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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

American Association of People with Disabilities,  
Daniel W. O'Conner, Kent Bell, and Beth Bowen,

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

Plaintiffs,

v.

Case No.: 3:01-CV-1275-J-21 <sup>HTS</sup> ~~TJC~~  
DISPOSITIVE MOTION

Jim Smith, as Secretary of State for the State of  
Florida; Edward Kast, as Director, Division of  
Elections; and John Stafford, as Supervisor of  
Elections, Duval County.

Defendants.

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**MOTION TO DISMISS AMENDED COMPLAINT,  
OR, ALTERNATIVELY, FOR SUMMARY  
JUDGMENT AND MEMORANDUM OF LAW**

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, Defendant, John Stafford, as Supervisor of Elections, Duval County, moves to dismiss this action, or, alternatively, for summary judgment. Plaintiffs assert violations of the Americans With Disabilities Act (ADA) and the Rehabilitation Act (RA) based on an asserted right to "cast independently a secret ballot" without third party assistance. This Court has previously dismissed such claims with prejudice thereby making dismissal of Plaintiffs' Amended Complaint as to such claims proper, or, alternatively, summary judgment in Defendants' favor.

**BACKGROUND**

In its Order dated October 16, 2002, this Court dismissed with prejudice the Plaintiffs' ADA and RA claims to the extent they were based on the theory that the challenged voting program under Florida law denies them the right to a "direct<sup>1</sup> and secret" vote due to the

<sup>1</sup> In their Amended Complaint, Plaintiffs are now using the phrase "independently cast" as a substitute for "direct" in describing the alleged ADA and RA violations, presumably to avoid dismissal due to the Court's dismissal of their state constitutional claim based on a "direct and secret" vote.

provision of third party assistance under section 101.051, Florida Statutes. The Court specifically stated that the ADA and RA counts are dismissed with prejudice "to the extent Plaintiffs assert that they have been excluded from or denied the benefits of a program of direct and secret voting that does not permit the type of assistance provided in Section 101.051 [Florida Statutes]."<sup>2</sup> Order at 38. The Court made clear that Plaintiffs were to allege more clearly the bases, if any, for their reliance on the more generic provisions of the ADA/RA. Order at 29-30.

The Amended Complaint, however, is replete with allegations that Plaintiffs are unable to "cast independently a secret ballot" without the assistance of third parties thereby violating the ADA and RA. Am. Comp. ¶¶ 1, 5, 6, 7, 12, 14, 16, 18, 19, 22, 23, 24, 25, 26, 31, 32, 36, 37, 53, 57, 58, 59, 75, 78, 79, 80, 81, 82, 90, 91, 92, 93, 95, 105, & 106. Plaintiffs again have relied substantially, if not exclusively, on the claim that Defendants have violated the ADA and RA by (a) allowing third party assistance to disabled voters under Florida law and (b) failing to purchase voting machines that allow the casting of independent, secret votes without such assistance. Plaintiffs' attempt to add language directed to the generic anti-

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<sup>2</sup> Under Florida law, disabled voters are entitled to assistance in casting their votes, either directly at the voting booth or via absentee ballot. Specifically, section 101.051(1), Florida Statutes, which provides for assistance at the polls to blind and other disabled voters, states that:

(1) Any elector applying to vote in any election who requires assistance to vote by reason of blindness, disability, or inability to read or write may request the assistance of two election officials or some other person of the elector's own choice, other than the elector's employer, an agent of the employer, or an officer or agent of his or her union, to assist the elector in casting his or her vote. Any such elector, before retiring to the voting booth, may have one of such persons read over to him or her, without suggestion or interference, the titles of the offices to be filled and the candidates therefor and the issues on the ballot. After the elector requests the aid of the two election officials or the person of the elector's choice, they shall retire to the voting booth for the purpose of casting the elector's vote according to the elector's choice.

§ 101.051(1), Fla. Stat. (2001); *see also* § 101.051(3) (providing for assistance in casting an absentee ballot).

discrimination provisions of the ADA (Comp. ¶ 38 & 82) are likewise based on the theory that third party assistance violates the ADA and RA. Because Plaintiffs' Amended Complaint is based on these previously rejected and dismissed theories, it should be dismissed or, alternatively, summary judgment granted in Defendants' favor.

