**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA



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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 96,836 |
| | ) | |
| THOMAS HENRY SPIOCH, III, | ) | FIFTH DCA CASE NO. 97-2616 |
| | ) | |
| Respondent. | ) | |

**ON DISCRETIONARY REVIEW FROM**
**THE FIFTH DISTRICT COURT OF APPEAL**

# RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0845566
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ATTORNEY FOR RESPONDENT

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## CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

Susan A. Fagan

SUSAN A. FAGAN
Assistant Public Defender

# TABLE OF CITATIONS



OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, | ) | |
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| | ) | |
| Respondent. | ) | |
| | ) | |

## SUMMARY OF THE ARGUMENT

Petitioner has not cited any cases which are in express and direct conflict with the opinion of the Fifth District Court of Appeal in the instant case. Nor has the Petitioner raised any other bases for this Court to exercise its discretionary jurisdiction under Article V, Section 3(b)(3) and Florida Rule of Appellate Procedure 9.030(a)(2). Actually, Petitioner is simply asking this Court to conduct a second appellate review of the trial court's scoring of Respondent's victim injury points on the Respondent's sentencing guidelines scoresheet. This Court should therefore decline to exercise its discretionary jurisdiction.

## ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE COURT'S DECISION IN VURAL V. STATE, 717 So.2d 65 (Fla. 3d DCA 1998)

Under Article V, Section 3 (b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. In Reaves v. State, 485 So.2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appeal within the four corners of the majority decision.

In the Fifth District Court's opinion in the above-styled case, the Fifth District found that the trial court had erred in assessing victim injury points for sexual contact based on its decision in Reves v. State, 709 So.2d 181 (Fla. 5th DCA 1998). Petitioner argues, in support of this Court accepting jurisdiction in this cause, that the instant decision rendered by the Fifth District is in conflict with the Third District Court of Appeal's decision in Vural v. State, 717 So.2d 65 (Fla. 3rd DCA 1998). Respondent would submit that the Fifth District adequately addresses and distinguishes the factual circumstances present in the instant case from those existing in Vural. Specifically, the Fifth District pointed out in the instant decision

that ". ..neither penetration nor union occurred, so the court incorrectly assessed the victim injury points." Spioch v. State, 24 Fla. L. Weekly D 1896, 1897 (Fla. 5th August 13, 1999). [See Appendix A] Moreover, the charge at issue in Vural, supra, dealt with the attempted sexual battery involving forced fellatio. t , as pointed out by the Respondent upon rehearing, the charge at issue in the case sub judice did not involve sexual battery but, rather, dealt with lewd and lascivious activity involving the foundling of the victim's penis through clothing.

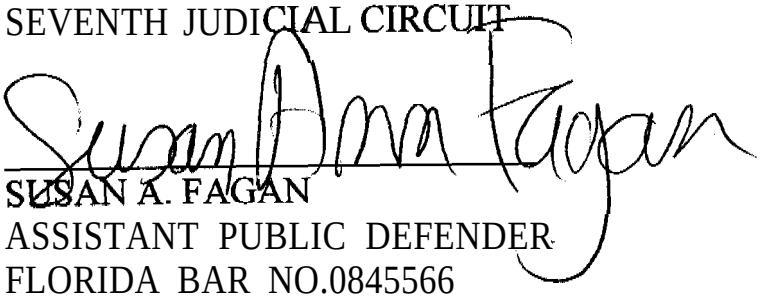
Petitioner has, therefore, failed to establish that the instant decision conflicts, either directly or expressly, with the Third District's decision in Vural. This is further shown by the Third District's own language utilized in Vural, as pointed out in the Respondent's response to Petitioner's motion for rehearing, [See Appendix B]: "...we have considered Reves v. State, 709 So.2d 181 (Fla. 5th DCA 1998) [directly relied on by the Fifth District in instant decision] and do not consider it to affect this decision." [Emphasis added] Vural v. State, supra, at 66. Accordingly, this Court should decline to accept jurisdiction in this cause as there exists no direct or express conflict with the decision of Vural rendered by the Third District.

## CONCLUSION

Based on arguments and authorities presented herein, Respondent would suggest that this Court should decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butter-worth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Thomas H. Spioch, Inmate #969352 (MB 1085) Hamilton Correctional Institution, 10650 SW 46th St., Jasper, FL 32052, this 30 day of November, 1999.

