SUPREME COURT OF FLORIDA

CASE NO. 70,145

RIGOBERTO CASO,

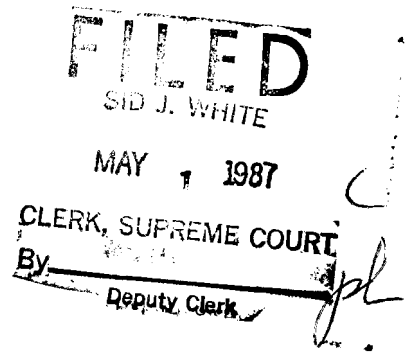
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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



BRIEF OF PETITIONER ON THE MERITS
(With Separate Appendix)

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BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

The Petitioner, Rigoberto Caso was the defendant below. The Respondent is the State of Florida. The parties shall be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

1. Proceedings and Disposition Below

On August 1, 1984 an indictment was filed charging the Petitioner, Rigoberto Caso, with two counts of first degree murder and one count of burglary. (R.1-2).[1/] Trial by jury commenced on March 4, 1985, before Judge Margarita Esquiroz, Dade County Circuit Court. (TR.1-466). The jury found the Petitioner

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[1/] The record on appeal consists of seven volumes: one volume of exhibits and court documents and six volumes of trial and sentencing proceedings. For purposes of this petition, the volume of exhibits and pleadings shall be designated "R" and reference to the trial volumes shall be signified by the letters "TR".

guilty of two counts of second degree murder (R.110-111) and one count of burglary of a structure. (R.112). The Petitioner was sentenced to two concurrent terms of life imprisonment. (R.172-174). Judgment was entered on May 30, 1985. (R.170).

In a brief filed in the Third District Court of Appeal on July 9, 1986, the Petitioner sought a new trial due to the trial court's error in admitting his confession into evidence. On December 30, 1986, the Third District affirmed the Petitioner's conviction based upon its obligation to follow Alvord v. State, 322 So.2d 533 (Fla. 1975). On January 14, 1987, the Petitioner moved for rehearing requesting that the Third District certify to this Court the question of the admissibility of his confession. On February 18, 1987, the panel of the Third District Court of Appeal certified the following to this Court as a question having a great effect on the proper administration of justice:

> **WHETHER THE DECISION IN ALVORD v. STATE, 322 So.2d 533 (Fla. 1975), HOLDING ADMISSIBLE IN THE STATE'S CASE-IN-CHIEF THE DEFENDANT'S CONFESSION OBTAINED IN A POST-MIRANDA CUSTODIAL INTERROGATION AND IN THE ABSENCE OF ADVICE REGARDING THE DEFENDANT'S RIGHT TO APPOINTED COUNSEL IF HE COULD NOT AFFORD AN ATTORNEY, SHOULD BE REEXAMINED IN LIGHT OF OREGON v. ELSTAD, 470 U.S. 298 (1985).**

2. Facts

On May 12, 1983, Norma J. Montecino and Luis Murgado were killed at a residence located at 102 West 7th Street, Apartment 9, Hialeah, Florida. There were no eyewitnesses. (TR.157,159).

The medical examiner determined that the death of Norma Montecino was due to blows to the head from an object consistent

with the butt of a rifle. (TR.176). Montecino also received gunshot wounds. (TR.118). The cause of death of Luis Murgado was multiple gunshot wounds. (TR.187).

The crime scene investigation revealed some evidence consistent with a burglary of the victims' residence. (TR.169). The investigators also discovered a triple beam scale in a closet of the apartment. (TR.244).

On or about July 7, 1983, the Hialeah Police Department received information from at least one confidential informant that the Petitioner, as the "wheelman", had participated in the crime with two other individuals. (R.13; TR.122,230,232). The investigating officers were aware from their sources that the Petitioner had participated in the crime only insofar as a robbery was concerned. (TR.232). They had learned that he was unaware that the other individuals involved intended to commit murder. (TR.232).

