IN THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT OF FLORIDA

_____

APPEAL NO.: 01-57

_____

JOHN SHARPE

Appellant-Petitioner,

v.

STATE OF FLORIDA

Appellee-Respondent.

_____

A DIRECT APPEAL FROM THE COUNTY COURT, FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY, FLORIDA OF A DENIAL OF A MOTION TO VACATE AND SET ASIDE A JUDGMENT AND SENTENCE UNDER RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

_____

BRIEF OF APPELLANT

William Mallory Kent
THE LAW OFFICE OF
WILLIAM MALLORY KENT
Fla. Bar No. 0260738
24 N. Market Street, Suite 300
Jacksonville, FL 32202

(904)355-1890 Telephone
(904)355-0602 Fax
kent@williamkent.com

Counsel for Appellant
JOHN SHARPE

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STATEMENT OF THE CASE AND OF THE FACTS

On November 29, 1995 John Sharpe entered a guilty plea to a charge of driving under the influence of alcohol in violation of Section 316.193, Florida Statutes. [R1-22] This was his fourth (4^{th}) DUI conviction. [R2-12] The plea was taken by the Honorable June Blackburn. At the time of the taking of the plea Judge Blackburn was aware that this would be Sharpe's fourth DUI conviction based on the driving record that the Assistant State Attorney had obtained prior to the plea. [R1-18] Judge Blackburn expressly asked if the State had a copy of the driving record. [R1-19] There was an off the record discussion at the bench after the State advised the Court that it had a copy of the driving record. [R1-21] After this off the record discussion Judge Blackburn advised Mr. Sharpe that the State had agreed to stipulate to a *third* DUI. [R1-22] Judge Blackburn had the State stipulate on the record that it was a *third* DUI. [R1-22] Judge Blackburn then asked Mr. Sharpe how he pled and based on the State's stipulation that it was a *third* DUI, Mr. Sharpe pled guilty. [R1-22] Judge Blackburn sentenced him to seven days jail, time served plus four months probation, with a special condition that his license be suspended for *six months* "based on the others [his three prior DUI convictions] being about twenty years old." [R1-23] Judge Blackburn repeated "He can't drive for six months." [R1-24] Judge Blackburn concluded by saying "And, Mr. Sharpe, to be fair with you, they may take your license for longer

when they see those old ones. But I'll try to do what's fair, since they're over 20 years old. Okay? The Florida Department can do whatever they want to; there's not much I can do about it." [R1-24-25]

The Court did not advise Mr. Sharpe that there was a mandatory lifetime revocation of his driving license because this was his forth DUI conviction.

The Court engaged in *no colloquy whatsoever with Mr. Sharpe before taking his plea and imposing sentence*. The Court did not advise Mr. Sharpe of any of his rights, did not insure that he understood what any of his rights were, and did not inquire if he was knowingly waiving any of his rights. The Court did not advise Mr. Sharpe what his charge was, what the maximum penalties were, what the consequences of the conviction were, including, but not limited to, a correct statement of the *lifetime* revocation of his driving license required under Florida Statutes § 322.28(2)(e).

Mr. Sharpe filed a timely motion to vacate his plea and set aside his conviction under Rule 3.850, Florida Rules of Criminal Procedure, and the authority of *Wood v. State*, 750 So.2d 592 (Fla. 1999) and *Peart v. State*, 756 So.2d 42 (Fla. 2000) on April 5, 2001 and an amended motion on May 1, 2001. [R1-1; R1-8]

The trial court conducted an evidentiary hearing on August 29, 2001 on the motion. [R2] The only witness was Mr. Sharpe. [R2] Mr. Sharpe testified that he understood it to be his third DUI and that

the Department of Motor Vehicles ["DMV"] had said that he could get his license back after five years. Mr. Sharpe understood the "little longer" language that Judge Blackburn used in sentencing him to refer to the five year suspension that the DMV had told him the suspension would be. [R2-7]

After waiting five years Mr. Sharpe then applied for a new license with DMV and was denied a license because this conviction was his *fourth* DUI. [R2-8]

Mr. Sharpe then hired counsel to set aside this conviction. [R2-8] He is an employee of the City of Jacksonville. [R2-8] He has been prejudiced by the loss of license. [R2-8] Mr. Sharpe testified that he would not have pled guilty if he had known that he would be losing his license permanently. [R2-8-9] Mr. Sharpe reiterated that when Judge Blackburn warned him that the DMV might keep his license longer than six months he was under the impression that he could get the license back. [R2-9] No one told Mr. Sharpe he could never get his license back. [R2-9]

