IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Appellant,

v. CASE NO. 75,128

DAVID DAVIS,
Appellee.

REPLY BRIEF OF APPELLANT

On Appeal From an Order of the County Court
in and for Franklin County on a Question
Certified as One of Great Public Importance

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INTRODUCTION

This is Appellant's reply brief addressing the authority of the Marine Fisheries Commission (MFC) to adopt emergency rule 46ER89-3 requiring the use of turtle excluder devices by shrimp fishermen in Florida waters. The Defendant below was cited for violation of the emergency rule and that citation was dismissed by the county court, that court holding that the rule was ultra vires. This court accepted jurisdiction of this case pursuant to Fla. R. App. P. **9.030(a)(2)(B).** Subsequent to the time when this court accepted jurisdiction of this case, an administrative hearing officer ruled on the validity of the Marine Fisheries Commission's permanent rule requiring TEDs. (A copy of that order was appended to Appellee's answer brief.) Although the hearing officer concluded that the MFC lacked authority to adopt the rule based on a different theory than the county court below, all other issues were resolved in favor of the agency.

The hearing officer found as facts that: the incidental catch and drowning of turtles in shrimp trawls is a significant source of mortality [order at 7]; absent the elimination of that factor, sea turtles are faced with extinction [order at 7]; the use of TEDs will substantially reduce that mortality factor [order at 7-8]; the use of TEDs does not result in significant loss to shrimp fishermen [order at 8 n.3]; only two options were available to the MFC to protect sea turtles, closing the shrimp fishery or requiring the use of TEDs [order at 13-14]; and the agency had complied with all of the relevant requirements of law in the promulgation of the rule [order at 20-21]. The MFC has filed a

notice of appeal based on the hearing officer's conclusion of law that the rule is ultra vires.

Because of the holdings of the hearing officer, the decision of this court in this case will determine the ability of the MFC to require the use of TEDs both under the emergency rule at issue here and under the permanent rule.

POINT I

BECAUSE THE MARINE FISHERIES COMMISSION HAS THE UNQUESTIONED POWER TO IMPOSE SHRIMPING GEAR REGULATIONS, THE PROPER TEST IS WHETHER THE TED RULE IS REASONABLY RELATED TO THE PURPOSES OF THE STATUTE

Turtle Excluder Devices (TEDs) are a shrimping gear specification. The Marine Fisheries Commission's power to impose shrimping gear specifications is unquestioned; the issue presented here is whether the Commission's statute can be construed to authorize shrimping gear specifications for the purpose of protecting marine turtles. This case presents a question of statutory construction.

Statutory construction requires an examination of the statute and its purposes as a whole. Peninsular Industrial Ins. Co. v. State, 55 So. 398, 399 (Fla. 1911). The Marine Fisheries Commission (MFC) was created by the legislature to regulate the harvest of marine life in Florida. Specific types of regulations which are available to the MFC to fulfill this function are found in § 370.027(2), Fla. Stat. Included in the list of allowable regulations are those which regulate the time, place, and manner of the act of harvesting.[1] In particular, the MFC is expressly

empowered to regulate fishing gear by establishing gear specifications. § 370.027(2)(a), Fla. Stat.

The purposes for which these regulations may be imposed are clearly addressed in a policy statement at the beginning of the MFC statute. Those purposes are

> management and preservation of [the state's] renewable marine fisheries resources, based on the best available information, emphasizing protection and enhancement of the marine and estuarine environment in such a manner as to provide for optimum sustained benefits and use to all people of this state for present and future generations.

