IN THE SUPREME COURT OF FLORIDA

JOHN WESLEY HENDERSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,885

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 238041

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext 4593

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Respondent in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, John Wesley Henderson, the Petitioner in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record consists of the documents appended to the petition for certiorari filed in the lower tribunal and in this Court. This brief will refer to a volume according to its respective designation within petitioner's brief. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that this brief has been typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts, with the following additions corrections or qualifications.

At the time the present issue arose the sheriff had just been served with a public records demand and no assertion of public records exemption had been made. See (Pet. App. II 21, 24)

Petitioner's counsel admitted to the trial court that one month prior to the scheduled trial he had run across Satz looking for something else and realized that his codefendant's discovery request had made the sheriff's records public. He thought that he would see what he could obtain. (Pet App II 25)

The documents requested by petitioner were provided to the trial court and sealed. This was done at petitioner's request, so that if he lost he could decide whether to withdraw his request for the documents. (Pet App II 18-28)

SUMMARY OF ARGUMENT

Petitioner is attempting to subvert Florida's liberal discovery rule by using it to force the state to disclose what would not otherwise be public records in order to avoid the discovery rule's reciprocity requirements. This Court should not allow such manipulation of the discovery process.

This Court should protect the reciprocal nature of the discovery process by affirming the lower tribunal, answering the certified question in the affirmative, and, determining that demanding the items listed in the discovery rule from police agencies rather than the prosecutor is participating in the discovery process.

The Court should also resolve the issue by adopting the reasoning of the court in Cabral that when a codefendant's discovery request results in otherwise non-public records becoming public record then reciprocal discovery is available to the state for all codefendants.

Finally, because the determination that release of information in discovery negates the public records exemption is a judicially created rule, this Court should modify the rule where codefendants are involved to prevent the subversion of the rule.

For any or all of these reasons, this Court should approve the decision of the lower tribunal.

ARGUMENT

ISSUE I

DOES SECTION 119.07(8), FLORIDA STATUTES (SUPP 1996), LIMIT A CRIMINAL DEFENDANT'S PRE-TRIAL DISCOVERY OF NON EXEMPT PUBLIC RECORDS REGARDING HIS OR HER PENDING PROSECUTION, TO THE DISCOVERY PROVISIONS IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.220, SUCH THAT RECEIPT OF SUCH RECORDS TRIGGERS A RECIPROCAL DISCOVERY OBLIGATION FOR THAT DEFENDANT?

Jurisdiction

This case is before this Court based on a certified question from the District Court of Appeal, First District of Florida. This Court has jurisdiction pursuant to Article V § 3(b)(4) Florida Constitution.

Facts

Petitioner is one of two codefendants charged with murder. (Pet. App. I A-1, A-2, A-3) Petitioner initially chose not to participate in the discovery process provided in Fla. R Crim P. rule 3.220. After his codefendant engaged in discovery under the rules of criminal procedure, petitioner proceeded to demand discovery materials from the state by making a Chapter 119 demand. In his letter, petitioner requested the sheriff's office to provide all investigative reports in its care, custody, and control relating to the death of the victim in the case and relating to the arrest of petitioner or his codefendant. Additionally, the demand requested all reports prepared by any agent of the department relating to the death of the victim or arrest of petitioner or his codefendant. (Pet. App. I A-2))

Petitioner would have been entitled to this information under Florida's liberal discovery rule but chose the public records route in an attempt to obtain the information without incurring the reciprocal discovery obligations contained in Fla. R. Crim P. rule 3.220. (Pet. App I A-5),(Pet App II p 2-3, 24-26) In the trial court, the state moved for a protective order (Pet App.I A-3) and the trial court ruled that the defendant's use of Chapter 119 in this manner was an invocation of the discovery process. (Pet. App. I A-4) From this ruling, petitioner sought certiorari. The appellate court denied the request for the writ, Henderson v. State, 708 So.2d 642 (Fla. 1st DCA 1998), and, certified the following question:

DOES SECTION 119.07(8), FLORIDA STATUTES (SUPP 1996), LIMIT A CRIMINAL DEFENDANT'S PRE-TRIAL DISCOVERY OF NON EXEMPT PUBLIC RECORDS REGARDING HIS OR HER PENDING PROSECUTION, TO THE DISCOVERY PROVISIONS IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.220, SUCH THAT RECEIPT OF SUCH RECORDS TRIGGERS A RECIPROCAL DISCOVERY OBLIGATION FOR THAT DEFENDANT?

