IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,155

MICHAEL RIECHE,

Petitioner,

-vs-

LOIS SPEARS, Interim Director,
Dade County Department of Corrections, and
THE STATE OF FLORIDA,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This petition for discretionary review is from a decision that the Third District Court of Appeal certified to be in direct conflict with decisions from other District Courts of Appeal. In this brief, the symbol "R." followed by a numeral will indicate the page numbers in the record on appeal. The symbol "SR." followed by a numeral will indicate the page numbers in the supplemental record filed with this Court under a separate motion.

STATEMENT OF CASE AND FACTS

Michael Rieche was arrested on December 16, 1998, and charged with two counts of grand theft and one count of resisting an officer without violence (R. 25-26). The arrest affidavit alleges that Mr. Rieche was riding in a stolen car that was pulling a stolen trailer and that he ran when police stopped the car (R. 25-26). He was released on an $11,000 bond (R. 27).

On January 15, 1999, the state arrested Mr. Rieche for tampering with a witness and battery, although the events allegedly occurred on December 24, 1998 (R. 32). The arrest affidavit alleges that Mr. Rieche slapped his former girlfriend and threw her on the bed during a fight (R. 32). The witness tampering charge apparently arose from the allegation that he took and destroyed the telephone when she attempted to call police (R. 32).

The state subsequently filed an information charging Mr. Rieche with only one count of grand theft (for the trailer and its contents), resisting without violence, and trespass to a conveyance (R. 34-39). Mr. Rieche pled not guilty to these charges (R. 51). Four days later, the state orally requested that the court hold Mr. Rieche without bond on this case. The only reason the state gave was Mr. Rieche's arrest in the witness tampering/battery case (R. 56). The trial court did not immediately rule on that motion and a hearing set for the next day apparently never occurred (R. 21, 56).

On February 9, 1999, the state declined to prosecute the witness tampering charge and filed an information only on the battery charge, which the circuit court transferred to county court (R. 42-44, 61). Defense counsel then moved for the circuit court to set a bond in the grand theft case (R. 61). The circuit court ordered Mr. Rieche held with no bond (R. 62).

Defense counsel later renewed her motion, noting that Mr. Rieche had lived in Dade County for the last six years (R. 62-63). His mother, father and aunt also live in town. He works to pay the rent and support his family and two children. He has no prior felony convictions and only one prior misdemeanor battery conviction (R. 62). The state opposed the motion (R. 63), citing the Third District Court of Appeal's decision in *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998), which held that if that a defendant is alleged to have violated a condition of pretrial release, the court can incarcerate that defendant without bond and without the procedural protections of a pretrial detention hearing or an *Arthur*[1] hearing. The trial court denied the motion for bond. Defense counsel objected, noting that the state did not prove the pretrial detention criteria of section 907.041 (R. 63).

Mr. Rieche filed his petition for a writ of habeas corpus with this Court because of the apparent, but unacknowledged, conflict between the decision in *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998), and numerous other

[1]The name is from *State v. Arthur*, 390 So. 2d 717 (Fla. 1980).

decisions beginning with *Merdian v. Cochran*, 654 So. 2d 573 (Fla. 4th DCA 1995).

While Mr. Rieche's petition was pending before this Court, the Fourth District Court of Appeal filed a lengthy opinion disagreeing with, and certifying conflict with, the *Houser* opinion. *See Paul v. Jenne*, 24 Fla. L. Weekly D581 (Fla. 4th DCA Mar. 3, 1999). Shortly after that, this Court transferred Mr. Rieche's petition to the Third District Court of Appeal, which denied his petition but now certified conflict. *See Rieche v. Spears*, 727 So. 2d 409 (Fla. 3d DCA 1999). This Court postponed its decision on jurisdiction and ordered briefing on the merits.

After being held without any bond for just under three months, Mr. Rieche accepted a plea to a withhold of adjudication and one year of probation on the grand theft case (SR. 2-6). He was released from jail the next day when the state announced a nolle prosequi of the battery charge (SR. 1). Mr. Rieche's situation is not unique. Circuit judges in Miami-Dade County routinely hold defendants without any form of pretrial release based on *Houser*. In an average day, each of the twenty circuit judges presiding in the criminal division incarcerates two or three defendants without bond even though there has been no *Arthur* hearing and no pretrial detention hearing.

