IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,927

RODERICK TERRELL PERRIMAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM CERTIFICATION
OF THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

INITIAL BRIEF OF ~~PETITIONER~~ Respondent ON THE MERITS

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INTRODUCTION

This is an appeal from a final judgment of conviction and sentence for possession of a firearm by a convicted felon entered by the Honorable Arthur Maginnis, Eleventh Judicial Circuit Court Judge, Criminal Division, Miami-Dade County. The Third District Court of Appeal affirmed the conviction and, after denial of the request for rehearing, certified to this Honorable Court the following question as one of great public importance:

> **WHETHER REVERSIBLE ERROR IS COMMITTED WHEN THE COURT FAILS TO DIRECTLY ANSWER A JURY QUESTION, WHEN THE CORRECT RESPONSE WOULD RESOLVE THE ISSUE POSED IN FAVOR OF THE DEFENDANT?**

The Defendant below, Roderick Terrell Perriman, was prosecuted by the State of Florida. In this brief, the Defendant will be referred to as Defendant. The State of Florida will be referred to as the State. The symbol "T" will be used to designate the transcripts of the trial proceeding and "R" will be used to denote the record; both will be followed by the Clerk's stamped page number, respectively.

STATEMENT OF THE CASE AND FACTS

On May 22, 1996, Petitioner was arrested and charged with Carrying a Concealed Firearm and Unlawful Possession of a Firearm or Weapon by a Convicted Felon. (R. 93-96).

On June 12, 1996, the State filed a two-count Information against the Defendant charging him with Carrying a Concealed Firearm, in violation of § 790.01(2), Fla. Stat., a third degree felony, and Unlawful Possession of a Firearm or Weapon by a Convicted Felon, in violation of § 790.23, Fla. Stat., a second degree felony. (R. 93-96).

On September 26, 1996, the State filed its Notice of Intention to Seek an Enhanced Penalty. (R. 166).

The Defendant pled not guilty to the charges. At some point before the commencement of the trial, Count I was severed from Count II. (T. Vol. 1, pg. 5). The trial, as to Count II, Unlawful Possession of a Firearm or Weapon by a Convicted Felon, began on September 18, 1996. (T. Vol. 1, pg. 340-341).

At trial, the State presented three (3) witnesses in its case-in-chief. (T. Vol. 1, pg. 158, 190, 207). The first witness was Detective Sergio Rueska ("Detective Rueska"). (T. Vol. 1, pg. 158). The second witness was Trooper Matt Propalsky ("Trooper Propalsky"). (T. Vol. 1, pg. 190). Finally, the third witness was Officer David Richards ("Officer Richards"). (T. Vol. 1, pg. 207).

Through the witnesses' testimony, the following sequence of events was adduced.

On May 2, 1996, Detective Rueska, a seven-year veteran with Metro-Dade Police Department, currently working in the Robbery Intervention Unit, was on duty in the evening. He was assigned to patrol the Northside District. (T. Vol. 1, pg. 158-162). Detective Rueska, working in conjunction with Detective Peart and Trooper Propalsky, was a member of a task force team. (T. Vol. 1, pg. 163, 164).

Detective Rueska was following Detective Peart in his unmarked police car, when he observed Detective Peart initiate a traffic stop pursuant to a tag misappropriation on a Chevy Caprice vehicle. (T. Vol. 1, pg. 163, 178, 186, 192). Mr. Frank Stanley Duke ("Duke") was driving the vehicle. The Defendant was a passenger. (T. Vol. 1, pg. 162-163). Upon stopping the suspect vehicle, both officers exited their respective cars simultaneously, with Detective Peart leading the way. (T. Vol. 1, pg. 163).

Duke, the driver, and owner of the suspect vehicle, stepped out of the car and began speaking with Detective Peart. (T. Vol. 1, pg. 163). Detective Rueska, standing to the rear of the Chevy, could and did observe the Defendant through the rear window of the Chevy. (T. Vol. 1, pg. 163, 165-166, 183, 186).

The Defendant, seated in the front passenger seat, made strange, suspicious movements with his hands under the seat. (T.

Vol. 1, pg. 163, 165-166, 183, 186). The Defendant, apparently having a problem with something under the seat, was either trying to push or retrieve something from under the seat. (T. Vol. 1, pg. 163, 166, 183, 186).

Concerned by the Defendant's unusual behavior, Detective Rueska moved closer to the passenger side of the Chevy for safety reasons and for a better view of the Defendant. (T. Vol. 1, pg. 166-167). Detective Rueska then observed the Defendant turn his shoulder toward the driver's side of the vehicle. Detective Rueska also observed the Defendant reaching with his right hand under his leg and shoving something under the front seat of the Chevy. (T. Vol. 1, pg. 166-167). The Defendant's movements were very aggressive and he appeared to be placing an item between the middle console and the passenger seat. (T. Vol. 1, pg. 167).

While Detective Rueska was closely watching the Defendant, Trooper Propalsky arrived at the scene. (T. Vol. 1, pg. 164, 167). Immediately after Trooper Propalsky parked and exited his vehicle, Detective Rueska warned him that the Defendant was making furtive movements with his hands and legs. (T. Vol. 1, pg. 167, 193, 199). Trooper Propalsky had parked his vehicle squarely in front of the Chevy; consequently, he could clearly see the Defendant directly through the front and passenger windows. (T. Vol. 1, pg. 195-196).

Detective Rueska continued watching the Defendant kicking and pushing his feet on or around the floorboard of the vehicle. (T.

Vol. 1, pg. 193-194, 199). When the Defendant heard Detective Rueska's warning to Trooper Propalsky, he looked up, slowed his movements, raised his hands and said, "I am not doing anything. I am not doing anything." (T. Vol. 1, pg. 167, 194).

Despite this observably inconsistent protestation, the Defendant, with his legs, began to forcefully push bags of soda, potato chips, and other snacks toward the area where he had previously been shoving the item he had attempted to conceal. (T. Vol. 1, pg. 186, 196).

Based on the Defendant's unusual activity, both Detective Rueska and Trooper Propalsky asked him to step out of the car. (T. Vol. 1, pg. 195). When the Defendant exited the car, he appeared nervous and gave the impression that he wanted to run. (T. Vol. 1, pg. 175, 181, 195-196, 199). Consequently, both Detective Rueska and Trooper Propalsky stood very close to the Defendant -- one on each side of him -- in the event that the Defendant decided to run. (T. Vol. 1, pg. 175, 181).

