IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 83,760

ROBERTA JACKSON, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

On page 1 of its brief, Petitioner states that detectives of the Sarasota Police Department followed Respondent to a restaurant "where they observed a narcotics transaction. (R. 125)" This is inaccurate. In his affidavit for a search warrant, Robert R. Korich of the Sarasota Police Department stated that Respondent and a Jeff Wyatt "completed what appeared to be a narcotics transaction" (R 125--emphasis supplied), not that the detectives observed a narcotics transaction, as stated by Petitioner.

On June 1, 1994, this Court issued an order postponing its decision on jurisdiction and setting up a schedule for briefs on the merits to be submitted.

## SUMMARY OF THE ARGUMENT

This Court should decline to exercise jurisdiction in this matter. There are few reported cases dealing with the issue involved herein, suggesting that it is not a frequently-occurring issue requiring immediate resolution by this Court. If the Court does reach the merits, Respondent must prevail. A duplicate digital display pager is much more intrusive than a pen register or trap and trace device, and the State therefore should be required to comply with the more stringent requirements of Chapter 934, Florida Statutes, relating to wiretaps before being authorized to obtain such a clone pager.

## ARGUMENT

### ISSUE

WHETHER THE ISSUANCE OF AN ORDER FOR A DUPLICATE DIGITAL PAGER IS GOVERNED BY THE PROCEDURE FOR THE PLACEMENT OF A PEN REGISTER OR A TRAP AND TRACE DEVICE OR THE PROCEDURE FOR SECURING A WIRE TAP? [As stated by Petitioner.]

Respondent initially would note that the dearth of caselaw dealing with duplicate digital display pagers suggests that the issue involved herein does not arise very often. Therefore, this matter is not one of compelling importance which cries out for judicial resolution, and this Court should save judicial labor by declining to exercise its jurisdiction. However, if the Court does take jurisdiction, Respondent must prevail on the merits.

On page 5 of its brief, Petitioner complains that the Second District Court of Appeal "erred when it looked to the legislative history of the federal act to determine that the monitoring of digital display pager are [sic] protected by the wiretap provisions" because "[r]esort to legislative history is only appropriate in the case of an ambiguous statute. [Citation omitted.]" However, Chapter 934 of the Florida Statutes <u>is</u> ambiguous insofar as its applicability to duplicate digital display pagers is concerned. Petitioner in effect concedes as much at pages 4-5 of its brief in acknowledging that the statute provides no definition of "digital display pager," and resorting to analogy to try to show which subsection of the statute is applicable in this case. If the statute clearly provided an answer as to whether law enforcement

authorities must comply with the provisions of the statute relating to pen registers and trap and trace devices in order to obtain a duplicate digital display pager, or whether they must comply with the more stringent requirements needed for a wiretap order, it is doubtful that Petitioner would be seeking review in this Court. As the Second District Court of Appeal was faced with alternative interpretations of the statute, it was entirely proper for it to "look to legislative history as a guide to [the statute's] meaning." Continental Can Company, Inc. v. Mellon, 825 F. 2d 308, 310 (11th Cir. 1987). See also State Farm Mutual Automobile Insurance Company v. O'Kelley, 349 So. 2d 717, 718 (Fla. 1st DCA 1977) ["While courts are not at liberty to resort to rules of statutory interpretation where the language of the statute is plain, and unambiguous, Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918), where the words are ambiguous the cardinal rule of construction is to interpret the statute in such a way that effect be given to the intention of the legislature. Tyson v. Lanier, 156 So.2d 833 (Fla.1963)."]

As Respondent's counsel pointed out at the suppression hearing before the trial court (R 10-11), and as the State conceded (R 3), while "tone only" paging devices are excluded from the operation of Chapter 934, duplicate digital display pagers, or "clone pagers" such as the police employed here, are not. §934.02(12)(c), Fla. Stat. (1991); see also United States v. Suarez, 906 F. 2d 977 (4th Cir. 1990) (Display pagers are included in the federal counterpart to Florida's Security of Communications Act, the Electronic

Communications Privacy Act of 1986, while tone only pagers are not. The federal act is "substantially similar" to the Florida act, Scheider v. State, 389 So. 2d 251, 252 (Fla. 1st DCA 1980), and so federal cases are helpful in construing the Florida law.) The point of contention below was whether the police were required to apply for the duplicate pager by following the procedure set forth in section 934.32 where a pen register or trap and trace device is sought, or whether they had to comply with the more stringent requirements for other types of interceptions of communications.