SUMMARY OF THE ARGUMENT

The legislature has created a pretrial detention law carefully crafted to balance the constitutional right to pretrial release with concerns for community safety and the integrity of the criminal justice system. Under this statute, the state must prove beyond a reasonable doubt the need for pretrial detention at an evidentiary hearing. The legislature has also imposed strict time limitations to ensure expeditious decisions on pretrial detention motions. Likewise, courts protect the right to pretrial release by requiring proof at *Arthur* hearings that is even stronger than beyond a reasonable doubt.

The *Houser* opinion, however, circumvents these protections by unnecessarily creating a judicial exception to the constitutional right to pretrial release. The *Houser* opinion was unnecessary both on the facts of that case and because the statute already provides for pretrial detention if a person violates conditions of pretrial release. The difference is that *Houser* provides virtually none of the procedural protections in the pretrial detention statute. The result is that *Houser* almost completely supplant motions for pretrial detention. Moreover, *Houser* is directly contradictory to Florida Rule of Criminal Procedure 3.131(h) and case law holding that the legislature can limit the courts' inherent powers. *Houser* even conflicts with the line of precedent that it cites for as basis for its claim of the courts' inherent power.

This Court must disapprove *Houser* and hold that the right to pretrial release requires the procedural protections of a pretrial detention hearing or an *Arthur* hearing before a person is held without bond.

ARGUMENT

A DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO PRETRIAL RELEASE UNLESS THE STATE HAS MET ITS BURDEN OF PROOF AT A PRETRIAL DETENTION OR AN *ARTHUR* HEARING.

Michael Rieche was incarcerated without bond for almost three months based on an arrest while he was on pretrial release. When he pled guilty he was released on a year of probation (SR. 2-6). The state ultimately dropped all charges in the second case (SR. 1). In other words, while the presumption of innocence attached, Mr. Rieche had no right to liberty, but as soon as he pled guilty he could resume his life. The right to pretrial release in the Florida Constitution is supposed to protect against such a Kafkaesque situation. The cause of the surrealism in Mr. Rieche's case is *Houser v. Manning*, 719 So. 2d 307 (Fla. 3d DCA 1998). *Houser* unnecessarily created a new exception to this right with virtually no procedural protections for the fundamental liberty interests it protects.

The text of the constitutional right to pretrial release explicitly provides that *every person* charged with a crime shall be entitled to reasonable conditions for pretrial release. The only exceptions are explicitly stated in the italicized provisions below:

> *Unless charged with a capital offense or an offense punishable by life imprisonment and the proof is evident or the presumption great*, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. *If no*

> *conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.*

Art. I, § 14, Fla. Const. The first exception is ensconced in *State v. Arthur*, 390 So. 2d 717 (Fla. 1980), and the substantial body of subsequent case law that has developed to protect our citizens' right to liberty unless and until the state is able to overcome the presumption of innocence. Accordingly, the state must prove by a standard even higher than beyond reasonable doubt that the proof of the defendant's guilt is evident or the presumption great. *See Kirkland v. Fortune*, 661 So. 2d 395 (Fla. 1st DCA 1995); *Elderbroom v. Knowles*, 621 So. 2d 518, 520 (Fla. 4th DCA 1993); *State v. Perry*, 605 So. 2d 94 (Fla. 3d DCA 1992) (collecting cases). Moreover, this provision is limited to only the most serious crimes that carry potential sentences of life or death.

Likewise, the legislature created a comprehensive pretrial detention scheme encompassing the group of exceptions added by the 1983 amendment. Under this statute, the state must prove beyond reasonable doubt the need for pretrial detention by proving one of four specific criteria in section 907.041(b), Florida Statutes. *See* § 907.041(4)(f), Fla. Stat. (1997); Fla. R. Crim. P. 3.132(c)(1). The defendant may be detained only twenty-four hours while the state moves for pretrial detention. *See* § 907.041(4)(d), Fla. Stat. (1997). If the state makes such a motion, the defendant is entitled to a prompt hearing on that motion, usually within five days. *See*

§ 907.041(4)(e), Fla. Stat. (1997). At that evidentiary hearing, the defendant has the right to counsel and to present (and cross-examine) witnesses. *See* § 907.041(4)(g), Fla. Stat. (1997). The court must then render its decision on such a motion within twenty-four hours. *See* § 907.041(h), Fla. Stat. (1997). If the state presents sufficient evidence and the judge orders pretrial detention, the state must bring the defendant to trial within 90 days. *See* § 907.041(i), Fla. Stat. (1997).

The legislature and the courts have gone to great lengths to interpret these textually-based exceptions to protect our citizens' right to liberty unless the state convincingly proves that a particular person is a real and substantial threat to either public safety or the orderly administration of justice. *Houser* judicially amends the Constitution to create another exception with virtually none of these protections. Such a judicial amendment is improper.

Houser creates an automatic exception to the right to pretrial release if the state alleges that a defendant violated a condition of pretrial release. The statute also includes a violation of a pretrial release condition as a ground for pretrial detention. A judge can order pretrial detention if "[t]he defendant has previously violated conditions of release and that no further conditions of release are reasonably likely to assure the defendant's appearance at subsequent hearings." § 907.041(4)(b)1, Fla. Stat. (1997). A newly enacted amendment to this statute also uses a violation of the conditions for pretrial release as ground for pretrial

detention, but now includes community safety considerations. Under this new statute, a judge can order pretrial detention if "[t]he defendant has violated one or more conditions of pretrial release or bond for the offense currently before the court and the violation, in the discretion of the court, supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the presence of the accused at trial." CS for SB 748, § 2 (1999 Legislature) (to be codified at 907.041(4)(b)7).

The difference between the statute and *Houser* is that *Houser* contains none of the procedural protections for constitutional liberty interests found in the pretrial detention scheme. *Houser* does not require the state to prove the violation beyond a reasonable doubt. *Houser* does not require the state to prove a threat to community safety or the administration of justice from the alleged violation. *Houser* does not require a prompt hearing, or even any evidentiary hearing at all. At most, *Houser* allows review for abuse of discretion. *See* 719 So. 2d at 309. In short, *Houser* allows a forfeiture of a significant constitutional right virtually without any procedural protections.

Houser requires only that the state allege that the defendant committed a new crime. When the state orally moved for Mr. Rieche's detention without bond, all it made was a bare-bones allegation of the new charges (R. 56). The *Houser* opinion makes it irrelevant if the state ultimately dismisses those new charges, as

occurred in Mr. Rieche's case (R. 45, 61; SR. 1). The mere allegation of a new crime, presumably supported by probable cause, is all that is required. Such a standard is much less protective of constitutional liberty interests than the high levels of proof required in the *Arthur* hearing or pretrial detention exceptions.

Moreover, *Houser* eliminates the procedural protections in a way that creates absurd results. For instance, a murderer, kidnapper, robber, or burglar arrested after a spree involving multiple crimes is entitled to the procedural protections of a pretrial detention hearing or an *Arthur* hearing if all of the crimes occurred before the person was on pretrial release. Mr. Rieche, however, received no such protection because one of his much less serious charges allegedly was committed while he was on pretrial release.

The *Houser* opinion claims that the exception it created is merely "complementary" to the pretrial detention scheme. 719 So. 2d at 311. Because of the much lower procedural and proof requirements, however, the practical effect of the procedure sanctioned in *Houser* is to largely supplant the pretrial detention scheme. The state attorney in Miami-Dade County almost never files motions for pretrial detention, relying instead on motions to revoke bond under *Houser*.

The *Houser* case could have been decided without creating an entirely new exception to the right to pretrial release. As the *Houser* court states in the final section of its opinion, the state originally could not meet its *Arthur* hearing

requirements because it could not prove that Mr. Houser had a firearm when he committed robbery. *See* 719 So. 2d at 311. After his pretrial release, Mr. Houser was arrested for carrying a concealed firearm, which the robbery victim subsequently identified as the weapon used in the robbery. *Id*. In an alternative holding, the *Houser* court ruled that the state could reopen the *Arthur* hearing in these circumstances. *Id*.

Unfortunately, the *Houser* opinion did not rest on this readily available basis. Instead, *Houser* created an entirely new exception to the constitutional right to pretrial release. The *Houser* opinion disputes that it created this exception from whole cloth, claiming that *Gardner v. Murphy*, 402 So. 2d 525 (Fla. 5th DCA 1981), shows that courts have always had the inherent power to hold defendants without bond. *See* 719 So. 2d at 308-10. In *Gardner*, however, the district court of appeal *granted* a writ of habeas corpus after the circuit court held a defendant without bond. *See* 402 So. 2d at 527. The *Gardner* court grumbled that "proven runners" should be denied bail, but nevertheless held that the constitutional right to bail (as it then existed) did not permit the outright denial of bail. *See id*. at 526. As an aside, the court noted that a violation of pretrial release conditions that "evinces a flagrant disregard of the court's authority or effort to evade its processes" might forfeit the right to bail. *Id*. *Houser* fails to acknowledge that the facts in *Gardner* did not involve a violation of a pretrial release condition and therefore this language

was dicta.

Houser also fails to acknowledge that this dicta originates in *Ex parte McDaniel*, 86 Fla. 145, 97 So. 317 (1923). *McDaniel* involved a defendant who twice violated pretrial release by failing to appear for trial. *See id*. at 147, 97 So. at 316-17. Under the reasoning of *Houser*, by violating the conditions of pretrial release Mr. McDaniel would have forfeited his right to any further pretrial release. This Court's holding in *McDaniel*, however, was just the opposite:

> It may be that there are circumstances under which the right to bail in otherwise bailable causes would be forfeited by breach of prior bonds. But this is not a case in which the facts warrant a resort to this principle. There may have been grounds for punishment for contempt, but there was no such conduct upon the part of petitioner in the way of flagrant disregard of the court's authority or effort to evade its processes as to forfeit his constitutional right to bail during a recess of several weeks or for an indefinite period of the trial court.

Ex parte McDaniel, 86 Fla. at 149, 97 So. at 318 (emphasis supplied, citations omitted); *see also Gallagher v. Butterworth*, 484 F. Supp. 1278, 1280 (S.D. Fla. 1980) (reading Florida law to hold that "the fact that petitioner has previously defaulted on bond does not justify a denial of bail."). *McDaniel* and *Gardner* do not support the extreme position adopted by *Houser*.

The dicta in *McDaniel* and *Gardner* was exploring the possibility of judicially creating a pretrial detention scheme. These cases were decided before the 1983 constitutional amendment and the legislative pretrial detention statute

codified in section 907.041 of the Florida statutes. Once the legislature passed this comprehensive pretrial detention law, however, courts followed that law and abandoned the embryonic judicial approach. *See Gomez v. Hinckley*, 473 So. 2d 809 (Fla. 4th DCA 1985). The prior dicta "was superseded by section 907.041" of the Florida Statutes. *State ex rel. Neicen v. Navarro*, 603 So. 2d 136, 136 (Fla. 4th DCA 1992) (referring to dicta in *Harp v. Hinckley*, 410 So. 2d 619 (Fla. 4th DCA 1982), which adopted the dicta in *Gardner*).

The legislature can place limits on a court's power, even an inherent power. For instance, courts have the inherent power to enforce their orders through contempt, but the legislature can establish limits on the punishments imposed. *See Walker v. Bentley*, 678 So. 2d 1265 (Fla. 1996); *A.A. v. Rolle*, 604 So. 2d 813, 815 (Fla. 1992).

Houser cites several cases purportedly for the proposition that "907.041 is complementary to, and does not replace, a trial court's already-existing power to deny bail." 719 So. 2d at 311. The cases cited, however, hold that the textual exceptions to the right to pretrial release are independent of each other. In other words, for crimes punishable by life or death where the proof is evident or the presumption great, the state need not also prove the criteria for pretrial detention. *See State v. Fox*, 647 So. 2d 1051 (Fla. 5th DCA 1994); *State v. Ajim*, 565 So. 2d 712 (Fla. 4th DCA 1990); *Driggers v. Carson*, 486 So. 2d 25 (Fla. 1st DCA 1986).

