IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,
Appellant/Cross-Appellee : Case No. 87,719
V. : 2d DCA Case No. 95-510
: Pinellas Co. CRC94-13748CFANO

KAWANA ASHLEY,
Appellee/Cross-Appellant

APPELLANT/CROSS-APPELLEE'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF CASE

Appellee, hereinafter, Defendant, was charged by Information, filed August **31, 1994**, with two alternative counts, one *of* Manslaughter, a second-degree felony, contrary to Sec. **782.07**, Fla. Stat., and one of Third Degree Murder, a second-degree felony, contrary to Sec. **782.04**(4), Fla. Stat. The Third Degree Murder count alleged that Defendant inflicted mortal wounds on Brittany Ashley through shooting herself in the abdomen between the dates of March 27 and **April 11, 1994**, while engaged in the perpetration of, or attempt to perpetrate, the felony offense of abortion **(R.1-2).**

Defense filed on November 23, 1994, a Motion to Dismiss the Information, pursuant to Rule 3.190(b), Fla.R.Crim.P., alleging that the facts of the crime do not constitute the crimes charged for a variety of reasons, and that "[a]pplication **of** Florida's homicide statutes to defendant's conduct in this case would violate the provisions and guarantees" of the U.S. and Florida Constitutions (R.88-90). Defense filed supporting Argument and Memorandum of Law the same date **(R.17-87).** The State moved to strike the motion as being **a** motion pursuant to Rule 3.190(c)(4), Fla.R.Crim.P., which was neither sworn nor sufficiently listed the undisputed and material facts as required by that rule (R.92). The State also filed a Response and Memorandum of Law (R.93, 94-106). The Defense filed **a** Reply in Support of Motion to Dismiss on January **23, 1995** (R.113-125). Both the Defense's Motion to Dismiss and the State's Memorandum of Law alleged facts. Facts are also of record in the Witness Affidavit, filed August **31,** 1994, (R.3-6),

upon which the court made a finding of probable cause on August 30, 1994 (R.6).

The State's Motion to Strike was denied by Court Order, dated and filed on January 20, 1995, R.112, after argument of counsel (R.138-145).

The Defense's Motion to Dismiss was heard on January 23, 1995, R.146-176, and the court ruled orally at the conclusion of that hearing that the Defendant could not be charged with Third Degree Murder and dismissed that charge (R.171-172). The court ruled that the Defendant could potentially be convicted of Manslaughter, and denied the Motion to Dismiss as to that charge (R.172). The court entered its written Order on January 27, 1995 (R.127).

The State's Notice of Appeal was filed February 2, 1995 (R.129). The Second District filed its Opinion certifying questions of great public importance on March 22, 1996, after oral argument. Mandate was issued April 19, 1996.

STATEMENT OF THE FACTS

During the hearing on the State's Motion to Strike the Defense's Motion to Dismiss, Defense counsel represented the material facts as being that the Defendant was pregnant, in the third trimester or 25 to 26 weeks pregnant, and shot herself in the stomach, with her baby being born alive and "subsequently dies as a result of being unable to maintain its life functions." (R.142-143)

The Witness Affidavit of St. Petersburg Police Department Detective Terry K. Babb further includes facts that Defendant originally told police that she had been shot in a drive-by shooting, but that later investigation showed she had shot herself in the abdomen with a .22 caliber weapon through a pillow she had placed over her abdomen (R.3). The bullet traveled from the right to the left side of Defendant's abdomen and passed through the wrist of the fetus. Defendant was taken to Bayfront Medical Hospital where the baby was born by Caesarean section where she was in "stable condition for approximately one week," but then suffered multi-organ problems of premature birth that led to her death on the fifteenth day after her birth (R.4). The doctor advised the affiant that "the final anatomic diagnosis was that the baby died as the result of complications of prematurity, following premature labor that was traumatically induced." (R.4) The doctor confirmed that the baby was twenty-five to twenty-six weeks gestational age (R.4).

The affiant was told by another officer, Sergeant Harmon of the St. Petersburg Police Department, that Defendant had told him that "she had shot herself in order to hurt the baby." (R.4) Defendant had told Sergeant Harmon where the .22 caliber weapon was and it was found where she indicated at 940 10th Avenue South, St. Petersburg (R.4-5). Post-Miranda, Defendant told Affiant Babb that she had not tried to kill her baby and wanted the baby (R.5).