Based upon this information, two detectives of the Hialeah Police Department went to the Petitioner's place of employment in October of 1983. (TR.212,267). The two detectives displayed law enforcement identification and requested that the Petitioner accompany them to the police station. (TR.213-214). When the Petitioner was first approached by the detectives, he was not placed under arrest. The Petitioner was not informed or promised that he would not be arrested. (TR.256). The officers did not display weapons and the Petitioner was not handcuffed. (TR.215). Both detectives testified at the Petitioner's trial that it was their belief when they went to Petitioner's place of

employment, that they did not possess the requisite probable cause to arrest him. (TR.256,267). The Petitioner was asked by the detectives to "voluntarily" accompany them because they wanted to question him. (TR.214). The Petitioner asked the officers how he would return to work. One of the detectives informed Petitioner that he would take him back. (TR.256).

After arriving at the police station, the Petitioner was taken to an interrogation room. (TR.221). There, the interrogating officers confronted him with the information that they had gathered that implicated him in the crime. (TR.215). The detectives testified that no force was used nor were threats or promises made to the Petitioner, other than the assurance that the Petitioner's cooperation in the investigation would be revealed to the Court. (TR.229).

The Petitioner was presented with an advice of rights form. (R.46; TR.227-229) (See Exhibit 1 for reproduction of form). The form did not advise the Petitioner that he had a right to appointed counsel at the state's expense if he could not afford an attorney. (R.46; TR.227-229). The Petitioner did not request an attorney. The interrogation of him proceeded. (TR.230). One tactic used to elicit the Petitioner's confession was to confront him with the confidential information that the detectives had received four months earlier. (TR.230). To this end, the Petitioner was advised that they knew that he had only intended to participate as the "wheelman" in a robbery and that the Petitioner had been unaware that his two accomplices planned to commit the homicides. (TR.230). The detectives persuaded the

Petitioner that it would be in his best interest to divulge the identity of his two accomplices since they were the ones who did intend to commit the homicides. (TR.230,232).

Initially, the Petitioner was reluctant to confess. (TR.258). Eventually, however, he agreed to verify the information that the detectives already had, such as the identity of the two killers. (TR.231-232). The Petitioner admitted that he drove the "getaway" car to the scene but that he only intended to participate in a "drug ripoff". (TR.269). Subsequently, the Petitioner gave a statement in which he told his interviewers that the two killers had exited the car wearing gloves and armed with at least one machine gun. (TR.233). He heard shots and realized that something had gone awry. The two killers ran from the apartment and all three men hastily left the scene with the Petitioner driving the car. (TR.233). At some point during the escape, the Petitioner was relieved as the driver of the "getaway" car and returned to his home. (TR.233). The Petitioner was unaware of the whereabouts of the other two accomplices after this point. (TR.233).

The interrogation of the Petitioner, in which the preceding confession was obtained, lasted approximately one hour to an hour and a half. (TR.257,309). At the conclusion of the interrogation, the Petitioner was driven back to his place of employment. (TR.245). The interrogating detectives proceeded to the State Attorney's Office, where they related the information that they had just obtained from the Petitioner to the Assistant State Attorney in charge of the investigation. (TR.272). The

detectives hoped that the new information would enable them to obtain an arrest warrant for the Petitioner's arrest. This was the reason that they immediately consulted with the State Attorney's Office after receiving the Petitioner's confession. (TR.272). A warrant for the Petitioner's arrest issued. (TR.272).

3. The Trial

The Petitioner testified at trial. He denied having given a statement to the detectives. (TR.317). He also testified that one of his interrogators threatened to strike him. (TR.322). Further, the Petitioner testified that he was given the advice of rights only as he departed from the police station. (TR.321-22). He signed the form readily because he had not confessed and thus had nothing to hide. (TR.321).

Counsel for the Petitioner objected at trial to the testimony of the detectives that revealed the confession. The objection was based upon the inadequacy of the advice of rights form which, counsel argued, failed to fully inform the Petitioner of his rights. (R.46; TR.222-223). Specifically, counsel brought to the trial court's attention the omission in the form of the right to have an attorney appointed for the Petitioner at the state's expense. (R.46; TR.22-224, 227-229).