None of these cases stands for the proposition that before *Houser* the state could bypass the procedural protections of an *Arthur* hearing or a pretrial detention hearing by merely alleging the commission of a new crime.

Moreover, the limitations *Houser* rails against are not imposed by only the legislature–they are also imposed by this Court in the rules of procedure. Under the rules of criminal procedure, the trial court can order a defendant on pretrial release be arrested in three situations: 1) a breach of the undertaking; 2) problems with the sureties; or 3) the court is satisfied that bail should be increased. *See* Fla. R. Crim. P. 3.131(g). Therefore, the discussion in *Houser* on the "American view" that a court can revoke bond following a violation of a condition of release misses the point.[2] *See* 709 So. 2d at 308-09. The question is not whether a court can revoke

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[2]*Houser*'s description of the "American view" is also incorrect. To the contrary, "[j]urisdictions which have constitutional or statutory provisions making the right to bail mandatory in all noncapital offense ordinarily admit to bail as a matter of right a person who has previously forfeited bail in the same case . . . ." Annotation, *Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail; as affecting right to second admission to bail in same noncapital criminal case*, 29 A.L.R. 2d 945 (1953).

The ABA standards that *Houser* cites specifically require:"After the defendant has been taken into custody [for violating conditions of release] and produced, the judicial officer should either: (i) set new or additional conditions of release; or, (ii) schedule a pretrial detention hearing . . . within [five] calendar days." *ABA Standards for Criminal Justice* 10-5.8 (1985). Nothing in the ABA standards indicates that a person can be held without bond absent a pretrial detention hearing.

Additionally, the cases *Houser* cites are not on point. *State v. Holmes*, 564 N.E.2d 1066 (Ohio 1991), does not involve a right to pretrial release, but the forfeiture of the bond amount by the surety when a defendant violates conditions

the bond a defendant has already violated, but whether the judge can then hold the defendant without any form of pretrial release. The answer is in Florida Rule of Criminal Procedure 3.131(h), which requires that the trial court set a bond even after ordering a defendant be recommitted. "If the defendant applies to be admitted to bail after recommitment, the court that recommitted the defendant *shall* determine conditions of release, if any, subject to the limitations of [3.131](b) above." Fla. R. Crim. P. 3.131(h) (emphasis supplied). The only relevant limitation in Rule 3.131(b) is if the state has filed a motion for pretrial detention.

Every other case has recognized this Court's procedural rules and the legislature's substantive criteria for pretrial detention. As the seminal case of *Merdian v. Cochran*, 654 So. 2d 573 (Fla. 4th DCA 1995), succinctly stated:

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of release. *State v. Ayala*, 610 A.2d 1162 (Conn. 1992), found that the state's pretrial detention *statute* was constitutional as applied in that case. Professors LaFave and Israel do not address to the procedural issues and write only about the substantive question of pretrial release after allegedly committing a new offense. *See Wayne R. LaFave & Jerold H. Israel*, Criminal Procedure, § 12.3(f) (2d ed. 1992). The other materials *Houser* cites seem to be based on a federal model where there is arguably no constitutional right to bail. *See United States v. Salarno*, 481 U.S. 739, 752-53 (1987).

Three state supreme courts have squarely decided the issue in the case at bar, two agreeing that a violation of pretrial release conditions justified an increase in bail but did not allow the court to deny bail altogether. *Compare Reeves v. State*, 548 S.W.2d 822 (Ark. 1977), *and Wallace v. State*, 245 S.W.2d 192 (Tenn. 1952), *with Mello v. Superior Court*, 370 A.2d 1262 (R.I. 1977). Another state has judicially narrowed its pretrial detention statutes to not allow a court to deny any bond after a violation of pretrial release conditions unless the violation thwarts the prosecution of the defendant. *See State v. Sauve*, 621 A.2d 1296 (Vt. 1993).