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| STATE OF FLORIDA, | ) | |
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| | ) | |
| Respondent. | ) | |
| | ) | |

**JURISDICTIONAL BRIEF OF PETITIONER**

**APPENDIX**

APPENDIX -A Spioch v. State, 24 Fla. L. Weekly D 1896, 1897 (Fla. 5th August 13, 1999)

APPENDIX -B Respondent's Response to Petitioner's Motion for Rehearing

JAMES B. GIBSON
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**Criminal law--Search and seizure-Trial court properly suppressed cocaine seized from defendant's mouth on ground that what had started as consensual encounter turned into seizure when officer asked defendant to open his mouth at time when defendant would not have felt free to leave**

STATE OF FLORIDA, Appellant, v. DERRICK LAVAR NEWTON, Appellee. 5th District. Case No. 99-34. Oojnion filed August 13. 1999. Appeal from the Circuit Court for Orange County, Margaret T. Waller, Judge. Counsel: Robert A. Butterworth, Attornev General. Tallahassee, and Pamela J. Koller. Assistant Attorney General, Daytona Beach! for Appellant. James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) The state appeals an order entered by the trial court granting Newton's motion to suppress. We affirm.

The arresting officer testified that he walked up to appellee, who was accompanied by two other men, because he knew him and had arrested him before on drug charges, and asked him if he had any dope. When appellee replied in the negative, the officer "asked" him to open his mouth.[1] Newton complied, whereupon the officer spotted what he recognized as crackcocaine, ordered Newton to spit out the contents of his mouth, after which Newton was arrested. There was also testimony by Newton and one of the other men that when the officer approached them, he grabbed Newton by the collar, held his flashlight to Newton's face and ordered him to open his mouth,

The trial judge concluded that, in the totality of the circumstances, what may have started as a consensual encounter turned into a seizure, because Newton would not have felt free to leave. A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the appellate court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State, 357 So.* 2d 410 (Fla. 1978).

Where evidence involved at the suppression hearing supports both a finding of a consensual encounter and a seizure and where the trial judge makes a factual finding that a reasonable person under the circumstances would not feel that he was free to go, the trial court's decision to suppress the evidence will be affirmed. ***See Hollinger v. State,*** 620 So. 2d 1242 (Fla. 1993).

**AFFIRMED. (DAUKSCH and PETERSON, JJ., concur.)**

'The officer testified that appellee had previously been found to carry drugs in his mouth.

* * *

**Criminal law-Sentencing-Prison Releasee Reoffender Act does not violate constitutional principle of separation of powers**

ROOSEVELT RICHARDSON, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 99-179. Opinion filed August 13, 1999. Appeal from the Circuit Court for Volusia County, Shawn L. Briese, Judge. Counsel: James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterwotth, Attorney General, Tallahassee, and Maximillian J. Changus, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Roosevelt Richardson appeals from sentence which was enhanced pursuant to the Prison Releasee Reoffender Act, section 775.082(8)(a), Florida Statutes. He contends that the statute is invalid because it violates the constitutional principle of separation of powers. We affirm. ***See Speed v. State,*** 24 Fla. L. Weekly D1017 (Fla. 5thDCA April 23, 1999).

AFFIRMED. (DAUKSCH and GOSHORN, JJ., concur.)

* * *

**Criminal law-Defendant was erroneously convicted and sentenced for both robbery with a firearm and grand theft of a firearm where both offenses arose from single criminal episode involving a single taking of property from a single victim-Grand theft conviction vacated-On resentencing, if court should impose term of probation which includes special conditions, court should orally pronounce those special conditions**

MORRIS SESSLER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-866. Opinion filed August 13, 1999. Appeal from the Circuit Court for Marion County, Carven D. Angel, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Buttenvotth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

(GOSHORN, J.) Morris Sessler was found guilty of and sentenced for robbery with a firearm' and grand theft of a firearm. [2] On appeal, he argues that he should not have been adjudicated and sentenced for both offenses because they arose from a single criminal episode involving a single taking ofproperty from a single victim. We agree and accordingly reverse the grand theft conviction.