The argument the State made to the trial court and makes here, that the device in question was akin to a pen register or trap and trace device, is not well taken. A pen register is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached..." §934.02(20), Fla. Stat. (1991). A duplicate pager does not identify numbers dialed from a particular telephone, but rather picks up numbers dialed to a particular number, and so is nothing like a pen register. A clone pager is more like a trap and trace device, which is "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or a device from which a wire or electronic communication was transmitted." §934.02(21), Fla. Stat. (1991). However, there is a very significant difference between a trap and trace device, which provides information about telephone numbers only, and a duplicate pager. The duplicate pager can, and in this case did, provide other information as well.

Defense counsel below informed the trial court that the information the police obtained from the duplicate pager contained not only a telephone number, but a code for the prospective buyer, and a number for the quantity of drug desired. (R 14-15) This information was contained in the affidavit for a warrant to search Respondent's car that was executed by Detective Korich. (R 124) He noted that the numbers that appeared on the duplicate pager "all appeared to have a two or three digit code identifying the caller, the telephone number and a two or three digit code indicating the amount of the purchase." (R 124) One message from a prospective purchaser that was specifically referred to in the affidavit in support of the warrant indicated not only the telephone number, but the number "28-100," which were the caller's personal code number and the amount of cocaine to be purchased. (R 124) The fact that this type of message is revealed to the police by means of a clone pager, and the fact that the police acquire information immediately, at the same time as the suspect, make the use of a duplicate pager much more intrusive than the use of either a pen register or trap and trace device. Respondent's conclusion in this regard is bolstered by cases from the federal system. Although, like the state law, the federal law contains a separate section relating to pen registers and trap and trace devices, see Suarez, the courts have treated duplicate digital display pagers as if they were subject to all the requirements of other types of interceptions of communications. See Suarez; United States v. David, 940 F. 2d 722 (1st Cir. 1991).

Furthermore, Petitioner's effort to analogize a clone pager to a pen register is refuted by one of the very cases Petitioner cites in support of its position. In People v. Pons, 509 N.Y.S. 2d 450 (N.Y. Sup. Ct. 1986), an arson case which Petitioner cites on page 6 of its brief, the court made the very point Respondent made above regarding the additional information that is supplied by a duplicate pager that is not revealed when a pen register is used: "The monitoring of the telephone pager device is more intrusive than the use of a pen register. The pager is capable of conveying substantive information by combining digits in various sequences. Both telephone numbers and coded messages may be conveyed." 509 N.Y.S. 2d at 453. The Pons court thus rejected the People's attempt to draw an analogy between a duplicate digital display pager and a pen register, and this Court should reject Petitioner's similar analogy in this case.

The portions of Chapter 934 authorizing interception of communications constitute a statutory exception to the federal and state right to privacy, and therefore must be strictly construed and narrowly limited in application. In re Grand Jury Investigation, 287 So. 2d 43 (Fla. 1973); Copeland v. State, 435 So. 2d 842 (Fla. 2d DCA 1983). The remedy for noncompliance with the act in the instant case is exclusion of the evidence obtained as a result of the issuance of the duplicate pager. §934.06, Fla. Stat. (1991); Copeland. The Second District Court of Appeal correctly determined that the evidence seized should have been suppressed,

and reversed Respondent's conviction and sentence. This Court must uphold the opinion of the Second District.

## CONCLUSION

This Court should decline to exercise jurisdiction in the instant case. In the alternative, the Court should answer the certified question in the affirmative, and approve the decision of the Second District Court of Appeal in this matter.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of July, 1994.

Respectfully submitted,

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