IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,688

KATHRYN HAYES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
BUREAU CHIEF, WEST PALM BEACH
Florida Bar No. 656879

JAMES J. CARNEY
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 475246
1655 Palm Beach Lakes Boulevard, Suite 300
West Palm Beach, FL 33401-2299
Telephone: (561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT iv

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT

THE FOURTH DISTRICT PROPERLY REVERSED THE TRIAL COURT'S DISMISSAL OF COUNT I OF THE INFORMATION. (Restated).

. 4

CONCLUSION 19

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

American Bakeries Co. v. Haines, 180 So. 524 (1938) 6

Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663 . . . . 8,9 16

Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991) 9,10

City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993) 8,15

Coleman v. Coleman, 629 So. 2d 103 (Fla. 1993) 8,15

Deason v. State, 705 So. 2d 1374 (Fla. 1998) 6

Hayes v. State, 720 So. 2d 1095 (Fla. 4th DCA 1998) 1,5 6

Johnson v. State, 23 Fla.L.Weekly D2419 (Fla. October 28, 1998) 9

Lareau v. State, 573 So. 2d 813 (Fla. 1991) 11

State v. Baxley, 684 So. 2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So. 2d 737 (Fla. 1997) 9,11

State v. Bonsignore, 522 So. 2d 420 (5th DCA 1988) 16

State v. Cogswell, 521 So. 2d 1081 (Fla. 1988) citing Unites States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 775 (1979) 16

State v. Dugan, 685 So. 2d 1210 (Fla. 1996) 4

State v. Holland, 689 So. 2d 1268 (Fla. 1st DCA 1997) . . . 7,8 9,12 14,17

State v. Iacovone, 660 So. 2d 1371 (Fla. 1995) 6

State v. Perry, 23 Fla.L.Weekly D1908 (Fla. 2d DCA August 14, 1998) 9

State v. Webb, 398 So. 2d 820 (Fla. 1981) 13

State v. Yu, 400 So. 2d 762 (Fla. 1981) 4,15

United States v. Turner, 59 F.3d 481 (4th Cir.1995) 9

Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987) . . . 4,15

STATUTES

21 U.S.C.S. 841(a) 9

§893.03(3)(c)4 11

Section. 893.135(1)(c)1 17

Section 893.03(3)(c)4 12

Section 893.03(2)(a) 6,7

Section 893.03(3)(c) 7

Section 893.135 11

Section 893.135(1)(c)1 6

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court below and the appellee in the Fourth District Court of Appeal and will be referred to herein as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court below and the appellant in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State." Reference to the record on appeal will be by the symbol "(R," reference to the transcripts will be by the symbol "The," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]," and reference to Petitioner's brief will be by the symbol "IB," followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of this appeal, subject to the following additions, corrections, and/or clarifications here and in the brief.

Petitioner was alleged to have identified herself as an employee from a doctor's office and phoned in a fraudulent prescription at a drug store. After being unable to verify the prescription, the pharmacist called the police. Hayes picked up the prescription. When she left the store, the police arrested her and retrieved 40 tablets of Lorcet, a hydrocodone derivative. Hayes v. State, 720 So. 2d 1095, 1095 (Fla. 4th DCA 1998). The incident occurred on December 6, 1996 (R 5).

SUMMARY OF THE ARGUMENT

The Fourth District's decision reversing the trial court's dismissal of Count I should be AFFIRMED. Based upon a plain reading of section 893.135(1)(c)1, a review of its legislative history and the United States Supreme Court's reading of the federal statute upon which section 893.135(1)(c)1 is based, it is clear that Petitioner was properly charged with trafficking.

ARGUMENT

THE FOURTH DISTRICT PROPERLY REVERSED THE TRIAL COURT'S DISMISSAL OF COUNT I OF THE INFORMATION. (Restated).

Petitioner argues the Fourth District erred by reversing the trial court's dismissal of Count I because section 893.135(1)(c)1 is inapplicable to this case. The State disagrees.

Petitioner was charged with violating section 893.135(1)(c)1, Florida Supp. (1996), which states in pertinent part:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), **or 4 grams or more of any mixture** containing any such substance . . .commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs."