Section 370.025(1), Fla. Stat. The interpretation that fishing regulations may be imposed for any purpose enunciated in the above-quoted purposes section is an established interpretation of the MFC that is reflected in other administrative rules. Shrimp trawling is prohibited in Tampa Bay north of the Gandy Bridge in order to protect sea grass beds. Those sea grass beds provide juvenile finfish habitat. Fla. Admin. Code Rule 46-25.003, published in Fla. Admin. Weekly Vol. 15. No. 25, pp. 2598-99 (June 23, 1989) attached hereto as Appendix C. Similarly, mechanical harvesting for bay scallops is prohibited in shallow areas and in any event may not be conducted **so** as to damage the sea bottom. Fla. Admin. Code Rule 46-18. These rules also

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[1] Amicus, Concerned Shrimpers, asserts that the passage of Ch. 89-113, Laws of Florida evidences the legislatures intent to reserve the protection of endangered species to itself because of the specific delegation of authority to the MFC to determine the degradability of balloons. This argument fails to recognize that the MFC has specific rulemaking authority over the harvest of marine species. Since the biodegradability of balloons is not part of a regulation of such a harvest, specific statutory authority was needed. The regulation under review here **is** a harvest regulation within the power of the MFC.

protect the habitat of various fisheries. Although these rules do not primarily protect the fisheries being regulated, they nonetheless are reasonably related to the above-quoted purposes.

The proper test for determining whether the MFC can validly require the use of TEDs on shrimp trawls is whether this gear specification is imposed for the purposes for which the MFC was created. If the goal of preserving the marine turtle population falls within these statutory purposes, the TEDs rule is valid because it is reasonably related to the purposes of the statute. As argued infra in point 11, the marine turtle fishery was an established and ongoing fishery until **1973,** and the MFC properly seeks by the instant rule to preserve sea turtles for the benefit of future generations.

Appellee and Amicus Concerned Shrimpers seek to contract the above-quoted statutory purposes so as to require that all MFC regulations: 1) must be directed to a currently harvested species [Appellee's answer brief at page 26]; and **2)** must be narrowly targeted so that the restrictions are aimed only at managing the specific fishery to which the restrictions **apply.**[2] No such

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[2] Under Appellee's theory, regulations applicable to shrimp fishing could be imposed only for the "conservation and management of the species being harvested" (i.e. shrimp). Appellee's brief at page 18. Applying Appellee's standard, in order to preserve the redfish fishery, the MFC could enact rules regulating redfish harvest but could take no action to prevent the incidental capture of redfish in fishing operations seeking other marine resources. This restrictive interpretation of the MFC's purposes and powers is at odds with the broad purposes expressed by the legislature. Amicus Concerned Shrimpers, at page **17** of its brief, admits that, although the purposes expressed in **§ 370.025** (quoted in the text above) are broad, these purposes are only the "policy of the state'' and have nothing to do with the MFC in particular. The inclusion of the
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restrictions are found in the statute.

Appellee argues in his answer brief that these more restrictive interpretations must prevail because the "reasonable doubt" standard applies to the question of whether the MFC is empowered to require TEDs on shrimp trawls. That standard applies to cases where the existence of the power to do the act complained of is in doubt, as was the case in all of Appellee's cited cases. E.g., Radio Telephone Comm. v. S.E. Telephone **Co.**, 170 So.2d 577, 582 (Fla. 1964) (new type of radio service not contemplated when PSC statute enacted: no power to regulate); Greenberg v. Bd. of Dentistry, 297 So.2d 628, 636 (Fla. 1st DCA 1974) (power to issue subpoena): City of Cape Coral v. GAC Utilities, 281 So.2d 493, 496 (Fla. 1973) (statute had expressly removed PSC power to regulate GAC).

When an agency has unquestioned jurisdiction to regulate in a subject area, the agency is entitled to deference in its choice of statutory interpretations developed in the course of implementing its legislative mandate. This principle appears in Island Harbor Beach Club v. DNR, 495 So. 2d 209, 214 (Fla. 1st DCA 1986), wherein the appellant contended that because the agency's jurisdiction was limited to the "beach-dune system," the agency's interpretation of that term was subject to the "reasonable doubt" standard for review of agencies' assertion of jurisdiction. The court rejected that argument, and deferred to the agency's interpretation of the term "beach-dune system,"

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purposes section as the first section of the MFC statute leads to a well-founded suspicion that it does relate to the MFC.

