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IN THE SUPREME COURT OF FLORIDA

CLIFTON BROCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,529

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, CLIFTON BROCK, was the defendant in the trial court, and Appellant in the court below. He will be referred to herein as Petitioner, Appellant, or by proper name. Respondent, the State of Florida, was the prosecution in the trial court and Appellee in the court below. Respondent will be referred to herein as such, Appellee, or the State.

The symbol "R" will refer to the record from the trial court and the symbol "T" will refer to the transcript of trial court proceedings. "IB" will designate Petitioner's Initial Brief. Each symbol is followed by the appropriate page number(s) in parenthesis.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In Brock v. State, 21 Fla. L. Weekly D419 (Fla. 1st DCA February 15, 1996), the court below certified conflict with Nunez v. State, 633 So. 2d 1146 (Fla. 2d DCA 1994) on the issue of random drug,

alcohol, and controlled substance testing imposed as a condition of community control. 21 Fla. L. Weekly D 419-420.

There were two issues raised in Brock's initial brief below:

> I. THE TRIAL COURT ERRED IN ORDERING RANDOM DRUG AND ALCOHOL TESTING, WHERE DRUG AND ALCOHOL USE WERE NOT DEMONSTRABLY RELATED TO APPELLANT'S PAST CRIMINAL CONDUCT OR TO FUTURE CRIMINALITY.
>
> II. THE TRIAL COURT ERRED IN IMPOSING A PUBLIC DEFENDER LIEN WITHOUT PROVIDING AN OPPORTUNITY TO CONTEST THE AMOUNT OF THE LIEN.
> (Appellant's IB to 1st DCA, p.i)

Relying on controlling precedent of Hayes v. State, 585 So. 2d 397, rev. den. 593 So. 2d 1052 (Fla. 1991) and F.S. §948.03(1)(k)(1), the district court affirmed on Issue I but certified conflict with Nunez.

On Issue II, the court stated:

> At the conclusion of the appellant's violation of probation hearing, the trial court imposed a $200.00 public defender's lien. §27.56(2)(a), Fla. Stat. The record does not reflect that the appellant was given adequate prior notice and an opportunity to contest the amount of the lien. Accordingly, we must strike the lien, without prejudice to reimpose it as a condition of community control on remand after compliance with the statute. *L.A.D. v. State*, 616 So.2d 106, 108 (Fla. 1st DCA) (in delinquency adjudication, assessment of attorney's fees and order authorizing public defender's lien against juvenile's mother were reversed and case remanded to allow opportunity to contest amount of lien), *rev. den.*, 624 So. 2d 268 (Fla. 1993); *Wright v. State*, 654 So. 2d 252 (Fla. 1st DCA 1995); *R.D.R. v. State*, 653 So. 2d 498 (Fla. 5th DCA 1995).
> -21 Fla. L. Weekly at D420

The state then filed a motion to certify conflict on Issue II with Holmes v. State, 658 So. 2d 1185 (Fla. 4th DCA 1995) where the Fourth District Court of Appeal held that failure of a represented defendant at trial to object to such fees precluded appellate review.

Petitioner (there, appellant) opposed the motion to certify:

> It [the State] may raise the issue as ancillary to the jurisdictional certified question contained in this Court's opinion. The supreme court will have jurisdiction over the entire case, not merely the issue creating jurisdiction. Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985). Thus, certification of conflict is unnecessary.

The district court denied the motion to certify conflict on Issue II.

Respondent notes, in connection with Issue II, that the record affirmatively demonstrates that appellant was represented by counsel and made no objection to the amount of the fee and did not request a hearing to contest the amount. (R. 38-42).

SUMMARY OF ARGUMENT

Issue 1. Petitioner here attacks a standard statutory condition of probation pursuant to section 948.03(1), Florida Statutes (1995).

His Biller/Rodriguez analysis of this challenge is "not applicable" per Biller. Standard conditions of probation or community control do not require oral pronouncement at sentencing. Hart v. State, 21 Fla. L. Weekly S77 (Fla. Feb. 22, 1996).

