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IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE, III,

Petitioner,

v. CASE NO. 85,136

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

PETITIONER'S REPLY BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief the parties and the record on appeal will be referred to as in **MR. CHICONE'S** initial brief. **MR. CHICONE'S** initial brief will be referred to by "IB.". The state's answer brief will be referred to by "AB."

ARGUMENTS

I.

JUDGMENTS MUST BE VACATED WHERE BOTH COUNTS OF INFORMATION FAILED TO ALLEGED ESSENTIAL ELEMENT OF KNOWLEDGE

In his initial brief, **MR. CHICONE** argued that the information was insufficient and should have been dismissed because it failed to allege the essential element of scienter or knowledge in both the possession of cocaine and possession of drug paraphernalia charges (IB 8-16). In its answer brief, the state does not discuss the possession of drug paraphernalia offense. It argues that guilty knowledge is not an element of the statutory offense of possession of cocaine, and therefore the information need not have included a knowledge element (AB 4).

In support of that statement, the state relies on a single case, Green v. State, 602 So.2d 1306, 1308-09 (Fla. 4th DCA), rev. denied, 613 So.2d 4 (Fla. 1992). The state misreads Green however. The primary opinion in Green discussed in great detail the element of scienter in possession and trafficking offenses. However, the primary opinion received no vote concurring with its opinion on those matters. One judge dissented. The third judge, Judge Stone, concurred only in the conclusion that the trial court did not err

in denying the motion for judgment of acquittal. The concurrence specifically disagreed with the primary judge's discussion of the scienter issue:

> I do not agree with the part of the majority reasoning which distinguishes, as to either proof or permissible inferences, between "knowledge" of the presence of a substance in "simple" drug possession cases and the required proof of "knowledge" in trafficking cases. In my judgment, the legislature's intent is that the evidence required and permissible inferences are the same for both possession and trafficking by possession, but for the additional required proof of the weight of the drugs.

Id. at 1310 (Stone, J., concurring specially; emphasis added). The underlined portion of the special concurrence not only takes issue with the primary opinion, it also supports one of **MR. CHICONE'S** arguments in his initial brief (IB 12). The Green "opinion" relied upon by the state is in reality simply the dicta of one judge.

The state further relies on that same judge's dissent in Gartrell v. State, 609 So.2d 112 (Fla. 4th DCA 1992), rev'd in part on sentencing issue, 626 So.2d 1364 (Fla. 1993)(AB 4-5). Gartrell was a trafficking case. In it the dissenting judge, again unable to garner any support for his views, basically reiterated what he had previously written in Green. Id. at 118-21.

The state's reliance on the Green dicta and the Gartrell dissent is clearly misplaced and must be rejected. It should be noted that the state makes no attempt to discuss State v. Medlin, 273 So.2d 394 (Fla. 1973), or State v. Ryan, 413 So.2d 411 (Fla. 4th DCA), rev. denied, 421 So.2d 518 (Fla. 1982), the two cases relied upon by the Fifth District in support of its opinion on this

issue. Chicone v. State, __ So.2d __ (Fla. 5th DCA 12/2/94)[19 Fla. L. Weekly D2538]. More importantly, and somewhat surprisingly, the state makes no effort whatsoever to distinguish the numerous authorities set forth in **MR. CHICONE'S** initial brief on this issue (IB 11-16). There is no effort whatsoever to rebut the cases discussed which have held that knowledge is an essential element of all possession cases. See also, Gartrell v. State, 626 So.2d 1364, 1366 (Fla. 1993)(knowledge is element of actual possession case). The state's failure to address these cases demonstrates the fundamental weakness of its position.[1]

Additionally, the state's argument is internally inconsistent. On the jury instruction issue, the state seemingly recognizes that knowledge may be an essential element to be proven by the state (AB 5). In fact, the state cites approvingly the Florida Standard Jury Instruction which states that knowledge is an essential element of a possession of a controlled substance offense (AB 5). However, if it is an essential element to be proven by the state, it must be alleged in the criminal information. State v. Dye, 346 So.2d 538, 541 (Fla. 1977). In failing to understand that principle, the state closes its eyes to the fundamental principle of notice as founded in due process of law (IB 9-10).

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[1] It should be noted that in State v. St. Jean, __ So.2d __ (Fla. 5th DCA 6/23/95)[20 Fla. L. Weekly D1475], the Fifth District does recognize that knowledge is an element of a constructive possession case. In St. Jean, the Fifth District was dealing with a Fla.R.Crim.P. 3.190(c)(4) motion to dismiss the information. It is illogical that knowledge should be an essential element for a (c)(4) motion to dismiss the information, but not an essential element for a Rule 3.190(b) motion to dismiss the information.

