

SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

CASE NO. 91,424

**OCT 8 1997**

AVATAR DEVELOPMENT CORP.  
and AMIKAM TANEL,

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

Petitioners

vs

STATE OF FLORIDA,

Respondent

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RESPONDENT'S BRIEF ON JURISDICTION

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On Review of a Decision of the  
Fourth District Court of Appeal

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## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioners' Statement of the Case and Facts except to add that Petitioners were charged in the information with *willful* violation of the terms of their permit constituting a violation of §§ 403.161(1)(b) and 403.161(5), Fla. Stat.

## SUMMARY OF ARGUMENT

The court below did rule that §§ 403.161(5) AND 403.161(1)(b), Fla. Stat., are constitutional. However, this is consistent with the law as it has been since 1919 and does not warrant this court's exercise of its discretionary jurisdiction.

This case does not conflict with *B.H. v. State*, or any other case. The court below did not recognize any conflict and in fact simply applied the existing law to the facts in this case in a manner inconsistent with Petitioners' wishes. Such application does not create a conflict for jurisdiction in this court.

This case presents no new or remarkable issues of law and this court should decline to exercise its discretionary jurisdiction.

## ARGUMENT

THE DECISION BELOW EXPRESSLY DECLARES  
§§ 403.161(5) AND 403.161(1)(b), FLA. STAT.,  
CONSTITUTIONAL, BUT SAID DECISION IS NOT  
ONE OF GREAT IMPORTANCE REQUIRING  
EXERCISE OF THIS COURT'S DISCRETIONARY  
JURISDICTION

Respondent cannot dispute that the court below ruled that §§ 403.161(5) and 403.161(1)(b), Fla. Stat., are constitutional and that this court has discretionary jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const. and Rule 9.030(2)(A)(I), FRAP. Such review is discretionary and this case does not warrant the exercise of that discretionary jurisdiction.

The Fourth District Court of Appeal in this case followed existing law and the conclusion of this case is neither new nor remarkable. As early as 1919, this court was faced with a challenge to a statute that made violation of the rules or orders of the Livestock Sanitary Board a misdemeanor. This court found that statute to be constitutional, holding

Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments.

The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review; and it is not among the powers of government that the Constitution separates into departments. (Citations omitted).

\* \* \* \*

The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. (Citation omitted).

*State v. Avatar Development Corp., Amikam Tanel*, 1997 WL 394482, \*4 (Fla.App. 4 Dist. 1997), quoting *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789 (Fla.1919). The District Court's opinion applying law in existence since 1919 presents no new issue requiring this court's attention. It is not unusual for the legislature to make the violation of a rule or permit of an administrative agency a misdemeanor. See, *State v. Rawlins*, 623 So.2d 598 (Fla.App. 5 Dist. 1993)( Rule 16N-22.03(1) specifically states that any person who violates rule 16N-22.012 shall be guilty of a misdemeanor of the second degree.). See, e.g. § 370.028 (violation of rules of Marine Fisheries Commission is a misdemeanor)

This court should DECLINE to exercise its discretionary jurisdiction in this case.

THE DECISION BELOW DOES NOT CONFLICT  
WITH *B.H. v. STATE* OR ANY OTHER DECISION

Petitioners also assert that this court should exercise its jurisdiction because this case conflicts with the decision in *B.H. v. State*, 645 So. 2d 987 (Fla. 1994).

The court below not only did not recognize a conflict with *B.H.*, but explicitly applied the standards from that case to reach its conclusion. Petitioners simply are unhappy with the way said standards were applied; that is not a conflict.

The court below cited to *B.H.* for the proposition that

In the criminal law context, there also may be some degree of flexibility consistent with the nondelegation doctrine, but only to the extent that the statute itself provides adequate notice of the prohibited conduct.

*State v. Avatar Development Corp., Amikam Tanel*, 1997 WL 394482, \*4

(Fla.App. 4 Dist. 1997), quoting *B.H. v. State*, 645 So. 2d at 993. The court then went on to determine that the statute contained sufficient standards to meet the requirements of the nondelegation doctrine. This is a proper application of the principles of *B.H.* In their brief, Petitioners argue the merits of their case, but can show no conflict with *B.H.* or any other case.

Petitioners' argument with respect to due process is equally meritless. This law does give fair notice of the proscribed conduct - willful violation of the



provisions of their permit. In *State v. Rawlins*, the Fifth DCA was faced with a similar argument and disposed of it, holding:

We conclude that the trial court misapplied the void for vagueness doctrine in this case because review of the rule under which Rawlins is being prosecuted reveals that a person of common intelligence would not need to guess as to whether he has violated the boat speed regulations.

*State v. Rawlins*, 623 So.2d 598, 600 (Fla.App. 5 Dist. 1993). In *State v.*

*Cumming*, this court was faced with a similar argument and held:

The state's argument that Section 372.922, Florida Statutes, enables persons of common intelligence to ascertain whether or not a contemplated act is lawful is supported by the language of the statute. The statute clearly prohibits possession without a permit from the Commission of "any wildlife as defined in this act." The statute, though lacking a specific definition of the term "wildlife," provides effective notice of what wildlife is contemplated as necessitating a permit by dividing that wildlife into the two Classes, and then directing that the regulations of the Commission shall further define the types of animals in the Classes.

*State v. Cumming*, 365 So.2d 153, 154-55 (Fla. 1978). In all of these cases, the rules implementing the statutes supplied the necessary notice of what the criminal conduct was for due process requirements. In the instant case, the permit holder is on notice that willful violation of any of the requirements of that permit constitutes a misdemeanor. Any reasonably intelligent person in that situation

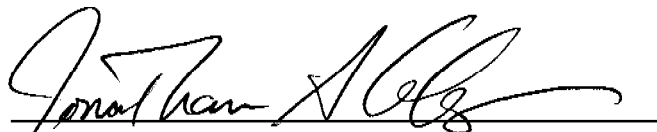
will know what conduct is proscribed. The court below so holding does not conflict with any other decision of this court or any district court. There is no basis for conflict jurisdiction in this court.

THIS COURT SHOULD DECLINE TO EXERCISE ITS  
DISCRETIONARY JURISDICTION

This case presents no new or remarkable legal propositions, nor does it present a conflict with any existing law. Petitioners simply argue the merits of their case and attempt to manufacture either a conflict or an issue warranting the discretionary review by this court. They failed on both counts and this court should decline to exercise its discretionary jurisdiction.

Respectfully submitted this 7 day of October, 1997.

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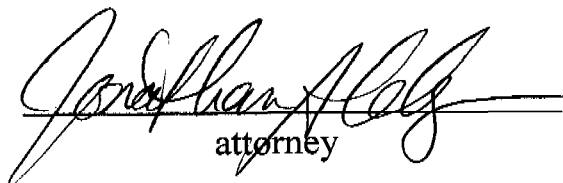
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this 7 day of October, 1997, on:

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