### **MEMORANDUM OF LAW**

Counts I and Count II, which allege ADA and RA violations, respectively, should be dismissed based on this Court's October 16, 2002 Order as well as the principles set forth in Nelson v. Miller, 170 F.3d 641 (6<sup>th</sup> Cir. 1999), which held that neither the ADA nor the RA create a cause of action under the facts alleged.

I. **THE AMENDED COMPLAINT VIOLATES THIS COURT'S DISMISSAL ORDER, WHICH DISMISSED ADA/RA CLAIMS ON THE SAME GROUNDS NOW ASSERTED.**

In its October 16, 2002 Order, this Court made clear that Plaintiffs cannot state claims under the ADA and RA based on the alleged denial of a voting system that provides for third party assistance under section 101.051, Florida Statutes. A fair reading of the Court's Order indicates that the Plaintiffs were not to reallege the same basis for their initial ADA and RA claims, that being a right to unassisted, secret voting. Instead, the Court's Order indicates an expectation that Plaintiffs were to make additional allegations, if any, that supported ADA and RA claims on other grounds under the more *general* anti-discrimination provisions the Court reviewed. Order at 29-30.

The Plaintiffs, however, have based their Amended Complaint on the very theory that this Court rejected: a right to unassisted, secret voting without third party assistance. No less than thirty-five paragraphs in the Amended Complaint contain allegations about the right to "cast independently a secret ballot" without third party assistance as a basis for Plaintiffs'

ADA and RA claims. These references are in the general allegations as well as the specific allegations of each of the two counts. Once again, the basis for the Plaintiffs' ADA and RA claims is the theory that a voting system that permits third party assistance denies the Plaintiffs the right to directly ("independently") cast a secret ballot. The Court has dismissed this theory with prejudice and should do so again as to Plaintiffs' Amended Complaint.

Notably, the Court's ruling on the ADA and RA counts must be read in conjunction with its dismissal with prejudice of the state constitutional claim. In holding that Plaintiffs failed to state a state constitutional claim, the Court specifically held that the "direct and secret" language of article VI, section 1 of the Florida Constitution was "satisfied by the assistance provided in Section 101.051." Order at 21. In other words, the constitutional requirement of a direct and secret vote is met by Florida's third party assistance statute. The point is that this Court's Order, properly read, cannot be construed to permit Plaintiffs to merely reassert as ADA/RA claims the same state constitutional law claims that this Court dismissed. In addition, as the next section discusses, it would be odd to permit ADA and RA claims based on allegedly wrongful conduct (i.e., third party assistance) that is required by and complies with *state and federal* voting rights legislation.

II. THE DECISION IN NELSON V. MILLER DISPOSES OF COUNTS I AND II, WHICH RELY ON AN ASSERTED RIGHT TO INDEPENDENT AND SECRET VOTING WITHOUT THIRD PARTY ASSISTANCE.<sup>3</sup>

The decision in Nelson v. Miller disposes of Counts I and II, which rely on an asserted right to independent, unassisted and secret voting. Based on the Nelson v. Miller district and circuit court decisions (discussed below), as well as the Court's Order herein, the Plaintiffs fail to state claims under the ADA and RA based on a claimed right to a secret vote without third party assistance. The emphasis in the Plaintiffs' Amended Complaint is again that disabled voters have a right to vote without third party assistance to avoid possible impingement on the secrecy of their votes. As the district and circuit courts in Nelson v. Miller recognized (and this Court tacitly recognized), claims based on the alleged denial of an independent and secret vote are not actionable under the ADA and RA.