Id. Here, the MFC has unquestioned authority to impose gear specifications on shrimp trawls. § 370.027(2)(a), Fla. Stat. Like the Appellant in Island Harbor, the opponents of the TEDs rule contend that because the MFC's jurisdiction to impose gear restrictions is limited by § 370.025(1), Fla. Stat. to those which serve to preserve "renewable marine fishery resources," the agency's interpretation of the term **"renewable** marine fishery resources" is subject to the "reasonable doubt" standard. It is not. Island Harbor makes clear that the MFC is entitled to the same deference that all agencies receive in construing the terms of their enabling legislation.[3]

The power of the MFC to impose gear restrictions on shrimp trawls is unquestioned. Thus, the proper test for examining the validity of the TEDs rule asks whether the MFC's interpretation is a reasonable one and whether the regulation is reasonably related to the purpose of the MFC statute. Both of these tests are met.

POINT II

MARINE TURTLES ARE A RENEWABLE MARINE FISHERIES RESOURCE WITHIN THE MEANING OF THE MARINE FISHERIES COMMISSION STATUTE

Marine turtles are a renewable marine fisheries resource. This question of fact was resolved in the Final Order of the

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[3] Amicus, Concerned Shrimpers, quotes a passage from United Telephone Co. v. General Telephone Co., 496 So.2d 116 (Fla. 1986) to suggest that the court there held the "deference **to** the agency's interpretation" rule is inapplicable when the agencies' jurisdiction is questioned. In fact, the "deference" referred to in that passage was not deference to the agency's interpretation of its enabling statute but was the deference accorded to the PSC in the sense that the PSC's orders reach the court clothed with a presumption of reasonableness. **Id.** at 118.

Hearing Officer in the administrative rule challenge to the permanent TEDs rule, filed with this court as Appendix A-1 to Appellee's answer brief. On page 20 of that Order, the Hearing Officer determined as a fact that "there was a sea turtle fishery in the state of Florida prior to 1973." Like the county court below, the Hearing Officer relied on the dictionary definition of "fishery" which includes "the industry or occupation of catching, processing or selling, fish, shell fish, or similar aquatic products." Hearing Officer's Order at 20. The harvest of marine turtles is plainly within this definition.

Appellee nonetheless sets forth three arguments as to why turtles are not a "renewable marine fisheries resource": 1) that the harvest of marine turtles has been prohibited by statute since 1973; 2) that turtles are not a saltwater fish within the meaning of § 370.01(2), Fla. Stat.; and 3) that an opinion of the Attorney General, 1989 Op. Att'y. Gen. Fla. 089-32 (May 23, 1989) defined fish to include any exclusively marine animal and that this definition excludes marine turtles because they are partially land animals. None of these contentions withstand scrutiny.

Since 1973, the harvest of marine turtles has been prohibited by section 370.12(1), Fla. **Stat.**[4] For that reason, Appellee

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[4] Appellee and Amicus, Concerned Shrimpers, point out that the MFC statute did not conditionally repeal § 370.12(1), Fla. Stat., prohibiting the harvest of sea turtles and that that failure to repeal necessarily means that the legislature intended that there could be no regulation of the incidental capture of sea turtles. A more reasonable interpretation of the failure to repeal is that the legislature merely intended to continue the statutory prohibition on harvest thereby preventing the MFC from licensing any directed harvest of sea turtles.

contends that turtles are not a fishery at all. The MFC's statute does not restrict its authority to species being currently harvested, but requires only that they be renewable. Preservation of the species is the first and most critical step toward the renewal of a fishery. One of the purposes of the MFC is to conserve and protect resources for present and future generations. § 370.025(1), Fla. Stat. This is a clear signal from the legislature that optimization of the short term harvest is not the *raison d'être* of the MFC. Under Appellee's reasoning, the MFC could not consider the long term consequences of current fishing practices. The example of the alligator set forth in Appellant's initial brief shows that an endangered or threatened animal can be brought back from the brink of extinction sufficiently to allow harvest. § 372.6672, Fla. Stat. The fact that marine turtles are depleted to the point that current harvest is prohibited does not support the conclusion that they are not a "renewable marine fisheries resource."