Next, Detective Rueska searched the vehicle in the area where he had observed the Defendant making covert, arduous, and rigorous movements. (T. Vol. 1, pg. 168-169, 183, 186). As a result of this search, Detective Rueska discovered a nine millimeter pistol,[1] wedged between the passenger seat and the middle console of the

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[1] The firearm was not registered and it had not been reported stolen.

car. It was hidden behind the grocery bags, in the same spot where Detective Rueska had observed the Defendant shuffling his feet and hands. (T. Vol. 1, pg. 168-169, 172, 180, 197; Vol. 2, pg. 205). Detective Rueska retrieved the weapon. (T. Vol. 1, pg. 168-169, 172, 180, 197; Vol. 2, pg. 205).

Attempting to discern the origin of the weapon, Detective Rueska then asked Duke if he had any firearms in the vehicle. (T. Vol. 1, pg. 180, 186-187). Duke stated that he did not. (T. Vol. 1, pg. 180, 186-187). Detective Rueska asked the same question two (2) more times; each time Duke replied in the negative. (T. Vol. 1, pg. 180, 186-187). Duke stated, "I don't know whose gun that is. It is not my gun. I don't allow guns in my car." (T. Vol. 1, pg. 190).

Officer Richards, who had by now also responded to the scene, noticed that the gun was fully loaded and that the safety clip was not on. (T. Vol. 1, pg. 173; Vol. 2, pg. 208). Accordingly, Officer Richards ejected the live millimeter rounds from the chamber and removed the magazine from the handle. (T. 209).

Following Officer Richards' testimony, the State rested. (T. Vol. 2, pg. 212). The Defendant then moved for a judgment of acquittal. (T. Vol. 2, pg. 212). The trial court denied the Defendant's motion. (T. Vol. 2, pg. 214). Following the denial of his motion, the Defendant proceeded to present his case. (T. Vol. 2, pg. 214).

Duke testified that he and the Defendant had been friends for approximately eight years and that they were like brothers. (T. Vol. 2, pg. 214). According to his testimony, on May 22, 1996, Duke left Jean Cherry Park at approximately 6:00 p.m. He was purportedly giving a guy named Black or Pete ("Pete") a ride to a bus stop. (T. Vol. 2, pg. 217, 219, 242). When Pete entered the car, Duke noticed that he had a cellular phone and a gun. (T. Vol. 2, pg. 218, 240, 242). Duke asserted that Pete plugged the phone into the lighter and placed the gun on the floorboard of the car, between his feet. (T. Vol. 2, pg. 219). Duke then drove Pete to a bus stop and left him there. (T. Vol. 2, pg. 217, 219, 242).

Next, Duke went to the Defendant's house to pick him up and take him to Morris Park to play basketball. (T. Vol. 2, pg. 220-221). On their way to the park, he was stopped by two unmarked police cars because he had switched the tag from another car, a Mazda, and placed it on the Chevy. (T. Vol. 2, pg. 222-223). Detective Peart approached Duke's car first; Detective Rueska was following. (T. Vol. 2, pg. 225). Duke exited the car and Detective Peart escorted him to the rear of the car. (T. Vol. 2, pg. 226).

Once there, Detective Peart directed Duke to kneel on the pavement. Later, another officer instructed Duke to sit on the pavement. (T. Vol. 2, pg. 227, 244). According to the testimony, Duke, from where he was positioned, could not see the Defendant who was still seated in the car. (T. Vol. 2, pg. 227, 244). At some

point, Detective Rueska asked Duke if he had a weapon to which he replied that he did not. (T. Vol. 2, pg. 229).

Notwithstanding this denial, the officers found a gun. (T. Vol. 2, pg. 230). Duke then told the officers that he was surprised that they had found a gun because one should not have been in the car. (T. Vol. 2, pg. 231, 245-246).

Duke also contended that although he has played ball with Pete on at least one hundred and fifty (150) times and has driven him places approximately a dozen times, he did not know Pete's last name or address. (T. Vol. 2, pg. 241). Duke testified that before the trial began, he had attempted to obtain Pete's address or phone number. However, Pete failed to get in touch with him. (T. Vol. 2, pg. 232, 249-250). Finally, Duke stated that he did not know that Pete had left the gun in the car. (T. Vol. 2, pg. 245).

Next, the Defendant testified that Duke had picked him up around 6:00 p.m. to play basketball. (T. Vol. 2, pg. 257). When the Defendant heard Duke beep the horn, he ran out of the house with his shirt, socks, and shoes in hand. (T. Vol. 2, pg. 258). As soon as the Defendant got in the vehicle, he saw a phone and a bunch of bags on the floorboard of the vehicle. (T. Vol. 2, pg. 259). He immediately picked up the phone and began making calls. (T. 261). While talking on the phone, the Defendant was also tying his shoe laces. (T. Vol. 2, pg. 261, 268-269).

Once the police encountered their vehicle, at some point, Duke was signaled to stop the car. (T. Vol. 2, pg. 261). When Duke was pulled over, the Defendant continued to talk on the cellular phone. (T. 261, Vol. 2, pg. 269). Duke exited the vehicle to speak to Detective Peart. (T. Vol. 2, pg. 261). Eventually, the Defendant was also asked to exit the vehicle. (T. Vol. 2, pg. 262-263, 271). Detective Rueska searched the vehicle, particularly around the seat which the Defendant had occupied; incident to the search, Detective Rueska retrieved a gun. (T. Vol. 2, pg. 262-263).

When confronted with the weapon, the Defendant told the officers that it was not his gun, but they only appeared interested in the cellular phone. (T. Vol. 2, pg. 263-264). He also told them that had he known that there was a gun in the car, he would never have entered the vehicle. (T. Vol. 2, pg. 264-265).

However, when asked in cross examination whether he knew that Duke occasionally carried a gun in his vehicle, the Defendant admitted that he did know that but he nevertheless got into the car. (T. Vol. 2, pg. 266-267). The Defendant was arrested. (T. Vol. 2, pg. 263-264).

