IN THE SUPREME COURT OF FLORIDA

CORDETTE WOODHAM

Petitioner,

vs.

Case No. SC01-2160
L. T. No.: 3D00-2277

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Respondent.

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

ON REVIEW OF A CERTIFIED QUESTION FROM
THE THIRD DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

The EEOC "unable to conclude" letter sent to Petitioner in this case did not constitute a FCHR "no cause" determination triggering the 35 day time limit set forth in § 760.11(7), Fla Stat., to request a hearing before an administrative law judge. There is no evidence in the record to support such a proposition and the relevant case law indicates that "no cause" determinations are totally different than the "unable to conclude" letter received by Petitioner here. In fact, the EEOC abandoned its policy of issuing "no cause" determinations in April, 1995.

Moreover, the procedure sanctioned by the lower court's ruling runs afoul of Petitioner's constitutional right to procedural due process as recently described in *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000). As stated in *Joshua, supra*, these rights encompass, at a bare minimum, the right to fair notice and the opportunity to be heard. The court observed that constitutionally protected rights should not be denied because the Commission failed to give adequate notice. Adequate notice requires that the Commission inform the claimant regarding the status of her case at some point before the expiration of the 180 day period. This failure led to reversal in *Joshua*, *supra*, and should lead to reversal in the case at bar.

Regarding the power of FCHR to nullify a vested right to sue by an untimely "no cause" determination, the opinion below will dramatically change the way

attorneys practice employment law in light of the severe new limitations on employee rights the court below has imposed. The opinion below and this Court's opinion in *Joshua* both addressed the limitations period for filing suit for those who fall under § 760.11(8), Florida Statutes. While the issues are not identical, *Joshua* offered three specific areas of guidance for resolving such questions. The opinion below has resolved each one of those three questions in a manner contrary to the mandate of this Court.

First, *Joshua* held that any reasonable conflict of interpretation would be resolved in favor of granting access to the remedy by liberally construing the statute to effectuate its purpose of remedying discrimination. The opinion below strained to interpret the statute to deny access to the remedy by drafting and reading a ghostly amendment into the statute. Second, *Joshua* noted that the right to sue under the statute, once vested, may not be eradicated without the full panoply of due process rights. The panel opinion allowed the vested right to be eradicated by a mere bureaucratic fiat. Third, *Joshua* relied heavily on the Legislative intent to let the administrative process run its full course and therefore strongly disfavored any statutory interpretation that would provide an incentive for the claimant to race to the courthouse before the administrative process had concluded. The opinion below reads the statute in such a way as to provide exactly that incentive because a plaintiff

who lets the process conclude runs the risk of losing the right to sue by an untimely "no cause" determination.

ARGUMENT

I. PETITIONER MET ALL ADMINISTRATIVE REQUIREMENTS OF THE FLORIDA CIVIL RIGHTS ACT OF 1992 BEFORE FILING SUIT

Summary judgment was granted on behalf of the Respondent in the trial court and affirmed in the court below on the basis that Petitioner had failed to properly exhaust her administrative remedies and satisfy all conditions precedent to filing a civil action as required by §760.11(7), Fla. Stat. The lower court's ruling was incorrect because it was based upon an erroneous factual determination that Petitioner had received a "no cause" determination from the Equal Employment Opportunity Commission (EEOC).[1]

A. The EEOC Dismissal and Notice of Rights was not a "No Cause" Determination

The lower court's decision affirming the trial court's order granting summary judgment was necessarily based upon the factual determination that the EEOC Form 161 entitled "Dismissal and Notice of Rights," constituted a determination that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of

[1] The court below did not explain in its opinion why it concluded that Petitioner had received a "no cause" finding from the EEOC.

1992 has occurred. This factual determination is significant in view of the requirements of § 760.11(7), Florida Statutes (1999). Said statute provides:

> If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved party may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date the determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner. If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

The lower court interpreted this statute to preclude the filing of a civil action based upon a violation of the Florida Civil Rights Act under circumstances where a request for an administrative hearing was not made within the 35 day period. However, Petitioner's case was not actually investigated by the Florida Commission on Human Relations (FCHR). Instead, the FCHR deferred to the EEOC pursuant to the terms of a worksharing agreement entered into between the EEOC and the FCHR.

