IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,636

Third District Court of Appeal
NO. 87-2155

DANIEL FIESELMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR DADE COUNTY, FLORIDA

PETITIONER'S MAIN BRIEF

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III. STATEMENT OF THE FACTS

(A) Clarification of The Procedural History

The Petitioner was charged with a traffic citation on July 7, 1985. This case has, therefore, been pending for more than three (3) years.

On February 21, 1986, the Court entered an Order on Petitioner's Renewed Motion to Dismiss which was Nunc Pro Tunc February 3, 1986 (Appendix 2 and 3). In that Order the Court specifically found "that the Defendant (Petitioner) was asleep in a motor vehicle in a parking lot without the motor running, and...that the Defendant's (Petitioner's) control of the automobile was insufficient to be culpable". Accordingly, the Court dismissed the complaint. The trial court based its decision on State v. Suarez. In a two-to-one decision, the Appellate Division of the Circuit Court for the 11th Circuit of Dade County overruled State v. Suarez on the basis of Griffin v. State and remanded the case.

The Third District Court of Appeal granted certiorari review of the appellate decision of the Circuit Court in and for the Eleventh Judicial Circuit of Dade County, Florida. Certiorari was denied. In the opinion issued by the Third District Court of Appeal (Appendix 15), conflict was certified with a decision from the Fifth District Court of Appeal in Baker v. State, 518

So.2d 457 (Fla. 5th DCA 1988). Petitioner filed a Motion for Rehearing and/or Clarification (Appendix 16). Said Motion was denied on December 28, 1988 (Appendix 17).

(B) The Facts

The undisputed facts are that, when arrested, the Petitioner was laying down asleep in the front seat of his automobile (Appendix 2, p.5). The automobile was in park (Appendix 2, p. p.12, l.24) and the key was in the off position (Appendix 2, p.6, 1.l-2). The tow truck operator stated that Petitioner's vehicle was not hot (Appendix 14). The arrest record reflects that Petitioner was arrested at approximately 3:15 a.m., July 7, 1985. The arresting officer awakened the Petitioner from a sound sleep (Appendix 2, p.6, 1.8-9). There was absolutely no evidence either before the Court or which could be offered in this cause as to whether the Petitioner had actually driven the vehicle or that the vehicle was operable. The arresting officer then charged Petitioner with driving or being in actual physical control of a vehicle with an unlawful blood alcohol level; that is, §316.193(1)(a), Fla. Stat. (1976).

ISSUES ON APPEAL

A. Whether certiorari jurisdiction to the District Court of Appeal lies from a judgment of the Circuit Court sitting in its

appellate capacity which reverses a County Court dismissal of a traffic citation.

B. Whether, under the undisputed facts, the County Court properly dismissed the traffic citation against the Petitioner herein.

IV. SUMMARY OF ARGUMENT

Certiorari jurisdiction is clearly appropriate where a circuit court sitting in its appellate capacity reverses a dismissal of the trial court. As the key to certiorari jurisdiction is a departure from the essential requirements of law, a circuit court in its reviewing capacity establishes law beyond the case in which the decision is rendered. In this instance, the circuit court reversed the trial court on the basis of Griffin v. State, 457 So.2d 1070 (Fla. 2nd DCA 1984). Griffin v. State was shown not to be controlling by the Third District Court of Appeal in this case. Thus, the ruling of the circuit court in reversing the dismissal was a clear departure from the essential requirements of law.

In this case, certiorari was the only available means by which the Petitioner was able to establish what, if anything, the State needed to prove to present a prima facia case of actual physical control.

The critical issue on the merits is actual physical control of a motor vehicle. The petitioner was found in the prone posi-

tion on the front seat of a motor vehicle asleep. The car was parked in a private parking lot. The engine was not warm. The only fact available from which the fact finder could infer actual physical control was that the keys were in the ignition.

The facts are undisputed. The trial court, based upon the undisputed facts, believed that a judgment of acquittal would be proper at the conclusion of the State's case if the only fact giving rise to an inference of control was that the keys were in the ignition of the vehicle. Thus, under Florida Rules of Criminal Procedure, a dismissal of the traffic citations was appropriate.