Affiant Babb learned that Defendant had told no one she was pregnant and that her prior child was being cared for by Defendant's grandmother, Rosa Ashley, because Defendant was unwilling to properly care for the child. Rosa Ashley told Affiant Babb that she had previously told Defendant that she would not be willing to care for any more of Defendant's children she might have (R.5).

Affiant Babb learned from Sharrona Fay Wright that Defendant had told her prior to the shooting that she might shoot herself in the stomach, but that Ms. Wright had not believed Defendant was being serious. Defendant had also told Ms. Wright, after the shooting, that the gun had gone off accidentally (R.5)

Defendant's unsworn "Summary of Factual Allegations" section in the Defense's Motion to Dismiss the Information, filed November 23, 1994, alleges:

> "1. On March 27, 1994, the Defendant, who was then approximately twenty-five (25) to twenty-six (26) weeks pregnant, inflicted a gunshot wound upon herself and into the area of her abdomen.

2. The Defendant was taken to the hospital where the medical staff determined it necessary to, and did in fact, deliver the Defendant's baby by performing an emergency Caesarian section.

3. The baby survived its delivery and seemed to do well for about a week until it began to experience multi-organ failure due to its prematurity.

4. On April 11, 1994, the baby died due to multi-organ failure." (R.88)

These unsworn allegations are prefaced by the disclaimer that they are a "summary of the factual allegations made by the State ...." (R.88) In the Argument and Memorandum of Law accompanying Defense's Motion to Dismiss, Defense acknowledged that "[f]or purposes of this motion only, Defendant accepts the prosecution's version of the facts as stated in the Felony Information and Witness Affidavit" which were attached to the Memorandum as Exhibit A (R.26, footnote 2). Defendant's inclusion of additional facts in the Memorandum, (R.27), are unsworn.

Also before the trial judge was the State's restatement of these facts in the State's Memorandum of Law, filed January 17, 1995, in conjunction with the State's Response to Defendant's Motion to Dismiss (R.94-96).

Defense counsel acknowledged that for purposes of the hearing on the Motion to Dismiss that the State's allegation of the facts were accepted as true (R.150, 155), and argued to the court during hearing on the Motion to Dismiss that neither the Third Degree Murder nor Manslaughter statutes charged in the Information applied to conduct of a pregnant woman in killing her fetus (R.150-151).

As authority for this argument, Defense counsel relied on Florida case law holding that a woman is not guilty of a criminal offense in ingesting cocaine on the theory of passage of the cocaine to the baby during the brief time after birth before the umbilical tube is severed (R.150-155). Defense counsel also argued that the Florida criminal abortion statute abrogates the applicability of Florida homicide statutes to facts of voluntary abortion resulting in the death of a fetus that was born alive (R.156-157). Defense's argument included that the application of the homicide statutes would raise the vagueness doctrine because of lack of notice and arbitrary application by prosecution (R.165).

The State argued that the Third Degree Murder statute was applicable because the baby lived from the self-inflicted abortion attempt and that Manslaughter was filed in the alternative when the Defendant changed her story to police from saying she intended to harm the baby to deny she intended to hurt the baby (R.162-165, 168).

The trial court acknowledged that the State's version of facts was accepted as true for purposes of the hearing, (R.169), and ruled that the "cocaine baby" cases were inapplicable (R.169-170, 173). The Second District agreed. The court ruled that there was no way Defendant could be convicted of Third Degree Murder, Sec. 782.04(4), Fla. Stat., because of the way the statute was written, and dismissed that count of the Information (R.170-172). The court denied the motion to dismiss the Manslaughter count, finding that the "born alive theory" was recognized in Florida and that a jury

"could potentially convict" Defendant of Manslaughter (R.172). The court added that it believed the Defendant could be charged with a third-degree felony of Abortion (R.173).

SUMMARY OF ARGUMENT

The Second District's Opinion is a departure from essential requirements of the law in construing the plain meaning of ordinary words "any person" in Sec. 390.001(10) (a), Fla. Stat., to exclude the pregnant female from those who may be liable for a termination of pregnancy.