Following the Defendant's testimony, the Defense rested and again moved for judgment of acquittal. (T. Vol. 2, pg. 275). Consistent with its earlier ruling, the trial court denied the motion. (T. Vol. 2, pg. 276).

The State presented one (1) rebuttal witness, Detective Wayne Peart ("Detective Peart"). He testified that on May 22, 1996, he had initiated the traffic stop because of the switched auto tag appearing on the Chevy. (T. Vol. 2, pg. 278). Detective Peart testified that he never saw a cellular phone; nor, upon his review of the impound report, did he note that a cellular phone had been impounded. (T. Vol. 2, pg. 279, 281).

At the conclusion of all of the aforegoing testimony, the trial court read the jury instructions and the jury retired to deliberate. (T. Vol. 2, pg. 329-337). At some point during the deliberations, the jury submitted a written question (R. 162; T. Vol. 2, pg. 338) to the trial court, which was read in open court as follows:

> THE COURT:(Reading) "If a convicted felon is in a car, a gun, without knowledge, is that against the law?"
>
> MR. MASTOS:No.
> (Defense Counsel)
>
> MS. DEMOS:I don't think we can answer that.
> (Prosecutor)
>
> MR. MASTOS:Judge, the answer you have to know. Without knowledge the answer is no. That is the whole case.
>
> THE COURT:Just hand it to the lawyers, look at it please.
>
> MR. MASTOS:If a convicted felon is in a car, a gun with out knowledge, is that --. It is a little bit confusing. Is in a car with a gun parenthesis.

THE COURT:The instruction knowingly had in care, custody, possession a firearm. I can tell them just to follow the instructions.

MS. DEMOS:Follow the instructions they have been (T. Vol. 2, pg. 338) given.

MR. MASTOS:They have asked a very simple question. If you are in a car.

MS. DEMOS:I appreciate Mr. Mastos just talking more quietly.

MR. MASTOS:Ms. Demos, you know how emotional I am.

MR. MASTOS:Judge, it summarizes this case in a nutshell. If you are in a car and there is a gun and you have no knowledge of [sic] gun it is not against the law. The Court has to answer that question, no.

THE COURT:Let me see the question. Let me read it again. They just haven't read the instruction. It is very simple.

MR. MASTOS:Judge, would you not agree the answer to that question is no. In other words, if the Court answers no, it is certainly not the Court commenting on the evidence. The Court is answering a question of law. If you are in a car and there is a gun, and you are without knowledge of the gun, you are not guilty.

THE COURT:I think the instructions tells them that. I think the instruction tells them that. I am just going to tell them please -- (T. Vol. 2, pg. 339).

After this exchange, the trial court returned the question to the jury room with the following instruction: "Please refer to the jury instructions. Thank you please save this note." (R. 162). The Defendant objected. (T. Vol. 2, pg. 340).

Subsequently, the jury returned a guilty verdict on September 20, 1996. (R. 163; T. Vol. 2, pg. 340-341). The trial court

adjudicated the Defendant guilty and ordered a presentence report. (T. Vol. 2, pg. 342). The State announced that it had already filed a notice to seek a sentence as a habitual violent offender. (T. Vol. 2, pg. 343). The matter was then recessed until November 7, 1996, for sentencing. (T. Vol. 2, pg. 345).

On December 6, 1996, the actual date of the sentencing hearing, the Defendant raised an *ore tenus* motion for a new trial. (R. 45). As grounds for the motion, the Defendant claimed that the defense witness, Duke, had recanted, both the testimony he had provided under oath to the State in a deposition on July 12, 1996, as well as his testimony in court at the trial. (R. 49-50). When Duke was called to testify again, he admitted that he had lied under oath on both occasions, and to the police, because he had been scared. (R. 50-51).

Duke then professed to being the owner of the gun. (R. 49-50). Duke contended that he had bought it from someone on the street for one hundred dollars and had thereafter placed it in the car under the seat. (R. 50). He also ostensibly confessed to the trial court that "Pete", about whom he had previously testified under oath, had, in fact, never existed. (R. 53).

After hearing and considering the argument from both sides, the trial court denied the Defendant's motion for a new trial. (R. 56, 63). The trial court then sentenced the Defendant as a habitual violent offender. (R. 70). The trial court sentenced the

Defendant to serve a mandatory minimum term of ten (10) years in State Prison as a habitual violent felony offender. (R. 70, 71). Once convicted and sentenced, the Defendant agreed to enter a plea to Count I of the Information and was sentenced to a term of five (5) years to run concurrent with the sentence in Count II. (R. 43).

On appeal to the Third District, in its original opinion dated February 18, 1998, the court noted that the trial judge had correctly responded to the jury's question by directing them to reread the standard instructions, rather than with a "no" as defense counsel had insisted he do.

The Third District, relying on Fla.R.Crim.P. 3.410, and a multitude of state cases, noted that the rule had been amended specifically to change the previously mandatory language, requiring the trial court to provide additional instruction when requested by the jury. The current language, the Third District explained, provided that the decision to give additional instruction lies entirely within the sound discretion of the trial court. Consequently, the Third District held that the trial court had not erred and a new trial was therefore not warranted.

Subsequently, pursuant to Defendant's motion for rehearing, the Third District filed an order in this matter on April 1, 1998. The court denied Defendant's motion for rehearing; but, in referring to questions posed in its earlier opinion, the court

certified the question at bar, which is the subject of the instant review.

CERTIFIED QUESTION ON APPEAL

WHETHER REVERSIBLE ERROR IS COMMITTED WHEN THE COURT FAILS TO DIRECTLY ANSWER A JURY QUESTION, WHEN THE CORRECT RESPONSE WOULD RESOLVE THE ISSUE POSED IN FAVOR OF THE DEFENDANT?

SUMMARY OF THE ARGUMENT

Reversible error is not committed when the trial court fails to directly answer a question when the correct answer would resolve the issue posed in favor of the defendant because the law in Florida gives the trial court discretion in its response.

In the instant case, the trial court did not abuse its discretion and properly responded to the jury's written request by instructing the jury to reread the standard jury instructions, where the issue of knowledge had already been adequately covered by the standard instructions.

In order to reverse the judgment below, this Honorable Court will have to find that as a matter of law, the trial court abused its discretion by referring the jury back to the already-provided, clear instructions -- a conclusion not supported by the evidence. Despite the jury's propounded question, they were nevertheless able to reach a unanimous decision. The jury chose to disbelieve the Defendant's version of events, as they were legally entitled to do.