The question before this Court is simple and straight forward. May defendants manipulate the rules and statutes in such a manner as to force the state to provide discovery to them without their incurring any reciprocal discovery obligations? This Court should not allow such abuse of the discovery process and should answer the certified question in the affirmative.

The discovery rule interpreted by the trial court provides:

Rule 3.220. Discovery

(a) Notice of Discovery. If a defendant should elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, the defendant shall file with the court and serve on the prosecuting attorney

notice of the defendant's intent to participate in discovery. The "Notice of Discovery" shall bind both the prosecution and defendant to all discovery procedures contained in these rules. The defendant may take discovery depositions on the filing of the notice. The defendant's participating in the discovery process, including the defendant's taking of the deposition of any person, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.

(b) Prosecutor's Discovery Obligation.

(1) After the filing of the charging document, within 15 days after service of the defendant's notice of election to participate in discovery, the prosecutor shall disclose to defense counsel and permit counsel to inspect, copy, test, and photograph the following information and material within the state's possession or control:

(A) the names and addresses of all persons known to the prosecutor to have information that may be relevant to the offense charged and to any defense with respect thereto. The defendant may take the deposition of any person not designated by the prosecutor as a person:

(i) who performed only a ministerial function with respect to the case or whom the prosecutor does not, in good faith, intend to call at trial; and

(ii) whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant if the trial is to be a joint one;

(E) those portions of recorded grand jury minutes that contain testimony of the accused;

(F) any tangible papers or objects that were obtained from or belonged to the accused;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the accused or of conversations to which the accused was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the accused.

(2) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure.

(3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(4) As soon as practicable after the filing of the charging document the prosecutor shall disclose to the defense counsel any material information within the state's possession or control that tends to negate the guilt of the accused as to the offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

(5) The prosecutor shall perform the foregoing obligations in any manner mutually agreeable to the prosecutor and defense counsel or as ordered by the court.

(c) Disclosure to Prosecution.

(1) After the filing of the charging document and subject to constitutional limitations, a judicial officer may require the accused to:

(A) appear in a lineup;

(B) speak for identification by witnesses to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving reenactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the defendant's fingernails;

(G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(H) provide specimens of the defendant's handwriting; and

(I) submit to a reasonable physical or medical inspection of the defendant's body.

(2) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of the appearance shall be given by the prosecuting attorney to the accused and his or her counsel. Provisions may be made for appearances for such purposes in an order admitting the accused to bail or providing for the accused's pretrial release.

(d) Defendant's Obligation.

(1) If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:

(A) Within 7 days after receipt by the defendant of the list of names and addresses furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by the defendant, except for trial subpoenas, reasonable notice shall be given to the defendant as to the time and place of examination pursuant to the subpoena. At such examination, the defendant, through defense counsel, shall have the right to be present and to examine the witness. The physical presence of the defendant shall be governed by rule 3.220(h)(6).

(B) The defendant shall disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material that is in the defendant's possession or control:

(i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;

(ii) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(iii) any tangible papers or objects that the defendant intends to use in the hearing or trial.

(2) The defendant shall make the foregoing disclosures within 15 days after receipt by the defendant of the corresponding disclosure from the prosecutor. The defendant shall perform the foregoing obligations in any manner mutually agreeable to the defendant and the prosecutor, or as ordered by the court.