The Fifth District erred in affirming the trial court's rulings that the criminal informations were sufficient. In this state, an information which seeks to allege possession of a controlled substance or possession of drug paraphernalia must allege the essential element of knowledge.

II.

JUDGMENTS MUST BE VACATED WHERE BOTH COUNTS OF INFORMATION FAILED TO ALLEGED ESSENTIAL ELEMENT OF KNOWLEDGE

In rebuttal to **MR. CHICONE'S** argument that the jury instructions on both the possession of cocaine and possession of drug paraphernalia offenses were inadequate (IB 16-23), the state asserts that the standard jury instructions used by the trial court were adequate (AB 5-7). Of course, it is interesting to note that, as **MR. CHICONE** pointed out in his initial brief (IB 20-21), the standard instructions on possession and knowledge were deemed to be so inadequate recently as to require substantial revision.

It is also interesting to note that in Mercer v. State, 656 So.2d 555 (Fla. 1st DCA 1995), the First District ruled that the Florida Standard Jury Instructions were fundamentally defective in failing to adequately describe the mens rea (criminal intent and knowledge) necessary to support a conviction under §893.13(7)(a)(9), Fla.Stat. (1991). Id. at 555-56. Mercer included another warning that blind obedience to the Florida Standard Jury Instructions, as occurred in Mercer, is a dereliction of the trial court's responsibility. Id. at 556, n.1.

The state seems to acknowledge that constructive possession cases may require different instructions (AB 5). It does cite Brown v. State, 428 So.2d 252 (Fla.), cert. denied, 463 U.S. 1209 (1983), where this Court stated that one element of a constructive possession case which the state must prove beyond a reasonable doubt is that the defendant knew of the illicit nature of the contraband. While citing Brown, the state ignores its requirement that the state prove knowledge of the illicit nature of the contraband. It also fails to acknowledge that the Florida Standard Jury Instructions also include a notation concerning lack of knowledge as to the nature of the drug (IB 19). The state simply fails to address head-on the issue of why **MR. CHICONE** was not entitled to jury instructions which required the state to prove his knowledge of the illegal nature of the items allegedly possessed.

The state relies in part on an insufficiency of the record argument (AB 2, 6). That argument must be rejected. It is clear that **MR. CHICONE** was charged in Count One with the actual or constructive possession of cocaine (II/84). His plea of not guilty placed all essential factual matters at issue, including his intent. It therefore constituted a denial of both actual and constructive possession. Recognizing this, the trial court gave the jury instructions, albeit inadequate on both actual and constructive possession, as well as exclusive and joint possession (I/40-42). Having placed all factual matters at issue, **MR. CHICONE** was entitled to correct instructions on all elements of the offense, including actual or constructive possession, exclusive or

joint possession, as a matter of due process of law (IB 16-17). In this appeal, there is no need to bring in the testimony from the several witnesses at trial as to the exact location of the cocaine, paraphernalia, or **MR. CHICONE**. **MR. CHICONE** was entitled to correct instructions covering all theories presented by the state.

The state made a similar complaint about the adequacy of the record before the Fifth District Court of Appeal. See Answer Brief of the State of Florida, filed in Chicone v. State, 5th DCA Case No. 93-2659, at p. 6, attached as Appendix A hereto. That claim did not prevent the Fifth District from ruling on the merits of this issue. That court recognized that complete trial transcripts are not necessary to resolve the issue. The Fifth District did not rely on any "inadequate record" theory. This Court must also address the legal contentions on their merits[2].

The state improperly attempts to bring into this case a prior case involving **MR. CHICONE** and a charge of possession of cocaine. It argues that first case has some bearing on whether **MR. CHICONE'S** possession of cocaine in this case was "knowing" (AB 6-7). In fact, the first case had no bearing whatsoever on this case. The state made no effort to introduce that evidence as collateral act

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[2] Despite **MR. CHICONE'S** belief that there is no need to provide this Court with a full trial transcript, he filed a motion to supplement the record on appeal with all portions of the trial not previously transcribed except the voir dire, preliminary instructions, and opening statements. The state opposed the motion, and this Court denied it by order dated August 9, 1995. Nonetheless, should this Court at any time believe that additional portions of the record are necessary to enable it to fully evaluate the legal claims involved, **MR. CHICONE** stands willing to supplement the record on appeal, and is entitled to that supplementation under Fla.R.App.P. 9.200(f)(2).

evidence at trial in this case, and it is therefore absolutely improper for the state to try to do so in this appeal.