Appellee's second and third arguments are based on the contention that turtles are not fish within the definitions contained in 1989 Op. Att'y Gen Fla. 089-32 (May 23, 1989) and § 370.01(2), Fla. Stat. The definition of "fish" is not at issue here. The statutory term is not "fish," but "renewable marine fisheries resource," which is patently broader. No definition of "fishery" appears in Florida Statutes and the dictionary definition of the term fishery[5] includes fish, shellfish, and

[5] New College Edition, American Heritage Dictionary of the English Language, 1979, Houghton Mifflin Co., Boston. at page 496.

other similar aquatic **products**.[6] Under this definition, marine turtles are a fishery, albeit one not currently harvested in Florida.

Finally, Appellee contends that turtles are not within the jurisdiction of the MFC because they spend some of their time on land. It is commonly known within the jurisdiction of this court that sea turtles spend their entire lives in the water with the exception that females come ashore once every two or three years for a short time to lay their eggs. These brief incursions onto land, where the turtles are vulnerable, do not diminish sea turtles' essential character as marine **species**.[7] It is not necessary, as Appellee assserts, that all threats to the

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[6] An example of a "similar aquatic product" can be found in the freshwater fisheries. The Game and Freshwater Fish Commission is responsible for establishing the forms for fishing licenses which authorize the taking of "freshwater aquatic life." § 372.561(2), Fla. Stat. A "freshwater fish dealer's license" entitles a person to engage in the business of taking and selling freshwater fish or frogs. § 372.65, Fla. Stat. Frogs may not be fish, but they are certainly regulated as a fishery, even though they spend part of their time on land and are scientifically classed as amphibians.

[7] Amicus Concerned Shrimpers contend at page 22 of their brief that "sea turtles inhabit both land and sea." Sea turtles are reptiles specifically adapted for life in the sea. R. Orr, Vertebrate Biology 104, 108-109 (4th ed. 1976), attached hereto as Appendix D. After hatching, the females leave the sea only once every two to three years in order to lay their eggs in specific breeding areas. Reaching these breeding areas may require swimming as far as 1400 miles. Id. at 298, 303-304, 319-320. The eggs are laid during the night. Immediately after the eggs are covered, the female returns to the sea. Id. at 384. To argue that these excursions render marine turtles partly a land animal is to call a once-a-year tourist from Okalahoma visiting Miami Beach who takes a dip in the ocean a partly aquatic animal. Pursuant to § 90.202(12), Fla. Stat., this court can and should take judicial notice of the fact that sea turtles are marine species that leave the sea only for the purpose of depositing eggs. Appendix D provides a foundation for judicial notice because it is a source "whose accuracy cannot be questioned."

continuing survival of sea turtles be addressed by one agency. Nothing in the regulatory scheme for marine fisheries resources suggests that the extinction of sea turtles at the hands of shrimpers should be licensed because there are other problems facing sea turtles which the MFC does not have authority over.

The MFC is entitled to deference in its application of the statutory term "renewable marine fisheries resource'' and need only choose a permissible one. Humhosco, Inc. v. HRS, 476 So.2d 258, 260-61 (Fla. 1st DCA 1985) (agency interpretation of statutory term "uniform methodology" permissible and "must be sustained even though another interpretation may be possible or even, in the view of some, preferable"); Natelson v. DOI, 454 So.2d 31, 32 (Fla. 1st DCA 1984) (department's construction of the statutory term "lack of fitness or trustworthiness to engage in business of insurance" was within the range of possible interpretations and sustained). The dictionary definition of "fishery" is broad enough to include marine turtles and the inclusion of formerly active fisheries within the statutory term is well within the range of possible interpretations.

POINT III

THE TED RULE DOES NOT REGULATE
THE HARVEST OF AN ENDANGERED SPECIES

As explained in Point I above, the purpose of the MFC is to regulate the harvest of marine life *so* as to preserve marine fisheries resources for present and future generations. Any harvesting technique or fishing gear which acts to diminish or threaten such resources is a proper subject of the MFC's

concern. This power to regulate the time, place and manner of harvest extends to all marine life except endangered species. § **370.027(1),** Fla. Stat. The TED rule sub judice regulates the harvest of shrimp; it does not regulate the harvest of endangered marine turtles.