The ruling of the trial court is in line with the reasoning of other court's considering substantially similar circumstances. One of the better tests has been developed by the Supreme Court of Alabama. That test is known as the "Totality-of-Circumstances" Test. Clearly, under this test the State is required to establish at least three elements to make a prima facia case. Other elements may also be considered to mitigate any element that is missing. Of the elements which are necessary to present a prima facia case, it is only logical and reasonable to conclude that the most important element is the operational capability of the motor vehicle. Thus, logic and the circumstantial evidence rule would dictate that if a motor vehicle is found undamaged, away from

traffic in a private parking lot with a cold engine, some action would be required by the officer in order to establish that the vehicle was operational.

Finally, Petitioner submits that it is time that this Court establish a public policy as was done in State v. Zavala, **666** P.2d **456** (Ariz. 1983). Without reservation it is reasonable and desirable to encourage a driver who believes his driving is impaired to pull completely of€ the highway, turn the key off and sleep without fear of being arrested for DUI.

ARGUMENT

A. THE THIRD DISTRICT COURT OF APPEAL PROPERLY EXERCISED ITS CERTIORARI JURISDICTION AND SHOULD BE AFFIRMED IN THAT RESPECT.

Daniel Fieselman, Petitioner herein, sought review of a decision from the Circuit Court in and for the Eleventh Judicial Circuit in Dade County, Florida. Said decision reversed a County Court dismissal of a traffic citation. Jurisdiction was sought under Fla. R. App. P. 9.030(b)(2)(A). The Third District Court of Appeal exercised its certiorari jurisdiction to review the decision of the Circuit Court. In exercising its discretionary jurisdiction, however, the Third District was faced with definite conflict in Baker v. State, 518 So.2d **457** (Fla. 5th DCA 1988). The Baker decision, without elaborating, states:

> This Court will not exercise certiorari jurisdiction to review an order denying a motion to dismiss or a circuit court opinion reversing an order granting a motion to dismiss, both of which amount to the same thing.
>
> Id. at 458.

Petitioner respectfully submits that the two situations mentioned in Baker are not the same. The Petitioner was charged with a violation of 316.193(1)(a), Fla. Stat. (1976). At issue is control as distinguished from operation of a motor vehicle. At the time the matter was heard before the trial court, no Florida case had established elements of the crime of actual physical control of a motor vehicle while under the influence. The State contended at all proceedings before the trial court that the question of actual physical control was one of law to be determined by the court. Thus, the only matter to be heard by the jury was whether the Petitioner's blood alcohol was sufficient to meet the criteria of being under the influence. The Petitioner argued strenuously to the trial court that the question of actual physical control was a matter of fact for the trier of fact. In addition, the Petitioner argued that certain elements must be present in order to establish actual physical control. Among those necessary elements were (1) an operable motor vehicle, (2) the position of the occupant in the motor vehicle, and (3) the possession of the ignition keys. The trial court believed, based upon the undisputed facts of the case, that a motion for judgment

of acquittal at the conclusion of the State's case would have been granted (Appendix 2, p.15, l.10-16). Thus, the trial court was inclined to grant the Defendant's motion for dismissal.

The State appealed to the Circuit Court of the Eleventh District in and for Dade County, Florida. The Circuit Court reversed the case without opinion, but apparently based its decision on Griffin v. State, 457 So.2d 1070 9Fla. 2nd DCA 1984). At argument, however, it was suggested to the Petitioner that the phrase "actual physical control" was one of law to be determined by the court. By reason of the split decision in the Circuit Court, the Petitioner sought certiorari relief from the Third District Court of Appeal. Among the questions presented for determination was whether "actual physical control" was a factual issue or a legal issue.

As the Court will note from the opinion, the Third District correctly recognized that a Circuit Court, sitting in an appellate capacity, may establish law beyond the case in which the decision is rendered (Appendix 15, p.3). Thus, certiorari jurisdiction is an appropriate measure where substantial rights are affected. Under the ruling of the Third District, Griffin was not controlling. Thus, in addition to affecting substantial rights, the Circuit Court reversal was a clear departure from the essential requirements of law. Furthermore, in this instance, neither

the Petitioner nor the State had sufficient guidelines for trial. By all standards, the Petitioner would have been denied due process of law.