(3) The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, the defendant may, within 2 days thereafter, or at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

The discovery rule was amended in 1989 because of misuse by the defense bar which was employing strategies designed to force the state to provide information while attempting to avoid the reciprocity required by the rule. The rule changes broadened the definition of engaging in discovery and provided that defendants who engage in discovery are deemed to have elected to participate in discovery under the rule. In re Amendment to Florida Rule of Criminal Procedure 3.220,550 So.2d 1097 (Fla. 1989) The provisions critical to the determination of this case are:

Rule 3.220. Discovery

(a) Notice of Discovery. If a defendant should elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, the defendant shall file with the court and serve on the prosecuting attorney notice of the defendant's intent to participate in discovery. The "Notice of Discovery" shall bind both the prosecution and defendant to all discovery procedures contained in these rules. The defendant may take discovery depositions on the filing of the notice. **The defendant's participating in the discovery process, including the defendant's taking of the deposition of any person, shall be an election to participate in discovery. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.**

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(d) Defendant's Obligation.

(1) **If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:**

The question presented by the facts in this case is what acts by a defendant amount to engaging or participating in discovery so as to trigger the reciprocity provisions of the discovery rule. The trial court found that demanding from the police under the public records act the same information required to be produced under rule 3.220 (in this case the complete police case file) was engaging in discovery when the information sought was directly related to the case being prosecuted. The appellate court affirmed the trial court's ruling as correct by denying certiorari relief. This decision should be affirmed as it incorporates both the language and spirit of the rule.

Discovery is defined by Black's Law Dictionary as the pretrial devices used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. The plain meaning of the term discovery process would include any action which **compels** another party to produce information included within the rule. Clearly, petitioner was engaging in "the discovery process" when he demanded the police reports related to the murder and the arrests of himself and his codefendant. These police reports are specifically identified as items that must be provided by the state when the defendant engages in discovery under the rule. See rule 3.220(b)(1)(A-K) This act of demanding the reports was not the conducting of an independent investigation resulting in the

defense obtaining information through its own efforts. This was **compelled production** of information deemed to be discovery information by the rule. Moreover, the demand was not limited to exculpatory information that the state would be otherwise required to share with the defendant. The state's position is that such compelled production demands are "engaging in discovery" under the rule. The lower tribunals did not err by determining that the petitioner engaged in discovery pursuant to the rule.

Respondent's position in this regard is bolstered by a long line of cases imputing to the prosecutor for discovery rule purposes all information possessed or known by the police agency. See Gorham v. State, 597 So.2d 782 (Fla. 1992), Tarrant v. State 668 So.2d 223, 225 (Fla. 4th DCA 1996), Griffin v. State, 598 So.2d 254, 256 (Fla. 1st DCA 1992) Thus, the state asserts that demanding the information from a police agency is the same as demanding it from the prosecutor because under the discovery rule they are the same entity, i.e., the state.

The unity of the prosecutor and police for discovery purposes is also bolstered by the definitions in the rule. The rule does not limit the prosecutor's disclosure to information in the prosecutor's personal possession. The rule provides that discovery information includes all information in the prosecutor's control, such as information possessed by police agencies. The State asserts that the rule makes this information highway a two way street. If the information known by the police

is imputed to the state for discovery purposes, then it is proper to impute any public record demand directed to the police for this information as a demand directed to the prosecutor and a decision to engage in discovery under the rule.

Petitioner wants the best of both worlds. He purports to want to return to the old trial by ambush style of litigation yet at the same time wants to compel the state to provide discovery material without incurring any reciprocal obligation. In other words, he wants to deny the state its due process right to a **procedurally** fair trial. State v. Epps, 592 So.2d 1233 (Fla. 5th DCA 1992) The decisions of the lower tribunals do not create any inequity or miscarriage of justice and the decision should be upheld by this Court.