The evidence at trial showed that Sessler, armed with a gun, entered a beverage store, confronted the clerk on duty, and took money from the cash register, the gold chain from around the clerk's neck, and the clerk's Smith & Wesson pistol. The robbery charge was based on the money and the grand theft charge was based on the pistol; no charges were specifically made based on the gold chain. Although the State contends that "the robbery of the money and the theft of the clerk's gun were two separate and distinct acts," it is clear that there was only one robbery under the facts of this case. Hence, Sessler could not have been separately convicted of robbery of the cash and robbery of the gun. ***See, e.g., Ward v. State, 730 So.*** 2d 728, 729-30 (Fla. 1st DCA 1999) (double jeopardy barred separate conviction for armed robbery [of keys, purse, checkbook, and money] and armed carjacking where "there was only one 'forceful taking' " and "[a]ll of the victim's property was taken as a part of the same criminal transaction or episode, without any temporal or geographic break"); ***Fraley v. State,*** 641 So. 2d 128, 129 (Fla. 3d DCA 1994) (vacating one of defendant's two convictions for armed robbery where defendant took money from register and clerk's personal firearm; "Because the two acts of taking 'were part of one comprehensive transaction to confiscate the sole victim's property,' only one of those convictions can stand."). Grand theft and robbery "are merely degree variants of the core offense of theft," ***Sirmons v. State, 634 So.*** 2d 153 (Fla. 1994), and Sessler cannot be convicted of a lesser included offense--theft-based on the taking of the gun where it was part of the robbery for which he has also been convicted. The grand theft conviction is vacated.

As conceded by the State, because of the vacation of the grand theft adjudication the points for firearm possession on Sessler's scoresheet must be removed on resentencing because the only remaining offense is robbery with a firearm-an offense for which firearm points have already been included. See *White v. State, 7* 14 So. 2d 440 (Fla. 1998). Without the points for the grand theft **conviction (1.2)** or the firearm possession (18), Sessler faces a guidelines range of 57.6 to 96 months rather than the 72 to 120 months on the scoresheet used below. On remand, he is to be resentenced using anew scoresheet reflecting this lower range.

Sessler also challenges the imposition of two special conditions of probation that were not orally pronounced. Although this argument was not been preserved for review, ***see, e.g., Klarich v. State,*** 730 So. 2d 4 19 (Fla. 5th DCA 1999), in light of the need for resentencing we note that on remand should the court again impose a term of probation which includes special conditions, it should orally pronounce those special conditions. ***See State v. Williams,*** 712 So. 2d 762 (Fla. 1998); ***Jackson v. State,*** 685 So. 2d 1386 (Fla. 5th DCA 1997).

**REVERSED in par&; REMANDED. (DAUKSCH and COBB,** JJ., concur.)

[1] § 812.13(2)(a), Fla. Stat. (1995).
[2] § 812.014(2)(c), Fla. Stat. (1995).

* * *

**Criminal law--lewd and lascivious assault on a minor--Sententing-Guidelines-Scoresheet-Error to assess victim injury points where defendant fondled victim's penis through victim's clothing, and there was no physical trauma-No error in sentencing defendant to time served for two of twenty-three convictions where defendant's cumulative sentence was 315 years, which is regarded as a life sentence-Error to fail to include in scoresheet counts for which adjudication was withheld**

THOMAS HENRY SPIOCH, III, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2616. Opinion filed August 13, 1999. Appeal from the Circuit Court for Brevard County, Charles M. Holcomb, Judge. Counsel: James

B. Gibson, Public Defender. and Susan A. Fagan. Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Thomas Henry Spioch, III, appeals his sentence, contending that the court erred in imposing victim injury points. The state cross-appeals the sentence of time served for two of the twenty-three convictions for lewd and lascivious assault on a minor. We reverse the sentence because the court erred in assessing victim injury points.

First, we do not agree with Spioch that his sentences are controlled by *Karchesky* v. *State*, 591 So. 2d 930 (Fla. 1992), which precluded the imposition of victim injury points in the absence of physical trauma. The testimony of both the victim and Spioch himself (who contended that the victim was the aggressor) established that the series of crimes began after the effective date of section921.01 1(8), Florida Statutes (Supp. 1992), which abrogated *Karchesky*, and which provided for the assessment of victim injury points in cases involving penetration or sexual "contact." See *also*, § 921.001(7), Fla. Stat. (1993).