As a practical matter, petitioner's challenge to the condition of community control is moot. He has since violated his community control by testing positive for marijuana use and for failing to report as directed. Brock v. State, Case No. 95-2928, pending in First District Court of Appeal.

Issue 2. Petitioner made no objection when the public defender lien was imposed pursuant to local administrative order. Statutory and case law mandate that appointed public defenders shall calculate the attorney fees and costs incurred in defending indigents and shall move the court to impose liens for these fees and costs. Section 27.56, Florida Statutes (1995); Bull v. State, 548 So. 2d 1103 (Fla. 1989). Here, the appellate public defender, from the same office as the trial public defender, argued that the failure of appointed trial counsel and client/petitioner to obey statutory and case law was attributable to the trial court. This is a classic case of created or invited "error" which should not be permitted.

Petitioner and counsel were on notice and their failure to object is exactly and precisely that -- **their** failure, and not in any way attributable to the trial court. Their failure to object does not constitute reversible error by the trial court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING RANDOM ALCOHOL, DRUG AND CONTROLLED SUBSTANCE TESTING AS A CONDITION OF COMMUNITY CONTROL? (Restated)

Suggestion of Mootness

Petitioner was originally placed on probation for two years, with a withheld adjudication for grand theft, effective September 23, 1993 (R. 18-19). On March 24, 1995, he admitted violating his probation; his probation was revoked and he was placed on two years community control. (R. 38-42).

On August 11, 1995, he was found to have violated his community control, by smoking marijuana and failing to report to his community control officer. (1st DCA Case No. 95-2928, R. 121). He was sentenced to five years imprisonment, with credit for 73 days time served. (1st DCA Case No. 95-2928, R. 121). As of April 15, 1996, the clerk of the First District advised that this appeal is pending before a panel of the court. The revocation of community control and imposition of a five year DOC sentence moots any challenge to community control conditions in this case. The state recognizes that mootness does not resolve the certified conflict on which jurisdiction rests.

Merits as to this Case

It has long been recognized that "the trial court is vested with broad discretionary authority to grant probation and set the terms thereof." Dearth v. State, 390 So. 2d 108, 110 (Fla. 4th DCA 1980) (citing to F.S. 948.01(3)). Florida Statutes §948.01 is titled "when court may place defendant on probation or into community control." Thus, the trial court has the same broad discretionary authority over community control.

Section 948.03(1) provides: "Conditions specified in paragraphs (a) through and including (m) and (2)(a) do not require oral pronouncement at sentencing and may be considered standard conditions of community control." Paragraph (k)1 is the statutory source for the community control condition (12) under attack here. It specifically authorizes random testing to determine the use of alcohol or controlled substances.

The holding of this Court in Biller v. State, 618 So.2d 734, 735, n.1 (Fla. 1993) is onpoint:

> There are many general conditions imposed upon most, if not all, probationers which are broadly directed toward supervision and rehabilitation. The requirements of *Rodriguez v. State*, 378 So. 2d 7 (Fla. 2d DCA 1979), are not applicable to these conditions.

The condition Petitioner attacks here, is, by statutory definition, a standard one. Petitioner's presentation to this

court of a Biller/Rodriguez analysis is by definition of this court in Biller, "not applicable." The condition of community control attacked here is specifically authorized by statute. F.S. 948.03(1)(j)[1].

Petitioner before this court makes no attack on this provision of community control based on insufficiency of notice or any other basis, only that it does not "relate either to the underlying crime, concern conduct itself criminal, or be reasonably related to future criminality." (IB, p. 4).