The lower court concluded without discussion that a "no cause" determination issued by the EEOC operates as a "no cause" finding by the FCHR.[2]

Amicus disagrees with the proposition that the EEOC failure to determine letter

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[2] This holding was set forth in footnote one to the lower court's opinion and is apparently based on *Blakely v. United Servs. Auto Ass'n*, 1999 U.S. Dist. LEXIS 17723, No. 99-1046-Civ-T-17F, 1999 WL 1053122 (M.D. Fla. Oct. 4, 1999).

is the same as a no-cause determination. In fact, a close examination of the EEOC Form 161 Dismissal and Notice of Rights Form itself reveals that there are a myriad of ways to dismiss an EEOC charge which clearly do not involve a determination that there is not reasonable cause to believe that a violation of the statutes has occurred. For example, a charge can be dismissed because of a failure to accept a reasonable settlement offer that affords full relief. Moreover, the last box on a EEOC Form 161 is simply a catchall for any reason the EEOC deems appropriate. Presumably, a "no cause" determination could be inserted in this section of the form if indeed a no cause determination was warranted and EEOC so intended.

As a practical matter, however, the EEOC is not likely to issue a no cause finding in the future because effective as of April of 1995, the EEOC abandoned its previous policy of issuing "no-cause" determinations in cases where reasonable cause was not established, and instead initiated a policy of dismissing such charges without particularized findings. *See* LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 29, at 1240, n.219 (3rd ed. 1996); *Daily Lab. Rep.* (BNA) at E-5 (Apr, 20, 1995).

An example of a "no cause" determination by the EEOC is illustrated in *Cortes v. Maxus Exploration Co.*, 758 F.Supp. 1182 (S.D. Tex.1991), *aff'd,* 977 F.2d 195 (5th Cir. 1992). In the appendix to the opinion the Court described the no cause

finding. It includes a letter of determination and a notice of right to sue and dismissal. The letter of determination attached to *Cortes* begins "Under the authority vested in me by the Commission's procedural regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act." The letter continues . . ."there is not reasonable cause to believe that the charging parties proposed transfer was retaliatory. There is not reasonable cause to believe that the proposed transfer to work under the former supervisor constituted discrimination because of her sex female, nor that her resignation constituted constructive discharge based upon sex and retaliation." The letter closes "should the charging party wish to pursue this matter further, the party may do so by filing a private action in Federal District Court against the Respondent named above within 90 days of receipt of this letter." Also included in the appendix to the *Cortes* decision is a notice of right to sue. The box checked on that notice of right to sue states as follows: "no reasonable cause was found to believe that the allegations made in your charge are true". An examination of *Cortes* reveals that the no cause determination was clear and decisive and left no question as to the finding of the EEOC. This no cause finding is totally different than the EEOC Dismissal and Notice of Rights sent to Ms. Woodham in the instant case as reflected by the language quoted in the lower court's formulation of the certified question. Thus, in the case at

bar, the conclusion is inescapable that the EEOC failure to conclude letter was not a no cause determination.

Most of the cases apparently relied upon by Respondent to support its contention that an EEOC "unable to conclude" finding is equivalent to a "no cause" determination do not involve explicit no cause determinations.

The one case Amicus anticipates will be cited by Respondent that does have facts similar to those in the case at bar is *Blakely v. United Serv. Auto. Ass'n*, No. 99-1046-CIV-T-17F, 1999 U.S. Dist. LEXIS 17723, 13 Fla. Law W. Fed. D. 79 (M.D. Fla. Oct. 4, 1999)(Kovachevich, J.). However, the decision in *Blakely* suffers from the same infirmity as the decision by the lower court herein, i.e. both courts essentially assumed without deciding that an EEOC "unable to conclude" finding was equivalent to an FCHR "no cause" determination. The *Blakely* court's erroneous interpretation of the statute is further evidenced by the conclusion that "[t]his decision by the EEOC replaced the decision by the FCHR and therefore failed to find the reasonable cause necessary to make the cause actionable under the FCHR." Thus, the court assumed that the only EEOC finding that could lead to a civil action was a reasonable cause finding. This overlooks the possibility that other findings may be made which do not trigger the 35 day time limit for requesting a hearing and that a civil action may be filed in those cases where the requisite 180 days elapses