The trial court described the warning form as "poor" and found that it "could be better". (TR.223-224). Further, the court found that the warnings were required but that it "probably" was sufficient that the Petitioner was advised of his

"right to remain silent, et. cetera".[2/] (TR.224). Although the court noted that the advice of rights form should have included the notice of one's right to a lawyer at the state's expense, the judge nonetheless ruled that the Petitioner's confession was voluntary and made with full knowledge of his rights. (TR.224).

Once the trial court ruled that the Petitioner's confession was admissible, the detective was allowed to testify concerning its substance. (TR.226). First, however, the officer translated the advice of rights form. (TR.226-229). It was his testimony that the title "Correct Copy" on the form signified that this form was the correct one, as distinguished from the prior form used by the police department, which had been deemed to be deficient. (TR.227). The advice of rights, which the detective testified that he gave to the Petitioner, were as follows: the right to remain silent; that anything the Petitioner said could be used against him; the right to an attorney prior to questioning or during the interrogation; the right to terminate the questioning altogether or to stop answering and to consult with an attorney at anytime during the interrogation. (TR.227-229). The detective then testified concerning the Petitioner's incriminating statement, the substance of which has been detailed in part 2. of this Statement of the Case and Facts. See p.5, supra.

[2/] The panel opinion of the Third District Court of Appeal that affirmed Petitioner's conviction, noted in footnote 1 that the trial court's finding that the Petitioner was in custody was supported by substantial competent evidence. See Appendix.

POINT ON APPEAL

WHETHER THE DECISION IN ALVORD v. STATE, 322 So.2d 533 (Fla. 1975), HOLDING ADMISSIBLE IN THE STATE'S CASE-IN-CHIEF THE DEFENDANT'S CONFESSION OBTAINED IN A POST-MIRANDA CUSTODIAL INTERROGATION AND IN THE ABSENCE OF ADVICE REGARDING THE DEFENDANT'S RIGHT TO APPOINTED COUNSEL IF HE COULD NOT AFFORD AN ATTORNEY, SHOULD BE REEXAMINED IN LIGHT OF OREGON v. ELSTAD, 470 U.S. 298 (1985).

SUMMARY OF THE ARGUMENT

The Petitioner's custodial confession, which was obtained in 1983, nearly seventeen years after the landmark Supreme Court decision in Miranda v. Arizona, did not comport with the requirements established by the Miranda opinion.[3/] Neither the advice of rights form nor the interrogators informed the Petitioner that he had a right to an attorney provided at the state's expense if he could not afford one by his own means. In the absence of this warning, the Petitioner's confession was unlawfully obtained according to the United States Supreme Court in Miranda. The Florida Supreme Court opinion in Alvord v. State[4/] misperceived the effect of Michigan v. Tucker[5/] in holding that a trial court could comport with federal constitutional standards in admitting a confession obtained in the absence of the warning of the right to appointed counsel. In light of the recent United

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3/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

4/ Alvord v. State, 322 So.2d 533 (Fla. 1975).

5/ Michigan v. Tucker, 417 U.S. 433, 945 S.Ct. 2357, 41 L.Ed. 2d 182 (1974).

States Supreme Court opinion in Oregon v. Elstad[6/], the Alvord decision bears reexamination. It is clear from both Tucker and Elstad that a defendant's confession is inadmissible under the circumstances present in Alvord and in the case at bar. Since the Petitioner's confession was the only evidence implicating him in this crime, its admission was not harmless but rather reversible error.

ARGUMENT

THE PETITIONER'S CONFESSION WAS OBTAINED IN VIOLATION OF THE DICTATES OF MIRANDA v. ARIZONA AND THEREFORE, THE TRIAL COURT ERRED IN ADMITTING THE CONFESSION INTO EVIDENCE IN THE STATE'S CASE IN CHIEF.

