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MAR 30 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ETIRZA EVERSLEY, :

Petitioner, :

vs. : Case No. 92,624

STATE OF FLORIDA, :

Respondent. :

_____ :

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

AMENDED BRIEF OF PETITIONER ON JURISDICTION

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The following statement of the case and facts is taken from the decision of the Second District Court of Appeal [A 1-8][1]:

Etirza Eversley was charged with and convicted of manslaughter and felony child abuse arising out of the death of her infant son, Isaiah. [A 1] In response to Eversley's motion for judgment of acquittal, the trial court overturned the jury's verdict of manslaughter and reduced the child abuse conviction to a misdemeanor. [A 1-2] On the state's appeal, the Second District reviewed the record and determined that there is sufficient evidence to support the jury's determination of guilt on both counts. In an opinion issued on January 28, 1998, the Second District reversed the order of the trial court granting the judgment of acquittal and reducing the child abuse charge. [A 1-2] The Second District reinstated Eversley's convictions for manslaughter and felony child abuse. [A 8] The Second District denied Eversley's motion for rehearing on March 4, 1998. [A 9]

Baby Isaiah was two months old when his mother, Etirza Eversley, retrieved him from Carey Barron, the woman to whom she had given him immediately following his birth. Eversley had originally given Isaiah away because she had to work and could not care for him. As evidence of her relinquished custody, Eversley had entered into a written agreement stating that Ms. Barron would

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[1] References to the Appendix to this brief are designated by A and the page number. Page references to the record on appeal are designated by a Roman numeral for the volume, R for the record proper, and T for the trial transcript.

be caring for Isaiah. On Sunday, February 4, 1996, Eversley decided to care for Isaiah and went to Ms. Barron's home to retrieve the baby. The evidence regarding whether Isaiah showed signs of ill health at that time is conflicting. Eversley told a police officer that when she picked up Isaiah, Ms. Barron told her he was sick. Ms. Barron, however, testified that he was not sick on Sunday. And, Eversley's aunt, who saw the child around 4:00 p.m. on Sunday, said he was not sick at that time. [A 2]

Isaiah was clearly exhibiting signs of being ill the next morning. According to Officer James Parry of the Tampa Police Department, Eversley took Isaiah to a nearby clinic to obtain some formula and while there a nurse told Eversley to take Isaiah to the hospital. However, a clerk at the clinic testified that Eversley asked to have a staff member examine Isaiah. A nurse was called, and she observed Isaiah and determined that he was having difficulty breathing. [A 2] Isaiah was breathing in a labored, raspy fashion and "grunting" for breath. [A 2-3] The nurse summoned a doctor to further examine Isaiah. Both the nurse and a doctor repeatedly advised Eversley that she must take Isaiah to the emergency room. The nurse specifically told Eversley that the clinic did not have the equipment to verify whether Isaiah had pneumonia and that she must take him directly to the hospital. Both the doctor and the nurse stressed more than once that Isaiah's condition required immediate medical assistance. [A 3]

In response to their directions, Eversley left the clinic and took Isaiah to the St. Joseph's Hospital emergency room. Upon

entering, Eversley noticed there were two or three patients in line ahead of her. Eversley immediately became impatient and left the hospital without attempting to obtain medical aid for Isaiah. [A 3] Eversley acknowledged that she was aware that if she had informed the hospital staff that Isaiah was ill and had been sent there by a doctor, the hospital staff would have taken Isaiah first on an emergency basis.[2] [A 5-6] Eversley attempted to excuse her behavior by alleging that she thought Isaiah only had a cold. [A 6]

Around midnight, Eversley attempted to feed Isaiah. He was still having difficulty breathing. Isaiah had exhibited similar breathing difficulty during a prior feeding earlier that evening. Nevertheless, Eversley laid down on her bed with Isaiah and went to sleep. At a few minutes before 3:00 a.m., Eversley's brother came home and she awoke. At that point Eversley noticed Isaiah was not breathing and called her aunt, who directed Eversley to call 911 for emergency assistance. [A 3]