Judge Drayton-Harris, who presided over the evidentiary hearing on the motion to withdraw plea and set aside conviction, expressed the opinion at the hearing, in discussing the defendant's claim that it was the responsibility of the trial court to insure that the defendant knew the consequences of the guilty plea to a DUI, in particular the effect on the suspension or revocation of the driving privilege, that it was not the judge's responsibility

to advise the defendant of these matters. [R2-31] Judge Drayton-Harris stated that if she told the defendant, for example, that he was going to lose his license for five years he would say no. [R2-31] Judge Drayton-Harris expressed the view that it was up to the defendant's attorney to answer the defendant's questions. [R2-33] Judge Drayton-Harris thought that if the attorney before the court has been practicing law for a number of years if would be going beyond her function [as a judge] to answer any questions the defendant might have about the consequences of the plea. [R2-33-35] Judge Drayton-Harris expressed the concern that it would diminish the attorney-client relationship for a judge to do this. [R2-35]

Concerning the lack of plea colloquy generally, Judge Drayton-Harris expressed the view that "Things were what they were in '95, '97, and perhaps judges now do take more time. Perhaps they do go more extensively into the plea colloquy." [R2-27]

However, Judge Drayton-Harris entered a written order on September 28, 2001 denying the motion to vacate and set aside Mr. Sharpe's plea. [R1-28-30] In her order Judge Drayton-Harris concluded:

> Rule 3.172(c) are guidelines and are not mandatory. Did Mr. Sharpe, based on the record before this Court be advised of the possible consequences of the driver's license? This Court finds that the defendant was placed on adequate notice. The plea dialog was not defective.

[R1-30]

Mr. Sharpe filed a timely notice of appeal and this appeal followed.

STANDARD OF REVIEW

The traditional rule is that questions of law are subject to an independent, *de novo*, review on appeal while a lower court's findings of fact are subject to due deference. *Cf. Ornelas v. United States*, 517 U.S. 690, 697, 699, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996) (requiring independent review of the lower court's legal conclusions on reasonable suspicion and probable cause, with due deference to the lower court's findings of fact and inferences to be drawn from those facts); *Miller v. Fenton*, 474 U.S. 104, 112, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985) (holding that although a state court's conclusions on factual questions are entitled to a presumption of correctness, the ultimate issue of the voluntariness of a confession is a legal question requiring independent review). *Cf. Thomas v. State*, 2002 Fla. App. Lexis 1348 (Fla. 1st DCA Feb. 12, 2002) "Our standard of review in determining the correctness of a trial court's summary denial of a 3.850 motion is that we must defer to a trial court's factual findings if they are supported by competent, substantial evidence, but we otherwise review *de novo* [the legal issue]." Whether Mr. Sharpe was advised of the lifetime revocation of his license is a mixed question of law and fact.

Clearly Mr. Sharpe was never advised that he faced a lifetime

revocation of his license as a result of his plea to a fourth DUI. Instead, he was only advised that his license would be suspended for six months. [R1-23; R1-24] To the extent Judge Drayton-Harris's order includes a fact finding that Mr. Sharpe was adequately advised of the lifetime revocation, that finding is not supported by "competent, substantial evidence," and is entitled to no deference. Whether Mr. Sharpe received "adequate" notice of the consequence of his plea is a question of law, subject to *de novo* determination.

SUMMARY OF ARGUMENTS

I. UNDER *WHIPPLE v. STATE*, 789 So.2d 1132 (Fla. 4th DCA 2001) AND *DANIELS v. STATE*, 716 So.2d 827 (Fla. 4th DCA 1998), THE TRIAL COURT WAS REQUIRED TO ADVISE SHARPE OF THE MANDATORY LIFETIME REVOCATION THAT WAS A CONSEQUENCE OF HIS PLEA TO A FOURTH DUI, AND THE FAILURE TO DO SO ENTITLED SHARPE TO WITHDRAW HIS PLEA.

When accepting a plea of guilty or no contest in a criminal case under Rule 3.172, Florida Rules of Criminal Procedure, a court is required to advise the Defendant of the direct consequences of the plea and conviction. In the case of a plea to driving under the influence which is the person's fourth conviction under § 316.193, Florida Statutes § 322.28(2)(e) requires the court to *permanently revoke* the person's driving license.