Moreover, petitioner still has a choice. The documents were provided to the court and sealed. (Pet App II 18-27) Pursuant to the discovery rule, petitioner may now decide to either participate in full discovery or withdraw his Chapter 119 request. He can have it one way or the other. This requirement to choose does not lead to any "Hobson's choice" as it is just one of many decisions a defendant has to make which involves a choice between mutually exclusive options.[1]

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[1]A defendant has to choose whether he will confess or remain silent. A defendant has to choose whether go to trial or plead. He has to choose between a jury and a non jury trial. He has to choose whether to exercise juror challenges or accept the juror. He has to choose whether to testify or remain silent. He must choose whether to present evidence or obtain the favored closing argument position.

Petitioner's cases do not support the proposition that the trial court's determination was a departure from the essential requirements of law or that the appellate decision was error. One case that discusses the issue, Llanes v State, 603 So.2d 1294 (Fla. 3rd DCA 1992), is based on significantly different facts. In Llanes, the defendant did not participate in discovery in the criminal case nor make a public records demand in the criminal case. There the defendant took a deposition in an administrative case involving the same underlying incident. The departure from the essential requirements of law occurred because the lower tribunal applied criminal procedure rules to an action occurring in a separate civil case not governed by criminal rules.

Here the situation is different. There is no collateral civil proceeding. The demand made was for the **state** to produce discovery information about the criminal case for use in the criminal case. Under the rule, this was electing to participate in the discovery process.

The other cases cited by petitioner do not even suggest that the trial court's ruling was in violation of the essential requirements of law. These cases discuss the scope of the public records exemption for investigative files. The cases hold that the Court should not expand the exemptions to prevent access to public records. Wait v. Florida Power & Light Co, 372 So.2d 420 (Fla.1979) Wait does not hold that public record access may not be restricted.

Moreover, petitioner does not fit within the facts of the cases he relies upon. His claim that he has somehow had his access to public records restricted is factually incorrect. The state provided the documents to the court with a request that the public record request be deemed participation in discovery. While issues of public records exemptions may end up being litigated in the trial court, they are not relevant to the determination that petitioner's demand amounted to engaging in discovery, because access to the records was not denied.

The interpretation of the rule suggested by the state does not involve a restriction or expansion of the public records law. Public records law would not be altered in any fashion by upholding the decision of the lower tribunal. The lower courts recognized that the documents were public record. Thus, the opinion below does not alter the definition of public records.[2] Thus, this is a case primarily involving the operation of this Court's discovery rule.

The appellate court based its interpretation of the interaction of Chapter 119 and the discovery rule on specific language in the statute and the rule. The statute provides that the statute is not to be used to expand or limit a defendant's or the state's rights under the discovery rules. Section 119.07(8) Fla. Stat. (1995) The court recognized that appellant is

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[2] At the time the issue arose the sheriff had just been served and no assertion of public records exemption had been made. See (Pet. App. II 21, 24)

attempting to use the provisions to expand his discovery rights by forcing the state to provide information without incurring any responsibility for reciprocity. The lower tribunal rejected this attempt to subvert the rule and this Court should affirm that position.

There is an additional, reinforcing, basis for affirming the decision below. As recognized by Cabral v. State, 699 So.2d 294 (Fla. 5th DCA 1997), the public records law provides that prosecution files as well as sheriff's office files are not public records while the prosecution in ongoing. The Cabral court stated:

> The State's prosecution files would normally be exempt from discovery under the public records law so long as such file is reasonably related to a pending prosecution or appeal. In this case, once the State released its file based on the codefendant request, it considered the released records as public records within Chapter 119. See Post-Newsweek Stations v. Doe, 612 So.2d 549, 551 (Fla.1992). However, but for the release to the codefendant, the records would not have been available to Cabral under a public records request. See sections 119.011(3)(d)2, 119.07(3)(b), and 119.011(3)(c)5, Florida Statutes (1995). We believe that the action of one defendant in requesting reciprocal discovery and a codefendant seeking the same records pursuant to Chapter 119 is nothing less than "knowingly and purposely" sharing in the discovery obtained by a codefendant under the rule and that the trial court was right in so determining.