Particularly destructive to Petitioner's claims before this court is State v. Hart, 21 Fla. L. Weekly S77 (Fla. Feb. 22, 1996).[2] Hart recognizes that general conditions are those defined by statute. Keeping in mind that the operative statute here, section 948.03(1) specifically provides that the statutory

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[1]Both of the cases here on conflict jurisiction, Hayes from the First District, and Nunez from the Second, cite the statute to be F.S. 948.03(1)(j), which indeed it was at time those cases were decided, Hayes in 1991 and Nunez in 1994. However, the statute has been renumbered in the 1995 statutes, and the exact same verbatim statutory provision is now to be found at F.S. § 948.03(1)(k)1. The current numeration is reflected in the First District's Brock decision at D420. The statutory provisions are identical, merely renumbered.

[2]Neither the parties nor the court below had the benefit of Hart.

authorization for the condition petitioner attacks here is a **standard** one, the rationale from Hart is directly onpoint:

> It has been held that the usual "general conditions" of probation are those contained in the statutes. In other words, a condition of probation which is statutorily authorized or mandated, see, e.g., sections 948.03-.034, Florida Statutes (1993), may be imposed and included in a written order of probation even if not orally pronounced at sentencing. The legal underpinning of this rationale is that the statute provides constructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements or procedural due process.
> (internal quotations and citations omitted)

Even leaving aside the legally controlling point that the condition of community control attacked here is by definition of the controlling statute a standard one, there is also adequate basis to support the trial court's "broad discretionary authority to grant probation and set the terms thereof[,]" Dearth, supra, and the sentencing court's legislatively mandated discretion, section 948.03(6). The record shows that as of January 23, 1993, active warrants were out for Mr. Brock for, *inter alia*, cultivation of cannabis and possession of paraphernalia. (R 3) Because it is well recognized that conviction of crime is not necessary to support a VOP or VOCC finding, the fact that warrants were out for him to answer to these types of crimes was sufficient basis to support the particular condition of community control attacked here.

A condition of probation or community control that one who has been accused of cultivating marijuana and possessing paraphernalia submit to alcohol and controlled substance testing cannot be deemed an abuse of the trial court's broad discretion in this area. A particular condition of probation which, it must be emphasized, is authorized, indeed, standard, by statute.

Put another way, for a warrant to have been issued to hold Petitioner to answer to these type of charges, probable cause must have existed. Probable cause to believe that he had cultivated marijuana and possessed paraphernalia is a more than sufficient basis to sustain the imposition of this condition by the trial court.

ISSUE II

WHETHER A DEFENDANT AT TRIAL WHO FAILS OR DECLINES TO OBJECT WHEN STATUTORILY AUTHORIZED FEES ARE IMPOSED CAN LATER RAISE THIS ISSUE ON APPEAL.

Jurisdiction

This Court has jurisdiction over this question. As stated in Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985):

> The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision." Art V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here,

> this Court may review any issue arising in the case that has been properly preserved and properly presented. (citation omitted).

Accord, Bell v. State, 394 So. 2d 979, 980 (Fla. 1981): "Our review power is not limited to the certified question only."[3]

It is apparent that this court does have discretionary jurisdiction under Tillman and Bell. Respondent recognizes that this Court's decision whether or not to review this question is purely a discretionary one. Tillman, supra. Moreover, petitioner below explicitly recognized this Court's Tillman jurisdiction over this issue, by arguing that "certification of conflict is unnecessary."

Respondent submits that this Court should exercise its discretion to resolve direct and express conflict between the district courts.

Inter-District Conflict

There is direct and express conflict between at least three district courts. In the First District, as is evident from Brock and the cases cited therein, liens are stricken and cases remanded for attempted re-imposition after notice and hearing, even when no

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[3]Noteworthy is that both Tillman and Bell are *post* the 1980 constitutional amendments regarding the jurisdiction of this Court. Thus, discretionary review by this court of this issue is entirely appropriate.

objections are lodged in the trial court. In the Fourth District, based on Holmes v. State, 658 So. 2d 1185 (Fla. 4th DCA 1995)[4] liens are upheld by virtue of appellant's failure to object and preserve the issue for review. In the Second District, a middle course is steered. Relying on that court's precedent in Borque v. State, 595 So. 2d 222 (Fla. 2d DCA 1992) the Second District explained the procedure in Hinkle v. State, 21 Fla. L. Weekly D790 (Fla. 2d DCA March 27, 1996) as follows:

> [T]he record reveals that though the trial court orally pronounced at sentencing that it was imposing a public defender's lien against Hinkle, it improperly failed to inform him of his right to contest the amount of the lien. *See* Fla. R. Crim. P. 3.720(d)(1). *See also Bull v. State*, 548 So. 2d 1103 (Fla. 1989); *Wilson v. State*, 21 Fla. L. Weekly 511 (Fla. 2d DCA Feb. 14, 1996), and cases cited therein. On remand, Hinkle will therefore have thirty days from the date of this court's mandate to file a written objection to the amount assessed for public defender fees. *Borque v. State*, 595 So. 2d 222 (Fla. 2d DCA 1992). In the event an objection is filed, the trial court shall strike the current assessment and shall not impose a new one without proper notice and a hearing. *Id.* Should Hinkle fail to file an objection, the trial court is directed to correct the written judgment to properly

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[4]The Fifth District has adopted Holmes, at least to the extent that it was cited as authority for the proposition that lack of contemporaneous objection precludes appellate review of restitution issues imposed as a result of a criminal conviction. See Mitchell v. State, 664 So. 2d 1099 (Fla. 5th DCA 1995). Given the analysis and rationale of the Fifth District in Mitchell, it is highly probable that it would apply the same Holmes principle to public defender fees and costs.

> reflect the lien, which appears to have been omitted therefrom due to a scrivener's error.
> Id. at D789-790

The rule from Borque is apparently routinely and commonly implemented in the Second District. See Belton v. State, 21 Fla. L. Weekly D785, D786 (Fla. 2d DCA March 22, 1996).

Three different results from three different districts on the same point clearly shows that this issue needs to be uniformly resolved throughout the state.

Conflict with decisions of this Court

This Court has held that any errors in sentencing must be preserved at the trial court level by contemporaneous objection. In State v. Whitfield, 487 So. 2d 1045, 1046 (Fla. 1986) this court said: "Sentencing errors which do not produce an illegal sentence or an unauthorized departure from the guidelines still require a contemporaneous objection if they are to be preserved for appeal." In Clark v. State, 363 So. 2d 331, 334 (1978), it was noted: "This Court has long recognized the contemporaneous objection rule." This Court has very recently reaffirmed this basic principle, specifically in the context of sentencing, in Hart, supra.

It is a bedrock principle of appellate review and the law of this state that absent contemporaneous objection an issue is unpreserved for appellate review. It is further well understood that the only exception to this rule is when the issue on appeal constitutes fundamental error.

Imposition of these public defender fees in the circumstance of this case has never been held fundamental error in any known appellate decision[5]. Indeed, it cannot be. In Clark, supra this court held that comment on a defendant's right to silence constituted constitutional error, but not fundamental error. "[W]e determine that ...Clark, because of [his] failure to object at trial, may not for the first time raise this issue on appeal." Clark at 334.

Surely, if violation of a well-recognized constitutional right, such as the right to remain silent, explicitly recognized by this court as constituting constitutional error, Clark at 333, cannot be reviewed absent objection, the public defender fee complaint of Petitioner before the First District can occupy no higher plane. Yet, that is exactly what the practice and procedure employed by the First District in this and like cases results in.

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[5]Holmes held specifically to the contrary. 658 So.2d at 1186.

Self-Created Error

It has long been recognized in this state that self-created error cannot be allowed to do service in the guise of an appeal. Clark, supra at 335: "A defendant may not make or invite an improper comment and later seek reversal based on that comment." In State v. Rhoden, 448 So. 2d 1013, 1016 (1984), this court explained the purposes behind the contemporaneous objection rule as follows: "The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant." In Whitfield, supra, this court cleared up any confusion in the Rhoden dicta as to whether the contemporaneous objection rule applies to errors in the sentencing process. Clearly, under Whitfield, the rule does apply.