The lifetime license revocation under § 322.28(2)(e) is a direct consequence of the DUI conviction under § 316.193. The court is required to advise the defendant of the lifetime driver's revocation before accepting a plea to a fourth DUI.

The only advice the court gave Mr. Sharpe concerning his license was that it would be suspended for six months.

When the court fails to advise a defendant of the direct consequences of his criminal plea and conviction, the plea is not a knowing and intelligent plea. The Defendant properly alleged and at his evidentiary hearing proved that he did not know that he faced a life time driver's license revocation as a result of his plea, and had he known this, he would not have pled guilty. Under

Whipple v. State, 789 So.2d 1132 (Fla. 4th DCA 2001), and *Daniels v. State*, 716 So.2d 827 (Fla. 4th DCA 1998), it was error to not permit Mr. Sharpe to withdraw his plea and vacate his conviction given this constitutional infirmity in the plea dialogue.

Judge Drayton-Harris seemed to conflate the assumption that Mr. Sharpe must have known that this was his fourth DUI (although there was no evidence in the record to show that Mr. Sharpe knew that), with the conclusion that he also knew the legal effect of that fact - that this would result in a lifetime revocation. There was nothing in the record to support such a conclusion, nor does Judge Drayton-Harris expressly make such a finding. Rather, it seems to be the unwritten, underlying assumption that is governing her conclusion that because Mr. Sharpe had counsel, and it is counsel's duty to explain these things to their clients, she was not going to allow him to withdraw his plea.

This conclusion would not be supported in the law even if there had been testimony from Mr. Sharpe's counsel at the time of the plea that he had warned Mr. Sharpe of this risk. It is the duty of the court to advise the defendant of the direct consequences of the plea, in particular, in light of the holding of *Whipple* and *Daniels*, of the license revocation. In any event there was no evidence in the record to even *suggest* that Mr. Bettman, Mr. Sharpe's trial counsel, had warned Mr. Sharpe that he faced a lifetime revocation of his license. Mr. Sharpe testified

that he did not know.[1]

Because (1) the trial court completely failed to warn Mr. Sharpe that he faced a mandatory lifetime revocation of his driver's license under § 322.28(2)(e), and (2) Mr. Sharpe's license was revoked for life as a result of this plea and conviction, and (3) Mr. Sharpe asserted that had he known he would not have pled guilty to this charge, he was entitled to withdraw his plea, and the court below erred in denying his motion to do so.

II. THE COURT DID NOT ENGAGE IN ANY COLLOQUY WITH SHARPE TO ESTABLISH THAT HE UNDERSTOOD THAT HE HAD A RIGHT TO TRIAL BY JURY OR ANY OF HIS OTHER FUNDAMENTAL RIGHTS AND THAT HE WAS KNOWINGLY AND INTELLIGENTLY WAIVING HIS FUNDAMENTAL RIGHTS BY ENTERING A GUILTY PLEA.

Sharpe contends that the record does not show that his plea was an intelligent and voluntary waiver of his constitutional rights. Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); see also *Porter v. State*, 564 So. 2d 1060, 1063 (Fla. 1990), cert. denied, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991). Here, the transcript of the plea hearing does not affirmatively show that Sharpe knowingly and intelligently

[1] Telling is the fact that the State never cross-examined and never sought to impeach Mr. Sharpe on this or any point in issue. The State did not argue below that Mr. Sharpe was not credible in his testimony on this or any other point.

entered his guilty plea. The detailed inquiry necessary when accepting a plea is absent in this case.

Florida Rule of Criminal Procedure 3.172 governs the taking of pleas in criminal cases. *Hall v. State*, 316 So. 2d 279, 280 (Fla. 1975). The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination. Fla. R. Crim. P. 3.172(c). Here, there was no colloquy with Sharpe and the trial court completely failed even to mention any of these rights. The Court never explained to Sharpe what any of his rights were, much less received an express waiver of any specific rights as required by Rule 3.172 and the Due Process clauses of the State and Federal Constitutions.

III. THE COURT DID NOT SATISFY THE CORE CONCERN OF A PLEA COLLOQUY OF ESTABLISHING THAT THE PLEA WAS NOT THE RESULT OF ANY COERCION OR THREAT.

The Court failed to satisfy itself of the core concern of any guilty plea, that it not have been the result of threat or coercion. At no point in the plea colloquy did the Court inquire whether Mr. Sharpe had been threatened or coerced. The failure to make this core concern inquiry is fundamental error, affects

Sharpe's substantial rights, and entitles Mr. Sharpe to vacate his plea. *McCarthy v. United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969).