Similarly, a review of Florida case law, as well as the law of other jurisdictions around the country, reveals that the Defendant's argument, as the Third District Court of Appeal found, is entirely untenable. Consequently, the Defendant's desire to have this Court overrule an extensive history of decisional case law must be denied.

Additionally, even if this Court were to answer the specific certified question in the affirmative, it has no bearing on the facts at bar because the certified question, as phrased, implies that the trial court either failed to respond or provided an answered incorrectly. However, as the record abundantly reveals, the trial court responded to the jury's question and provided the correct answer -- to reread the jury instructions -- which provided the answer to their question. Hence, the Defendant was not denied due process nor a full and fair trial regardless of this Honorable Court's answer to the certified question.

Furthermore, the Defendant's citations to federal case law are wholly inappropriate because the federal rule is substantially different from the applicable Florida law. Therefore, because of the pronounced conflict, this Court should apply Florida law rather than the federal analog.

In conclusion, even the most restrictive and strict construction of Florida case law does not compel the result sought by the Defendant. Rather, the applicable precedents militate in favor of this Court's affirming the judgment of the Third District Court of Appeal.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DIRECTED THE JURY TO FOLLOW THE INSTRUCTIONS THAT IT HAD PREVIOUSLY PROVIDED BECAUSE THE INSTRUCTIONS ADEQUATELY ADDRESSED THE QUESTION POSED.

A.

IN ORDER TO REVERSE THE JUDGMENT BELOW, THIS HONORABLE COURT WILL HAVE TO FIND, INCONSISTENT WITH ITS PREVIOUS HOLDINGS, THAT AS A MATTER OF LAW, THE TRIAL COURT ABUSED ITS DISCRETION BY REFERRING THE JURY TO THE ALREADY-PROVIDED, CLEAR, STANDARD JURY INSTRUCTIONS.

The Defendant contends that the trial court erred by refusing to answer a written request propounded by the jury during deliberations regarding the element of knowledge. The Defendant, despite his seemingly compelling arguments, is nevertheless mistaken.

In order to agree with Petitioner's reasoning, this Honorable Court will have to overrule an extensive history of decisional case law to the contrary. Consequently, the State submits that the trial court properly directed the jury to reread and follow the standard jury instructions for the crime charged which had been provided to them before they retired to deliberate.

It should be noted as a preliminary matter that in a very recent case, *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997),

this Honorable Court explained that the trial court has wide discretion in instructing the jury. The trial court's decisions regarding its charge to the jury is reviewed with a presumption of correctness on appeal. *Id. citing, Kearse v. State*, 662 So. 2d 677, 682 (Fla. 1995).

The Defendant's argument -- that the trial court erred -- is simply not supported by the unquestionably clear and consistent decisions of this Court. For example, in *Whitfield v. State*, 22 Fla. L. Weekly S558, 559 (Fla. Sept. 11, 1997), a case that is particularly on point because the issue is virtually identical, this Court found no abuse of discretion.

In *Whitfield*, during deliberations, the jury asked

> [d]oes life in prison without parole really mean 'no parole' *under any circumstances*. He will never be allowed back into society again?

Id. at S559 (emphasis in original).

In response to this question, the defendant asked the trial court to provide an affirmative response. *Id.* The trial court declined the defendant's request. Instead, the trial court chose to reread the appropriate instruction to the jury. *Id.* On appeal, this Court concluded that the trial judge acted properly because the jury instructions adequately answered the question posed by the jury. *Id.*

Equally on point is *Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992). In that case, the defendant argued that the trial

court had erred in refusing to answer the following questions raised by the jury during deliberations:

> (1) If he's sentenced to life, when would he be eligible for parole? Does the time served count towards the parole time?
> (2) If paroled from [Florida] would the defendant then be returned to [New York] to finish his sentence there?

Id.

In response to the questions, the trial judge informed the jury that they would have to depend on the evidence and instructions. *Id.* On appeal, this Court found that, with regard to the first question, the jury instructions were adequate. However, the second question could not be answered. *Id.* Therefore, this Court held that the trial court had not abused its discretion in refusing to answer the jury's questions. *Id.*

In the case *sub judice*, exactly like the trial courts in *Whitfield* and *Waterhouse*, the trial court here referred the jury to the standard instructions, because as the record demonstrates, it correctly believed that the already-provided jury instructions adequately addressed the posed question. (T. Vol. 2, pg. 339). As in *Whitfield* and *Waterhouse*, because the instructions provided were adequate to answer the question posed, the trial court in the case at bar did not abuse its discretion.

The above-cited cases clearly demonstrate that this Court has consistently held that a trial court does not abuse its discretion by merely declining to reinstruct in response to a jury's specific

request. *See Walls v. State,* 641 So. 2d 381 (Fla. 1994)(there was no error where, in response to a jury question during deliberations, the trial court simply referred the jury to the previously given instruction on the factor).

Additionally, the trial court's discretion encompasses a wider spectrum of responses. For example, where a jury's question is a narrow one and the trial court's reinstruction was complete on the subject posed, the trial court's decision to redirect the jury to follow the standard jury instructions already provided, will not be disturbed on appeal. *Holsworth v. State,* 522 So. 2d 348, 353 (Fla. 1988).

Similarly, in *Henry v. State,* 359 So. 2d 864 (Fla. 1978), defendant was indicted for first-degree murder resulting from the murder of two (2) girls. *Id.* at 865. At the conclusion of the evidence, the trial court instructed the jury on first-degree murder, attempted murder in the first-degree, murder in the second-degree, attempted murder in the second-degree, murder in the third-degree, attempted murder in the third-degree, manslaughter, justifiable homicide, and excusable homicide.

After retiring to deliberate, the jury submitted the trial court a note asking:

> [i]t will not be necessary to hear Mr. World's testimony. We do have a problem understanding the difference in murder in the first degree and murder in the second degree. In other words, can this be clarified?

Id.