The construction of plain, ordinary, unambiguous words which raise no doubt and which do not result in a ridiculous or unreasonable conclusion is a departure from essential requirements of the law. The construction of ordinary words is an intrusion of the legislative function.

Because the legislature is presumed to know prior case law on the subject, the legislature's use of the words "any person" in Sec. 390.001(10) (a), Fla. Stat., to define persons to whom the law is applicable is an obvious change from the common law, which is presumed to reflect the legislative intent.

The construction of the ordinary, obvious words, which are in derogation of the common law, to conclude that the legislature did not intend a departure from the common law is a departure from essential requirements of the law.

Because the legislature changed the common law to make the pregnant female liable for termination of her pregnancy, the Second District's opinion that the pregnant female could not be charged with third-degree felony murder, with abortion by termination of pregnancy as the underlying offense, is a departure form essential requirements of the law.

ARGUMENT

ISSUE I. THE DISTRICT COURT DEPARTED FROM ESSENTIAL REQUIREMENTS OF THE LAW IN CONSTRUING THE PLAIN MEANING OF THE STATUTE.

The District Court departed from essential requirements of the law in construing the clear and unambiguous language of Sec. 390.001(10)(a), Fla. Stat., and determining that words "any person" excluded the pregnant female.

Where the words of the legislature are clear and unambiguous, courts intrude on the legislative function by construing statutory wording to achieve a desired result. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); Roush v. State, 413 So. 2d 15, 18-19 (Fla. 1982); Heridia v. Allstate Insurance Co., 358 So. 2d 1353, 1355 (Fla. 1978). That courts should give statutory language its plain and ordinary meaning has been called a cardinal rule of statutory construction. Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993); Smith v. Crawford, 645 So. 2d 513, 522 (Fla. 1st DCA 1994).

Because construction of a statute is for the purpose of determining the legislative intent, no construction is necessary, or permitted, when the intent on the ordinary meaning of the

statutory language is plain and unambiguous and the literal interpretation does not lead to a ridiculous or unreasonable conclusion. State v. Egan, 287 So. 2d 1, 3 (Fla. 1973); Holly v. Auld at 219; Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 396 (Fla. 1990); Cooke v. Insurance Co. of No. Am., 603 So. 2d 520, 522 (Fla. 2d DCA 1992); Weber, supra. "The Legislature must be understood to mean what it has plainly expressed, and this excludes construction....Even when a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 2d 693, 694-695 (1918); accord, Egan; Shelby Mut.; Smith v. Crawford, supra.

"It must be assumed that the legislature knows the meaning of the words and has expressed its intent by the use of the words found in the statute." Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992); accord, S.R.G. Corp. v. Dept. of Rev., 365 So. 2d 687 (Fla. 1978); State v. Dalby, 361 So. 2d 215, 216 (Fla. 2d DCA 1978). Statutory language is to be afforded its plain and obvious meaning. Dalby, supra; Cooke v. Ins. Co. of No. Am., 603 So. 2d 520, 522 (Fla. 2d DCA 1992), rev. in part on other grounds, 624 So. 2d 252, 255 (Fla. 1993.

The Second District itself has previously held that "the words 'any person' constitute clear, unambiguous, all-inclusive language that requires no interpretation of legislative intent." Conquest v. Auto-Owners Ins. Co., 637 So. 2d 40, 42 (Fla. 2d DCA May 11,

1994); approved, Auto-Owners Ins. Co. v. Conquest, 658 So. 2d 928 (Fla. 1995), disapproving Cardenas v. Miami-Dade Yellow Cab Co., 538 So. 2d. 491 (Fla. 3d DCA 1989).

Legislation frequently utilizes the descriptive word "any," and courts, in considering such enactments have noted the ordinary meaning of the word as all-inclusive. In C.W. v. State, 655 So. 2d 87, 89 (Fla. 1995), this Court found that the words "any damage" in sec. 39.054(1)(f), Fla. Stat., were plain language, **requiring** inclusion of pain and suffering in restitution awards.

In Cohen v. Fla. Dept. of Law Enforcement, 654 So. 2d 1058 (Fla. 1st DCA 1995), the Court found that the language "any state" in Sec. 295.101, Fla. Stat., was clear and unambiguous and did not permit construction to mean only Florida. The Court said that the "term 'any,'...clearly connotes indifference" and, therefore, refers to any state. Cohen at 1058.

In Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 614 So. 2d 1198, **1201** (Fla. 5th DCA 1993), the Court rejected that the words "any personal property" in Sec. **818.01** excluded intangible personal property.

In Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 265 (Fla. 5th DCA 1989), the Court agreed with two federal courts, that had previously considered the question, in holding the legislative use of the words "any person" in enactment of Sec. 624.155(1)(b), abrogated the common law and changed the result of prior case law refusing to allow **an** insured to sue his insurer for failure to make a good faith settlement. "The language of section

624.155 is clear and unambiguous and conveys a clear and definite meaning. It provides a civil cause of action to 'any person' who is injured as a result of an insurer's bad faith dealing. Thus, there is no occasion for resort to rules of statutory construction; the statute must be given its plain and obvious meaning," Opperman at 266, citing Holly v. Auld. The Court found the legislative intent to expand the common law to be clear. Id.

In Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987), this Court refused to accept that the language of Sec. 440.02, that "[t]he term 'employee' includes any person ...," excluded corporate officers. This Court held that "[t]he 1978 amendment to section 440.11(a) authorizes actions against all fellow employees for acts of gross negligence resulting in injury to other employees. To separate corporate officers from this rule requires a highly convoluted and logistically suspect construction of the statute..,. [W]e must stress that the plain language of section 440.1(1) fully precludes any such interpretation." Streeter at 271.

In Reed v. Bowen, 503 So. 2d **1265** (Fla. 2d DCA 1986), the Court refused to exempt children from the operation of the defense, to liability for **dog** bites provided in Sec. 767.04, of precluding "any person" who provoked the dog from seeking recovery. "[S]ection 767.04 is replete with all inclusive terms such as 'any dog,' 'any damages,' and 'any person.' We find that, according to the plain and ordinary meaning of those terms, we are precluded from automatically exempting children below a certain age from the statute's operation." Reed at 1267.

In Trushin v. State, 475 So. 2d 1290, 1291 (Fla. 3d DCA 1985), the Court found that the plain language of Sec. 63.212(1)(a), prohibiting "any person" from placing a child for adoption outside the state, included defendant as the arranger.

A different construction than a literal interpretation of a statute is permitted only to effectuate the obvious intent of the legislature. Holly v. Auld at 219; State v. Egan, 287 So. 2d 1 (Fla. 1973). The Second District claims the right to construe "any person" in Sec. 390.001(10)(a) as excluding the pregnant female to effectuate the supposed legislative purpose of retaining the common law notion that the pregnant female could not be held liable for her own abortion. As expressed by the Florida Supreme Court, however, "departure from the letter of the statute ... 'is sanctioned by the courts only when there are cogent reasons for believing that the letter [of the law] does not accurately disclose the [legislative] intent.'" Holly v. Auld at 219, emphasis by the Court in quoting from State ex rel. Hanburg v. Tunnicliffe, 98 Fla. 731, 124 So. 279, 281 (1929).

There are no cogent reasons for believing that the legislature intended to retain the common law exclusion of liability of the pregnant female for her own abortion when in 1979 it amended the abortion statutes to apply to "any person." See Opperman, supra. To the contrary, it should be obvious that the legislature intended the change effected by the addition of the words "any person" to make the pregnant female liable for her own illegal abortion. See Streeter, supra. See Argument at Issue II herein.

The Second District's opinion violates another rule of statutory construction; that "'[u]ncertainty should be resolved by an interpretation that best accords with the public benefits.'" Cooke v. Insurance Co. of No. Am., 603 So. 2d 500, 503 (Fla. 2d DCA 1992), rev. in part on other grounds, 624 So. 2d 252, 255 (Fla. 1993). The United States Supreme Court resolved that the public benefit permits regulation and prohibition of abortion after the third trimester. Roe v. Wade, 410 U.S. 113 (1973).

Wherefore, the District Court departed from essential requirements of the law in construing the plain and ordinary meaning of the words "any person" in Sec. 390.001(10)(a) to exclude the pregnant female.

ISSUE 11. THE SECOND DISTRICT DEPARTED FROM ESSENTIAL REQUIREMENTS OF THE LAW IN HOLDING THAT DEFENDANT, AS THE PREGNANT FEMALE, COULD NOT BE CHARGED WITH THIRD-DEGREE MURDER, IF THE UNDERLYING PREDICATE FELONY IS ABORTION OR ATTEMPTED ABORTION.

