IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 1999-26

STATE OF FLORIDA,

Petitioner,

versus,

KAREN FINELLI,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, and modeled after Rule 28-2(d), United States Rules of Appellate Procedure for the Eleventh Circuit, counsel for the Respondent hereby certifies that the instant brief has been prepared with 14 point Times Roman font, a font that is spaced proportionately.

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SUMMARY OF THE ARGUMENT

The definition of "conviction" under State v. Snyder, is not applicable to felony DUI cases. Though the legislature intended to protect the public from dangerous instrumentalities, the DUI statute (3 16.193) protects the public by punishing, with imprisonment, those defendants who commit driving under the influence while a prior third "conviction" is pending appeal. The felony implications of a fourth DUI charge is therefore, merely, a sentencing enhancement and the definition used in Snyder is not applicable.

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ARGUMENT

I. FOR PURPOSES OF DRIVING UNDER THE INFLUENCE **(DUI),** "'CONVICTION," WHEN USED TO ESTABLISH BASIS FOR FILING UNDER FELONY STATUTE, IS NOT DEFINED IDENTICALLY WITH THE DEFINITION ILLUSTRATED IN STATE **V. SNYDER,** 673 **SO. 2D** 9 (FLA. 1996).

Because this is a case of first impression before this court, it is necessary to delineate the distinguishing elements of State v. Snyder to conclude that "conviction" under the felony driving under the influence is **not** the same as under § 790.23, possession of a firearm by a convicted felon. Once State v. Snyder is clearly distinguished, it is unnecessary for this Court to determine what the applicable definition of "conviction" would be under this circumstance as the Fourth District Court has already held that a pending appeal **does not** constitute a "conviction" under § 3 16.193. State v. Finelli, 744 So. 2d 1053 (Fla. 4th DCA 1999).

Even though the certified question illustrates that prior convictions are "elements" of the offense of felony driving under the influence and that the legislature intended to protect the public from dangerous instrumentalities, the nature of the charge itself distinguishes Snyder from the instant case. Snyder, **specifically** addressed Florida Statute § 790.23, possession of a firearm by a convicted felon. The critical difference in Snyder and the instant case is that

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possession of a firearm by a convicted felon can **only** be charged where a convicted felon possesses a firearm. Essentially, there is no "lesser charge" under § **790.23.**

For clarification, there is no misdemeanor charge of mere possession of a firearm with an **enhancement into felony jurisdiction** when the defendant is a convicted felon. Florida Statute § 3 16.193 **does** have this enhancement. A DUI is a misdemeanor. If the defendant has three prior "convictions" of driving under the influence then the charge is enhanced placing the defendant into the jurisdiction of the Circuit Court. Although it has been held that prior convictions are an element of the offense [State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991)] the prior convictions do no more, in reality, than enhance the potential penalties. In Snyder, and under F.S. § 790.23, to arrive at **any** penalty whatsoever, the State must prove that the defendant was a "convicted" felon.

In this manner, the legislative intent of protecting the public is preserved. That is, under **F.S.** § 790.23 if a "conviction" is not effective unless an appellate court affirms the adjudication of the trial court then there can be **no** present punishment for the offense because the requisite element of "conviction" can not be met. This endangers the public by placing the defendant back into society without **any** legal repercussion. On the contrary, Florida Statute § 3 16.193 does

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not place the same burden upon the necessity for a "conviction". If a "conviction" is on appeal, then the defendant is **not free** from punishment for driving under the influence. The effect is merely to keep the jurisdiction of the **Circuit Court** from being invoked. The defendant **will** still be punished for driving under the influence, restrictions to protect the public are employed and the legislative intent of "public protection" will be maintained.

Even to adopt the Petitioner's position, the definition of "conviction" under Snyder is appropriate where there is **no other** "protection" afforded the public where an appeal is pending, thus such a construction of F.S. § 3 16.193 would be inappropriate in the '"public protection" argument made by Petitioner. The Fourth District Court of Appeal noted in State v. Villafane, 444 So. 2d 7 1, 72-73, (Fla. 4th DCA 1984) (involving a violation of § 847.0 11 where the defendant had been previously "convicted" of a violation of the same statute raising the charge to a third degree felony), quoting, Coleman v. State, 281 So. 2d 226 (Fla. 2d DCA 1973);

> While enhancement of a **charge** is technically different from enhancement of **punishment,** the similarity is sufficient to justify analogizing from one to the other. In both situations an Information is filed setting forth the defendant's prior conviction or convictions as the basis for the enhancement; and the practical effect on the defendant is the same- **more severe punishment.** It seems logical that if a conviction is not final for enhancement of **punishment so** long as

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> appeal of a pertinent prior conviction is pending, the same rule should apply for enhancement of the **offense** charged. [emphasis added].

There is no difference in the situation presented in the instant case. The prior convictions effectively enhance the offense, and therefore the punishment. There is no reason to deviate from the holding of the District Court of Appeal to torturously re-define "conviction" so that it may be wedged in the definition under Snyder.

Even so, under Snyder, should this Court choose to adopt the definition of "conviction" explained in Snyder, the application to the instant case would be impermissible as it is indistinguishably identical to an ex **post facto** law, or as an "unforseeable judicial enlargement of a criminal statute." 673 So. 2d 9, 11 (Fla. 1996), see also, Bouie v. City of Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed. 2d 894 (1964).

CONCLUSION

WHEREFORE, based on the foregoing argument and authorities cited herein, the Respondent respectfully requests this Honorable Court AFFIRM the findings of the Fourth District Court of Appeal and **not** define "conviction" consistent with State v. Snyder.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by U.S. Mail to: Heidi Bettendorf, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, this 27th day of January, 2000.

Respectfully submitted,

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