The necessity of contemporaneous objection applies even in capital cases. See Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990) wherein this court said:

> The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus has failed to establish this claim.
> (footnote omitted)

This case, and others of the same species in the First District constitute nothing more, nothing less, than self-created error by public defenders. The counsel complaining on behalf of the defendant at the appellate level about the imposed fee is the public defender. The counsel who failed to object at the trial level when the fee was imposed was the public defender. The trial level public defender has an affirmative statutory (F.S. 27.56) and case law (Bull, infra) obligation to move the court for the imposition of these fees. Under Bull and Chapter 27, the trial level public defender was legally and ethically obligated to apprise the client of this lien and his right to contest the amount.

In Holmes v. State, 658 So. 2d 1185, 1186 (Fla. 4th DCA 1995) the Fourth District held:

> Appellant raises various challenges to the trial court's imposition of prosecution costs and public defender fees, including lack of notice and lack of proof. While some of appellant's arguments seemingly have merit, we do not consider them on appeal for the very simple reason that appellant failed to object when those costs were orally pronounced in open court by the trail judge. A defendant, represented by counsel, may not sit idly by in open court while fees or costs are improperly assessed by the trial judge, fail to raise any objection whatsoever to the imposition of those improper costs and then be heard to argue on appeal that the trial judge committed reversible error in imposing those costs.

Holmes is of further import because it specifically struck other fees orally pronounced as having no authorization by statute, and thus constituting fundamental error. Thus, Holmes fully recognizes where there is no statutory authority for a cost or fee, it is without legal authority, and hence fundamental error. The corollary, of course, is that where there **is** statutory authority for the fees (F.S. 27.56) and a person is statutorily noticed, Beasley, the imposition of this fee is entirely proper. This Court has held statutory publication notice of Chapter 27 costs provides adequate notice. State v. Beasley, 580 So. 2d 139 (Fla. 1991).

Section 27.56(1)(a) places this affirmative duty on the trial level public defender: "At the sentencing hearing or at such stage in the proceedings as the court may deem appropriate, the public defender, the assistant public defender, or the private attorney representing such defendant **shall** move the court to assess attorney's fees and costs against the defendant." As is evident in this case, the assistant public defender did no such thing.(R. 38-42). It is further affirmatively demonstrated that no objection was made at the time the public defender lien was imposed. (R. 41-42). It is further apparent from this record that the imposition of the public defender lien was not specified as an item in the Judicial Acts to be Reviewed. (R. 33). This issue was seen and raised for

the first time in Appellant's initial brief to the First District.

The failure of the trial level public defenders to comply with their affirmative statutory obligation under Chapter 27 also contravenes this court's decision in Bull v. State, 548 So. 2d 1103 (Fla. 1989). In Bull, the public defender challenged these statutory provisions, arguing that a public defender could not ethically represent a client while "petitioning the court for the assessment of fees and costs as required by section 27.56(1)(a)." Bull, 548 So. 2d at 1105. This Court emphatically rejected this argument and upheld the statutory requirements:

> We disagree with petitioner's argument and disapprove [Graham v. Murrell, 462 SO. 2d 34 (Fla. 1st DCA 1984)]. The provision simply establishes a device whereby the attorney rendering the services presents a bill to the court and to the client. We see no ethical conflict in an attorney presenting a bill to a client even though the client is unable to pay at the time the bill is presented. The provision is necessary if the state's substantive right to obtain payment is to be enforced. Unlike the Murrell court, we see no procedural conflict with rule 3.720(d)(1). By its terms, section 27.56 does not become operative until the court having jurisdiction has determined guilt, at which point it is left to the discretion of the court when to receive and consider the motion for fees and costs. Similarly, rule 3.720 provides that a sentencing hearing will take place as soon as practicable after guilt is determined and that during this hearing action will be taken on the lien.

This court further noted in Bull, 548 So. 2d at 1104:

> Section 27.56 provides as a matter of law for the assessment of attorney fees and costs against guilty

> defendants who have used the services of appointed counsel because of indigency. The assessment creates a lien in the name of the county funding the services and provides for entry of a judgment which may be enforced by the county commissioners in a civil action. Alternatively, the court may require the defendant to execute a lien on presently owned of after-acquired real or personal property as security for the debt. The assessment may take place at any stage of the proceeding after guilt is determined, at the discretion of the court. However, the defendant shall be afforded the right to notice as well as the opportunity to object, to be represented by counsel, and to exercise rights provided in the laws and court rules pertaining to civil cases.

Note carefully that in this case Brock initially had to petition the court for appointed counsel. A public defender cannot represent a person unless appointed by the court. Note further that he had statutory notice of the imposition of the lien as provided for under section 27.56, a procedure specifically sanctioned by this Court in Beasley. Note further that at the time this lien was imposed he was represented by counsel, and he had the right to object to the amount at that time. No objection to the amount of the lien was made at that time, or any hearing requested. In short, petitioner got everything that due process commands--notice, hearing, representation by counsel[6], the opportunity to object to

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[6]Parenthetically, appointed counsel has the affirmative statutory duty to move the court for such fees. If statutory notice is sufficient to apprise a layman of the fees, as per Beasley, then it must certainly be sufficient to apprise an attorney practicing precisely in the area addressed by, and under

the amount, or to request a hearing. This is due process, as this court specifically held in Hart, 21 Fla. L. Weekly S77 at S78: "[C]onstructive notice of the condition which together with the opportunity to be heard and raise any objections at a sentencing hearing satisfies the requirements of procedural due process." (citation omitted).

Petitioner's failure to object at that ripe and opportune time when the fee was imposed should be deemed a waiver, exactly as this court found waiver on the part of petitioner in Bull:

> **Petitioner's failure to object or request a hearing constitutes a valid waiver.** Petitioner argues that rule 3.720(d)(1) is deficient in that he must be given an opportunity to challenge the imposition on *any* lien for the services of an appointed attorney. We disagree. Section 27.56 provides for the assessment of fees and costs as a matter of law. **It is only the amount which is potentially at issue.** ...Notice and an opportunity to be heard have been afforded, and enforcement of the lien will require a civil action during which petitioner may show an inability to repay the debt.
> Id. at 1104-1105 (emphasis by **bold** by respondent, emphasis by *italics* in original)

It is evident that the situation here is similar to that addressed in Bull. A defendant noticed by statutory publication, represented by an attorney who has an affirmative statutory duty to move for imposition of fees and costs, stood by silently when the

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the authority of, the statute.

only possible contestable issue, the amount, was pronounced in open court. As in Bull, his failure to object or request a hearing on the amount, as is the situation in this case, must be deemed a waiver. See also Hart, supra, holding constructive notice by publication and the opportunity to object satisfies procedural due process, contemporaneous objection required at sentencing.

A written decision of this court reiterating the statutory duty of trial level appointed counsel to move for such fees, as well as the necessity to object, is needed to end the wasteful series of reversals and remands which are currently the norm in the First District on this issue. This Court should hold that a defendant who has full statutory publication notice of imposed public defender fees, who is represented by counsel at the time such fee is imposed, and who fails at that time to object or request to be heard as to the amount of the fee has waived the issue. In short, this court should approve the result and reasoning of Holmes, as it is harmonious with well recognized principles of the necessity of contemporaneous objection to preserve sentencing claims, Whitfield, and waiver by failure to object, Bull.

Conclusion

Issue 1. This Court should approve Hayes, and disapprove Nunez.

Issue 2. This Court should approve Holmes and disapprove the conflicting decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Glen Gifford, Asst. Public Defender, Leon County Courthouse, 301 S. Monroe St., Tallahassee, FL. 32301 this 23 day of April, 1996.

Daniel A. David
Assistant Attorney General

[A:\BROCK.SUP --- 4/23/96,1:48 pm]