It is evident from the record below, both from the testimony of the interrogating officers and the advice of rights form, that at no time was the Petitioner advised that he had the right to appointed counsel if he could not afford an attorney at his own expense. (R.46; TR.227-229). The Petitioner's objection, based upon the omission of the right to an appointed attorney, was amply raised and thus had been properly preserved. (TR.222-225).

The starting point for the instant petition is the landmark United States Supreme Court decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 41 L.Ed. 2d 182 (1966). In establishing the now familiar warning, the Court observed the

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6/ Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 222 (1985).

following with regard to the right of the accused to appointed counsel:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he had one or had the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent -- the person most often subjected to interrogation -- the knowledge that he too has a right to have counsel present. As with the warning of the right to remain silent, and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. Id. at 473, 1627.

There can be no question that each of the four warnings are required prior to the interrogation of the defendant. Id. at 444, 478; 1612, 1630. Moreover, that the warnings are "prerequisites to the admissibility of any statement made by the defendant" is equally evident from Miranda. Id. at 476; 1629.

From the advent of the Miranda decision until this Court's opinion in Alvord v. State, 322 So.2d 533 (Fla. 1975) the case law of this State was uniform in requiring the suppression of a defendant's confession where that confession was obtained during a custodial interrogation in the absence of specific notice of the right to appointed counsel. See, e.g., Woods v. State, 211 So.2d 248 (3d DCA 1968); Abram v. State, 216 So.2d 498 (1st DCA 1968); James v. State, 223 So.2d 52 (4th DCA 1969).

Moreover, the former Fifth Circuit and the Eleventh Circuit maintain the requirement that a confession obtained under the circumstances revealed by the record below must be suppressed. See United States v. Espinoza-Orlando, 704 F.2d 507, 514 (11th Cir. 1983); United States v. Stewart, 576 F.2d 50 (5th Cir. 1978).

Perhaps the most comprehensive discussion of the state of the law of the Miranda requirements in general and the effect of the specific omission that arose in the case at bar can be found in the Stewart opinion. 576 F.2d 50. In that case, the Court cited numerous precedents from 1967 to 1977 from that circuit that firmly established the inadmissibility of a confession where the interrogators failed to advise the accused of his right to an appointed attorney. Id. at 54. In Stewart, the trial court had found that the defendant voluntarily and intelligently waived his right to have retained or appointed counsel. Id. at 55. (Emphasis in original). The Fifth Circuit ruled that the trial court erred because absent any indication that the appellant was advised of these rights he "could not have waived rights he knew nothing about". Id. The Stewart opinion has been recently approved of and relied upon by the Eleventh Circuit in Espinoza-Orlando. 704 F.2d 507.

This Court's opinion in Alvord v. State, 322 So.2d at 533, (Fla. 1975) signified a marked departure from the established state and federal precedent cited above in which it had been consistently ruled that a defendant's confession without the full Miranda warnings was inadmissible in the state's case-in-chief. In Alvord, this Court was presented with a Miranda violation

identical to that at bar, the failure of the interrogating officers to advise the defendant of his right to have counsel appointed if he was indigent. Id. at 537. Rejecting Alvord's claim that this deficiency mandated the exclusion of his confession, the Alvord Court held that the trial court's ruling admitting the confession comported with United States and Florida constitutional standards "pertaining to the admissibility of custodial statements by defendant." Id. at 538. To reach this conclusion, the Alvord Court relied upon the United States Supreme Court decision in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed. 2d 182 (1974). The reliance upon Tucker in this instance was unwarranted and does not support the conclusion reached by the Court.