Appellee contends that the TED rule is a regulation of endangered species and is therefore barred by the endangered species exception to the MFC statute. Even if the TED rule is viewed as a regulation of an endangered species, it is not barred by the endangered species exception because it does not in any sense authorize harvest of marine turtles. Examination of the Florida Endangered and Threatened Species Act in pari materia with the MFC statute supports this interpretation. Consideration of both statutes together is the proper approach to this construction problem because legislative enactments on the same subject "should be considered as an entirety in ascertaining the real legislative intent and purpose." Peninsular Industrial Ins. Co. v. State, **55** So. **398,** 61 Fla. **396 (1911).**[8]

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[8] Appellee contends that the state is barred from raising the argument that statutes on the same subject must be read in their entirety. The cases cited by Amicus Concerned Shrimpers in its brief do not preclude the introduction of new legal arguments on the issue of the power of the MFC. Each of the cases indicates that new issues cannot be presented to an appeals court. Dober v. Worrell, **401** So.2d **1322** (Fla. **1981)** (appellant barred by statute of limitations and attempted to raise issue of fraudulent concealment for the first time on appeal); In Re Beverly, **342** So.2d **481** (Fla. 1977) (claiming patient-psychiatrist privilege on appeal for first time); Abrams v. Paul, **453** So.2d 826 (Fla. 1st DCA **1984)** (failure to state a cause of action raised on appeal but not raised in trial court). No new issues are presented here; the issue before this court is the power of the MFC to require TEDs on shrimp trawls.

When the MFC was created in 1983, the Department of Natural Resources had the duty to research and manage endangered and threatened marine species. § 372.072(4)(a)(2), Fla. Stat. (1983). However, by operation of § 370.027(2), Fla. Stat., the MFC's exclusive rulemaking authority supersedes "any conflicting authority" of any state agency,' and MFC rules supersede any "inconsistent rule or the inconsistent part thereof" that is promulgated by any other state agency. Without the endangered species exception to the MFC's exclusive rulemaking authority, the MFC could authorize harvest of endangered marine species. This authorization would supersede DNR's ability to protect endangered species by prohibiting their harvest. By limiting the exclusive authority of the MFC to marine life other than endangered species, the legislature solved that problem - DNR's power over endangered species is preserved.[10] Thus, even if the TED rule is considered to be a rule regulating endangered species, it is still authorized because it does not attempt to supersede DNR's rules on endangered species. The TED rule was adopted at the request of DNR [Appendix B to Appellant's initial brief[11]] and therefore cannot be construed as inconsistent with

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[9] An example of conflicting authority that was superseded is the authority of the DNR Division of Marine Resources to regulate "fishermen and vessels" in the state engaged in taking fisheries. § 370.02(2)(a), Fla. Stat. (1983).

[10] The exception for endangered species also occurs as an exception to the MFC's "full rulemaking authority over marine life." § 370.027(1), Fla. Stat. This exception means that the rulemaking authority is partial rather than full - that on the subject of endangered marine species, authority is shared with DNR.

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DNR's rules on endangered species.

Appellee contends that the endangered species exception to the MFC's rulemaking powers indicates that the legislature reserved to itself the task of regulating endangered species. It did not. Under the Florida Endangered and Threatened Species Act, § 372.072, Fla. Stat., the task of managing endangered marine species is delegated to DNR, and these responsibilities can be implemented by the adoption of administrative rules. § 370.021(1), Fla. Stat.

Appellee also contends that the MFC asserts a power to implement the Florida Endangered and Threatened Species Act. Appellants agree that no such power exists.