> The petitioner is entitled to have the court reconsider bail and conditions of release even if recommitment is ordered as a result of the breach of the bond condition. *See* Fla. R. Crim. P. 3.131(h). It is the state's burden to prove the need of pretrial detention, Section 907.041(4)(f), Fla. Stat., which it must show beyond a reasonable doubt. *See* Fla. R. Crim. P. 3.132(c)(1).

654 So. 2d at 576. Numerous other cases have followed this reasoning. *See, e.g., Moody v. Campbell*, 713 So. 2d 1032 (Fla. 1st DCA 1998); *Martinez v. State*, 715 So. 2d 1024 (Fla. 4th DCA 1998); *Lepore v. Jenne*, 708 So. 2d 980 (Fla. 4th DCA 1998); *Blackman v. State*, 707 So. 2d 820 (Fla. 4th DCA 1998); *Surdovel v. Jeene*, 706 So. 2d 115 (Fla. 4th DCA 1998); *Dupree v. Cochran*, 698 So. 2d 945 (Fla. 4th DCA 1997); *Metzger v. Cochran*, 694 So. 2d 842 (Fla. 4th DCA 1997); *Santos v. Garrison*, 691 So. 2d 1172 (Fla. 4th DCA 1997).

After the *Houser* opinion was released, the Fourth District Court of Appeal had the opportunity to reconsider its position in *Paul v. Jenne*, 24 Fla. L. Weekly D581 (Fla. 4th DCA Mar. 3, 1999). That court's restatement of the law speaks for itself and this Court should adopt it:

> Although we agree with *Houser* that a trial court has the authority to *revoke* a defendant's bond under pretrial release rules allowing arrest and recommitment for bond violations, and pursuant to the court's inherent power to enforce its own orders, we disagree that a trial court has the absolute discretion to *deny* bond unless a defendant meets the criteria for detention without bond under the pretrial detention statutes. By breaching a condition of the bond originally set by the court, a defendant forfeits the right to continued release under the

> terms of that bond. However, the defendant does not forfeit his or her constitutionally guaranteed right to bail altogether; a refusal to readmit a defendant to any bail at all must be subject to the limitations of the pretrial detention statute. Indeed, Florida Rule of Criminal Procedure 3.132(b), which provides that a motion for pretrial detention may be filed *at any time prior to trial*, contemplates successive bail applications. The rule strongly suggests that it applies not just to release determinations upon initial arrest, but also to bond decisions following rearrests and renewed bail applications.
>
> We continue to hold, as we did in *Merdian* and *Metzger*, that the court's authority to deny bond pending trial is circumscribed by the provisions of Florida Statute section 907.041. The legislature has specifically delineated and narrowly limited those circumstances under which bond may be denied. We have no difficulty divining the legislative intent to curtail the court's power to deny bail, except in certain instances, in light of the constitutionally guaranteed right to bail. To effectuate its express policy of assuring the detention of "those persons posing a threat to the safety of the community or the integrity of the judicial process," the legislature enacted a pretrial detention statute, which sets forth a comprehensive list of conditions that will qualify a defendant for detention without bail. By providing clear and reasonable guidelines for courts to follow in considering denial of this basic and fundamental right, the legislature may very well have been motivated by a desire to achieve uniformity and fairness in judicial determinations of bail entitlement, as well as to provide trial courts with a means of identifying persons whose criminal histories and patterns of behavior signal a danger to society.

24 Fla. L. Weekly at D583 (emphasis in original; footnote omitted).

CONCLUSION

The legislature has carefully crafted the pretrial detention scheme to balance the right to pretrial release against concerns for community safety and administration of the criminal justice system. The courts have similarly protected the right to liberty in *Arthur* hearings. Without any need or substantial basis in precedent, *Houser* created another exception that ignores these protections and significantly undermines the constitutional right to pretrial release. This Court must disapprove *Houser* and hold that the right to pretrial release requires the procedural protections of a pretrial detention hearing or an *Arthur* hearing before a person is held without bond.

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CERTIFICATE OF SERVICE AND TYPE SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief, which is printed in 14 point CG Times (a font similar to Times New Roman), was delivered by mail to Allison Cutler, Assistant Attorney General, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, Florida 33301, this 2nd day of June 1999.

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