Certiorari jurisdiction should be exercised where there is a departure from the essential requirements of law. In Combs v. State, 436 So.2d 93 (Fla. 1983), this Court found that the Fifth District Court took too narrow a view of what constitutes a departure from the essential requirements of law. Thus, in determining whether there has been a departure from the essential requirements of law, district courts of appeal should not be so concerned with the mere existence of error as much as the seriousness of the error. This Court further points out that "the district courts must be allowed a large degree of discretion so that they may judge each case individually".[1] From the Combs decision, it would appear that certiorari jurisdiction was correctly assumed by the Third District Court of Appeal.

The Supreme Court also approved certiorari jurisdiction of an appeal from the Circuit Court setting in its reviewing capacity reversing an administrative decision affecting the rights of the supervisor of the Deerfield Beach Wastewater Treatment Plant. The case holds that certiorari is the proper remedy. City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982).

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[1] See Combs v. State, 436 So.2d 93, 95,96 (1983).

Finally, the Third District Court of Appeal in this case states:

> Even as the availability of an adequate remedy of appeal in the event of ultimate conviction is not a ground upon which the Florida Supreme Court would deny certiorari appeal of an appellate decision of the District Court reversing a trial court's dismissal of criminal charges, it is not a ground for denial of certiorari review in the present case.[2]
>
> Fieselman v. State, _____So.2d_____ (Fla. 3rd DCA 1988)

The Supreme Court has jurisdiction to hear this case pursuant to Article V, § 3(b)(3), Fla. Const.

Petitioner respectfully urges this Court to accept jurisdiction on both the issues of certiorari jurisdiction and the ultimate merits of the case.

(B) THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL ON THE MERITS SHOULD BE REVERSED AND THE ORDER OF DISMISSAL BY THE TRIAL COURT REINSTATED.

Actual physical control should clearly be a factual matter and not a matter of law. Numerous elements make up the question of actual physical control which must be determined by the fact finder. Yet nowhere in the Statutes or any case law within the State of Florida have the elements of actual physical control been set out with any degree of certainty. At oral argu-

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[2] See Appendix 15, p. 3.

ment before the Third District Court, Petitioner urged the Court to accept the "Totality-of-Circumstances" Test as espoused by the case of Cagel v. City of Gadsden, 495 So.2d 1144 (Ala. 1986). At the time of oral arguments the First District had rendered an opinion in Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987). Notwithstanding the statements made in the Jones case with reference to the "Totality-of-Circumstances" Test, the Third District does not adopt the test. The basis of the Third District's opinion centers on whether the facts are sufficient for a fact finder to infer that the Defendant was, within a reasonable time before being found and while intoxicated, in actual physical control of the vehicle. The Third District Court finds that the keys in the ignition is sufficient to preclude a conclusion as a matter of law that the Defendant was not in actual physical control. Thus, the Third District Court of Appeal concluded that entry of a dismissal of the charges was improper.

The opinion by the Third District ignores Fla. R. Crim. P. 3.190(b) and (c)(4). Both the State and the Petitioner agree that there are no material, disputed facts. The Court makes reference to the undisputed facts in its decision (Appendix 15, p. 3, II.). The provisions of Fla. R. Crim. P. 3.190 provide that the Court may, at any time, entertain a motion to dismiss on any of the following grounds..."(4) there are no material, disputed

facts and the undisputed facts do not establish a prima facia case of guilt against the defendant". That Rule provides essentially the same standard as Fla. R. Crim. P. 3.380. In determining a motion for a judgment of acquittal, the court may enter a judgment of acquittal if it is of the opinion that the evidence is insufficient to warrant a conviction.

As authority for the similarity of standard, Petitioner cites Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981). Therein it is required that the prosecution, in presenting a prima facia case, must prove each and every element of the offense charged beyond a reasonable doubt. Where the State fails to meet that burden of proof, the case should not be submitted to the jury and a judgment of acquittal should be granted. It would appear from the statements in the Ponsell case that if there are no material, disputed facts and, given the undisputed facts, the State is unable to establish a prima facia case, then a motion to dismiss should be granted. The trial court dismissed the case against Petitioner because it was faced with only the fact that the keys were in the ignition of an automobile. The Petitioner was lying down in the prone position asleep. The automobile was parked in a private parking lot. The engine was not warm. The officer did not attempt to start the engine. The car had been there in excess of two hours. The headlights were in the on posi-

tion. The State cannot prove beyond a reasonable doubt that the automobile was capable of operation. Petitioner submits that the County Court was eminently correct in its dismissal under the provisions of Fla. R. Crim. P. 3.190.