A plain reading of the statute shows it applies in three (3) separate instances: (1) when a person has 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone **or;** (2) when a person has 4 grams or more of any salt, derivative, isomer, or salt of an isomer thereof, as described in Schedule I and Schedule II **or;** (3) when a person has **4 grams or more of any mixture containing any such substance.**

"Any such substance" refers to both those drugs expressly listed in section 893.135(1)(c), i.e., morphine, opium, oxycodone, hydrocodone and hydromorphone **and** those listed in Schedule I and II,

i.e., section 893.03(1)(b) and (2)(a). Further, **"any mixture"** means **all** mixtures containing any one of the foregoing substances **regardless** of the amount of the prohibited substance contained in the mixture. Cf. State v. Yu, 400 So. 2d 762, 765 (Fla. 1981) (upholding constitutionality of Section 893.135(1)(b), Florida Statutes, the cocaine trafficking provision, and holding that "[t]he legislature reasonably could have concluded that a mixture containing cocaine could be distributed to a greater number of people than the same amount of undiluted cocaine and thus could pose a greater potential for harm to the public"); Velunza v. State, 504 So. 2d 780 (Fla. 3d DCA 1987).

Thus, **it is a crime to possess** 4 or more grams of **any mixture** containing hydrocodone. Here, Petitioner does not argue that the tablets contained hydrocodone. Nor does Petitioner argue that the total or aggregate weight of the tablets is less than 4 grams. Thus, it is clear that Petitioner was properly charged under the trafficking statute.

It is a fundamental principle of statutory construction that where the language of a statute is clear and unambiguous and conveys a definite meaning, the language of the statute must control and there is no need for judicial interpretation. *See e.g.* State v. Dugan, 685 So. 2d 1210 (Fla. 1996)(when interpreting statute, courts must determine legislative intent from plain meaning of statute; if language of statute is clear and unambiguous, court must derive

legislative intent from words used without involving rules of construction or speculating what legislature intended).

The only meaning that can be gleaned from the language of section 893.135(1)(c) is that **it is a crime to possess** 4 or more grams of **any mixture** containing morphine, opium, oxycodone, hydrocodone, or hydromorphone. The legislature is presumed to know the meaning of the words employed in the statute. Thus, by employing the broad word "any" in describing the type of mixtures that fall under the statute demonstrates it was casting a wide-net and intended to cover **"all mixtures"** containing hydrocodone, including prescription drugs like Vicodin ES.

Support for the State's "plain reading" of the statute is found in its legislative history. Effective July 1, 1995, section 893.135(1)(c)1 was amended to include hydrocodone "or 4 grams or more of any mixture containing any such substance." This most recent pronouncement of the legislature establishes its clear intention to create the offense of trafficking in 4 or more grams of **any mixture** containing hydrocodone and to make it punishable under the trafficking statute. "The change was brought about by the rise in court cases in Florida in which people had avoided conviction for trafficking in substances not listed in the statute." Hayes, 720 So.2d at 1096 (citing the staff report). "The obvious intent of the legislators, therefore, was to broaden the scope of the trafficking statute to allow the state to prosecute persons, . . ., who

previously escaped conviction and punishment." Hayes, 720 So. 2d at 1096. The obvious purpose was also to target the growing and overwhelming trafficking in **prescription drugs.**[1]

The basic flaw in Petitioner's argument is that she has failed to demonstrate how section 893.135(1)(c)1 is ambiguous. Instead, she **assumes** the statute is **ambiguous** and needs interpretation by resort to other statutes. Section 893.135(1)(c)1 is plain and unambiguous. Thus, there is no need to look to section 893. 03, as Petitioner requests, to create an ambiguity. Section 893.03(2)(a) lists Schedule II drugs, which are described as follows:

> Unless specifically excepted **or unless listed in another schedule,** any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis:
>
> (1) Opium and any salt, compound, derivative, or preparation of opium except nalmefene or isoquinoline alkaloids of opium, including, but not limited to the following:
>
> ***
>
> (j) hydrocodone.

---

[1] Even if this Court finds an ambiguity in section 893.135(1)(c), the "rule of lenity" would not come into play. The court's **primary** duty in statutory interpretation is to give effect to the legislative intent of the statute. State v. Iacovone, 660 So.2d 1371 (Fla. 1995). The legislative intent is the polestar by which a court must be guided in interpreting statutes and all other rules of statutory construction are **subordinate** to it. American Bakeries Co. v. Haines, 180 So. 524 (1938). This Court has already **rejected** the notion that the "rule of lenity" supersedes legislative intent in construing statutes. Deason v. State, 705 So.2d 1374 (Fla. 1998).

(Emphasis added)

Hydrocodone is also listed as a schedule III drug under Section 893.03(3)(c), which includes:

> Any material, compound, mixture, or preparation containing limited quantities of any of the following controlled substances or any salts thereof:
>
> ***
>
> (4). Not more than 300 milligrams of hydrocodone per 100 milliliters or not more than 15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients which are not controlled substances.