POINT IV

THE TED RULE IS AUTHORIZED UNDER EVEN THE MOST EXTREMELY NARROW CONSTRUCTION OF THE MFC STATUTE BECAUSE ONE SPECIES OF MARINE TURTLE IS A THREATENED SPECIES

Even the most literal and narrow interpretation of the endangered species exception to the MFC's exclusive rule-making authority permits the adoption of the TED rule. One of the marine turtle species - the loggerhead - is not listed as an endangered species but as a "threatened" species. Fla. Admin. Code Rule 39-27.004(3). Appellee contends that because the term "endangered species" in the MFC statute is a term of common

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[11] Appellee objects to the inclusion of this appendix to Appellant's initial brief. This document is R. 353-58 of the record of Concerned Shrimpers of America v. Marine Fisheries Commission, 549 So.2d 1111 (Fla. 1st DCA 1989), and Appellants have an outstanding request with this court to take judicial notice of the record in that case. That request was filed on December 8 along with the request for stay.

usage, the dictionary definition should be used. That definition includes any species in danger of extinction without differentiating between endangered and threatened species. It was upon this basis that the Hearing Officer invalidated the permanent TED rule. Appendix A-1 to Appellee's brief at page 18-19, n.6. This theory ignores the fundamental rules of statutory construction.

At the time the MFC statute was enacted, the term "endangered species" was already in Florida statutes in the 1977 Florida Endangered and Threatened Species Act, § 372.072, Fla. Stat. (1983). The MFC statute and the Florida Endangered and Threatened Species Act both deal with the subject of conservation of the state's natural resources. When statutes addressing similar subjects use the same "exact words or phrases," courts should assume that in both chapters the terms were intended "to mean the same thing." Goldstein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958); Accord, Schorb v. Schorb, 547 So.2d 985, 986 (Fla. 2d DCA 1989) ("when statutes employ exactly the same words or phrases, the legislature is assumed to intend the same meaning"). This rule of construction compels the conclusion that the term "endangered species" in the MFC statute means the same thing as "endangered species" in the Endangered and Threatened Species Act - those species listed as "endangered species" pursuant to that Act.

Nor should the term "endangered species" be construed to include "threatened species." When the legislature wanted to include both threatened and endangered species, it did so

explicitly. Florida Statute Sections **370.021(c)(5)** and 373.414(c) apply to both endangered and threatened species and use both terms to indicate separate and distinct categories.

The fact that one of the sea turtles species is threatened rather than endangered permits the TED rule to escape even the extremely narrow construction of the MFC statute advanced by the Appellee. The primary purpose of the TED rule is to protect endangered and threatened sea turtles; the permissible purpose of protecting threatened species provides a sufficient basis for authority.

CONCLUSION

The TEDs rule is reasonably related to the purposes for which the MFC was created - the preservation of the state's renewable marine fisheries resources for future generations. This court should defer to the agency's interpretation of the statutory term "renewable marine fisheries resource" as including sea turtles thereby making them a proper subject of consideration of the MFC. The TEDs rule is a gear specification for the shrimp fishery. Requiring the use of TEDs by shrimp trawls is not a regulation of endangered species. The MFC statute can also be reasonably construed to permit non-exclusive regulation of endangered species so long as harvest in any sense remains prohibited. And, even using the extremely narrow construction of the MFC statute advocated by Appellee, the rule is valid because the loggerhead turtle is listed as threatened, not endangered (yet). For the foregoing reasons, emergency rule 46ER89-3 is a valid exercise of the authority delegated to the MFC by the legislature and the order of the county court should be REVERSED.

Respectfully submitted this 2nd day of January, 1990.

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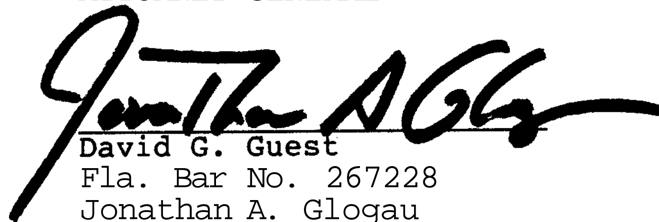

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail delivery on J. Patrick Floyd, 408 Long Ave., P.O. Drawer 950, Port St. Joe, Florida 32456; Jim Hintz, Esq., Assistant State Attorney, Franklin County Courthouse, Apalachicola, FL 32320; John D.C. Newton, 1711-D Mahan Dr., Tallahassee, Florida 32308; David Gluckman, Rt. 5, Box 3965, Tallahassee, Florida 32301; and Winston K. Borkowski, 926 South Ridgewood Ave., Daytona Beach, Florida 32114, this 2nd day of January, 1990.

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