Other State Supreme Courts considering substantially similar cases have favored the Defendant. The Arizona Statutes define the crime of driving under the influence as follows:

> "It is unlawful and punishable as provided in § 28-692.01 for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state."

A.R.S. § 28-692(A)

The Arizona Supreme Court construed the statute in State v. Zavala, 666 P.2d 456 (Ariz. 1983). In Zavala the defendant was found in the emergency or parking lane off the traveled portion of Interstate 10. The arresting officer testified that he had passed that location twenty minutes earlier and the defendant was not there. The defendant was hanging partially from the window on the driver's side of the vehicle unconscious. The Court found that the acts of the defendant in pulling off to the side of the road and turning off the ignition indicated that the defendant voluntarily ceased to exercise control over the vehicle prior to losing consciousness.

The Court of Criminal Appeals in Alabama adheres to the

theory of Zavala. In Key v. Town of Kinsey, 424 So.2d 701 (Ala. Cr. App. 1982), the defendant was found parked in the median strip of a highway laying down asleep in the front seat (exactly as Mr. Fieselman was) of a Model T Ford. His blood alcohol level was .19. The court concluded that there are three elements necessary to establish actual physical control. The three elements are (1) active or constructive possession of the vehicle's ignition key by the person charged, (2) position of the person charged in the driver's seat, behind the steering wheel, in such condition that, except for the intoxication, he is physically capable of starting the engine and causing the vehicle to move and (3) a vehicle that is operable. The court found the first two elements lacking and, thus, ruled the defendant was not in actual physical control. In the case at bar, the second and third elements are also missing. Mr. Fieselman was admittedly found lying down on the front seat, not behind the steering wheel and there was no evidence that the car was operable.

The holding in Key v. Town of Kinsey has now been modified by the Alabama Supreme Court in the case of Cagel v. City of Gadsden, 495 So.2d 1144 (Ala. 1986). Our sister states adopts the "totality-of-the-circumstances" test in determining when a driver of a motor vehicle is in actual physical control. The Court in modifying the Key case states:

> This being the case, the stringent, three-pronged test set forth in Key v. Town of Kinsey is hereby abandoned, and in its place we adopt a totality-of-the-circumstances test. This is not to say that the factors which compose the test in the Key case are not to be considered when determining whether a person is guilty of driving under the influence, but that these are not the only factors to be considered.
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> Id. at 1147.

Thus, if the circumstances are sufficient to indicate that an automobile had been operated and was capable of being operated while the driver is under the influence of alcohol, a conviction would be affirmed. Where no such showing is made, the defendant should be acquitted. This burden of proof is upon the State. The State's case is solely dependent on circumstantial evidence. Both Florida and Alabama courts adhere to the same principle where circumstantial evidence is concerned. That principle is that if a crime is entirely circumstantial, then it is the State's burden to show that the circumstances are not only consistent with guilt, but also inconsistent with any reasonable hypothesis of innocence. J. O. and R. G., Juveniles v. State, 384 So.2d 966 (Fla. 3rd DCA 1980), Cagel v. City of Gadsden, 495 So.2d 1144 (Ala. 1986). Since there was no circumstantial evidence to establish that the car in which the Petitioner was sleeping had been driven or was capable of operation, the trial court found that under no circumstances could the State carry this burden. Thus, the dismissal

was appropriate.

The Petitioner strongly suggests to this Court that the State of Florida adopt the Alabama test. Clearly, §316.193(1)(a), Fla. Stat., was not intended by the Legislature to apply to an inoperable motor vehicle. The Petitioner submits that this Statute should not be applied illogically or unreasonably.

The trial court dismissed the case on authority of State v. Suarez, 48 Fla.Supp. 130 (Fla. 11th JCCT. 1979). In Suarez, the defendant was found slumped over the steering wheel while in the parking lot of the New England Oyster House. The motor was turned off, but the keys were in the ignition. Mr. Suarez was asleep. Judge Robinson in his opinion states:

> ...This court does not find that the defendant's control was sufficient to be culpable and adopts the rationale of the majority opinion in State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (1971).
>
> Id. at 131.