The facts reveal that after a conference with counsel, the judge, in open court, reinstructed the jury on first- and second-degree murder. Defendant objected to the limited reinstruction, arguing that the court should have reinstructed the jury on all of the degrees of unlawful homicide, including justifiable and excusable homicide. *Id.* Subsequently, the jury returned a verdict finding defendant guilty of murder in the first degree. *Id.*

Given those facts, and noting the wide consensus from other jurisdictions,[2] on appeal this Court found that it was proper for a judge to limit the repetition of the charges to those specially requested as any additional instruction might needlessly protract the proceedings. *Id.* at 866.

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[2]*United States v. Wharton*, 139 U.S. App. D.C. 293, 433 F.2d 451 (1970); *United States v. Salter*, 346 F.2d 509 (6th Cir. 1965); *Whiting v. United States*, 321 F.2d 72 (1st Cir. 1963), *cert. denied*, 375 U.S. 884 (1963); *Apel v. United States*, 247 F.2d 277 (8th Cir. 1957); *Allen v. United States*, 186 F.2d 439 (9th Cir. 1951); *People v. Schader*, 457 P.2d 841 (1969); *Jones v. State*, 214 S.E.2d 544 (Ga. 1975); *Shouse v. State*, 203 S.E.2d 537 (Ga. 1974); *Creamer v. State*, 194 S.E.2d 73 (Ga. 1972); *Waldrop v. State*,144 S.E.2d 372 (Ga. 1965); *Carrigan v. State*,58 S.E.2d 407 (Ga. 1950); *Hatcher v. State*, 18 Ga. 460 (1855); *East v. State*, 339 So. 2d 1104 (Ala.Cr.App.1976); *Bennett v. State*, 108 Ga.App. 881, 134 S.E.2d 847 (1964); *Kimberly v. State*, 4 Ga.App. 852, 62 S.E. 571 (1908); *State v. Dawson*, 180 S.E.2d 140 (N.C. 1971); *State v. Murray*, 6 S.E.2d 513 (N.C.1940); *State v. Hamilton*, 23 N.C.App. 311, 208 S.E.2d 883 (1974); *Commonwealth v. Perkins*, 373 A.2d 1076 (Pa.1977); *Commonwealth v. McNeil*, 337 A.2d 840 (Pa.1975).

This Court further found that the feasibility and scope of any reinstruction of the jury is a matter residing within the sound discretion of the trial judge. *Id. citing* Committee Note, Rule 3.410, Fla.R.Crim.P.; *United States v. Salter, infra* n. 2; *Whiting v. United States, infra* n. 2; *Allen v. United States, infra* n. 2; *Jones v. State, infra* n. 2; *Shouse v. State, infra* n. 2; *Commonwealth v. Boone*, 354 A.2d 898 (Pa. 1975); *Commonwealth v. Davenport*, 342 A.2d 67 (Pa. 1975); *Commonwealth v. Rodgers*, 327 A.2d 118 (Pa. 1974); *State v. Frandsen*, 30 P.2d 371 (Wash. 1934); ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Section 5.3(b), commentary.

Consequently, this Court found no abuse of discretion in limiting reinstruction to a direct response to the jury's specific request. This Court noted that to hold otherwise might have created confusion in the minds of the jurors and/or **given the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter.** *Henry v. State*, 359 So. 2d at 867. (Emphasis added).

Hence, this Court has consistently recognized that the scope of reinstruction is wholly within the trial court's sound discretion. *Garcia v. State*, 492 So. 2d 360 (Fla. 1986), *cert. denied*, 479 U.S. 1022 (1986); *see also Goddard v. State*, 458 So. 2d 230 (Fla. 1984).

Moreover, the trial court does not abuse its discretion by limiting the reinstruction of the jury, especially where it might give the appearance of placing the trial court in the role of advocate rather than impartial arbiter. *Engle v. State*, 438 So. 2d 803 (Fla. 1983).

Additionally, it is proper for the trial judge to limit the reinstructing of the charges, even to those questions specifically requested, which might needlessly protract the proceedings. *Hedges v. State*, 172 So. 2d 824 (Fla. 1965), *citing, Hysler v. State*, 95 So. 573 (Fla. 1923).

Consequently, as all of the preceding cases clearly and concretely demonstrate, the trial court has wide discretion *viz-a-viz* jury questions. Based on the foregoing precedents, therefore, in the case at bar, the trial court correctly exercised that discretion.

B.

FLORIDA CASE LAW REVEALS THAT THE DEFENDANT'S ARGUMENT, AS THE THIRD DISTRICT COURT OF APPEAL FOUND, IS ENTIRELY UNTENABLE. CONSEQUENTLY, THE DEFENDANT'S DESIRE TO HAVE THIS HONORABLE COURT OVERRULE AN EXTENSIVE HISTORY OF DECISIONAL CASE LAW MUST BE DENIED.

As already noted above, and an example derived from one of this Court's precedents, is *Cunningham v. State*, 676 So. 2d 1054 (Fla. 3d DCA 1996). In that case, just as in the case *sub judice*, the Third District held that the standard instructions given to the

jury sufficiently encompassed the "lack of knowledge" defense. A separate charge on that defense was not required.[3] The standard instructions, that the trial court had provided to the jury regarding knowledge or lack thereof, adequately covered the issue addressed in the jury question. *Id.*

Similarly, in *Kirkland v. State*, 557 So. 2d 130, 131 (Fla. 3d DCA 1990), the Third District found that where the trial court, in response to the jury's question regarding intent, instructed the jury to reread the written jury instructions provided in the standard jury instruction packet, the trial court provided a proper and reasonable reply. Moreover, "refusal to give a requested charge when it is covered by charges given has been held not to constitute error in decisions too numerous to justify citation." *White v. State* 324 So. 2d 115, 116 (Fla. 3d DCA 1975), *cert. dismissed*, 339 So. 2d 1173 (1976).

In the case *sub judice*, exactly as in *Cunningham* and *Kirkland*, and consistent with this Court's prior holdings, the trial court provided standard jury instructions which adequately and legally covered the issue of knowledge. (T. 329-227). Specifically, the standard jury instructions provide in pertinent part:

> Before you can find the Defendant guilty of possession of firearm by a convicted felon,

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[3] Cunningham, charged with trafficking in cocaine, requested two instructions dealing with her "lack of knowledge" defense. *Cunningham v. State*, 676 So. 2d 1054 (Fla. 3d DCA 1996).