At approximately 3:05 a.m. on February 6, 1996, the paramedics arrived at Eversley's home. They found Isaiah stiff, cold, without a pulse and with fixed, dilated pupils. He seemed to have been dead for quite some time. [A 3]

At trial, causation was the pivotal issue. Eversley argued that pneumonia, not her actions, caused Isaiah's death. Following

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[2] The opinion, at p. 5, erroneously states that Eversley "testified." [A 5] In fact, Eversley waived her right to testify at trial. [V, T 445-446] The state introduced Eversley's statements to Officer James Parry [III, T 204-208] and to Detective John Yaratch. [IV, T 285-291, 299-311]

a jury trial and conviction, Eversley again raised the issue of causation. [A 3] Conflicting testimony over the strain of pneumonia Isaiah had contracted was cited to support statistics regarding the likelihood that a child will die as a result of having pneumonia. [A 3-4] The various experts who testified in this case concluded that Isaiah had at a minimum, a seventy-five percent chance of survival, depending on the strain of pneumonia he had contracted. [A 6]

Relying on Bradley v. State, 84 So. 677 (Fla. 1920), the trial court found that a parent's failure to provide medical care for a child suffering from an injury or illness is not the legal cause of the child's death; therefore, a charge of manslaughter would not lie in such a case. The Second District Court of Appeal decided that Bradley is not applicable to this case, so the trial court's reliance on Bradley was error. [A 4] The Second District held that a defendant may be charged with manslaughter arising out of a failure to obtain medical attention for a child in need of same. [A 5] The Second District further held that causation may be satisfied when a defendant's action is a material contributing factor in the victim's death. [A 5] The Second District also held that the trial court's reduction of the felony child abuse conviction to a misdemeanor was error because the deprivation of medical treatment was a contributing cause of Isaiah's death. [A 7]

SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal expressly and directly conflicts with this Court's prior decision in Bradley v. State, 84 So. 677 (Fla. 1920), on the question of whether a parent who fails to obtain medical treatment for a sick or injured child, who subsequently dies from the illness or injury, caused the death of the child to support a manslaughter conviction.

The Second District's decision expressly and directly conflicts with the decision of the Third District in Hodges v. State, 661 So. 2d 107 (Fla. 3d DCA 1995), rev. denied, 670 So. 2d 940 (Fla. 1996), on the question of whether to apply the "material contributing factor" or the "but for" test to determine causation in a manslaughter case which does not involve two defendants acting independently who committed two separate acts each of which alone was sufficient to bring about the prohibited result.

The Second District's decision expressly and directly conflicts with the decision of the Fourth District in Boyce v. State, 638 So. 2d 98 (Fla. 4th DCA 1994), on the question of whether a parent can be convicted of felony child abuse where the child is harmed by a disease and there is no proof that the parent's conduct caused the disease.

ARGUMENT

ISSUE

THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN BRADLEY v. STATE, 84 So. 677 (Fla. 1920); HODGES v. STATE, 661 So. 2d 107 (Fla. 3d DCA 1995), rev. denied, 670 So. 2d 940 (Fla. 1996); AND BOYCE v. STATE, 638 So. 2d 98 (Fla. 4th DCA 1994).

This Court has discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law. Art. V, § 3(b)(3), Fla. Const.