Because **MR. CHICONE** was entitled to jury instructions which adequately placed the element of his knowledge of the illicit nature of the items allegedly possessed before the jury, this Court must vacate the Fifth District's opinion and remand for a new trial.

III.

SENTENCES MUST BE REVERSED DUE TO A) IMPOSITION OF GENERAL SENTENCE, B) IMPOSITION OF ILLEGAL SENTENCE ON COUNT TWO, AND C) DIFFERENCES BETWEEN ORAL PRONOUNCEMENT AND WRITTEN ORDERS

Both **MR. CHICONE** and the state agree that standard conditions of probation or community control need not be orally announced at sentencing to be imposed upon a defendant (IB 32-33; AB 9). Additionally, **MR. CHICONE** argues that any special conditions of probation must be orally announced at sentencing (IB 33). The state apparently disagrees, and would allow them to be imposed at a second sentencing (AB 11), or upon resentencing (AB 16).

In its answer brief filed in this Court, the state for the first time argues that certain conditions of probation which **MR. CHICONE** complains of as constituting special conditions, are in fact standard conditions (AB 11-15). The state did not take that position in its answer brief to the Fifth District, or at oral argument before that court. See App. A, p.7. The Fifth District agreed with **MR. CHICONE** that the conditions were special. Chicone v. State, 19 Fla. L. Weekly at D2538.

Both **MR. CHICONE** and the state agree that the conditions set forth in Chapter 948 are standard conditions of probation. However, the state now asserts for the first time that all of the conditions provided in Fla.R.Crim.P. 3.986 are standard, not special, conditions and therefore need not be orally announced at sentencing (AB 11-12). That argument must be rejected[3]. Rule 3.986 is a form promulgated in 1992. It is not a statute passed by the legislature with the intent to set forth conditions of either probation or community control. The cases talking about standard conditions of probation which do not need to be orally announced at sentencing refer to the conditions set forth in Chapter 948, not in a form provided for a clerk or court's benefit in the criminal rules.

The state is being factitious when it argues that **MR. CHICONE** believes that he should be allowed to possess and carry firearms or weapons and to use intoxicants to excess during his community control and probation (AB 14). **MR. CHICONE** is contending no such thing. What he is contending is that the condition 4, which prohibits his possession of any firearm despite the fact that he is not a convicted felon, and any weapon despite any effort to delineate what would constitute a weapon, and despite the fact that this case does not involved any use of a firearm or a weapon, is a special condition of probation, rather than a standard one, and therefore must have been orally announced at sentencing.

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[3] This issue is before this Court in Hart v. State, 651 So.2d 112 (Fla. 2d DCA 1995), rev. granted, Fla.S.Ct. Case No. 85,168.

Similarly, **MR. CHICONE** is not contending that he can use intoxicants to excess. However, he is contending that condition 6 which states that he cannot use intoxicants to excess is not a standard condition of community control or probation and therefore was required to be orally announced. If the trial court was concerned about **MR. CHICONE** possessing firearms or weapons, or using intoxicants to excess, or about any of the other unannounced special conditions discussed in **MR. CHICONE'S** initial brief (IB 33-37), it could have readily announced those provisions as special conditions of probation on October 6, as it did with the drug treatment program. However, since the trial court did not do so at sentencing, it cannot do so some several weeks later.

The state relies a great deal on the recent opinion in Justice v. State, ___ So.2d ___ (Fla. 5th DCA 7/21/95) [20 Fla. L. Weekly D1697][4]. One of the procedures discussed in Justice and suggested by the state in its answer brief in **MR. CHICONE'S** case (AB 11) is calling the defendant back for a second hearing in the presence of counsel whereby additional conditions of probation may be announced. It should be noted, of course, that did not happen in

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[4] Justice v. State, S.Ct. Case No. 86,264, is presently pending before this Court on a notice to invoke discretionary jurisdiction based upon the Fifth District's certification of the following issue:

> Where a sentence is reversed because the trial court failed to orally pronounce certain special conditions of probation which later appeared in the written sentence, must the court strike the unannounced conditions, or may the court elect to "reimpose" those conditions at resentencing?

MR. CHICONE'S case. There was no second hearing. Neither counsel nor **MR. CHICONE** were notified of the special conditions until the trial court entered its written order on November 12, 1993.

Secondly, and most importantly, the calling back of a defendant for a second sentencing hearing, and the addition of more conditions of probation, would clearly violate the dictates of Lippman v. State, 633 So.2d 1061 (Fla. 1994), and Clark v. State, 579 So.2d 109 (Fla. 1991). See also, Troupe v. Rowe, 283 So.2d 857 (Fla. 1973); Zepeda v. State, __ So.2d __ (Fla. 5th DCA 8/11/95) [20 Fla. L. Weekly D1829, D1830]; C.M. v. State, __ So.2d __ (Fla. 2d DCA 8/9/95) [20 Fla. L. Weekly D1811]; Johnson v. State, __ So.2d __ (Fla. 3d DCA 7/26/95) [20 Fla. L. Weekly D1702].

The state, as did the majority in Justice, seems to believe that there was no "sentence" until the entry of a written order some 5 1/2 weeks after the sentencing hearing (AB 10). However, a sentence is the pronouncement of the court, Fla.R.Crim.P. 3.700(a), and begins as soon as the sentencing hearing is completed. Troupe, supra. Surely the state does not contend that if **MR. CHICONE** had been arrested for a new offense in the 5 1/2 weeks between the sentencing and the filing of the written order he would not be subject to a violation of community control or probation. **MR. CHICONE** began serving his sentence when he walked out of the courtroom on October 6, 1993. Under well-established double jeopardy and due process principles, that sentence could not be increased except for limited circumstances such as a violation of probation (IB 37-44).

In his initial brief, **MR. CHICONE** pointed out the Fifth District's lack of consistency on this issue (IB 38-40). Interestingly, in Zepeda v. State, __ So.2d __ (Fla. 5th DCA 8/11/95)[20 Fla. L. Weekly D1829], the Fifth District ruled that the trial court could not add an additional special condition of probation absent a violation of probation. Yet that is exactly what the state seeks, and the Fifth District would allow on remand, in **MR. CHICONE'S** case.

In arguing that on remand the trial court can impose these additional special conditions of probation (AB 15-18), the state ignores these well-established principles. The Fifth District's opinion in Chicone cannot be squared with this Court's opinion in Troupe, supra. In Troupe, this Court recognized that once the sentencing hearing had concluded, and the defendant had begun serving his sentence, that sentence could not be increased. Clark, supra, and Lippman, supra, express the same principle of law. Contrary to the state's argument (AB 18), allowing either the state or the trial court a second "bite of the apple" at a second sentencing, or at a resentencing, absent a violation of probation by **MR. CHICONE**, would be illegal.

Upon resentencing of **MR. CHICONE**, this Court must make it clear that the trial court cannot impose any special conditions of community control and/or probation upon **MR. CHICONE** which were not orally announced at his first sentencing on October 6, 1993.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in **MR. CHICONE'S** initial brief, this Court must reverse in part and affirm in part the decision of the Fifth District Court of Appeal (IB 44-45).

RESPECTFULLY SUBMITTED this 22nd day of August, 1995, at Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing and attached appendix have been furnished this 22nd day of August, 1995, by U.S. Mail to **ANTHONY J. GOLDEN,** Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida, 32118, with the original and seven copies with attached appendices being sent by Federal Express to **SID J. WHITE,** Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399.

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IN THE SUPREME COURT OF FLORIDA

JERRY JAY CHICONE III,

Petitioner,

v. CASE NO. 85,136

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

APPENDIX TO PETITIONER'S REPLY BRIEF ON MERITS

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JERRY JAY CHICONE III,

Appellant,

v. CASE NO. 93-02659

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

The trial court properly denied Appellant's motions to dismiss and for arrest of judgment based upon the contention that the charging document did not specifically use the terms "scienter" or "knowledge". The knowledge element was fully argued. The sufficiency of the evidence is not an issue. The jury was fully instructed from the standard jury instructions on knowledge. None of the cases cited by Appellant require that mens rea be specifically alleged in the charging document.

The trial court did err as regards Appellant's sentences. The paraphernalia count is a first degree misdemeanor and the special conditions should be orally pronounced. The cause should be remanded for resentencing.

ARGUMENT

POINT I -- RESTATED

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS AND FOR MOTION FOR ARREST OF JUDGMENT WHERE THE INFORMATION DOES NOT SPECIFICALLY ALLEGE SCIENTER.

Appellant cites the Florida Supreme Court's decision in State v. Dominguez, 509 So. 2d 917, 918 (Fla. 1987) and this Court's decision in Drain v. State, 601 So. 2d 256, 260 (Fla. 5th DCA 1992) in support of his assertion that the Information in this case should have been dismissed because it did not include an allegation concerning scienter or knowledge.

