted to Chief Judge Trowbridge for his decision (Parker's Direct Appeal Supreme Court Case No. 63,177, Volume IX p. 1523). Judge Cianca did not rule on the Public Defender's Motion. On May 18, 1982, Chief Judge Trowbridge granted the Public Defender's motion and appointed Robert Makemson to represent Parker (Parker's Direct Appeal Supreme Court Case No. 63,177, Volume IX p. 1543). Hence, it is apparent that Powers was not misrepresenting to Parker that the Public Defender was his court appointed attorney. Therefore, Parker has failed to show that Powers

acted improperly in obtaining Parker's written waiver. Additionally, at the 1988 evidentiary hearing on his post-conviction motion, Parker testified that he knew the importance of an attorney when he made his statements in 1982 (SR p. 331). Parker also testified that if he had a different attorney on May 5, 1982 he would not have confessed (SR p. 334).

The statement made on May 7, 1982 is distinguishable from the May 5 1982 statement because on May 7, 1982 when Parker requested that he be able to call his mother before he cooperated, Powers allowed him to do so, after which Parker waived his Miranda rights (SR p. 50). Parker never requested to speak with the Public Defender's office before he cooperated. Parker clearly made the choice to cooperate and was not coerced by Powers. It is also apparent from the record that Parker understood the rights being abandoned and the consequences of that abandonment. Hence, based on a totality of the circumstances, it is clear that Parker freely and voluntarily waived his rights. This court must affirm the trial court's denial of the motion to suppress.

However, should this court find that the trial court improperly denied Parker's motion to suppress, any error is harmless. "The question is whether there is a reasonable possibility that the error affected the verdict." State v.

DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

> The test must be conscientiously applied and the reasoning of the court set forth for the guidance of all concerned and for the benefit of further appellate review. The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence.

Id.

In the instant case, there is no reasonable possibility that the error affected the verdict. Terry Wayne Johnson testified that he was close with Parker while growing up because Johnson's sister had kids with Parker's brother (T. Vol. 28 p. 1903). Johnson testified that on the night Francis Slater was murdered, he was with Parker, Bush, and Cave (T. Vol. 28 p. 1908). Johnson testified that they went to the Lil General Store twice on that night (T. Vol. 28 p. 1912). Johnson testified that when they went back to the store the second time, Parker gave Cave the gun and when they came out of the store Cave held Francis at gun point and made her get in the car and she was begging for her life(T. Vol. 28 p. 1918, 1919-1922). Johnson testified that they drove to western Martin County and Bush got out of the car first, then Bush told Francis to get out (T. Vol.

28 p. 1924). Bush cut around the car and stabbed her. Cave had the gun at this time and Parker got out of the car, prior to shooting Francis, Parker told Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson heard a shot but did not see who shot her (T. Vol. 28 p. 1925). Cave was in the car when Johnson heard the shot (T. Vol. 28 p. 1926). Johnson testified that they split the money they stole from the Lil General Store (T. Vol. 28 p. 1932). Johnson said that after Francis was killed, Parker told Bush to throw the knife away and Bush threw it out the window (T. Vol. 28 p. 1928). Johnson also testified that $134 was taken in the robbery and after the murder, they went to Cave's rooming house and split the money (T. Vol. 28 p. 1932).

Parker claims that Detective Powers testimony alone supports the witness elimination and pecuniary gain aggravators. Specifically Parker cites to the fact that Parker advised Bush to dispose of the knife used to kill Francis, however, Johnson also testified to this fact (T. Vol. 28 p. 1928). Parker also claims that Powers testimony reflects that Parker stated on May 7, 1882 there was discussion regarding the killing of Deputy Bargo. However, after a complete review of the record that was not the sole fact relied upon by the trial court when it found

the avoid arrest aggravating circumstance.[4] Finally Parker, claims that Powers testimony also reflects that the murder was committed to gain $134.00 and that Parker admitted to sharing the proceeds, however, Johnson also testified that $134 was taken in the robbery and after the murder, they went to Cave's rooming house and split the money (T. Vol. 28 p. 1932). Hence, it is apparent from the record that there is no reasonable possibility that any error in admitting the May 7th statement could have affected the verdict.

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[4] In the instant case, the trial court found that "[t]he evidence establishes that the purpose of the abduction and killing was clearly to eliminate the only witness to the robbery. This was the sole or dominant motive in killing the victim. The evidence also establishes that the defendant had been seen twice while he was in the Lil General, once alone, when he was "casing" the store, and the later with Bush and Cave during the robbery itself. Both times the defendant made no effort to conceal his identity. There were places in the Lil General Store where the victim could have been locked up by the defendants in order to prevent her from calling the police, but they elected to remove her from the store. Immediately prior to the victim being shot Parker reached over to Alphonso Cave and commanded "Hand me the gun". The defendant then took the gun from the sight of the killing Parker advised Bush regarding disposing of the knife used to stab the victim. There was discussion in the car regarding killing Deputy Bargo who stopped them after the murder of the victim. This aggravating factor of a capital felony which was committed for the purpose of avoiding or preventing a lawful arrest is given great weight because of defendant's significant participation. (R. Vol. 7 p. 1329-1330).

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's death sentence.

Respectfully submitted,

Charles J. Crist
ATTORNEY GENERAL
Tallahassee, Florida

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MELANIE A. DALE
Assistant Attorney General
Florida Bar No.0168556
1515 North Flagler Drive
Suite 900
West Palm Beach, FL 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Supplemental Answer Brief," has been furnished by U.S. mail, postage prepaid, to: David Lamos, Esq., 805 Delaware Ave., Fort Pierce, Fl. 34950 on _____, 2003.

_____
Melanie A. Dale

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief

is 12 point Courier New.

_____
Melanie A. Dale