As in Nelson v. Miller, Plaintiffs claim a potential deprivation of a claimed right to absolute secrecy in their votes if third party assistance is provided. They again claim a right to cast their votes free from third party assistance, a right no court has recognized under federal or state law. In this regard, the disabled voter assistance statute upheld in Nelson v. Miller is substantially the same as Florida's statute. Both provide for the assistance of two inspectors if an elector needs assistance in casting his or her vote. Both also provide blind

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<sup>3</sup> In its dismissal Order, this Court did not address the application of Nelson v. Miller to the substantive issue of whether compliance with state/federal elections laws requiring third party assistance forecloses ADA and RA claims based on the facts alleged. See American Ass'n of People With Disabilities v. Smith, 2002 WL 31375631, \*15 (M.D. Fla. 2002) (limiting analysis of Nelson to whether Plaintiffs adequately allege that Defendants received federal financial assistance under RA). Because that issue is now before the Court, portions of this section reiterate Defendant's earlier arguments that Nelson v. Miller is applicable and that an alleged refusal "to provide [Plaintiffs] with voting assistance other than that already extended to them under [third party assistance laws], does not discriminate against them in violation of the ADA and/or the RA." Nelson, 170 F.3d at 653.

voters with the ability to designate a person (e.g., a family member) to assist in the casting of their votes. Additionally, Florida law specifically protects secrecy rights by penalizing any person who wrongfully discloses an elector's vote. § 104.23, Fla. Stat. (2001). As such, the analysis in Nelson v. Miller that such statutes provide legally adequate assistance, and do not discriminate in violation of the ADA or RA, is equally applicable here thereby justifying dismissal of Plaintiffs' claims based on an alleged right to unassisted, secret voting.

A. The *Nelson v. Miller* Decision Forecloses Plaintiffs' Amended Claims In Counts I and II (ADA and RA Claims)

In Nelson, a statewide class of blind voters brought an action under the ADA claiming violations arising from the failure of the State of Michigan to implement methods by which the "Plaintiffs could cast their votes unassisted by another person." 170 F. 3d 641, 644 (6<sup>th</sup> Cir. 1999) (*citing Nelson v. Miller*, 950 F. Supp. 201 (W.D. Mich. 1996)). Specifically, the plaintiffs alleged the existence of "inexpensive technologies that are currently in commercial use which [sic] permit persons who are blind to read and mark ballots without involving a third party, including braille ballot overlays or templates, taped text or phone-in voting systems." Id. at 644 n.1. Plaintiffs sought a permanent injunction to require that the State implement such methods in the future. Id. at 644.

The defendants moved to dismiss the entire action for two reasons. First, the defendants argued that the Michigan statute<sup>4</sup> allowing blind voters to designate any person over the age of eighteen or a family member to assist in casting a ballot was in compliance with the Federal Voting Rights Act of 1965 and the Voting Accessibility for the Elderly and

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<sup>4</sup> The Michigan Statute at issue, § 168.751, states:

When at an election an elector shall state that the elector cannot mark his or her ballot, the elector shall be assisted in the marking of his or her ballot by 2 inspectors of election. If an elector is so disabled on account of blindness, the elector may be assisted in the marking of his or her ballot by a member of his or her immediate family or by a person over 18 years of age designated by the blind person.

Handicapped Act of 1984, both of which specifically address the issues of assistance with and accessibility to voting by handicapped individuals. 950 F. Supp. at 202. Second, the defendants argued that the ADA and RA do not establish a right to privately cast a ballot without the assistance of a third party. Id.

The district court granted the defendant's motion, holding that “*Michigan's current voting law, which permits blind voters to have third-party assistance of their choosing in marking their ballots, complies with the ADA and RA and thus that the Plaintiffs had failed to allege facts upon which relief could be granted under either act.*” Id. at 644 (emphasis added). The district court made two rulings.

First, the court found that the ADA and RA, statutes that apply generally to disability-based discrimination, needed to be read in conjunction with older, specific congressional acts dealing with voting rights for the disabled, namely the Voting Rights Act of 1965 (as amended in 1982), 42 U.S.C.A. § 1973aa-6 (West 1994) (“VRA”), and the Voting Accessibility for the Elderly & Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1 (West 1994) (“VAEH”), insofar as they involved the elections of federal officers.