In State v. Holland, 689 So.2d 1268 (Fla. 1st DCA 1997), the First District, without finding an ambiguity in section 893.135(1)(c)1, agreed that section 893.03 should be consulted in determining whether one could be charged with trafficking. The First District held that if a mixture containing the controlled substance falls into schedule III, then the amount per dosage unit, not the aggregate amount or weight determines whether the defendant can be charged with trafficking. The Holland court's reasoning appears to be that because Section 893.03(2)(a) exempts substances "listed in any other schedule," and because hydrocodone is listed in schedule III as well, these drugs are exempted from the trafficking statute and one can never be convicted for trafficking in Vicodin or hydrocodone.

Thus, according to Holland, one could never traffic in Vicodin. If an individual possessed or sold a billion Vicodin pills, each

containing 7.5 milligrams of hydrocodone and 750 milligrams of acetaminophen, pursuant to the ruling of the Holland court, that person could not be charged with trafficking. The court plainly states "the concentration of hydrocodone per dosage unit will remain below this threshold regardless of the number of tablets sold." Id. at 1270. The opinion in Holland insults efforts to stop drug abuse and is logically and legally unreasonable. As such, it is not surprising that it was rejected by the Fourth and Fifth Districts.

The listing of hydrocodone as both a Schedule II and Schedule III drug **cannot and does not have any effect upon** the trafficking statute. Because it is clear from the face of the trafficking statute that it applies to **any** mixture containing hydrocodone, there is no need to look behind the provision's plain language to determine legislative intent. See Coleman v. Coleman, 629 So. 2d 103 (Fla. 1993); City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993). Thus, even though the Vicodin ES tablets involved in this case are listed as a Schedule III, they are still covered by the trafficking statute because they are a "mixture" containing hydrocodone.

In Hayes, the Fourth District Court of Appeal addressed the **identical** issue raised here - whether a defendant may be charged with trafficking under section 893.135(1)(c) where the amount of hydrocodone in each **individual** tablet is less than 15 milligrams, making it a Schedule III drug under section 893.03(3), but where the

aggregate weight of all the tablets is more than 4 grams.

Based upon its reading of section 893.135(1)(c), the legislative history of section 893.135 (1)(c) and the United States Supreme Court's interpretation of the federal law upon which section 893.135(1)(c) is premised, the Hayes court held it is the aggregate weight of the tablets and not the amount of hydrocodone per dosage unit which determines the weight for prosecution under section 893.135(1)(c). See also Johnson v. State, 23 Fla.L.Weekly D2419 (Fla. October 28, 1998). In so holding, the Hayes court followed State v. Baxley, 684 So.2d 831 (Fla. 5th DCA 1996), rev. denied, 694 So.2d 737 (Fla. 1997) and certified conflict with Holland, 689 So.2d 1268 (Fla. 1st DCA 1997) and State v. Perry, 23 Fla.L.Weekly D1908 (Fla. 2d DCA August 14, 1998). The Hayes court explained how the plain reading of section 893.135(1)(c) is in accord with the United State Supreme Court's interpretation of the federal law upon which our statute is based, as follows:

> In Chapman v. United States, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991), superseded by statute on other grounds as stated in, United States v. Turner, 59 F.3d 481 (4th Cir.1995), the defendant was convicted of selling 10 sheets of blotter paper containing 1,000 doses of LSD in violation of 21 U.S.C. S 841(a). The law called for "a mandatory minimum sentence of five years for the offense of distributing more than one gram of a 'mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD).' " The Supreme Court held that the weight of the blotter paper, and not just the weight of the pure LSD which the paper contained was to be used in determining the sentence. The Court

concluded that this interpretation was compatible with Congress' " 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence."

Noting that neither the statute nor the sentencing guidelines defined either "mixture" or "substance", the Chapman court deciphered their meaning within the scheme of the drug laws, by first consulting various dictionaries:

A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 Oxford English Dictionary 921 (2d ed.1989).

Applying these definitions to the blotter papers containing LSD, the court decided that since the drug was dissolved onto the paper, the drug and paper had "mixed" or "commingled", but the LSD had not chemically combined with the paper. Although the two could be separated, they could also be ingested together like cocaine or heroine mixed with cutting agents; therefore, it was logical to include the weight of the paper in calculating the total weight of the controlled substance. Conversely, the court held that the weights of containers or packaging materials, which clearly do not mix with the drug and are not consumable along with the drug, could not logically be included for sentencing purposes.