Id at 295.

The appellate court recognized that without the request of the codefendant the documents were not public records at all and not obtainable under Chapter 119. Therefore, the court reasoned that the discovery request of the codefendant combined with the public records request was "knowingly and purposely sharing in the

discovery" under the rule. Adopting the Cabral reasoning also affirms the decision of the lower tribunal. For just as in Cabral, petitioner recognized that his codefendant's discovery request made the document's public records under case law such as Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981) rev. denied 413 So.2d 877 (Fla. 1982) (Pet App II 25) Petitioner attempted to piggyback off the codefendant's request to obtain documents without providing reciprocal discovery. Petitioner's counsel admitted to the trial court that one month prior to trial he had run across Satz looking for something else and realized that his codefendant's discovery request had made the sheriff's records public. He thought that he would see what he could obtain. (Pet App II 25) In other words he wanted to use the public records law to expand his discovery options. This Court could rule that by piggybacking his public records request upon the discovery request of his codefendant, petitioner falls within the definition of knowingly sharing in the discovery of his codefendant and to allow such a windfall would violate the legislative intent expressed in Section 119.07(8). Cabral

There is a third reason to uphold the determination of the trial court. The determination that exempt records under the public records statute become public record upon release in discovery is a judicial interpretation. This Court has recognized that release of public record discovery information may be restricted when that release impacts that rights of other the parties or other individuals. In Florida Freedom Newspapers,

Inc. v. McCrary, 520 So.2d 32 (Fla. 1988), this Court held that restricting access to public record discovery information was proper in order to provide a fair trial. Likewise, this Court in Post-Newsweek Stations, Florida Inc. v. Doe, 612 So.2d 549 (Fla. 1992) held that limitations on disclosure of discovery material are proper in some circumstances. Therefore, this Court should hold that when codefendants are involved that the documents do not become public record until both defendant's have requested discovery or rule that when one codefendant has obtained discovery a trial court has the authority to restrict access to the discovery information when this information is demanded under the public records act.

Summary

Petitioner is attempting to subvert this Court's liberal discovery rule by forcing the state to provide discovery without binding himself to the rule's reciprocal discovery requirements. This Court should not allow such manipulation of the discovery process.

This Court should maintain the reciprocal balance of the discovery process by affirming the lower tribunal, answering the certified question in the affirmative, and, holding that demanding the items listed in the discovery rule from police agencies constitutes participating in the discovery process.

This Court should also resolve the issue by adopting the reasoning of the court in Cabral and holding that when a codefendant's discovery request results in documents becoming

public records accessible to the public then the reciprocity provisions of the discovery rule are applicable to all criminal defendants in the alleged criminal offense.

Finally, because the determination that release of information in discovery removes the public records exemption is a judicially created rule, this Court should modify the rule where codefendants are involved to prevent the subversion, and ultimate nullification, of the rule. For all of the above reasons, this Court should approve the decision of the lower tribunal.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the District Court of Appeal reported at Henderson v. State, 708 So.2d 642 (Fla. 1st DCA 1998) should be approved, and the order entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

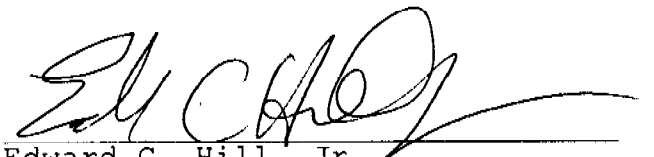
EDWARD C. HILL, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 238041

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext 4593

COUNSEL FOR RESPONDENT
[AGO# L98-1-4975]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Rhonda S. Clyatt, Esquire, Post Office Box 2492, Panama City, Florida 32402, and to Steven G. Mason, Esquire, 1643 Hillcrest Street, Orlando, Florida, 32803, this 20th day of July, 1998.



Edward C. Hill, Jr.
Attorney for the State of Florida

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