Id. at 644. In doing so, the district “court stated that *Congress did not intend for the ADA to displace the Federal Voting Rights Acts*” and noted that “*the VRA specifically required that a blind voter be provided assistance by a person of his or her choice when voting*” (with certain immaterial exceptions). Id. (emphasis added). Also, the Senate Report accompanying the VAEH (which requires polling places to be “accessible” to handicapped voters), specifically noted “that any minimal effect [from third party assistance] on the privacy of those who are elderly or handicapped is more than offset by the expanded opportunities for participation in the political process.” Id. at 644-45 (citation omitted). Thus, to the extent these enactments were applicable, the district court “concluded that the Defendant could not be said to have violated them by providing the Plaintiffs with the same type of meaningful assistance prescribed by them.” Id. at 645. Likewise, here the Defendants cannot be violating federal voting rights laws by providing Plaintiffs “with the same type of meaningful

assistance prescribed by them [i.e., third party assistance]." Plaintiffs' ADA/RA claims are due to be dismissed.

Second, the district court addressed whether, as to state and local elections that the VRA and VAEH did not cover, the ADA or RA created a private right of blind or visually impaired voters to cast a secret ballot. In rejecting this claim, the district court:

reasoned that nothing in the language of the ADA or RA indicated that voting *privacy* was a benefit Congress sought to protect under them ... and that ***Congress did not intend the ADA and RA to extend to blind voters in state and local elections anything more than it had already extended to them in federal elections through the VRA and VAEH.***

Id. (emphasis added). Stated differently, the ADA and RA were intended to ensure that disabled voters are not excluded from a state's voting program; they were not intended to create a federal right of secrecy of the ballot independent of that established under state law. For these reasons, the district court dismissed the plaintiffs' ADA and RA claims. For these same reasons, dismissal is proper here.

The Sixth Circuit affirmed dismissal of the ADA and RA claims. At the outset, the court noted the similarities between the ADA and RA, which both generally prohibit a disabled person's exclusion from participation in or denial of benefits for services, programs and other activities by reason of disability. The court also addressed the Michigan blind voter statute, section 168.751, *supra*, and the Michigan Constitution, which provides that:

The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, ***to preserve the secrecy of the ballot***, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

Id. at 649 (*citing* Mich. Const. art. 2, § 4 (emphasis added)). The plaintiffs claimed that this provision created "a constitutional right to secrecy of the ballot, or a 'secret voting program,' for all of Michigan's voters." Id. The plaintiffs alleged that the Secretary of State "denied Michigan's blind voters the benefit of complete secrecy of the ballot enjoyed by Michigan's



sighted voters” due to her refusal “to implement a system by which blind voters could vote without third-party assistance of their choosing.” Id. In other words, the plaintiffs claimed “that the State has violated the ADA and RA by ‘exclud[ing them] from participation in or ... den[ying them] the benefits of’ the State's constitutionally mandated ‘secret voting program.’” Id. at 650 (quoting district court).

The Sixth Circuit phrased the issue as whether Michigan constitutional and statutory law mandated absolute secrecy in voting where blind or visually impaired voters are at issue.

For such a claim to be true, Appellants essentially must show that the Michigan legislature, by providing blind voters with third-party voting aid, rather than unassisted voting aid, has violated the Michigan Constitution's mandate that it "enact laws to ... preserve the secrecy of the ballot," Mich. Const. art. 2, § 4. The question, then, is whether the Michigan Constitution requires more secrecy than the Michigan legislature has provided for in Mich. Comp. Laws Ann. § 168.751.

Id. at 650. In determining how the Michigan Supreme Court, if faced with this issue, would decide the matter, the Sixth Circuit concluded that it would find that the statute fulfilled the requirements of the state constitution. Based on similar analysis, this Court likewise concluded that the Florida Supreme Court, if deciding the issue, would conclude that Florida's third party assistance statute fulfilled the requirements of the "direct and secret" clause in article VI, section 1 of the Florida Constitution.