> the State must prove the follow [sic] two elements beyond a reasonable doubt:
> 1. Roderick Perriman had been convicted of three felonies.
> 2. After the conviction Roderick Perriman **knowingly** had in his care, custody, and possession or control a firearm.

(T. 329-330)(emphasis added).

***

> If a person has exclusive possession of a thing, **knowledge** of its presence may be inferred or assumed.
> If a person does not have exclusive possession of a thing, **knowledge** of it is [sic] presence may not be inferred or assumed.

(T. 331)(emphasis added).

Thus, when the jury submitted the specific request, the trial court, following the previous dictates of this Court as well as its own precedents, properly recognized that the standard jury instructions amply covered the subject matter. (T. Vol. 2, pg. 339). Hence, the trial court concluded that the jury should simply reread the standard jury instruction that had already been provided. (T. 339). Hence, the trial court's decision in this regard was entirely consistent with this Court's previous holdings.

C.

JURISDICTIONS THROUGHOUT THE COUNTRY RESOLVE THIS QUESTION IN CONFORMITY WITH THIS COURT'S PREVIOUS HOLDINGS AND IN OPPOSITION TO PETITIONER'S CONTENTIONS.

In *State v. Bundy*, 539 A.2d 713 (N.H. 1988), the defendant was convicted by a jury of stealing an automobile. *Id.* On appeal, the

defendant argued that the trial court had erred in its response to a question posed by the jury during their deliberations. *Id.* Specifically, the jury had sent the trial judge a question asking

> [d]oes the law read that a person has to be driving a car to be charged with the theft?

Id. The trial court replied "no." *Id.*

The defendant admitted that the answer was legally correct but, notwithstanding this admission, he contended that the answer was incomplete, misleading, and intrusive of the jury's exclusive authority to resolve factual issues. *Id.* Hence, defendant argued that he had been denied a fair trial. *Id.*

The Supreme Court of New Hampshire found that there was no prejudice to the defendant and consequently no reversible error. *Id.* Citing to *State v. Frederick*, 648 P.2d 925 (Wash. Ct. App. 1982), the court found that the jury had merely asked what the law required and the trial judge had plainly answered. Therefore, because defendant had failed to show that the supplementary instruction was incomplete, misleading or violative of his constitutional rights, the court, finding no error, affirmed the conviction. *Id.*

Similarly, in *People v. Fauber*, 640 N.E.2d 689 (Ill. App. Ct. 1994), the defendant was convicted by the jury of various crimes arising from a fight that took place after a high-school football game. *Id.* at 690. On appeal, the defendant contended *inter alia* that the court had erred in instructing the jury regarding the

proof of defendant's guilt and accountability over defense objection. *Id.* This claim by the defendant arose because during deliberations, the jury sent the judge a question asking:

> [d]oes the defendant himself have to specifically use force or violence to be considered guilty of mob action, or does knowledge and planned involvement of the mob using force determine guilt?

Id. at 693.

When the court shared the question with the parties, the prosecutor initially believed that the court should try to clarify the matter for the jury. *Id.* However, defense counsel argued that the answer was already contained in the provided instructions. *Id.* After the trial court's discussion with the parties, the court responded to the jury's question by saying

> [a]ll of the instructions apply to all of the charges and the instructions you now have supply the answer to the first part of your question. We do not understand the second part of your question.

Id. at 694.

On appeal, the court found no reversible error in the trial court's decision to refer the jury to the already provided instructions. The court noted that any purported confusion resulted in a benefit to the defendant. *Id.* at 695.

Exactly as in *Bundy* and *Fauber,* and consistent with this Court's previous holdings, the Defendant has failed to show that

the trial court's response was incomplete, misleading or violative of his constitutional rights.

Only in infrequent and isolated cases, where the defendant is able to make the requisite showing that the trial court abused its discretion, do the courts reverse convictions and remand the matter. In *People v. Childs*, 636 N.E.2d 534 (Ill. 1994), the defendant was tried for murder and armed robbery. *Id.* at 535. During deliberations, the jury sent the judge a note asking:

> [c]an the defendant be guilty of armed robbery and voluntary or involuntary manslaughter or must murder be the only option with armed robbery?

Id. at 538.

The trial judge, who had been reached by phone at a restaurant, answered by saying "[y]ou have received your instructions as to the law, read them and continue to deliberate." *Id.* The trial judge then informed the prosecutor of the jury posed question, with whom the judge was having lunch, but made no attempt to immediately inform defense counsel. *Id.*

On appeal, the Supreme Court of Illinois, while noting that the trial court may exercise its discretion in responding to jury questions, found that because the provided instructions were unclear, the jury had a right to clarification. *Id.* at 539-40. Therefore, the court found reversible error. *Id.* at 542.

Similarly, in *Sesler v. Ghumman*, 268 Cal. Rptr. 70 (Cal. Ct. App. 1990), the court held that where the original instructions are

inadequate, and the jury asks questions indicating their confusion and their need for further clarification, the failure to give proper additional instruction is usually reversible error. *Id.* at 76. *See also, Harrington v. Beauchamp Enterprises*, 761 P.2d 1022 (Ariz. 1988)(where the jury question clearly reveals a likelihood that the jury is confused, the trial court's failure to respond to a jury's question constitutes reversible error); *Accord, Bottaro v. Schoenborn*, 251 A.2d 79 (Conn. 1968); *White v. Robert Claude Gore and Merchants Grocery Company, Inc.*, 110 S.E.2d 228 (Va. 1959).

However, unlike *Childs, Sesler, Harrington, Bottaro,* and *White*, where the courts found that unclear or insufficient instruction necessitated reversal, the instructions in the case at bar were clear and adequate. In fact, the Third District affirmed that the instructions were adequate and that the Defendant had failed to adequately rebut this conclusion. Consequently, because the instant instructions were facially sufficient, the trial court properly exercised its discretion in referring the jury back to them.

D.

ALTERNATIVELY, EVEN IF THIS COURT WERE TO ANSWER THE SPECIFIC CERTIFIED QUESTION IN THE AFFIRMATIVE, IT HAS NO BEARING ON THE FACTS AT BAR BECAUSE THE QUESTION, AS PHRASED, IMPLIES THAT THE TRIAL COURT GAVE AN INCORRECT ANSWER. HOWEVER, AS THE RECORD ABUNDANTLY REVEALS, IN THE INSTANT MATTER, THE JUDGE DID NOT GIVE AN INCORRECT ANSWER.