The decision of the Second District Court of Appeal reversing the trial court's post-verdict order granting Eversley's motion for judgment of acquittal on charges of manslaughter and felony child abuse causing great bodily harm [A 1-8] expressly and directly conflicts with this Court's prior decision in Bradley v. State, 84 So. 677 (Fla. 1920). Bradley's epileptic daughter, who was under 16 years of age, suffered a seizure, fell into a fire, and was seriously burned. Id., at 679 (West, J., dissenting). For over a month following this injury, Bradley kept her at home and refused to obtain treatment from a physician. Id., at 679-680. The daughter was then taken to a hospital, where she received medical care and died three weeks later. The treating physicians testified at trial that the death resulted from the burn, and that in their opinion, she would have recovered if she had received medical

attention promptly after being burned. Id., at 680. This Court reversed Bradley's conviction for manslaughter, holding that the father's failure to provide medical care for his child did not cause her death:

> Manifestly the death of the child was caused by the accidental burning in which the father had no part. The attentions of a physician may or may not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause "the killing" of the child, even if the failure or refusal of the father to provide medical attention was "culpable negligence" within the intent of the statute.

Id., at 679. Pursuant to this holding in Bradley, Eversley could not be convicted of manslaughter because death was caused by pneumonia, not by Eversley's failure to obtain medical care.

The Second District purported to distinguish Bradley on the ground that Florida law governing child abuse has changed since Bradley was decided. [A 4] The Second District held that "a defendant may be charged with manslaughter arising out of a failure to obtain medical attention for a child in need of same." [A 5] Moreover, the Second District held that the state's evidence in this case was sufficient for the jury to find that Eversley was guilty of manslaughter on the ground that her failure to obtain medical care for Isaiah was a material contributing factor in the child's death, and that the trial court's reversal of the jury's verdict on the authority of Bradley was error. [A 5-7]

The Second District's holding in this case effectively overrules this Court's decision in Bradley. The Second District's decision makes a parent who fails to obtain medical attention for

a sick or injured child who subsequently dies from the illness or injury liable for conviction for manslaughter, while such a parent cannot be convicted for manslaughter under Bradley. This is an important change in the criminal law of Florida which should not have been made by the Second District.

The Second District had no authority to overrule this Court's decision. District courts are bound to follow the case law set forth by the Florida Supreme Court. Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973). "Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise." State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). "The constitutional system of courts in this State contemplates that only the Supreme Court may overrule its own decisions." Gilliam v. Stewart, 291 So. 2d 593, 594 (Fla. 1974). In Gilliam, at 594, the Court further explained:

> When the district courts decide that ancient precedents should be overruled, we welcome their views and such should be unhesitatingly rendered but, in cases such as this, it is the duty of the district courts under the plain constitutional language to adhere to the former precedents and then certify the decision to us.

This Court should grant review of the Second District's decision in this case because the Second District overstepped the bounds of its authority by issuing a decision that not only expressly and directly conflicts with a prior decision of this Court, but also has the effect of overruling this Court's prior decision.

The Second District's ruling, "Modern manslaughter cases have broadly construed the causation requirement. Instead of the old 'but for' test for causation, causation may be satisfied when a defendant's action is a material contributing factor in the victim's death," [A 5] conflicts with the Third District's decision in Hodges v. State, 661 So. 2d 107 (Fla. 3d DCA 1995), rev. denied, 670 So. 2d 940 (Fla. 1996). In Hodges, at 110, the court ruled,

> In determining whether a defendant's conduct was a cause-in-fact of a prohibited consequence in result-type offenses such as manslaughter, this court and others, with rare exception, have uniformly followed the traditional "but for" test.

In a footnote, at 110 n. 3, the court explained the exception,

> In cases where two defendants acting independently and not in concert with one another commit two separate acts each of which alone is sufficient to bring about the prohibited result, the courts have abandoned the "but-for test" in favor of the "substantial factor test."

Under Hodges, the exception allowing application of the substantial factor test does not apply to Eversley's case because this case does not involve two defendants acting independently who committed two separate acts each of which alone was sufficient to bring about the prohibited result. This Court should grant review to resolve this conflict and decide which test to use for determining causation in a manslaughter case when the actual cause of death is a disease not caused by the defendant.