ARGUMENTS

I. UNDER *WHIPPLE v. STATE*, 789 So.2d 1132 (Fla. 4th DCA 2001) AND *DANIELS v. STATE*, 716 So.2d 827 (Fla. 4th DCA 1998), THE TRIAL COURT WAS REQUIRED TO ADVISE SHARPE OF THE MANDATORY LIFETIME REVOCATION THAT WAS A CONSEQUENCE OF HIS PLEA TO A FOURTH DUI, AND THE FAILURE TO DO SO ENTITLED SHARPE TO WITHDRAW HIS PLEA.

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The only advice the court gave Mr. Sharpe concerning his license was that it would be suspended for six months.

When the court fails to advise a defendant of the direct consequences of his criminal plea and conviction, the plea is not a knowing and intelligent plea. The Defendant properly alleged and at his evidentiary hearing proved that he did not know that he faced a life time driver's license revocation as a result of his plea, and had he known this, he would not have pled guilty. Under

Whipple v. State, 789 So.2d 1132 (Fla. 4th DCA 2001), and *Daniels v. State*, 716 So.2d 827 (Fla. 4th DCA 1998), it was error to not permit Mr. Sharpe to withdraw his plea and vacate his conviction given this constitutional infirmity in the plea dialogue.

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Sharpe contends that the record does not show that his plea was an intelligent and voluntary waiver of his constitutional rights. Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); see also *Porter v. State*, 564 So. 2d 1060, 1063 (Fla. 1990), cert. denied, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991); *Lopez v. State*, 536 So. 2d 226, 228 (Fla. 1988); *Mikenas v. State*, 460 So. 2d 359, 361 (Fla. 1984). Here, the transcript of the plea hearing does not affirmatively show that Sharpe knowingly and intelligently entered his guilty plea. Because a guilty plea has serious consequences for the accused, the taking of a plea "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 243-44. The detailed

inquiry necessary when accepting a plea is absent in this case.

Florida Rule of Criminal Procedure 3.172 governs the taking of pleas in criminal cases. This rule provides basic procedures designed to ensure that a defendant's rights are fully protected when he enters a plea to a criminal charge. *Hall v. State*, 316 So. 2d 279, 280 (Fla. 1975). The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that he is giving up the right to plead not guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination. Fla. R. Crim. P. 3.172(c). Here, there was no colloquy with Sharpe and the trial court completely failed even to mention any of these rights. The Court never explained to Sharpe what any of his rights were, much less received an express waiver of any specific rights as required by Rule 3.172 and the Due Process clauses of the State and Federal Constitutions. *Cf. Joseph v. State*, 2001 Fla. App. LEXIS 7380; 26 Fla. L. Weekly D 1385 (Fla. 2nd DCA 2001) (written plea form signed by defendant not sufficient to satisfy requirement that trial judge orally advise defendant of rights and ascertain knowing waiver), *Perriello v. State*, 684 So.2d 258 (Fla. 4th DCA 1996) (written plea form read to defendant by attorney advising of deportation consequence of plea not sufficient

to satisfy court's obligation to advise defendant); *Childers v. State*, 782 So.2d 513 (Fla. 1st DCA 2001) (although a defendant may have signed a plea which addressed some of what Fla. R. Crim. P. 3.170 requires that a defendant understand before agreeing to a plea, if the record does not show that the trial court informed the defendant of the points in the rule and that the defendant understood the written form, much less whether the defendant could even read, the plea was involuntary and the defendant may withdraw his plea of guilty or nolo contendre).

There is no basis to find from the superficial plea colloquy here, that Sharpe's plea was voluntary and intelligent. *See Koenig v. State*, 597 So.2d 256 (Fla. 1992). Sharpe must be permitted to set aside his plea due to the failure of the trial judge to satisfy any of the core concerns of the plea colloquy mandated by Rule 3.172 or the Due Process Clause of the State and Federal Constitutions.

III. THE COURT DID NOT SATISFY THE CORE CONCERN OF A PLEA COLLOQUY OF ESTABLISHING THAT THE PLEA WAS NOT THE RESULT OF ANY COERCION OR THREAT.

The Court failed to satisfy itself of the core concern of any guilty plea, that it not have been the result of threat or coercion. At no point in the plea colloquy did the Court inquire whether Mr. Sharpe had been threatened or coerced. The failure to make this core concern inquiry is fundamental error, affects Sharpe's substantial rights, and entitles Mr. Sharpe to vacate his

plea. *McCarthy v. United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969), as discussed in *United States v. Martinez-Molina*, 64 F.3d 719 (1st Cir. 1995).