This Court's decision in *Coleman v. State*, 610 So. 2d 1283 (Fla. 1992) is very much on point with regards to the certified question in the case at bar. In *Coleman*, during deliberations, the jury asked if the vaginal swabs taken from the sexual battery victims matched the defendant's DNA. *Id.* at 1286.

After discussing the question with the parties, the court refused the defense request to tell the jury "no" and, instead, told the jurors to rely on their recollection of the evidence. *Id.* On appeal, the defendant argued that refusing to answer the question constituted reversible error. *Id.*

On appeal, this Court determined that the trial court could appropriately respond to the jury's question by telling jurors to rely on their recollection of evidence. *Id.* Furthermore, this Court also found that the trial court could refuse the defendant's request that the jury be told "no," even though defendant's DNA did not match the swabs taken from victims'. This Court reasoned that while one codefendant's DNA did match, testimony was presented that both defendant and codefendant had raped victims, and the doctor had testified that the fact that the swabs failed to match

defendant's DNA, did not mean that sexual activity had not occurred. *Id.*

Therefore, this Court should find with regards to the certified question in the instant matter, that if the trial court's failure to respond to a jury question (despite its benefit to the defendant) is nevertheless supported by competent record evidence, then the trial court has not erred and a harmless error analysis should apply.

However, the instant certified question is not applicable to the facts at bar. In the case *sub judice*, the trial court did not fail to give an answer. Rather, the trial court, as the Third District found, **gave an appropriate answer** -- consistent with the particular facts of the case and the previous decisions of this Court. *Perriman v. State*, Case No. 97-460 (Fla. 3d DCA April 1, 1998).

Instead of failing to directly answer a jury question, as is posited in the certified question, the trial court here swiftly and effectively dealt with the jury's questions -- a question which even defense counsel admits was confusing -- by referring the jury back to the clear and legally correct instructions. Therefore, this Court should find that regardless of the answer to the certified question posed by the Third District Court of Appeal in this matter, the trial court correctly responded to the jury.

E.

PETITIONER'S CITATIONS TO FEDERAL CASE LAW ARE WHOLLY INAPPROPRIATE BECAUSE THE RULE IN THE FEDERAL SYSTEM IS SUBSTANTIALLY DIFFERENT FROM THE APPLICABLE FLORIDA RULE.

The federal cases cited by the Defendant in his brief not only do not apply because they are guided by a rule entirely different from the law in Florida and most other states, but additionally, the are inapposite factually. For example, in *Bollenbach v. United States*, 326 U.S. 607 (1946), the trial judge responded to the jury' question with an erroneous charge. *Id.* An experienced trial judge should have realized, knowing the length of time the jury had been involved in its deliberation, that they were tired and fatigued and obviously desired to go home. The United States Supreme Court also observed that trial judge, compounded the error by an obvious "hint" to the jury "...that a verdict ought to be forthcoming." *Id.*

United States v. Zabic, 745 F.2d 464, 474 (7th Cir. 1984), constitutes a case wholly dissimilar from the instant case. In *Zabic,* the jury did not pose a question to the trial court after retiring to deliberate. Rather, in its initial charge to the jury, the trial court provided instructions regarding whether or not certain activity of the defendant affected interstate and foreign commerce. The 7th Circuit found that the trial court had accurately and concretely instructed the jury.

In *United States v. Rodriguez,* 765 F.2d 1546, 1552-1553 (11th Cir. 1985), the jury submitted a question to the trial court after

several hours of deliberation. After the jury retired to deliberate, the trial judge announced that his presence was required at a sentencing hearing in a different location and that he/she would be unable to return until the following day. *Id.* Consequently, the parties agreed that any questions from the jury would be answered through a conference call and in the event that the jury reached a verdict, the verdict would be sealed until the judge's scheduled return the next day. *Id.*

Unbeknownst to the trial judge, the jury submitted a question after several hours of deliberation. *Id.* The judge's law clerk attempted to reach him without success. *Id.* Meanwhile, the jury continued to deliberate and eventually reached a verdict before the judge's return. *Id.* The verdict, as had been agreed upon, was sealed. *Id.* Subsequently, when the trial judge returned, a conference was held in chambers. *Id.* At the conference, the trial judge refused to allow the defendant to see the question posed by the jury and declined to answer it. Instead, the trial court ordered that the verdict be published. *Id.*

On appeal, the Eleventh Circuit Court held that although "[a] trial judge has some obligation to answer a question from the jury", the judge in this case was unable to respond before the jury reached a verdict. *Id.* The court found no error in the judge's actions and even if any error had occurred, it was harmless. *Id.*

United *States v. Anderton*, 629 F.2d 1044, 1048-1049 (5th Cir. 1980), a case involving eleven (11) substantive counts of bribing of public officials, is also entirely different from the case at bar. In *Anderton*, the judge did not give the proper instruction nor its equivalent. During deliberations, the jury submitted a note asking whether the defendant could be considered as an "agent" of the government. *Id.* In response, the trial court stated that the answer to the questions was a factual one and within the province of the jury not the court. *Id.*

On appeal, the Fifth Circuit Court disagreed with the State and found that the word "agent" is not self-defining. In fact, the legal term agent, the court noted carries "a rather esoteric meaning." *Id.* The trial court in this case, should have recognized the jury's confusion and provided a clear and concrete answer. *Id.*

Both *United states v. Karlin*, 852 F.2d 968, 974-975 (7th Cir. 1988) and *United States v. Cheramie*, 520 F.2d 325, 329-330 (5th Cir. 1975), also stand for the proposition, which is not contested by the State, that the trial judge should provide assistance and clarity and accuracy in its charge to the jury.

In an attempt to avoid belaboring the inappropriateness and inapplicability of the federal cases cited by the Defendant, the State will simply conclude this section by asserting that none of the cases cited above assist this Honorable Court, because either

they are factually distinguishable and/or they are based on the rule that governs federal rule.

The law in Florida, governing communications between the jury and the judge after deliberation has began and additional instructions are requested, states that:

> After the jurors have retired to consider their verdict, if they request additional instructions or have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court **may** give them the additional charge and the court **may** order the testimony read to them. The instructions **shall** be given and the testimony read only after notice to the prosecuting attorney and counsel for the defendant.