The Chapman analysis applies with respect to the Lorcet tablets in this case. The hydrocodone has been mixed, or commingled, with the acetaminophen, and the two are ingested together. The acetaminophen facilitates the use, marketing, and access of the hydrocodone. Therefore, based upon the legislature's clear intent to create the offense of trafficking in

> hydrocodone, as well as the Supreme Court's definition of the term "mixture" as it is used in this context, we conclude that the aggregate weight of the tablets seized from Hayes, and not the amount of hydrocodone per dosage unit, is the determinative weight for prosecution under section 893.135(1)(c)1, Florida Statutes (1996). Since the weight of the hydrocodone mixture exceeded four grams, Hayes could be prosecuted under section 893.135(1)(c)1 for trafficking in a Schedule II drug.

Id. at 1096-1097 (citations omitted).

In Baxley, the Fifth District held that only a small amount of hydrocodone is a schedule III substance and that if the amount involved is 4 or more grams of a mixture containing hydrocodone, it becomes a schedule II substance for which prosecution for trafficking under Section 893.135 is proper. The Baxley court noted that hydrocodone is listed in schedule II and III, both of which provide a substance is included in that schedule "unless listed in another schedule". The court said:

> "In fact, because hydrocodone appears in both schedules, our interpretation of the statute is given more credence. Schedule III substances include hydrocodone or hydrocodone mixtures *which meet the §893.03(3)(c)4 limitation* and schedule 2 includes *all other hydrocodone.* This gives both schedules meaning. See Lareau v. State, 573 So.2d 813 (Fla. 1991) (when two conflicting or ambiguous provisions of the same legislative act were intended to serve the same purpose, they must be read in *pari materia* to ascertain the overall legislative intent and to harmonize the provisions so that the fullest effect can be given to each; Mack v. Bristol Myers Squibb Co., 673 So.2d 100 (1st DCA 1996) (a law should be construed in harmony with any other statute having the same purpose ..." Id. at 832-833 (Italics in original).

Alternatively, should this Court somehow conclude that it is still necessary under the facts of this case, despite the amendment to section 893.135(1)(c)1, to consult the Schedules before determining whether or not a trafficking charge is properly brought, the interpretation of the Schedules suggested by Holland is incorrect and unduly restrictive.

Essential to this second area of concern has been the question of how to interpret the Schedules themselves. Under the 1993 statute, if the drug in question was neither morphine or opium and was not otherwise "described" in either Schedule I or II, that defendant could not be charged with trafficking. In the Holland case, the 1st DCA concluded that because Patricia Holland was in possession of pills containing a specific dosage amount which was consistent with the description found in Schedule III, section 893.03(3)(c)4, the State was therefore precluded from charging the defendant with trafficking because of language in Schedules I and II which suggested that if the drug appears in any other Schedule, it was consequently excluded from classification as either a Schedule I or II narcotic. The language in question reads: "Unless specifically excepted or unless listed in another schedule..., the following substances are controlled in Schedule X." The State disagrees with the Holland court's interpretation of this language.

The difficulty with this interpretation of the statute is that all of the schedules contain this language, which makes it extremely difficult to interpret. Arguably, if one is in possession of a drug

which, like hydrocodone, is found in more than one Schedule simultaneously, it is possible to reach the absurd conclusion that the drug must be excluded from all of the Schedules wherein it appears, because *each* of those schedules directs the court to exclude the narcotic if it is also found in another schedule. This type of "hall of mirrors" interpretation causes an absurd result. Since hydrocodone appears in both schedule II (section 893.03(2)(a)) and III (893.03(3)(c)4), if one follows the instructions requiring exclusion of any narcotic which also appears in another schedule, the absurd result mandated by the 1st District's decision requires that hydrocodone be excluded from both of the Schedules in which it appears. Surely the legislature did not intend such a result, nor should this Court permit such an erroneous, illogical and unreasonable interpretation to stand. See State v. Webb, 398 So. 2d 820, 824 (Fla. 1981) ("Construction of a statute which lead to an absurd or unreasonable result or would render the statute purposeless should be avoided.")

The effect of the 1st and 2nd District's decisions is to exclude from the trafficking statute any preparation of hydrocodone which fits the description found in Schedule III, despite the fact that hydrocodone also appears in schedule II. The State urges that the legislative intent behind this language was to grant the State the authority to select between two different offenses, trafficking or possession. The 2nd District's opinion, in following Holland,

strips the State of the discretionary authority intended by the legislature and, as we shall see, prohibits the State, effectively, from ever being able to prosecute anyone for trafficking in hydrocodone.