The issue before the United States Supreme Court in Tucker was whether the testimony of a witness, whose identity was learned from the defendant's confession, must be excluded because the police failed to advise the defendant that counsel would be appointed if he was indigent.[7/] Id. at 433; 2359. Thus, Tucker concerned only whether a witness's testimony, the fruit of the poisonous tree of the unwarned confession, was admissible. In deciding this question, the Court found no precedent to control

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7/ At the outset of the Tucker opinion, Chief Justice Rehnquist framed the issue before the Court as follows: "This case presents the question whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent." 417 U.S. at 435; 94 S.Ct. at 2359.

its inquiry. For, although Miranda required suppression of the suspect's statement and Wong Sun v. United States, 371 U.S. 471, 835 S.Ct. 407, 9 L.Ed. 2d 441 (1963), required suppression of the fruits of a Fourth Amendment violation, the Court had yet to be confronted with the admissibility of the "fruits" of a Miranda violation. Id. at 445-446; 2364. Absent any controlling precedent, the Tucker Court examined the matter as a "question of principle". Id. at 146; 2365.

The two principles that governed the Court in Tucker were the deterrent effect on police conduct and protection of the courts from untrustworthy evidence. Id. at 446-449; 2365-2366. It is from the Court's analysis of the former, the deterrent value in suppressing the witness's testimony, that the Alvord opinion drew support. See Alvord, 322 So.2d at 537-538. However, analysis of Chief Justice Rehnquist's decision in Tucker reveals it to be inapposite to the situation that was present in both Alvord and the instant case. It is clear that Chief Justice Rehnquist was considering only the additional deterrent effect of excluding the testimony of a witness whose identity had been learned from the confession. Id. 448; 2365-66. The Tucker Court's discussion of this additional deterrent of suppressing the fruit of the Miranda violation provides no support for admitting the confession itself.

Thus, it is evident from the issue before the United States Supreme Court and its reasoning as discussed above, that the Tucker Court did not confront the question before this Court in Alvord and at bar, the admissibility of a suspect's confession

in the absence of the full Miranda warning. Moreover, it is clear that the Tucker opinion is premised on the fact that the suspect's own statements were in fact suppressed. See also United States v. Stewart, 576 F.2d 50, 54 (5th Cir. 1978) (Tucker holding premised on fact that defendant's own statement was excluded). As Justice Rehnquist emphasized: "More important, the respondent did not accuse himself. The evidence sought to be introduced was not a confession of guilt by the respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures." Id. at 449; 2366 (Emphasis in the original). Four other references can be found in the majority opinion in which the Court emphasized that the defendant's statement had been excluded and thus was not issue. Id. at 445, 447-448, 452; 2364, 2365, 2367, 2368.

The Petitioner's position that this Court's reliance upon Tucker in Alvord bears re-examination is supported by the recent United States Supreme Court decision in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985). The Elstad opinion as a whole can be viewed as restricting the scope of Miranda. However, in an overview of the Miranda exclusionary rule, Justice O'Connor reaffirmed the Miranda mandate insofar as it requires the exclusion of a defendant's statement from the prosecution's case. Id. at 307; 1292. In her exposition, Justice O'Connor took the opportunity to discuss the rule of law that was established in Tucker. See Elstad, 470 U.S. at 305-310; 105 S.Ct. at 1291-1293. Justice O'Connor elucidated in Elstad

that the issue before the Tucker Court was only whether the Wong Sun "fruits" doctrine would be applied to a Miranda violation. Id. at 308; 1293. There is no doubt from Justice O'Connor's exposition in Elstad that the unwarned confession itself, as opposed to the fruits of the confession, must be suppressed. "The unwarned confession [in Tucker] must, of course, be suppressed, but the [Tucker] Court ruled that introduction of the third-party witness' testimony did not violate Tucker's Fifth Amendment rights." Id. Thus, it is evident from this recent United States Supreme Court decision concerning the continued vitality of Miranda, that this Court's earlier interpretation that Tucker sanctioned the admissibility of a custodial confession in the absence of notice of the right to appointed counsel, was a misinterpretation of the effect of the Tucker decision.

That the Tucker holding has been read as limited only to the issue of the admissibility of the witness's testimony and is not so expansive as to allow into evidence the defendant's own statement, is amply explicated in Judge Brown's opinion in United States v. Stewart:

> In Michigan v. Tucker, 1974, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182, the testimony of a third party identified in defendant's exculpatory statement without a warning of his right to appointment of counsel if he was indigent was held admissible when the interrogation took place prior to, but the trial occurred after, the Miranda decision. Despite this dilution, we know of no case in which the Supreme Court has sanctioned the admissibility of a defendant's in-custody confession during the government's case-in-chief in the absence of full warning or a showing of effective waiver. Indeed, the Court in Tucker,

> supra, premised the holding in part on the fact - reemphasized several times-- that the defendant's own statements had been properly excluded from evidence. 417 U.S. at 448, 449, 450, 451, 94 S.Ct. 2357.

United States v. Stewart, 576 F.2d 50, 54 (5th Cir. 1978). (Emphasis added).

Apart from the distinction between Tucker and cases in which the defendant's own confession is sought to be introduced, a second important distinguishing factor renders Tucker inapplicable to the instant case. Significantly, the United States Supreme Court in Tucker limited the effect of its holding to pre-Miranda interrogations. 417 U.S. at 447-448; 94 S.Ct. 2365-2366. Despite the arguments advanced by the United States as amicus curiae, the court in Tucker specifically declined to hold that irrespective of when the interrogation occurred, a witness's testimony is admissible where the police learn of the witness's identity from the defendant's statement taken in violation of Miranda. On this latter point, the Eleventh Circuit in the habeas appeal in Alvord v. Wainwright, 731 F.2d 1486, 1487, n.22a, (11th Cir. 1984) specifically ruled that Tucker was not binding on Alvord's Miranda claim, since the alleged Miranda violation occurred after the Miranda decision.[8/] See also,

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8/ The subsequent case history of Alvord is significant. In the initial appeal of the United States District Court's denial of habeas corpus relief, the Eleventh Circuit agreed with this Court's interpretation of Tucker and found it to govern the issue in Alvord. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984), cert. denied, 469 U.S. 956 (1984). On rehearing, however, the panel expressly retracted that portion of the prior opinion in which it had concurred with this Court's Tucker analysis and instead substituted an entirely

United States v. Downing, 665 F.2d 404, 407 (1st Cir. 1981) (Tucker not controlling in post-Miranda interrogations).

Thus this Court's reliance upon Tucker in the Alvord opinion was misplaced for two reasons. First, Alvord concerned the admissibility of the defendant's confession, not the testimony of a witness whose identity was derived from the defendant's statement. Second, Alvord concerned a post-Miranda confession, whereas Tucker is limited to unwarned confessions that were obtained prior to the Miranda decision.

CONCLUSION

In summary, the circumstances under which the Petitioner's confession was obtained rendered the confession inadmissible as evidence in the state's case-in-chief. The absence of notice to the Petitioner that an attorney would be provided for him if he could not afford to obtain his own counsel constituted a Miranda violation. Despite Michigan v. Tucker's holding with regard to "fruits" of Miranda violations, the unwarned confession is nonetheless inadmissible. Because the confession was the only evidence against Petitioner, its admission cannot be deemed harmless, but rather constituted reversible error.

Based upon the preceding analysis and authority, it is respectfully requested that the opinion of the Third District Court of Appeal that affirmed Petitioner's conviction be quashed

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new three page per curiam opinion in which it found it unnecessary to address Tucker's applicability to Alvord because of the lack of evidence that the defendant did not receive the full panoply of warnings. 731 F.2d 1486, 1487.

and that this cause be remanded with directions that the Petitioner's conviction be reversed.

Respectfully submitted,

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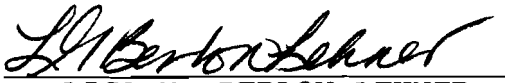
By: 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits with Separate Appendix was mailed this 29th day of April, 1987, to: Assistant Attorney General, Julie S. Thornton, Office of the Attorney General for the State of Florida, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.


LISA M. BERLOW-LEHNER