The Second District's holding that the trial court erred by reducing the felony child abuse conviction to a misdemeanor, on the ground that deprivation of medical treatment was a contributing

cause of Isaiah's death and constituted felony child abuse, conflicts with the Fourth District's decision in Boyce v. State, 638 So. 2d 98 (Fla. 4th DCA 1994).[3] In Boyce, the defendants were convicted of felony child abuse for causing their daughter to develop encopresis and for failing to have her evaluated by a physician or psychologist in order to ascertain the cause of the continuing encopresis, thereby causing her to suffer permanent psychological damage. The Fourth District reversed the convictions because the evidence did not establish that the defendants' mistreatment of their daughter caused her disease. Similarly, the state's evidence in the present case did not establish that Eversley's conduct caused Isaiah to have pneumonia, which was the actual cause of death, so Eversley could not be convicted of felony child abuse pursuant to the decision in Boyce. This Court should grant review to resolve this conflict in the case law interpreting the felony child abuse statute, section 827.04(1), Florida Statutes (1995).

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant review of the decision of the Second District Court of Appeal because that decision expressly and directly conflicts with prior decisions of this Court and other district courts of appeal.

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[3] The trial court relied upon Boyce, as well as Bradley, in granting Eversley's motion for judgment of acquittal. [VI, T 584]

APPENDIX

		PAGE NO.
1.	The decision of the Second District Court of Appeal filed January 28, 1998.	A 1-8
2.	The order denying rehearing filed March 4, 1998.	A 9

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA)
)
Appellant/Cross-Appellee,)
)
v.) CASE NO. 96-04693
)
ETIRZA EVERSLEY)
)
Appellee/Cross-Appellant,)
)
)

Opinion filed January 28, 1998.

Appeal from the Circuit Court for Hillsborough County; M. William Graybill, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Erica A. Raffel, Assistant Attorney General, Tampa, for Appellant/Cross-Appellee.

James Marion Moorman, Public Defender, and Paul C. Helm, Assistant Public Defender, Bartow, for Appellee/Cross-Appellant.

QUINCE, Judge.

Etirza Eversley was charged with and convicted of manslaughter and felony child abuse arising out of the death of her infant son, Isaiah. In response to

A 1

Eversley's motion for judgment of acquittal, the trial court overturned the jury's verdict of manslaughter and reduced the child abuse conviction to a misdemeanor. Our review of the record indicates there is sufficient evidence to support the jury's determination of guilt on both counts. Therefore, we reverse the order of the trial court granting the judgment of acquittal and reducing the child abuse charge.

Baby Isaiah was two months old when his mother retrieved him from Carey Barron, the woman to whom she had given him immediately following his birth. Eversley had originally given Isaiah away because she had to work and could not care for him. As evidence of her relinquished custody, Eversley had entered into a written agreement stating that Ms. Barron would be caring for Isaiah. On Sunday, February 4, 1996, Eversley decided to care for Isaiah and went to Ms. Barron's home to retrieve the baby. The evidence regarding whether Isaiah showed signs of ill health at that time is conflicting. Eversley told a police officer that when she picked up Isaiah, Ms. Barron told her he was sick. Ms. Barron, however, testified that he was not sick on Sunday. And, Eversley's aunt, who saw the child around 4:00 p.m. on Sunday, said he was not sick at that time.

Isaiah was clearly exhibiting signs of being ill the next morning. According to Officer James Parry of the Tampa Police Department, Eversley took Isaiah to a nearby clinic to obtain some formula and while there a nurse told Eversley to take Isaiah to the hospital. However, a clerk at the clinic testified that Eversley asked to have a staff member examine Isaiah. A nurse was called and she observed Isaiah and determined that he was having difficulty breathing. Isaiah was breathing in a

labored, raspy fashion and "grunting" for breath. The nurse summoned a doctor to further examine Isaiah. Both the nurse and a doctor repeatedly advised Eversley that she must take Isaiah to the emergency room. The nurse specifically told Eversley that the clinic did not have the equipment to verify whether Isaiah had pneumonia and that she must take him directly to the hospital. Both the doctor and the nurse stressed more than once that Isaiah's condition required immediate medical assistance.