Although Florida courts often speak of a requirement of "prejudice" as a condition precedent for withdrawing a plea for a violation of Rule 3.172, prejudice is presumed when one of the three "core concerns" of any guilty plea colloquy is missing or inadequately addressed by the trial court. *See e.g. United States v. Siegel*, 102 F.3d 477 (11th Cir., 1996) (Black, J.). The three "core concerns" are rooted in the Due Process clause of the Constitution, and any failure to address a core concern in a plea colloquy results in per se substantial prejudice to the defendant's fundamental rights. In *Siegel* Judge Black held as follows:

> Rule 11(c)(1) [the federal equivalent of Rule 3.172] imposes upon a district court the obligation and responsibility to conduct a searching inquiry into the voluntariness of a defendant's guilty plea. *United States v. Stitzer*, 785 F.2d 1506, 1513 (11th Cir.), cert. denied, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 44 (1986). Three core concerns underlie this rule: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *United States v. Hourihan*, 936 F.2d 508,

511 n. 4 (11th Cir.1991); *United States v. Bell*, 776 F.2d 965, 968 (11th Cir.1985), cert. denied, 477 U.S. 904, 106 S. Ct. 3272, 91 L. Ed. 2d 563 (1986); *United States v. Dayton*, 604 F.2d 931, 935 (5th Cir.1979), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980). If one of the core concerns is not satisfied, then the plea of guilty is invalid. *Stitzer*, 785 F.2d at 1513. Thus, "A court's failure to address any one of these three core concerns requires automatic reversal." Id.; *Bell*, 776 F.2d at 968 (citing *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)); see also *Buckles*, 843 F.2d at 473 [*United States v. Buckles*, 843 F.2d 469 (11th Cir. 1988)].

Whether a plea is threatened or coerced is a core concern. In *United States v. Martinez-Molina*, 64 F.3d 719 (1st Cir. 1995), the court set aside a plea due to the failure to make an *adequate* inquiry into the possibility of threats or coercion, stating:

> Rule 11(d) [upon which Florida Rule 3.172 is based] states: "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. Proc. 11(d) (emphasis added). Here, the district

court conducted only a partial inquiry into the voluntariness of Travieso's and Velez' guilty pleas. Specifically, it asked them whether they had "entered into [the] plea agreement without compulsion or any threats or promises by the -- from the U.S. Attorney or any of its agents." It did not, however, ask whether the defendants were pleading guilty voluntarily or whether they had been threatened or pressured by their codefendants into accepting the package plea agreement. Under these circumstances, the district court's inquiry was incomplete because, regardless of whether Travieso's and Velez' guilty pleas were actually coerced by their codefendants, the literal answer to the court's question could still have been "yes." Admittedly, all the defendants acknowledged in their written plea agreements that they had not been threatened or pressured into entering their guilty pleas, and all testified at the plea hearings that they had answered the questions in the plea agreements truthfully after consultation with their attorneys. In many situations, however, "reliance on 'a written document is not a sufficient substitute for personal examination [by the court].'" *United States v. Medina-Silverio*, 30 F.3d 1, 3 (1st Cir. 1994) (quoting James W. Moore, 8 Moore's Federal Practice P 11.-05[2]

(1994)) (other citations omitted). The Supreme Court has similarly expressed the importance of direct interrogation by the district court judge in determining whether to accept the defendant's guilty plea:

> To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries.

McCarthy v. United States, 394 U.S. 459, 467, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). The Court in Sharpe's case failed to address in any fashion this core concern, and accordingly Sharpe is presumed to have been prejudiced in his fundamental rights and he must be allowed to withdraw his plea.

CONCLUSION

Based on the foregoing arguments, Appellant Sharpe requests this Honorable Court vacate his conviction and sentence for DUI in Case Number 95-52909 MM.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Florida Bar No. 0260738
24 North Market Street
Suite 300
Jacksonville, Florida 32202
(904) 355-1890 Telephone
(904) 355-0602 Facsimile
Http://www.williamkent.com
kent@williamkent.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to The Office of the State Attorney, Fourth Judicial Circuit, Duval County, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, 32202, by United States mail, postage prepaid, this March 4, 2002.

_____
William Mallory Kent

APPENDIX

1. ***Whipple v. State***

2. ***Daniels v. State***

3. **Florida Statutes, § 322.28**