Thus, based upon the substantial assistance the Michigan statute provides for blind electors to cast their votes, the Sixth Circuit concluded that the refusal "to provide [plaintiffs] with voting assistance other than that already extended to them under ... § 168.751, does not discriminate against them in violation of the ADA and/or the RA." Id. at 653.<sup>5</sup> The parallels

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<sup>5</sup> See also NAACP v. Philadelphia Bd. of Elections, 1998 WL 321253 at \*4 (E.D. Pa. 1998) ("Defendants are not required to provide the specific procedures authorized under the VAEH, but the decision to do so is a reasonable modification to comply with the ADA.... The (Continued...)

to the instant case are evident. Given the substantial assistance and protections that Florida's elections statutes provide for disabled voters to cast their votes in secret, the alleged refusal to provide the Plaintiffs with voting assistance (other than that already extended to them under section 101.051) does not discriminate against them in violation of the ADA or RA. For this reason, the reasoning of Nelson v. Miller -- as buttressed by this Court's dismissal Order -- justifies dismissal (again) of the Plaintiffs' ADA and RA claims, which assert a federal statutory violation for the failure to purchase equipment that does not provide for an independent (i.e., unassisted) secret vote.

B. The Office of Civil Rights Has Upheld Florida's Third Party Assistance Program Under The ADA.

Further buttressing dismissal of Plaintiffs' ADA claim is that the Office of Civil Rights, Department of Justice, has specifically held that Florida's statutory program of assistance for blind voters meets ADA standards. In a Letter of Findings dated August 25, 1993, the Department addressed whether the failure to provide blind voters in Pinellas County, Florida with an electronic method of voting violated the ADA.<sup>6</sup> The complainant specifically asserted that blind voters were not provided a method of voting that allowed a secret ballot. The Department stated that the supervisor of elections, who followed section 97.061 by providing third party assistance to blind voters, was in compliance with the Act. The Department stated:

***Although providing assistance to blind voters does not allow the individual to vote without assistance, it is an effective means of enabling an individual with a***

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defendants' provision of the alternative ballot procedures [authorized by the VAEH] to qualified individuals with disabilities fulfills their obligation under the ADA....").

<sup>6</sup> The Division noted that electronic systems for voting *by telephone* that meet security requirements were not currently available. Id.

*vision impairment to cast a ballot.* Title II requires a public entity to provide equally effective communications to individuals with disabilities, but "equally effective" encompasses the concept of equivalent, as opposed to identical, services. *Poll workers who provide assistance to voters are required to respect the confidentiality of the voter's ballot,* and the voter has the option of selecting an individual of his or her choice to provide assistance in place of poll workers. *The Supervisor of Elections is not, therefore, required to provide Braille ballots or electronic voting in order to enable individuals with vision impairments to vote without assistance.*

Letter of Findings, Dep't of Justice (August 25, 1993) (to Supervisor of Elections, Pinellas County, Florida) <http://www.usdoj.gov/crt/foia/cltr099.txt> (emphasis added) (footnote omitted). The highlighted language reflects the Division's view that Florida's voter assistance statute is an "effective" method of enabling the visually impaired to vote while preserving the secrecy of their votes. Further, the Division recognized that, under both the ADA and RA, a public entity is not required to provide "identical services" in order to meet legal requirements. Instead, the longstanding interpretation of these acts is that a public entity must provide "equally effective communications to individuals with disabilities" that includes "equivalent, as opposed to identical, services." *Id.*<sup>7</sup>

Again, the point is that Plaintiffs' Amended Complaint alleges ADA and RA violations based on a claimed federal right to independent, secret voting that other federal courts, as well as the Department of Justice, have rejected. This Court, having rejected the claim that assisted voting under Florida law violates a right to "direct and secret" vote, should likewise reject Plaintiffs' ADA and RA claims, which are based on the numerous, repeated allegations

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<sup>7</sup> Consistent with this equivalency concept, the Division has stated that certain "curbside voting policies" -- which permit disabled voters to vote curbside where existing polling places are inaccessible -- are "effective" "alternative methods" that enable disabled voters "to cast a ballot on the day of the election." *See, e.g.,* Letter of Findings, Dep't of Justice, Civil Rights Division (August 19, 1993) (to County Elections Department, Las Vegas, Nevada) <http://www.usdoj.gov/crt/foia/lofc017.txt>; Letter to Senator Thurmond, Dep't of Justice, Civil Rights Division (Aug. 11, 1995) <http://www.usdoj.gov/crt/foia/lofc173.txt> (same).

in the Amended Complaint of a federal right to an independent and secret vote without third party assistance.