In Drain, the defendant was charged with possession with intent to sell an imitation controlled substance. This Court held that the defendant's motion to dismiss should have been granted, not because of failure to allege scienter, but because the Information was defective as self-contradictory, charging possession of an imitation controlled substance, "to wit: Cocaine." This Court did say that, in Dominguez, the Supreme Court held that:

> ...knowledge of the nature of a substance possessed is an essential implied element of every crime of possession of a controlled substance and that even in a case involving a genuine controlled substance the accused must be shown to have known what the substance actually was...(Emphasis added). Drain, supra at 260.

Appellant has not argued that the evidence was insufficient to establish that he knew what he possessed. His contention is

that scienter should be specifically alleged in the charging document. Dominguez merely held that the standard jury instructions on trafficking were inadequate and amended them to include the knowledge element. It does not stand for the proposition that the mens rea must be expressly mentioned in the charging document. Since the attorneys argued the element of knowledge to the jury, since the trial court properly instructed the jury on that element according to Dominguez and since Appellant has cited no cases specifically holding that the knowledge necessary for possession must be specifically alleged in the charging document, Appellant has failed to establish any error in the denial of his motions to dismiss and for arrest of judgment.

POINT II -- RESTATED

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON SCIENTER AND REASONABLE DOUBT.

As previously noted, in State v. Dominguez, the Florida Supreme Court added the knowledge element to the standard jury instructions on drug trafficking. Appellant was charged with possession of cocaine and paraphernalia. The trial court did instruct the jury from the standard jury instructions on possession that the State had to prove that Appellant had knowledge of the presence of the cocaine. The court went on to explain the distinction between the knowledge which can be inferred from exclusive possession of drugs and paraphernalia as opposed to non-exclusive possession. (T40-41, 42).

Appellant has also questioned the adequacy of the Florida standard jury instructions on reasonable doubt, citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) and Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 338 (1990). On March 22, 1994, the United States Supreme Court again addressed this issue as it related to the reasonable doubt instructions as given in California and Nebraska. Victor v. Nebraska, 1994 WL 87447 (U.S.NEB.). The Court said that the state courts' instructions taken as a whole correctly conveyed the concept of reasonable doubt and that there was no reasonable likelihood that the jury's finding of guilt was based upon an unconstitutionally low degree of proof. The Florida instructions on reasonable doubt likewise adequately convey the concept and Appellant has failed to show that the jury's finding was based upon an unconstitutionally low degree of proof.

Given that Appellant has chosen to provide this reviewing court with only an abbreviated record of the proceedings below, it cannot be said that he has established that the instructions given were inadequate. The burden is on the Appellant to produce a sufficient record to demonstrate reversible error. State v. G.P., 588 So. 2d 253, 254 (Fla. 1st DCA 1991), citing Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982).

POINT III -- RESTATED

THE TRIAL COURT DID NOT ERR IN WITHHOLDING ADJUDICATION OF GUILT AND SENTENCING APPELLANT TO COMMUNITY CONTROL TO BE FOLLOWED BY PROBATION ON COUNT I, A THIRD DEGREE FELONY, BUT SHOULD NOT HAVE IMPOSED THE SAME SENTENCE CONCURRENTLY ON COUNT II, A FIRST DEGREE MISDEMEANOR.

Sentencing in this case took place on October 6, 1993. The rial court withheld adjudication and announced a sentence of one ear of community control to be followed by three years of robation. (R78-81). Thereafter, the written orders placing ppellant on concurrent terms of community control to be followed y probation were filed November 12, 1994 (nunc pro tunc 0/6/93). (R139-144). Although Appellant did not object at the entencing proceeding, he does correctly point out that Appellant as convicted of a first degree misdemeanor charged in Count II f the Information, Possession of Drug Paraphernalia in violation f Section 893.147(1), Florida Statutes (1992). Although ommunity control to be followed by probation is a legal sentence n Count I, the maximum penalty for Count II is one year in the ounty jail. In light of this fact along with the differences oted by Appellant between the sentences orally pronounced, the ourt minutes and the written orders, resentencing on both counts ould appear to be the most appropriate means of resolving these iscrepancies. At that time, Appellant could interpose any bjections he may have to any special conditions of his robation.

CONCLUSION

Based on the arguments and authorities presented herein, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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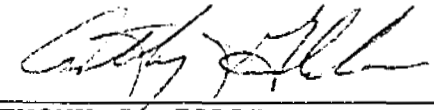
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been mailed to James M. Russ, Esquire, 18 West Pine Street, Orlando, Florida 32801, this 25th day of March, 1994.

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Assistant Attorney General