Fla.R.Crim.P. 3.410. (Emphasis added)

Clearly, the framer of the rule understood the difference between the words "**may**" and "**shall**" and specifically drafted the rule to provide the trial judge with wide discretion in determining whether or not to respond to a jury question. The federal rule, on the other hand, does not allow such discretion to the court. The framing on the federal rule provides that the trial court **shall** answer the question.

Finally, and most significantly, the trial court in the case *sub judice* did not neglect its duty. Rather, after receiving the jury question and discussing it with the prosecuting attorney and counsel for the Defendant, provided the jury assistance by

directing them to the standard instructions, which contained a definition of knowledge.

F.

FINALLY, EVEN THE DEFENDANT'S CITATIONS TO FLORIDA CASE LAW DO NOT COMPEL THE CONCLUSION ADVOCATED BY THE DEFENDANT; RATHER, THE APPLICABLE PRECEDENTS MILITATE IN FAVOR OF THIS COURT'S AFFIRMING THE JUDGMENT OF THE THIRD DISTRICT COURT OF APPEAL.

The Defendant cites this Court to *Miami Herald Publishing Co. v. Morphonios*, 467 So. 2d 1026 (Fla. 3d DCA 1985) for the proposition that the trial court in the case *sub judice* erred because the response the trial court provided violated this Court's requirement that jury instructions eliminate juror confusion. However, it should first be noted that in *Miami Herald Publishing Co*, a case dealing with the closure of pretrial proceedings, is absolutely silent regarding Petitioner's argument. Therefore, the State is at a loss as to how the Defendant intended to use this case.

Nevertheless, the State submits that the Defendant does not, and cannot, explain how the trial court's response failed to ameliorate the purported confusion. Faced with a confusing question, the trial court's response was entirely appropriate and seemingly sufficient for the jury to subsequently reach a unanimous decision.

Petitioner further cites to *Miami Herald Publishing*, for the proposition that,

> the responsibility of the trial court extends to protecting a defendant in a criminal prosecution from inherently prejudicial influences which threaten the fairness of the trial and the abrogation of constitutional rights.

However, this broad constitutional language is not contested either by the State or by the facts of this case. Rather, the State submits that while protecting those very rights, the trial court in the instant case appropriately performed its duty. The Defendant has entirely failed to show otherwise, despite his appeal for the preservation of our most fundamental judicial concepts.

The Defendant also cites to *Medina v. State*, 466 So. 2d 1046 (Fla. 1985), for the proposition that controlling the jury and insuring a defendant a fair trial is the trial court's responsibility. Once again, the State does not contend that this is a correct statement of the law. Rather, the State questions its relevance to the matter at bar -- did the judge commit reversible error by its response to the jury's questions. As has been argued throughout this answer brief, the State resoundingly maintains that the trial court acted appropriately and within its sound and wide discretion.

Equally misplaced, and for the same reasons as above, is the Defendant's reliance on *Meek v. State*, 487 So. 2d 1058 (Fla. 1986). The Defendant cites to *Meek* for the proposition that the court's

discretion should be restricted to providing direct responses to specific jury questions, without the need of taking additional testimony, evidence or otherwise improperly commenting on the evidence.

However, in the facts *sub judice*, the record amply demonstrates that the trial court did not abuse its discretion in that it most definitely responded to the jury question effectively. Just as in *Meeks*, the trial court avoided taking additional testimony and evidence and it did not place itself in a position of having to comment on the evidence. Instead, the trial court chose to follow the examples of *Whitfield* and *Waterhouse*, and merely and correctly referred the jury to the previously provided instructions which adequately addressed the posed question.

Similarly, the Defendant's reliance on *Howard v. State*, 467 So. 2d 445 (Fla. 1st DCA 1985) is distinguishable on its facts and therefore quite inapposite. In *Howard*, the defendant was charged with possession of contraband. *Id.* at 446. On appeal, the defendant argued that he should have been entitled to an instruction on knowledge of the presence of the contraband. *Id.* In response, the State argued that the standard jury instruction had adequately covered the subject matter. *Id.* The Court correctly disagreed with the State because there were no standard jury instructions on the charge of possession of contraband at the time. *Id.*

In stark contrast to *Howard*, the instant case presents a different scenario. The trial court was not required to provide additional instructions to the jury because the standard jury instructions existed for the crime charged. These instructions adequately included, and defined, the element of the Defendant's knowledge. The trial court read the instructions to the jury and provided them with a copy before they retired to deliberate. (T. Vol. 2, pg. 329).

The Defendant also cites to *Morgan Int'l Realty, Inc. v. Dade Underwriters' Ins. Agency, Inc.*, 571 So. 2d 52 (Fla. 3d DCA 1991) for the proposition that it has been held to be an abuse of discretion for the trial court to provide a response that fails to ameliorate the confusion of a jury. However, *Morgan* is entirely distinguishable on it facts from the case at bar.

In *Morgan*, the jury sent several questions to the court that clearly indicated its lack of understanding. The jury even went so far as to indicate that it was fatigued. *Id.* at 53. Unlike the facts in *Morgan*, the jury below sent only one question which was itself confusing. Hence, the court's response was entirely appropriate.

Therefore, this Honorable Court should answer the certified question in the negative and affirm the Third District's decision that the trial court properly responded to the posed question by

instructing the jury to reread the standard jury instructions, which adequately addressed the definition of knowledge.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the State respectfully requests that this Court answer the certified question in the negative and affirm the decision of the Third District Court of Appeal upholding the Defendant's final order of conviction and sentence.

Respectfully Submitted,

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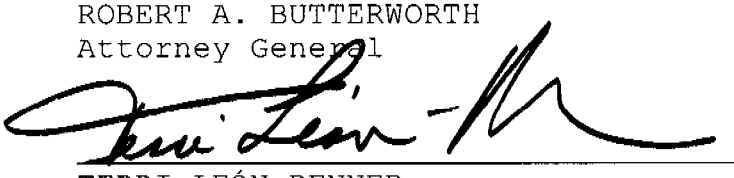
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief was mailed this 19th day of June 1998, to Harold Long, Jr., Esq. 4770 Biscayne Boulevard, Suite 1460, Miami, Florida 33137.

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