C. Plaintiffs' New Allegations Fail To State ADA/RA Claims Because They Assume Third Party Assistance Is Unlawful.

The more general allegations in the Amended Complaint fail to state a claim for relief under the ADA or RA because they are contrary to state and federal elections laws that require third party assistance to disabled voters. Specifically, the allegations in paragraph 82 that disabled voters are required to "reveal their votes to a third-party" and that they "risk" having to wait for third parties who may reveal their votes to others or influence their votes thereby "having to vote in a manner the singles them out in the polling place" fail to state ADA/RA claims because the third party assistance upon which they are based is a lawful and appropriate accommodation under state law, particularly with the safeguards provided in Florida.<sup>8</sup> In addition, the alleged burden of travelling to the Supervisor of Elections office "in the event Duval County ever purchases" "accessible" voting machines is entirely speculative and premature for judicial review. As in Nelson v. Miller, the refusal to provide Plaintiffs with voting assistance other than that already extended to them under Florida law does not discriminate against them in violation of the ADA or the RA. 170 F.3d at 653.

Likewise, the generic allegations of discrimination in paragraph 38 do not state a claim for relief. As the Sixth Circuit held in Nelson v. Miller, the provision of third party assistance

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<sup>8</sup> Florida law protects the right of secrecy by providing that no person may be "in the voting booth with any elector except as provided in subsection (1)." § 101.051(2), Fla. Stat (2001). As a specific deterrent against violation of voting secrecy, Florida law further provides that "[a]ny election official or person assisting any elector who willfully discloses how any elector voted, except upon trial in court, is guilty of a felony of the third degree" punishable under Florida law. Id. § 104.23. In addition, poll inspectors and clerks are sworn to an oath requiring that they "perform [their] duties ... according to law and will endeavor to prevent all fraud, deceit, or abuse in conducting the election." Id. § 102.012.

does not discriminate against disabled voters in violation of the ADA or RA. Id. Given that the provision of third party assistance satisfies the ADA and RA, a claim for auxiliary aids under the ADA is non-actionable. The alleged discrimination -- i.e., the failure to give primacy to Plaintiffs' request for auxiliary aids -- is based on the theory that third party assistance is inadequate and discriminatory. Both the Sixth Circuit and this Court, however, have rejected this theory thereby foreclosing Plaintiffs' claims. For all of these reasons, dismissal of Plaintiffs' Amended Complaint is proper.

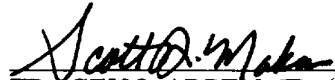
III. DEFENDANT STAFFORD ADOPTS THE MOTION OF DEFENDANTS SMITH AND KAST SEEKING DISMISSAL OR SUMMARY JUDGMENT.

Defendants Smith and Kast have concurrently filed a dispositive motion for dismissal or alternatively for summary judgment in which Defendant Stafford joins to the extent the grounds asserted therein are applicable to him.

CONCLUSION

Based upon the foregoing, Defendant Stafford requests that this Court dismiss each of the claims in the Plaintiffs' Complaint with prejudice because they are predicated on allegations of a right to "cast independently a secret ballot" without third party assistance. Alternatively, summary judgment in Defendant's favor is requested.

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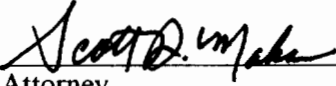
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail and facsimile to J. Douglas Baldrige, Esq., Howrey, Simon, Arnold & White, LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20036; Lois G. Williams, Esq., Washington Lawyers' Committee for Civil Rights and Urban Affairs, 11 DuPont Circle, NW, Suite 400, Washington, D.C., 20036, and Charles A. Finkel, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this ~~20th~~ day of November, 2002.

  
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Attorney