In response to their directions, Eversley left the clinic and took Isaiah to the St. Joseph's Hospital emergency room. Upon entering, Eversley noticed there were two or three patients in line ahead of her. Eversley immediately became impatient and left the hospital without attempting to obtain medical aid for Isaiah.

Around midnight, Eversley attempted to feed Isaiah. He was still having difficulty breathing. Isaiah had exhibited similar breathing difficulty during a prior feeding earlier that evening. Nevertheless, Eversley lay down on her bed with Isaiah and went to sleep. At a few minutes before 3:00 a.m., Eversley's brother came home and she awoke. At that point Eversley noticed Isaiah was not breathing and called her aunt, who directed Eversley to call 911 for emergency assistance.

At approximately 3:05 a.m. on February 6, 1996, the paramedics arrived at Eversley's home. They found Isaiah stiff, cold, without a pulse and with fixed, dilated pupils. He seemed to have been dead for quite some time.

At trial, causation was the pivotal issue. Eversley argued that pneumonia, not her actions, caused Isaiah's death. Following a jury trial and conviction, Eversley again raised the issue of causation. Conflicting testimony over the strain of pneumonia

Isaiah had contracted was cited to support statistics regarding the likelihood that a child will die as a result of having pneumonia.

Relying on Bradley v. State, 84 So. 677 (Fla. 1920), the trial court found that a parent's failure to provide medical care for a child suffering from an injury or illness is not the legal cause of the child's death; therefore, a charge of manslaughter would not lie in such a case. We believe Bradley is not applicable to the facts of this case; therefore, the trial court's reliance on Bradley was error.

The Bradley decision was premised upon the 1906 manslaughter statute and the state of the law regarding child abuse and neglect at the turn of the century. Since our supreme court authored the Bradley decision, the law has come to recognize the paramount importance of protecting the children under its jurisdiction. To that end, the legislature has enacted extensive child abuse regulations directed at enumerating and criminalizing acts of brutality and neglect perpetrated against children. Florida law specifically recognizes that the failure to obtain medical assistance for a sick child is an act subject to criminal penalties. See, e.g., § 827.04, Fla. Stat. Florida law has advanced considerably from the time when, as the Bradley decision itself acknowledged, "[t]here is no statute in this state specifically making the failure or refusal of a father to provide medical attention for his child a felony...." Id. at 679. Our decision today recognizes that Bradley's reasoning is no longer applicable to this State's view of the criminality of child abuse. Thus, we believe Bradley to be distinguishable and inapplicable to the present case.

We have determined that a defendant may be charged with manslaughter arising out of a failure to obtain medical attention for a child in need of same. However, our analysis does not end there. We must now determine whether Eversley's actions rose to the level of culpability required to support a manslaughter conviction.

Manslaughter may be proven by evidence that a defendant, (i) causes the death of a person, (ii) by culpable negligence, and (iii) without lawful justification. § 782.07, Fla. Stat. (1995). Culpable negligence occurs when a defendant recklessly or wantonly disregards the safety of another. Modern manslaughter cases have broadly construed the causation requirement. Instead of the old "but for" test for causation, causation may be satisfied when a defendant's action is a material contributing factor in the victim's death. Maynard v. State, 660 So. 2d 293 (Fla. 2d DCA 1995)(defendant whose victim died of heart attack brought about by assault was guilty of manslaughter).

In this case, the mother's failure to provide the medical attention needed contributed to the baby's death. Eversley testified that Isaiah was "not breathing right" throughout Monday and into the early morning hours of Tuesday. She said he was fussy and not eating. She confirmed that the clinic staff directed her to go immediately to the hospital and that she followed those directions. She further admitted that she failed to obtain medical care for Isaiah at the hospital because she was "impatient" and did not wish to wait until the hospital staff had assisted the two or three people in line ahead of her. Eversley even acknowledged that she was aware that if she had informed the hospital staff that Isaiah was ill and had been sent there by a doctor, the

hospital staff would have taken Isaiah first on an emergency basis. Despite this knowledge, Eversley made no effort to advise the hospital staff of Isaiah's condition.