Spioch further contends that the acts to which the victim testified. Spioch's fondling of the victim's penis through the victim's clothing, do not qualify for victim injury points. We conclude that Spioch has adequately preserved this issue. See *Pinacle* v. *State*, *654* So. 2d 908 (Fla. 1995). In *Reyes* v. *State*, 709 So. 2d 181 (Fla. 5th DCA 1998). the trial court assessed 18 points for victim injury, or sexual contact, based on the defendant's having fondled the female victim's breast during the commission of the attempted sexual battery. This court reversed the sentence holding that "contact" meant the union of the sexual organ of one person with the oral, anal or vaginal opening ofanother. Thus, this court held, in the absence ofphysical trauma, victim injury points are appropriately assessed only in cases involving sexual battery, either by penetration or union. *Cf. Vural v. State*, 717 So. 2d 65 ( 3d DCA 1998), rev. *denied*, 733 So. 2d 591 (Fla. 1999). In the instant case, neither penetration nor union occurred, so me court incorrectly assessed the victim injury points.

We do not agree with the state that the court erred in sentencing Spioch to time served for two of the twenty-three convictions. The permitted guidelines sentence was 27 years to life, and Spioch's cumulative sentence was 315 years, which is regarded as a life sentence, *see Alvarez v. State*, 358 So. 2d 10 (Fla. 1978). We do agree, however, that counts for which adjudication is withheld should be included in the scoresheet. Rule 3.701 Florida Rules of Criminal Procedure defines a conviction as "a determination of guilt resulting frompleaortrial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended." Onremand, in re-calculating Spioch's sentence, the trial court will include counts 22 and 23 on the scoresheet.

REVERSED and REMANDED (SHARP, W. and PETERSON, JJ., concur.)

* * *

**Criminal law-Juveniles-Search and seizure---Where school resource officer, a deputy sheriff, was advised by a student that defendant was showing a bag of marijuana, resource officer passed information on to assistant principal, and defendant was called to office of assistant principal and searched, resource officer's involvement was minimal, and appropriate standard for search was reasonable suspicion rather than probable cause-Fellow student's accusation sufficient to raise reasonable suspicion and to justify search**

R. L., A Child, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-3420. Opinion filed August 13, 1999. Appeal from the Circuit Court for Volusia County, Stephen A. Boyles and Julianne Piggotte, Judges. Counsel: James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General. Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) R. L., ahighschool student, was called into the office of the assistant principal and searched. The marijuana thus discovered was the basis of this proceeding and the subject of the motion to suppress denied by the trial court and appealed to this court. We affirm.

The school resource officer, a deputy sheriff, was approached by a student who advised him that appellant was showing a bag of marijuana and trying to get rid of it. The resource officer passed this informationon to the assistant principal minutes later when he saw the official in the hallway. This was the "reasonable suspicion" relied on to justify the official's search of the student.

R. L. urges that since the deputy sheriff was involved in the incident, the standard for the search should be probable cause. We find the deputy's involvement to be minimal and that reasonable suspicion was the appropriate standard. *See K. K. v. State*, *7* 17 So. 2d 629 (Fla. 5th DCA 1998). Further, since a fellow student made the accusation in person, we find such allegation sufficient to raise reasonable suspicion and justified the search. The fact that the allegation was first made to the resource officer who passed the information on to the school official does not, in our view, require a finding that the official "acted at the behest of law enforcement." The school official took actiononthe allegation of a student passing on information that could be reasonably assumed to be within that student's personal knowledge and acted appropriately.

AFFIRMED. (ANTOON. C. J., and PETERSON, J., concur.)

* * *

**Criminal law-Prisoners-Probation revocation-Where, upon revocation of probationary term of split sentence, sentence imposed was less than original incarcerative term, Department of Corrections had authority to impose forfeiture of gain time so as to require defendant to serve portion of his original prison term which was not actually served**

EDDIE CUNNINGHAM, Petitioner, v. STATE OF FLORIDA, et al., Respondents. 5th District. Case No. 98-3301. Opinion filed August 13. 1999. Petition for Certiorari Review of Order from the 'Circuit Court for Lake County, Jerry T. Lockett, Judge. Counsel: Eddie Cunningham, Clermont, *pro* sc. Susan A. Maher, Deputy General Counsel, Department of Corrections, Tallahassee, for Respondent Department of Corrections. No Appearance for Respondent State of Florida.