The Second District admits that, on application of the step-by-step analysis in Knighton v. State, 603 So. 2d 71 (Fla. 4th DCA 1992), to the elements of third-degree felony murder, "the Information would appear to state a crime under the laws of Florida." Ashley, slip op. p.7. However, the court claims to rely on authority that a woman cannot be the principal or coconspirator to her own abortion to reach the contrary result. The authority cited, however, addresses her being an accomplice rather than the principal. The Second District reaches the conclusion that the pregnant woman could not at common law be guilty of her own

abortion "based upon another common law doctrine that considers the woman to be the victim of the crime of abortion and, therefore, not a perpetrator." Ashley slip op. p.7. However, a pregnant woman clearly is not "the victim of the crime of abortion," Ashley, slip op. p.7, when she is the sole perpetrator of her own abortion or attempted abortion. That case law from other jurisdictions based either on the common law or statute considers her the victim when the abortion is performed by another is irrelevant to facts of the pregnant female being the one performing or attempting a self-abortion. State v. Carey, 56 A.632 (Conn. 1904), cited by the District Court as authority for its conclusion that a pregnant woman is almost universally not considered a principal because she is, rather, considered the victim, does not support that statement. The quote from 636 of that case ignores the explanation in Carey that Connecticut had distinctly separate statutes for perpetrators of an assault on a pregnant woman by those who "with their hands thrusting an instrument into her womb and body ... [intended] thereby to procure upon her a miscarriage and an abortion ..." Carey at 633, and for the pregnant woman who committed miscarriage on herself or by the agency of another. Carey at 636. The defendant in Carey was charged with violation of Connecticut General Statutes of 1902 Sec. 1155, and the court in Carey noted that the female could have been charged with Connecticut General Statutes of 1902 Sec. 1156 and 1157. This fact was necessary to the holding in Carey that the trial court had not erred in instructing the jury on the credibility of the pregnant woman's

testimony as an accomplice. Carev at 636. Although she was not strictly an accomplice of the crime charged against the defendant, she had admitted to violation of the separate crime of "attempt to secure her own miscarriage ...." Carey at 633. The court found that nothing in the record supported that she had been granted "immunity from prosecution for the distinct crime she had committed." Carey at 635.

The Second District also rejects that the language regulating termination of pregnancies in Sec. 390.001(10) (a) of "any person" includes the pregnant female or abrogates the common law that she could not be guilty of abortion. Ashley, slip op. p.9. The Court's erroneous construction of Sec. 390.001(10) (a) as not intended to abrogate the common law is a departure from essential requirements of the law. It is, rather, clear that the legislative enactment of Sec. 390.001(10) (a) in 1979 did change the common law, and there is no permitted construction of the ordinary language of the statute to claim the contrary. See Argument at Issue I herein.

The Second District's resorting to construction of the plain and ordinary words "any person" to exclude the pregnant female in order to preserve the common law exception is unwarranted. "When the Legislature makes a substantial and material change in the language of the statute, it is presumed to have intended some specific objective or alteration of law, unless a contrary indication is clear." Manqold v. Rainforest Golf Sports Center, ____ So. 2d ____ (Fla. 1st DCA Feb. 13, 1996), 21 Fla. L. Weekly D411; accord, Town of Lake Park v. Karl, 642 So. 2d 823, 825 (Fla.

1st DCA **1994).** Statutes intending to alter the common law are generally strictly construed to retain the common law. Ellis v. Brown, 77 So. 2d 845 (Fla. 1955); Law Offices of Harold Silver, P.A. v. Farmers Bank & Trust Co., 498 So. **2d** 984 (Fla. 1st DCA **1986).** To alter the common law, legislation should expressly so state or be repugnant to the common law. Thornber v. City of Ft. Walton Beach, 568 So. 2d 914, **918** (Fla. 1990). Although the common law may not be "changed by doubtful implication[,][o]f course, where the implication is obvious, it cannot be ignored." Egan at **6.** However, where the plain language of the statute does clearly change the common law, this Court has reversed a district court for construing an exception, in derogation of the common law, contrary to the statutory language. Acosta v. Richter, _____ So. 2d ____ (Fla. Jan. **18,** 1995), 21 Fla. L. Weekly S29, disapproving Castillo-Plaza v. Green, 655 ***So.*** 2d 197 (Fla. 3d DCA 1995); Pierre v. No. Shore Med. Center, Inc., ____ So. **2d** ____ (Fla. Jan. **18,** 1996), **21** Fla. L. Weekly S35, quashing Castillo-Plaza. In Opperman, supra, the court held that the legislature had obviously changed the common law and prior case law by use of the words "any person" in Sec. **624.155** (1)(b) and that the clear and unambiguous language prevented judicial construction of the plain meaning of the statute. The legislature's use of the words "any person" in assigning liability for termination of pregnancy can only be read as a plain, ordinary statement in derogation of the common law doctrine that the pregnant woman was not the perpetrator of her own abortion.

In passing a law, the Legislature is presumed to be "acquainted with judicial decisions on the subject,...." Puglia v. Drinks on the Beach, Inc., 457 So. 2d 519, 521 (Fla. 2d DCA 1984). "Statutes intending to alter the established case law must show that intention in unequivocal terms." Hiller v. Int'l. Bankers Ins. Co., 572 so. 2d 937, 939 (Fla. 3d DCA 1990). Because the legislature is presumed to be aware of prior case law, Puglia, supra, the change of preceding case law by enactment of 39.011(10) (a) in 1979 should be presumed to be intentional, It appears that the legislature in 1979 included the suggestions of Judge Ervin from his concurring opinion in Walsingham v. State, 250 So. 2d 857, 862-863 (Fla. 1971), in making the provisions of Sec. 390.001 (10)(a) on termination of pregnancy applicable to all persons. Like Connecticut law as described in Carey, supra, Florida includes a separate statute prohibiting abortion on a pregnant woman by another. Sec. 797.03, Fla. Stat. (Ch. 78-382 s.10). The legislature's addition of the termination of pregnancy statute in 1979 to the separate abortion statute enacted in 1978 cannot be ignored as intending something different. As expressed in the majority opinion in Walsingham, the legislature is presumed in reenacting a statute to be aware of construction of the law by the courts "and, in the absence of clear expressions to the contrary, is presumed to have adopted the construction placed upon it ..." by the courts. Walsingham at 859.

In enacting the termination of pregnancy statute, the legislature's use of the words "any person" is a clear expression

to have adopted the suggestion of Judge Ervin in the concurring opinion and to have changed the construction of the state of the law on applicability of the abortion statute. The legislature did not change the abortion statute's applicability to those who perform an abortion on a pregnant woman, but added a separate statute which covers the liability of the pregnant woman for her own termination of her own pregnancy. The implication that the legislature intended this change through use of the all inclusive, descriptive words "any person" "is obvious, [and] it cannot be ignored." Egan at 6.

Contrary to the strained interpretation of the ordinary words "any person" by the Second District in this case, any person was on notice from enactment in 1979 of Sec. 390.001(10)(a) of the Legislature's intent to make all persons liable for termination of pregnancy.

Defendant, as any other Florida resident, is presumed to be aware of Florida law. Beasley v. State, 580 So. 2d 139, 142 (Fla. 1991). Defendant was on notice that her conduct of shooting herself in the stomach, through a pillow, with a low-caliber weapon, while in the third trimester of pregnancy (R.94), could result in the deprivation of life of her viable fetus and of her child were it to be born alive. She was on notice that Florida law imposes a criminal liability for such conduct. See Gluesenkamp v. State, 391 So. 2d 192 (Fla. 1980).

CONCLUSION

WHEREFORE, the Second District's construction of Sec. 390.001(10)(a), Fla. Stat., to exclude the pregnant female, and thereby prohibit the charge of third-degree felony murder, is a departure of essential requirements of the law and should be reversed.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the above Appellant/Cross-Appellee's Initial Brief on the Merits has been furnished by personal service to Bruce Johnson, Assistant Public Defender, Criminal Courts Building, 5100 144th Avenue North, Clearwater, Florida 34620, and by U.S. mail to Priscilla J. Smith, Esquire, 120 Wall Street, 18th Floor, New York, New York 10005, counsel for Appellee/Cross-Appellant, this 7 day of May, 1996.

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