Eversley attempts to excuse her behavior by alleging that she thought Isaiah only had a cold. However, this argument is belied by the testimony from the nurse at the clinic that she advised Eversley that the clinic's equipment was insufficient to determine whether Isaiah was suffering from pneumonia. Moreover, there is no evidence in the record that Eversley attempted to obtain medication to treat the ailment she allegedly believed Isaiah was suffering, namely a cold. We believe this behavior epitomizes willful and wanton recklessness.

Isaiah was an infant, dependant upon adults to care for his every need. Eversley's behavior demonstrated that she was aware of Isaiah's ill health. Eversley removed Isaiah from Ms. Barron's care, the only other caretaker who could have ensured he got the medical attention he needed. Eversley alone controlled Isaiah's ability to obtain medical assistance. It was for the jury to decide whether Eversley's failure to obtain medical services for Isaiah was a contributing cause of his death. The jury resolved that issue against Eversley.

The various experts who testified in this case concluded that Isaiah had at a minimum, a seventy-five percent chance of survival, depending on the strain of pneumonia he had contracted. Medical science has progressed significantly since the days when "it was not capable of being proven that if the child had had medical attention it would have recovered." Bradley, 84 So. at 679. There was a significant chance that, given medical aid, Isaiah could have survived his bout with pneumonia.

Eversley's withholding of medical care eliminated that chance. We are not persuaded that this chance was significantly impacted by Isaiah's weakened immune system. A defendant takes her victim as she finds him. Maynard, 660 So. 2d at 296. His condition does not erase the causative connection between Eversley's culpable negligence and Isaiah's premature death.

The jury heard substantial competent evidence from which it could have reasonably concluded that Eversley was criminally responsible for causing Isaiah's death. Id. The trial court's reversal of the jury's verdict upon the authority of Bradley was error.

We also find the trial court's reduction of the felony child abuse conviction to a misdemeanor to be error. Felony child abuse is proven by evidence that a person willfully or by culpable negligence deprives or allows a child to be deprived of medical treatment, and in so doing causes great bodily harm. § 827.04(1), Fla. Stat. Eversley's capricious decision to leave the emergency room, despite her knowledge that she could obtain immediate assistance, evidences a specific and willful intent to deny Isaiah medical services. Nicholson v. State, 600 So. 2d 1101 (Fla. 1992), cert. denied, 506 U.S. 1008 (1992)(defendant who controlled child victim's intake of food and denied the child food offered by others acted willfully); Leet v. State, 595 So. 2d 959 (Fla. 2d DCA 1991)(defendant who did nothing to protect child from mother's acts of abuse found culpably negligent). The deprivation in this case was at least a contributing cause of Isaiah's death. The jury appropriately convicted Eversley of felony child abuse.

We hereby reinstate Eversley's convictions for manslaughter and felony child abuse.

ALTENBERND, A.C.J., and FULMER, J., Concur.

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IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

MARCH 4, 1998

STATE OF FLORIDA, Appellant(s), v. ETIRZA EVERSLEY, Appellee(s).	)	Case No. 96-04693

BY ORDER OF THE COURT:

Counsel for appellee/cross-appellant having filed a motion for rehearing or certification of conflict in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

Received By

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

DISTRICT COURT OF APPEAL SECOND DISTRICT SAT CITO SI RECTE STATE OF FLORIDA

c: Erica M. Raffel, A.A.G.
Paul C. Helm, A.P.D.
Honorable Richard L. Ake

/PM

A 9

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Erica M. Raffel, Assistant Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 25th day of March, 1998.

Respectfully submitted,

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/pch