(SHARP, W., J.) In this case, we elect to treat Cunningham's appeal from the circuit court's denial of his mandamus proceeding to review administrative action as a petition for certiorari. See *Sheley v. Florida Parole Commission*, 720 So.2d 216 (Fla. 1998). The issue before us is the propriety of the Department of Correction's election to impose a forfeiture penalty of 547 days in order to effect a complete forfeiture of gain time pursuant to section 944.28(1), Florida Statutes (1997).

After revocation of the probationary portion of a split sentence, the trial court on September 25, 1997, sentenced Cunningham to ten and one-halfyears incarceration. The Court provided credit of 800 days for time spent in the county jail after Cunningham's arrest for violation of probation. It also ordered the Department to apply the original jail credit awarded and to compute and apply credit for the time previously served in prison.

The Department subsequently added 547 days as a forfeiture penalty to forfeit all gain time Cunningham had previously accumulated during the incarcerative portion of his split sentence. The original split sentence was twelve years incarceration followed by five years probation. Since the ten and one-half year sentence imposed after revocation of probation was less than the original twelve-yearincarcerative term, DOC added the forfeiture penalty of 547 days so that all gain time could be forfeited pursuant to section 944.28(1), Florida Statutes (1997).

We have recently held that the Department has the authority to apply this forfeiture penalty in these circumstances to require a defendant to serve the portion of his original prison term which was not actually served. *See Singletary v. Whittaker*, 1999 WL 5 18728 (Fla. 5th DCA July 23, 1999).

Petition for Writ of Certiorari DENIED. (GOSHORN and THOMPSON, JJ., concur.)

* * *

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

| | | |
|---|---|---|
| THOMAS SPIOCH, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | DCA CASE NO. 97-2616 |
| vs. | ) | |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |

RESPONSE TO APPELLEE'S MOTION FOR REHEARING

COMES NOW the Appellant, by and through his undersigned attorney, in response to Appellee's Motion for Rehearing, and states as follows:

1. On August 13, 1999, this Court filed its opinion reversing the Appellant's sentences. Appellee has filed a Motion for Rehearing rearguing points made in the answer brief of Appellee. In Snell v. State, 522 So.2d 407 (Fla. 5th DCA 1988), this Court held that motions for rehearing should be filed only under limited circumstances and were not meant to serve as a vehicle for rearguing the issues. See Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). In Lawvers v. Title Ins. Corp. v. Reitzes, 631 So.2d 1100 (Fla. 4" DCA 1993), the Court said that it was not the purpose of Rule 9.330 to use the motion for rehearing as a last resort to persuade the court to change its mind.

2. Specifically, Appellee reargues the decision of Reyes v. State, 709 So.2d 181 (Fla. 5th DCA 1998), which has been fully argued in this appeal and appropriately applied in the

instant decision.

3. Appellee also maintains that the instant decision ". . .appears to conflict with the holding of its sister court in Vural v. State, 717 So.2d 65 (Fla. 3rd DCA 1998), rev. denied, 733 So.2d 591 (Fla. 1999)" Appellant disagrees since that case dealt with attempted forced fellatio. As clearly stated by the Third District in Vural; "[W]e have considered Reyes v. State, 709 So.2d 181 (Fla. 5th DCA 1998), and do not consider it to affect this decision." Vural. supra, at 67.

4. In sum, Appellant submits that because this Court's instant decision is in conformity with its decision in Reyes and does not conflict with the Third District's decision in Vural, Appellee's motion for rehearing should be denied by this Court.

WHEREFORE, since Appellee's Motion for Rehearing, merely reargues the issues in a final attempt to persuade this Court to change its mind, the Motion should be denied.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A Fagan

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COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Thomas Spioch, #457863, Hardee Correctional Institution, 6901 State Rd. 62, Bowling Green, FL 33834, this 7th day of September, 1999.

Susan A. Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER