IN THE
SUPREME COURT OF FLORIDA

DEPARTMENT OF PROFESSIONAL REGULATION,

Petitioner,

vs.

CASE NO. 71,854

PEDRO F. BERNAL, M.D.,

Respondent.
_____/

On Review of a Petition to Invoke
the Discretionary Jurisdiction
of the Florida Supreme Court
to Review
a Decision of the Third District Court of Appeal
Upon Certification of Conflict

PETITIONER'S BRIEF ON THE MERITS

LISA S. NELSON
Appellate Attorney
MIKE COHEN
Trial Attorney
WILLIAM O'NEIL
General Counsel
DEPARTMENT OF PROFESSIONAL
REGULATION
130 North Monroe Street
Tallahassee, Florida
32399-0750
(904) 488-0062

Attorneys for Petitioner

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PRELIMINARY STATEMENT

The petitioner, the Department of Professional Regulation, was the petitioner in the administrative proceedings and the appellee before the Third District Court of Appeal and will be referred to as the Department. The respondent, Pedro F. Bernal, M.D., was the respondent in the administrative proceeding and the appellant before the Third District and will be referred to as Dr. Bernal or respondent. The Florida Board of Medicine is the administrative body within the Department of Professional Regulation charged with final agency action and will be referred to as the Board. References to the record will be designated (R-) and all emphasis is supplied by the Department unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case originated with the filing of an administrative complaint by the Department against the respondent, charging him with violating the Medical Practice Act and seeking to discipline his license to practice medicine. (R-1-3). Respondent initially elected a formal hearing pursuant to section 120.57, Florida Statutes (1985), and then entered into a stipulated settlement with the Department under which he would be given a reprimand, two years supervised probation and a $1500 fine. (R-4; 273-275). The Board rejected the stipulated settlement and the matter was referred to the Division of Administrative Hearings for a formal hearing on the Administrative Complaint.

The hearing officer found that respondent violated the

charges alleged in the Administrative Complaint: specifically, that Dr. Bernal violated section 458.331(1)(g) (by aiding, assisting, procuring, or advising at least three unlicensed doctors to practice medicine, as defined by section 458.327(1)(a)); section 458.331(1)(t) (by gross or repeated malpractice or the failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances); and section 458.331(1)(w) (by delegating professional responsibilities to persons when the licensee knows or has reason to know that such persons are not qualified by training, experience, or licensure to perform them), Florida Statutes (1985). The hearing officer recommended that the Board impose the following penalty:

> (a) A 90-day suspension of Respondent's license to practice medicine:
> (b) A one year period of probation to follow the suspension, with a condition of probation that Respondent work under the supervision of another licensed physician and that he attend continuing education courses specified by the Board with an emphasis on the legal duties of physicians; and
> (c) An administrative fine in the amount of $500.

(R-247-251). Respondent filed exceptions to the recommended order of the hearing officer and the Department moved for an increase in penalty to a one year suspension. The Board of Medicine rejected the exceptions of the respondent and increased the penalty from that recommended by the hearing officer, revoking Dr. Bernal's license to practice medicine in Florida. The Board stated that:

> Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Hearing Officer be REJECTED as being too lenient under the circumstances for the reasons set forth in the Exceptions filed by the Petitioner, Department of Professional Regulation. Specifically, the Respondent was less than candid in his testimony before the Hearing Officer -- as found by the Hearing Officer. Patients were endangered by the fact that unlicensed persons, persons who had not established their ability to practice medicine with skill and safety, were practicing medicine, which is a felony.

(R-260). Dr. Bernal appealed the revocation of his license to the Third District Court of Appeal. The Third District affirmed the findings of guilt but reversed the Board's increase in penalty beyond that recommended by the hearing officer. The court held that 1) the physician's lack of candor before the hearing officer could not be the basis of an increase in penalty, finding the case to be analogous to sentencing guidelines cases; and 2) the second reason, concerning the seriousness of the offense, did not "cite to the record in justifying the action" as required by section 120.57(1)(b)(10), Florida Statutes (Supp. 1986). The Third District recognized that its decision concerning the second reason cited by the Board conflicted with the decision of the First District Court of Appeal in Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986). Accordingly, the court certified its decision to be in conflict with Britt pursuant to article V, section 3(b)(4), Florida Constitution. (R-370-373).

BASIS FOR INVOKING JURISDICTION

Petitioner respectfully suggests that this Court has

jurisdiction over this cause pursuant to article V, section 3(b)(4), Florida Constitution, in that the district court certified its decision as being in conflict with a decision of another district of the court of appeal, Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986).

SUMMARY OF THE ARGUMENT

The Third District certified its decision in this case as being in conflict with the First District's decision in Britt v. Department of Professional Regulation, 492 So.2d 697 (Fla. 1st DCA 1986). At the crux of the conflict, however, is the scope of appellate review to be applied in administrative disciplinary cases. The Department asserts that in this case the Third District has substituted its judgment of that of the Board of medicine on an issue of discretion. It has gone beyond assuring that the procedural requirements of section 120.57(1)(b)(10), Florida Statutes (Supp. 1986) have been met to evaluating the discretionary acts of the Board.

Both the caselaw and the requirements of Chapter 120 make it clear that the Board has a duty to explain their reasons for increasing a penalty over the imposed by the hearing officer. It is also clear that that explanation has been made in this case. The Third District has gone beyond the procedural requirement of assuring compliance with the statutory requirement of exposition to analyzing the reasons given. By contrast, Britt, which is very similar to the case before this court, is consistent with the scope of review enunciated by this Court.

The Third District also erred in striking the first reason cited by the Board concerning the licensee's lack of candor in the proceedings concerning his license. The court imposed the standard of review used in criminal sentencing guidelines cases, a standard based upon a different statutory scheme and different rules of procedure than that used in administrative disciplinary proceedings. The Department suggests that had any issue regarding reliance on Dr. Bernal's' lack of candor been raised in the appellate court, the issue for the court to consider would have been whether reliance on his lack of candor constituted a violation of a constitutional or statutory provision. If it was determined to constitute a violation of this sort, the proper course would have been to remand the case to the Board for reconsideration of penalty.

In any event, it is clear that the court substituted its judgment for that of the Board in directing that the Board impose the penalty recommended by the hearing officer. Caselaw is clear that in those instances where a finding of the Board has been reversed, the court should not decide the proper penalty itself but should remand to the agency for a new determination of penalty in light of the reversal. This was not done in this case. Accordingly, the Department asks that the final order of the Board of Medicine be reinstated, or in the alternative, that the case be remanded to the Board for reconsideration of the penalty in light of this court's determination of what constitutes compliance with section 120.57(1)(b)(10), Florida Statutes (Supp. 1986).

ARGUMENT

I.
THE SCOPE OF APPELLATE REVIEW IN ADMINISTRATIVE PENALTY DETERMATIONS

The issue at the crux of this case is whether appellate courts have authority to review the penalties imposed by state agencies in administrative proceedings when the penalty imposed is within the allowable statutory range. The seminal case decided by this Court on this issue is Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1978). This Court held that

> so long as the penalty imposed is within the permissible range of statutory law, the appellate court has no authority to review the penalty unless the agency findings are in part reversed.

Id. at 201. Although the Legislature has expanded the procedure required for the Board to alter any penalty recommended by a hearing officer, the Department asserts that the scope of review enunciated in Webb is still sound.

In Webb, the hearing officer found the licensee guilty of three violations of Chapter 475, but stated that inasmuch as the violations did not involve fraud or dishonesty, suspension was not an appropriate penalty. He recommended that the Board impose a reprimand, which would include an order to cease and desist the licensee's prior practice involving the handling of escrow funds. The Board disagreed and imposed a sixty day suspension. The Third District held that where only a minor violation of the Commission's rules was evident, the penalty imposed was unduly

harsh and directed the Commission to amend its order as to penalty and enter a written reprimand.

At the time that Webb was decided, section 120.68(12), Florida Statutes (1975) provided:

> (12) The court shall remand the case to the agency if it finds the agency's exercise of discretion to be:
> (a) Outside the range of discretion delegated to the agency by law;
> (b) Inconsistent with agency rule, an offically stated agency policy, or a prior agency practice, if deviation therefrom is not explained by the agency; or
> (c) Otherwise in violation of a constitutional or statutory provision;
> but the court shall not substitute its judgment of that of the agency on an issue of discretion.

Section 120.68(12), Florida Statutes (1987) is substantially the same. This Court agreed with the Commission that the setting of penalty in disciplinary proceedings is a matter of discretion solely within the delegated discretion of the Commission; in reducing the penalty the district court had substituted its judgment for that of the agency on an issue of discretion. 367 So.2d at 202. The Court also disapproved the Third District's action in Robert's Drugstore, Inc. v. Florida Board of Pharmacy, 346 So.2d 118 (Fla. 3d DCA 1977), stating that although the court reversed findings of the Board of Pharmacy in that case, it exceeded its authority in reducing the penalty. The proper procedure, according to the Webb court, would have been to remand the cause to the Board to reconsider the penalty in light of the reversal of agency findings. The Court stated that:

> In those situations where the penalty may be overturned, the appellate court may not exercise its judgment as to the proper penalty to be imposed but must remand the cause for further consideration by the agency.

367 So.2d at 204.

The Court also noted in its decision that section 120.57(1)(b)(9), Florida Statutes (1975), required only that the agency review the complete record before any increase in penalty but did not require it to explain its reasons for any increase. Section 120.57(1)(b)(10), Florida Statutes (Supp. 1986) has since been amended in pertinent part to require:

> The agency may accept the recommended penalty in a recommended order, but may not reduce it or increase it without a complete review of the record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

The amendment at issue was added by Chapter 84-173, section 2, Laws of Florida. Few cases have interpreted the new requirement that an agency "state with particularity" its reasons for departing from the recommendation of the hearing officer. See Zaldivar v. Department of Professional Regulation, Board of Medical Examiners, 503 So.2d 432 (Fla. 3d DCA 1987) (reasons cited by Board for increase contain sufficient factual date to satisfy statutory requirement to cite to the record); Van Ore v. Board of Medical Examiners, 489 So.2d 883 (Fla. 5th DCA 1986) (final order increasing penalty stating reasons as "offense proven coupled with liberal prescribing practices as evidenced in the record" does not state with particularity why the practices

were liberal and why this was improper); Lazarus v. Department of Professional Regulation, Board of Medical Examiners, 461 So.2d 1022 (Fla. 3d DCA 1985) (order failed to give any reasons for increasing the penalty recommended by the hearing officer as required by statute). Only the First District has articulated what effect, if any, section 120.57(1)(b)(10), Florida Statutes (Supp. 1986) should make on the scope of appellate review of penalties imposed by administrative agencies. In Hutson v. Casey, 484 So.2d 1284 (Fla. 1st DCA 1986), the Bradford County School Board increased the discipline imposed upon a teacher from a one year suspension to dismissal. The only reason articulated at the board meeting was the statement "I feel as a school board member I disagree with the penalty on here findings of fact." Id. at 1285. The First District stated that the reasons for articulating the penalty were not stated with the specificity required by the 1984 amendments to the section, vacated the final order and remanded the case back to the Board to enter an amended order in compliance with the requirements of section 120.57(1)(b)(9), Florida Statutes (1985). But in doing so the First District stated:

> Our opinion should not be read as expanding the scope of judicial review on the substantive question of whether the penalty exacted -- assuming the penalty to be within the range allowable by law -- is appropriate punishment of the misdeeds of the person proceeded against. The apparent purpose of the above statute, as amended, is to provide some assurance that the agency has gone through a thoughtful process of review and consideration before making a determination to change the recommended penalty. As long as this statutory

> procedural requirement is met, we are not authorized to review the penalty. Florida Real Estate Commission v. Webb, 367 So.2d 201 (Fla. 1979); Fresh Start v. Division of Alcohol, Beverage and Tobacco, 469 So.2d 244 (Fla. 2d DCA 1985); Clark v. Department of Professional Regulation, 463 So.2d 328, 333 (Fla. 5th DCA 1985).

Id. at 1285-86.

Later that year the First District considered a Board of Medical Examiners order wherein the recommended penalty had been increased because it was "too lenient based on the gravity of the offenses," noting the "potential for harm" and that "the offenses constitute a breach or trust which the patient places with his physician." Britt v. Department of Professional Regulation, 492 So.2d 698, 699 (Fla. 1st DCA 1986). In affirming the order, the First District stated:

> A recommended penalty ... may not be increased merely upon an agency's disagreement with the recommendation, absent a statement of specific reasons for the increase. See Hutson v. Casey, 484 So.2d 1284 (Fla. 1st DCA 1986). But in the present case the agency's reasons were stated and it was indicated that this disposition was reached upon "a complete review of the record." The nature of the stated reasons does not warrant more definite record citation, and that requirements of section 120.57(1)(b)9 have been satisfied in substance.

Id. at 700. Similarly, in Zaldivar v. Department of Professional Regulation, Board of Medical Examiners, 503 So.2d 432 (Fla. 3d DCA 1987), the Third District affirmed an order of the Board, holding that the Board's stated reasons "contain sufficient factual date so that the statutory requirement that the order `cit[e] to the record' in support of its reasons is entirely met....Explicit record citations were therefore unnecessary in

this case." Id. at 433. It is upon this foundation that the Third District held that the reasons cited by the Board in this case were not valid.

II.
THE BOARD'S INCREASE IN PENALTY BASED UPON THE SEVERITY OF THE OFFENSE WAS PROPER

The second reason stated by the Board of Medicine in increasing the penalty in this case is that:

> Patients were endangered by the fact that unlicensed persons, persons who had not established their ability to practice medicine with skill and safety, were practicing medicine, which is a felony. See section 458.327, Florida Statutes.

(R-277). The Third District characterized this reason as referring to the alleged seriousness of the offense, stated that such a reason did not cite to the record in justifying the action and amounted to a mere disagreement with the hearing officer's evaluation prohibited in Hutson v. Casey. The court specifically recognized the First District's holding in Britt and certified conflict with the majority opinion in that decision. (R-373).

Ironically, although the Third District cites Hutson v. Casey as authority for its decision reversing the increase in penalty, so does the First District in upholding the increased penalty in Britt. The Department asserts that the decision in Britt is more consistent with the scope of review enunciated in Webb and reiterated in Hutson v. Casey than is the decision of the Third District in Bernal. The penalty imposed in administrative disciplinary proceedings is a matter of agency discretion, and is to be decided by the Board and not the hearing

officer. Webb. Although the Board must state why they disagree with any decision that the hearing officer makes, it is the Board, an not the hearing officer, who has the ultimate responsibility of administratively interpreting Chapter 458. Likewise it is the Board who must make a final decision concerning violation of the Medical Practice Act and any penalties imposed for those violations. Compare Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985).

In Britt, the First District stated that more definite record citations were not necessary because of the nature of the stated reasons for the increase in penalty. There is no dispute that the Board explained their reasons for increasing the penalty. The Department asserts that the reasons stated both here and in Britt satisfied the Board's duty of exposition, see Rotstein v. Department of Professional and Occupational Regulation, 397 So.2d 305, 308 (Fla. 1st DCA 1980) (Wentworth, J., dissenting to original opinion.), especially when the penalty imposed is consistent with agency policy for the violations found. See Rule 21M-20.001, Florida Administrative Code. Where, as here, the findings of fact and conclusions of law are accepted and the penalty is within the parameters authorized by section 458.331(2), Florida Statutes, once the statutory requirement to articulate the reasons for an increase is satisfied, the penalty imposed remains beyond review. Moreover, the Third District's own decision in Zaldivar is also consistent with Webb, Hutson v.

Casey, and Britt. It is only in this case that Third District determined that the reason cited by the Board, which refers to the nature and extent of the violations proven, is insufficient to meet the requirement of section 120.57(1)(b)(10), Florida Statutes (Supp. 1986). Thus it is clear that the court has substituted its judgment of what the penalty should be for the decision of the Board on this issue.

Respondent will no doubt point to Van Ore v. Board of Medical Examiners, 489 So.2d 883 (Fla. 5th DCA 1986) as support for the Third District's decision in this case. Van Ore, however is entirely consistent with the standard of review in Webb and Hutson v. Casey. Dr. Van Ore was charged with violation of sections 458.331(1)(g), (h), (q), (t), & (aa), Florida Statutes (1985), based upon his supervision of physician's assistants and malpractice in prescribing controlled substances. The hearing officer found him guilty of furnishing his physician's assistant with presigned prescriptions in violation of section 458.331(1)(aa), but found that Van Ore was not guilty of illegal or negligent prescription practices. The Board of Medicine accepted the hearing officer's findings but increased the penalty "in light of the offense proven, coupled with the liberal prescribing practices as evidenced by the record." 489 So.2d 885. As the Fifth District stated,

> Based on the record in the instant case, it is clear that Van Ore was not found guilty of illegal or negligent prescription practices, but his penalty was increased for "liberal" prescription practices. The Board adopted the hearing officer's

> findings of fact and conclusions of law. The Board made no attempt to equate "liberal" practices with improper practices. While the record does show numerous instances where Van Ore prescribed large amounts of highly addictive narcotics over short periods of time, the final order does not state with particularity the reasons why the practices were determined to be liberal, and, if liberal, state why this was improper.

Id. at 885-886.

In light of the Board's findings that Van Ore's prescribing was not negligent, an explanation of what constituted "liberal prescribing" was necessary in order for the order to be consistent. Further, it is important to note that the district court did not hold that the Board's reason for the increase in penalty was invalid: only that the reason must be restated with particularity. See Id. at 886. Unlike the case before this Court, the reasons cited in Van Ore clearly mandated a more detailed explanation than was given. Such is not the case here. The Board's second reason for increasing the penalty in Dr. Bernal's case was stated with particularity as required by section 120.57(1)(b)(10), Florida Statutes (1986), and the Third District erred in striking it.

III.
THE COURT ERRED IN STRIKING THE BOARD'S FIRST REASON FOR INCREASE OF PENALTY

The Department respectfully suggests that this Court also has jurisdiction to consider any other errors that may have been committed by the Third District in this matter. Pagano v. State, 387 So.2d 349, 350 (Fla. 1980); P.C. Lissendon Co. v. Board of

County Commissioners, 116 So.2d 632, 636 (Fla. 1960). The Department also asserts that the district court erred in striking the first reason stated by the Board as well as the second.

In increasing the penalty recommended by the hearing officer, the Board stated as their first reason that Dr. Bernal was less than candid in his testimony before the hearing officer. Although Dr. Bernal objected to the increased penalty generally, he did not specifically raise any argument concerning this reason in his appeal to the district court. The Third District, however, stated:

> the doctor's alleged lack of candor in his testimony before the hearing officer himself, is an offense with which he was not charged. In any case, one's conduct in defending an action against him may not be the subject of an increased penalty if he is nevertheless found guilty of the substantive crime charged. On these points, we believe that the cases which hold that even perjury on other misconduct in the defense of a criminal charge may not provide a ground for an increased sentence or an upward deviation from the sentencing guidelines are analogous and most persuasive.

(R-372) (footnote and citations omitted). Inasmuch as this was an administrative proceeding and not a criminal trial, the Third District erred in reversing the penalty imposed by the Board based on a criminal standard.

It is well settled that administrative proceedings are creatures of statute and are not generally governed by rules applicable in civil or criminal proceedings. Florida Department of Law Enforcement v. Dukes, 484 So.2d 645 (Fla. 4th DCA 1986) (corpus dilecti rule not applicable in administrative

proceedings); Farzad v. Department of Professional Regulation, 443 So.2d 373 (Fla. 1st DCA 1983) (laches, civil and criminal statutes of limitation inapplicable to administrative license revocation proceedings); Gordon v. Savage, 383 So.2d 646 (Fla. 5th DCA 1980) (criminal procedures not applicable to administrative disciplinary proceedings). Further, in many ways the imposition of penalties subsequent to a section 120.57(1) proceeding is vastly different from criminal sentencing proceedings. For example, in criminal proceedings the judge does not receive a sentencing recommendation for a separate fact finder (with the exception of capital cases), and the judge is required to impose sentence upon the defendant's classification in a complicated matrix set out in Rule 3.988, Florida Rules of Criminal Procedure, and pursuant to the provisions of Rule 3.701, Florida Rules of Criminal Procedure. Rule 3.701(11) provides that:

> Departure from the guidelines range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.

The Sentencing Guidelines specifically provide for such factors as the degree of the offense, additional offenses at conviction, prior convictions, legal status at the time of the offense, and

the extent of victim injury. The Disciplinary Guidelines utilized by the Board, while providing minimum and maximum penalties as required by statute, are not that detailed. Nor are the hearing officers at the Division of Administrative Hearings required to recommend penalties in accordance with the guidelines promulgated. Further, while the sentences imposed by judges in criminal proceedings are final, the Legislature has not given hearing officers that authority, but rather has limited their role to an advisory one. It is the respective Boards, charged with the interpretation of their practice acts, which are charged with the final disciplinary authority.

It is also interesting that under section 120.57(1)(b)(10), should the Board choose to increase or decrease the penalty recommended by the hearing officer, it must cite with particularity its reasons from the deviation, with those citations limited to the record before them. This is <u>always</u> going to be the record which was also before the hearing officer when he made his recommended penalty. Thus it seems clear that the Legislature must have recognized that the Board would be in a better position to determine the appropriate discipline for violations of their practice act. Also, it cannot be ignored that while a trial judge must give clear and convincing reasons in increasing a criminal penalty, the Legislature has imposed no such requirement in administrative disciplinary proceedings; only explanation is required. By evaluating the reason given as it has, the Third District has again substituted its judgment for

that of the Board in its estimation of what penalty is appropriate in this case. This is especially in appropriate in a case such as the one before this Court, where both the recommended penalty and the penalty imposed by the Board are within the Guidelines established by the Board for the violations charged.

Respondent will no doubt argue that the Third District was correct and that, even without applying the criminal sentencing guidelines' standards, the Board erred in using his lack of candor as a reason for revoking his license. However, the Department asserts that the Board's reliance on Dr. Bernal's lack of candor could have been challenged as a violation of a constitutional provision and if the court so found, the cause could have been remanded to the Board. Section 120.68(12)(d), Florida Statutes (1987). Although such a procedure would be consistent with both section 120.68(12) and with the scope of review enunciated in Webb, it was not done in this case.

IV.
THE THIRD DISTRICT ERRED IN DECIDING THE APPROPRIATE PENALTY TO BE IMPOSED

Finally, the Third District directed that "the penalty is reversed and the cause is remanded for the implementation of the recommendation of the hearing officer." (R-373). Even assuming, without conceding that the court was correct in striking one or both of the reasons stated by the Board for increasing the penalty imposed in this case, Webb makes it clear that

> In those situations situations where the penalty may be overturned, the appellate court may not exercise its judgment as to the proper penalty to be imposed but must remand the cause for further consideration by the agency.

367 So.2d at 204. The correct procedure in this case would have been for the district court to remand to the Board for reconsideration of the issue of penalty, at which time the Board could, in its discretion, allow further arguments or submissions from the parties on the issue of penalty. Hutson v. Casey, 484 So.2d at 1285. The Third District erred in limiting the penalty that could be imposed to that recommended by the hearing officer.

CONCLUSION

Based on the foregoing, the Department respectfully requests that this Court quash the decision of the Third District Court of Appeal and reinstate the final order of the Florida Board of Medicine revoking Dr. Bernal's license to practice medicine in the state of Florida. In the alternative, in the event that this Court finds either or both of the reasons stated by the Board fails to comply with the requirements of Chapter 120, the Department requests that this case be remanded to the Board of Medicine for reconsideration of the penalty to be imposed.

Respectfully submitted,

Lisa S. Nelson
Appellate Attorney
Michael Cohen
Trial Attorney
William O'Neil
General Counsel
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32399-0750
(904) 488-0062

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Frank Diaz Silveria, Esquire, DIAZ SILVERIA & ASSOCIATES, P.A., 2153 Coral Way, Suite 607, Miami, FL 33145 this 2d day of **March**, 1988.

Lisa S. Nelson

Lisa S. Nelson