subsequent to the filing of a claim. The range of possible EEOC decisions is simply not the same as the "cause" or "no cause" typology governing FCHR determinations.

The court in *Blakely*, *supra*, cited a previous decision by the same court as supporting the decision, i.e. *Dawkins v. Bellsouth Telecomm., Inc*., 53 F. Supp. 2d 1356 (M.D. Fla. June 8, 1999)(Kovachevich, J.). However, in *Dawkins*, there is no reference to an "unable to conclude" decision at all.

Since § 760.11(7), Fla. Stat., clearly permits a dismissal of a complaint only where there is a determination that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, a dismissal under any other circumstances simply cannot trigger the 35 day time limit to request a hearing.

There are two recent decisions from the Second District Court of Appeal holding that an EEOC "unable to conclude" finding is not the equivalent of a FCHR "no cause" finding. The first such case was the decision cited by the court below in its decision certifying conflict with *Cisko v. Phoenix Med. Prod., Inc.*, 2001 Fla. App. LEXIS 10625, 26 Fla. L. Weekly D 1851 (Fla. 2d DCA July 27, 2001). The second, more recent decision was *Jones v. Lakeland Reg'l Med. Ctr.*, 2001 Fla. App. LEXIS 15796 (Fla. 2d DCA Nov. 9, 2001).

There are several unpublished state and federal trial court decisions that have determined that the EEOC "unable to conclude" letter is not a "no cause"

determination. One of the more recent decisions in this regard is *Motry v. The Devereux Found., Inc.* Case No. 99-1457-CIV-ORL-19B (M.D. Fla. April 21, 2000)(Fawcett, J.) *Motry* is particularly significant because it is based upon three grounds, all of which are present in this case. First, Judge Fawcett determined that there was no evidence in the record from which it could be determined that the EEOC determination was the equivalent of an FCHR determination. Second, even if it was equivalent, the EEOC determination occurred after 180 days had elapsed and therefore did not bar a civil action. And finally, the EEOC determination was defective because it did not comply with the notice requirements of § 760.11(3), Fla. Stat.

In *Nichols v. Wal-Mart Stores, Inc*. 958 F. Supp. 583 (M.D. Fla. 1997), the court was presented with a similar argument claiming that the Plaintiff failed to meet the administrative requirements if the FCRA before filing suit. In rejecting the Defendant's contention in this regard, the court observed that although the EEOC issued a right to sue letter prior to the passage of the 180 day period described in § 760.11(8), Fla. Stat., the FCHR itself neither withdrew its jurisdiction nor made a determination within the 180 day period. The court stated, "[i]t is apparent that . . . the FCHR had jurisdiction over the Plaintiff's claim for the required 180 days and made no determination." The court concluded that since Plaintiff's civil action was

not commenced until after the passage of the required 180 days, all administrative remedies had properly been exhausted. The court's analysis in *Nichols*, *supra*, was further explained and discussed subsequently in *Armstrong v. Lockheed Martin*, 990 F. Supp. 1395 (M.D. Fla. 1997), where Defendant claimed that Plaintiff failed to exhaust her administrative remedies because of her request for an EEOC right to sue letter before the passage of the 180 day period. The court noted that if the FCHR viewed a right to sue letter as an acceptable resolution of the administrative process this would be "troubling to the court in light of the different administrative schemes." *Id*. at 1399, n.4. The court stated that "if the Florida Commission accepts the right to sue procedure as terminating its inquiry, its avoids its responsibilities under the Florida scheme and may jeopardize the complainant's rights to pursue legal remedies further." *Id*. The court observed that "this is an area of confusion if not outright disagreement" because of the difference between the Florida administrative scheme and the federal scheme. *Id*. at 1400. The issuance of the EEOC right to sue letter "does not neatly fit into the state administrative scheme." *Id*. The court concluded that the EEOC right to sue letter does not terminate a complainant's right to bring a state claim "as long as the claimant allows the Florida Commission the full 180 days to conduct whatever investigation it chooses to conduct." *Id*.

Similarly, in this case Petitioner allowed the Florida Commission to conduct

whatever investigation it chose to conduct within the 180 day period. The EEOC "unable to conclude" letter, like the right to sue letter, does not neatly fit into the state administrative scheme. The EEOC "unable to conclude" letter neither terminates the FCHR's inquiry nor triggers the 35 day time limit for requesting an administrative hearing. Florida law is clear that nothing short of a "no cause" determination requires a claimant to request a hearing on pain of losing her right to bring a civil action.

Other courts have reached the same conclusion. The following unpublished decisions held that an EEOC "unable to conclude" letter was not a "no cause" determination: *Beckman v. AT&T Universal Card Serv. Corp.*, 98-211-Civ-J-10B (M.D. Fla. June 23, 1999) (Hodges, J.) and *Peralta v. Florida Detroit Diesel-Allison, Inc.*, Case No. 98-894-Civ-J-20B (M.D. Fla. March 16, 1999) (Schlesinger, J.).

Thus, the "unable to conclude" letter sent to Woodham is not a "no cause" finding and is not otherwise significant in terms of the claimant's requirement to exhaust her administrative remedies. Such a letter at most constitutes an indication by the EEOC that it simply could not determine one way or the other whether the law was violated, i.e., it could neither find cause, nor determine that there was no cause. This type of EEOC action does not fit into Florida's administrative scheme and should properly serve as nothing more than a signal to the Florida Commission that it may commence it's investigation if it so chooses.

B. The Failure of the FCHR to Notify Appellant Regarding the Status of Her Claim Within 180 Days Violated Her Rights to Procedural Due Process

As noted, in *Joshua v. City of Gainesville*, 768 So. 2d 432 (Fla. 2000)(citations omitted) "an individual's procedural due process rights are violated when a deprivation of a right has occurred without notice and an opportunity to be heard." As *Joshua* made clear, the Florida Civil Rights Act shows that the intent of the Legislature was to have the Commission make a preliminary determination, notify the claimant of its findings, and inform the claimant of the steps that must be taken next to further pursue the claim. The Court stated that "Joshua's constitutionally protected rights should not be denied because the Commission failed to give her adequate notice. A claimant should not be penalized for attempting to allow a government agency to do its job." *Id*. The court concluded that the Commission should "take the necessary steps to protect the interests of claimants . . .by providing some type of notice to claimants within 180 days of filing regarding the status of their claims." *Id*.

The Court observed that Joshua "did not receive a reasonable cause determination from the Commission based on her July 1995 claim nor did she receive any other communication regarding the status of her complaint *within the 180-day period*.(emphasis added) The court further observed that "the Florida Civil Rights

Act embodied in Chapter 760 of the Florida Statutes does not provide clear and unambiguous guidance to those who file complaints under its provisions nor to those who are brought into court on allegations of violating its terms." After reviewing the Florida Civil Rights Act of 1992 in detail the court indicated that the failure of the Commission to provide some type of notice to Joshua within 180 days of filing regarding the status of her claim implicated the fair notice and opportunity to be heard requirements inherent in her constitutional right to procedural due process. The Court concluded that the Florida Civil Rights Act of 1992 should be liberally construed to preserve and promote access to the remedy provided. *See also, Motry v. The Devereux Found., Inc.* Case No. 99-1457-CIV-ORL-19B (M.D. Fla. April 21, 2000) (Fawcett, J.).

Similarly, in the case at bar, Petitioner did not receive a reasonable cause determination based upon her FCHR claim nor did she receive any other communication from the Commission regarding the status of her complaint within the 180 day period. In accordance with the reasoning in *Joshua*, *supra*, the failure of the EEOC or the Commission to act on her complaint within the 180 day period resulted in Petitioner's right to file a civil action within the four-year statute of limitations found applicable in *Joshua*.

Regardless of the analysis employed or the factual permutations involved, the

conclusion is invariably the same, i.e., as long as a no cause determination is not made within the 180 day period and as long as the Florida Commission is given the full 180 days to conduct whatever investigation it chooses, all administrative remedies and conditions precedent have been satisfied under Florida's administrative scheme and a civil action may properly be commenced upon the expiration of the 180 day period. Hence, this action was timely and properly filed.

As was the case in *Joshua*, no such notice was given to Woodham. Therefore, Woodham's procedural due process rights were clearly violated.

II. AN UNTIMELY "NO CAUSE" FINDING IS A NULLITY

In addition to the certified question before the Court, a closely related error in the opinion below has loomed large in the wake of being adopted uncritically by another court, *Bach v. U.P.S., Inc.*, __ So. 2d __, 2001 WL 984715 (Fla. 4th DCA Aug. 29, 2001). This is the erroneous finding that a vested right to sue established by 180 days of inaction by FCHR may thereafter be voided without due due process by a later untimely "no cause" finding.

Section 760.11(3) of the Florida Civil Rights Act requires the FCHR to investigate the allegations of a discrimination charge and issue a determination within 180 days. This Court recognizes, however, that the "Legislature was well aware of the fact that the Commission did not always make a determination within the 180

days following the filing of the complaint." *Joshua v. City of Gainesville*, 768 So.2d 432, 438 (Fla. 2000). Accordingly, the Legislature established a self-invoking right to sue if no determination is made before that 180-day period expires. Section 760.11(8) (permitting a charging party to proceed as if a "cause" finding had been issued in the absence of a determination within 180 days). Thus a charging party whose case is not determined within 180 days in exactly the same legal posture as one who receives a "cause" finding.

The court below, however, created an illusory conflict between 760.11(7) of the Act and subsections (3), (4) and (8). Section 760.11(7) states that a complaint is to be dismissed if the FCHR renders a no-cause finding. In that case, the charging party's only remedy is to petition for an administrative hearing within 35 days of the no-cause finding. Subsections (4) and (8) of the Act state that complainants have the right to file a civil action when 180 days pass with no determination. Read harmoniously and in pari materia to make a coherent whole of the statute, these subsections state that the right to sue vests on day 180. It necessarily requires a ghostly judicial amendment to the Act to claim that a later "no cause" finding can eradicate that vested right. The opinion below conjured just such a ghostly amendment to the statute. Section 760.11(8) states merely that when the Commission fails to act within 180 days, "an aggrieved person may proceed . . . as if the

commission determined that there was reasonable cause." The ghostly judicial amendment would add words to the effect "unless a 'no cause' finding thereafter issues." This is not only poor statutory construction. Such a judicial alteration of the statute also violates the mandate of this Court in *Joshua* in at least three ways.

A. The Florida Civil Rights Act "shall be construed according to the fair import of its terms and shall be *liberally construed* ."

Section 760.01(3) of the Act states: "The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be *liberally construed* to further the general purposes stated in this section and the special purposes of the particular provision involved." (Emphasis added) Accordingly, Chapter 760 "is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature." *Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla. 2000). The opinion of the court below does not comport with the *Joshua* language, nor the direct language if the Act itself, requiring that the Act be liberally construed. Indeed, the opinion below takes the opposite approach of struggling to construe the statute to deny access to the remedy. The District Court's interpretation requires addition of the ghostly amendment noted above. Neither the statute itself nor the *Joshua* mandate permits such a reading.

Other District Courts have recently taken pains to apply the liberal construction requirement of the statute in the wake of *Joshua*. It is fairly clear in reading two

recent appellate cases under the Act that this Court's insistence on the primacy of the "liberally construed" language of § 760.01 was outcome-determinative in both cases. *Dixon v. Sprint*, 787 So.2d 968 (Fla. 5th DCA 2001); *Cisko v. Phoenix Med. Prod., Inc.*, 2001 WL 844675 (Fla.2d DCA July 27, 2001). It should likewise be outcome-determinative here. *See also, Jones v. Lakeland Reg'l Med. Ctr.*, 2001 Fla. App. LEXIS 15796 (Fla. 2d DCA Nov. 9, 2001).

B. Vested Rights Are Not Written in Disappearing Ink

Since the right to sue vests on day 180 under both § 760.11(8) and under *Joshua*, that right may not thereafter be divested without the aggrieved party being accorded the full panoply of due process rights. A bureaucratic fiat will not suffice once the right has vested. *Joshua*, 768 So. 2d at 438-439, recognized this vested right to sue as a "constitutionally protected property interest." *Joshua* further required **pre-deprivation** due process before the state may void this vested right. In this case and all others like it, the Commission affords no due process of any sort from the time the right vests on day 180 and the time the vested right is revoked by issuance of a "no cause" determination. *See Motry v. The Devereux Found., Inc.,* Case No. 99-1457-CIV-ORL-19B (M.D. Fla. April 21, 2000)(Fawcett, J.) (No cause finding coming after passage of 180 days has no force of law).

Further, since claimants who receive no determination within 180 days are

legally equal under the statute with claimants who receive a "cause" finding, the opinion below necessarily means that the Commission may revoke a "cause" finding and replace it with a "no cause" finding at any time before the claimant brings suit. Thus the constitutionally and statutorily vested rights of both classes of claimants are written in disappearing ink which may be eradicated at the whim of the agency with no pre-deprivation due process of any sort. No such divestiture has been tolerated in any other area of American law. The vested right to sue is not to be treated as a coin in a stage magician's hand that appears and disappears with a flick of the wrist.

C. The Newly-Created Race To The Courthouse Conflicts With Legislative Policy and Supreme Court Mandate.

If the panel opinion were to stand, the Commission could revoke the right to sue of all claimants who had acquired it on day 180 of the Commission's failure to issue a determination. This creates a powerful incentive for those claimants to bring suit immediately upon the passage of day 180 to avoid divestiture of the right to sue by an untimely "no cause" finding. In a closely related context, this Court has specifically disapproved of reading this statute in a fashion that creates such incentives. Noting the Legislature's desire that aggrieved persons "avail themselves of the remedies provided by the Commission prior to seeking court action," this Court concluded:

> Thus, despite the language of section 760.11(8), which allows a

> complainant to proceed to circuit court without a reasonable cause determination, the entire statutory scheme seems to favor exhaustion of administrative remedies prior to court action.

Joshua, 768 S0. 2d at 437.

Thus the Legislature and this Court have expressed a strong policy in favor of letting the administrative process run its course, even while affording the claimant a right to abort that process after 180 days have passed. Such a policy arises from the understanding that, even after 180 days, the Commission might still successfully resolve the claim through mediation or conciliation, thereby obviating the need for a lawsuit. But no reasonable claimant will let the process run its course if, after day 180, doing so involves the risk of losing an already-acquired right to sue. In this way, the panel's opinion sets up a race to the courthouse wherein the complainant rushes to divest the Commission of jurisdiction to avoid being stripped of the right to sue by an untimely "no cause" determination.

CONCLUSION

The opinion below should be reversed. The Court should establish once and for all that (a) an "unable to conclude" determination from the EEOC is not the equivalent of a "no cause" finding from FCHR, and (b) that an untimely "no cause" determination issued by FCHR after 180 days with no determination is a nullity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this 15th day of November, 2001, to Patrick D. Coleman, Esq., Coffman, Coleman, Andrews & Grogan , P.O. Box 40089 Jacksonville, FL, 32203; to Lisa Fletcher-Kemp, Esq., 3800 South Ocean Drive, Suite 217A, Hollywood, FL 33019; and to Gary L. Printy, Esq., 1301 Miccosukee Road, Tallahassee, FL 32202.

Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

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Richard E. Johnson