The stipulated evidence is that hydrocodone appears on the street only in pill form, and always in a mixture which admittedly is correctly described by the language found in Schedule III. If this Court agrees that the 2nd District's interpretation of the 1995 trafficking statute is correct, the consequence of this would be that the State would be foreclosed from prosecuting cases involving trafficking where the mixture of hydrocodone contains less than 15 milligrams per dosage unit and is delivered in a pill form. Consider these two defendants; one having a thousand pills weighing in total more than 4 grams, and each pill containing less than 15 milligrams of hydrocodone, the other defendant having a bag of similar hydrocodone pills weighing in total more than 4 grams but which he has crushed with a hammer into a powdery mass; before they were crushed, number two's 1000 pills each contained less than 15 milligrams of hydrocodone per dosage unit. What logic is there to an interpretation permitting the second defendant to be charged with trafficking, but the first defendant with nothing more serious than possession?

By its plain language, the trafficking statute applies to 4 grams or more, but less than 30 kilograms, "of **any** mixture"

containing hydrocodone as described in s. 893.03(1)(b) or (2)(a), **regardless** of the amount of hydrocodone actually present in the mixture. Cf. State v. Yu, supra and Velunza v. State, 504 So. 2d 780 (3rd DCA 1987).

Lesser concentrations of hydrocodone, such as is described in Schedule III, are not automatically exempt from prosecution under the "any mixture" portion of second. 893.135(1)(c)1 simply because Schedule III is an accurate description of the mixture. The State should have the authority to determine which charge is appropriate under the facts of each case. The 2nd District's opinion strips the State of this authority.

Instead, because it is clear from the face of the 1995 trafficking statute that it applies to **any** mixture containing hydrocodone, there is no need to look behind the provision's plain language to determine legislative intent. Coleman v. Coleman, 629 So. 2d 103 (Fla. 1993) and City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993). Consequently, while hydrocodone in the dosage strength possessed by a defendant might well be accurately described in Schedule III, nevertheless, if the pills in question were without question a mixture (hydrocodone and acetaminophen), this mixture nevertheless may be considered as being governed by the trafficking statute because of language found therein which prohibits and defines as trafficking the possession of 4 grams or more of any mixture containing hydrocodone.

Obviously one or two tablets containing a small amount of hydrocodone would have minimal potential for abuse and could readily be prosecuted under the third degree felony statute. However, possession of a larger number of tablets could have the same potential for abuse as any other schedule II substance. In Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 668; 54 L.Ed.2d 604 (1978), the court said"

> In our system, so long as the prosecutor has probable cause to believe that the accuse committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.

Similarly, the Florida Supreme Court has held that the prosecutor has the discretion to decide under which statute to charge an offender. See State v. Cogswell, 521 So. 2d 1081, 1082 (Fla. 1988) citing Unites States v. Batchelder, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 775 (1979), State v. Bonsignore, 522 So. 2d 420 (5th DCA 1988). By dismissing the instant information, the trial court failed to recognize the plain reading of the statute, and that the prosecutor has the discretion to determine which charge is appropriate, and which charge can be proven beyond a reasonable doubt.

In following Holland, the 2nd District has failed to consider the effect of the 1995 amendment to Fla. Stat. Section 893.135(1)(c)1. By following the 1st District's decision, the 2nd District has perpetuated an interpretation of the statute which

ignores and gives no meaning or effect to substantial modifications of that statute which took effect in 1995. Further, the 2nd District's decision to align itself with the 1st District strips the State of the prosecuting authority to punish those who would traffic in hydrocodone.

In sum, it is clear that Petitioner's argument is in clear contrast to the "plain meaning" of the statute, its legislative history and the United States Supreme Court's interpretation of a similar federal statute. Accordingly, the Fourth District's decision **reversing the trial court's order dismissing the trafficking** charge should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, Respondent respectfully requests this honorable Court to **AFFIRM** the Fourth District's decision.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA TERENZIO
BUREAU CHIEF

JAMES CARNEY
Assistant Attorney General
Florida Bar No.: 475246
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
(561) 688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief" has been furnished by U.S. mail, postage prepaid, to: Andrew B. Metcalf, P.O. Box 2618, Vero Beach, FL 32961, on this 8 day of March 1999.

Of Counsel

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief has been prepared in Courier New font, 12 point, and double spaced.

Jane J Carey

Of counsel