The State has to date attempted to convince the court that Griffin V. State, 457 So.2d 1070 (Fla. 2nd DCA 1984), overruled State v. Suarez and is the guiding principle for actual physical control. Interestingly, Judge Robinson in Suarez considered Hughes v. State, 535 P.2d 1023 (Okla. Cr. 1975), which is the case relied upon by the Second District in Griffin. In Hughes, the defendant was found parked at a ninety degree angle in the

road. The Hughes case, however, was not consistent with the circumstantial evidence of Suarez. Judge Robinson relied upon State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (Utah 1971). In Bugger, the Defendant was found asleep in his car which was completely off the traveled portion of the highway and his motor was not running. The court held that Mr. Bugger was a passive occupant and, thus, there was no actual physical control of the vehicle.

The opinion of the Third District Court of Appeal, while not mentioning Suarez, reversed the trial court by implicitly overruling Suarez. The Petitioner submits that the cases are unmistakably distinguishable, and Suarez should not have been overruled but, instead, clarified.

The Utah Statute on driving under the influence contains language identical to § 316.193(1), Fla. Stat. (1976). The Utah Supreme Court decided State v. Bugger, 25 Utah 2d 404, 483 P.2d 442 (Utah 1971) in 1971. The Hughes v. State, 535 P.2d 1023 (Okla. Cr. 1975) case, was decided in 1975. The Utah Supreme Court revisited the Bugger decision in 1982 in the case of Garcia V. Schwendiman, 645 P.2d 651 (Utah 1982), and distinguished Hughes. The Utah Supreme Court distinguishes Hughes and Bugger as follows:

> As a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles

except as passengers or passive occupants as in Bugger, supra. [Emphasis added].

Id. at 654.

Clearly, the Utah court classified Mr. Bugger as a passive occupant. Mr. Suarez and Mr. Fieselman fit into this category.

The case of Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987), causes serious concern. As stated, the Jones case was decided after briefs were submitted to the Third District Court of Appeal. Jones, is a puzzling case. While it apparently adopts the "Totality-of-Circumstances" Test as established by the Supreme Court of Alabama, the test is modified by the First District. The Jones case as interpreted by the Petitioner would eliminate one of the elements required of the prosecution to establish a prima facia case, that is, the operational capacity of the automobile. In order for an individual to be convicted of being in actual physical control, it would seem self-evident that the State must prove that the car in which the defendant is found is capable of being operated on the streets or highways of the State. If the vehicle is not, there certainly can be no control since it is impossible to control an inoperable vehicle. Both Cagel v. City of Gadsden, 495 So.2d 1144 (Ala. 1986), and Key v. Town of Kinsey, 424 So.2d 701 (Ala. Cr. App. 1982), confirm that the operational capability of a vehicle is a critical element of the crime. Yet Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987), would

eliminate the operability of an automobile as an element by converting it to a defense. If the First District is to be followed, it would seem that the basic right of individuals to be innocent until proven guilty is seriously impaired. In addition, the Jones case materially changes the circumstantial evidence rule. Thus, under the Jones decision, circumstantial evidence of guilt would no longer be required to be consistent with guilt and inconsistent with any reasonable hypothesis that the defendant is innocent. Such a departure from long-established rules of evidence should be closely scrutinized by this Court.

Petitioner submits that this Court should recognize the problems created by Jones. Those problems would all be rectified by correctly adopting the "Totality-of-Circumstances" Test. Thus, the elements necessary for a prima facia case of actual physical control of a motor vehicle while under the influence would be established for the benefit of all parties. An automobile capable of operation is a critical element. After all, the only additional effort required of a police officer conducting an investigation is an attempt to start the motor vehicle.

Petitioner also contrasts the present circumstances where the Petitioner was found asleep in an automobile parked in a private

parking lot to a situation where a individual is found in an automobile which has been wrecked or is stopped in the roadway. Clearly, circumstantial evidence would be sufficient in such an instance to establish the operational character of the motor vehicle. However, where there is no circumstancial evidence that the car was operable, the vehicle must be tested by the police officer in order to meet the burden of proof with respect to this element.

A final troubling aspect of the opinion issued by the Third District Court of Appeal is the deferral of the public policy argument to the Legislature. The Second District in Griffin v. State, 457 So.2d 1070 (Fla. 2nd DCA 1984), recognizes the strong policy argument in its opinion wherein it stated:

> Petitioner argues that affirmance of his conviction might discourage inebriated drivers from pulling over to "sleep it off". We, of course, agree that such conduct should be encouraged. [Emphasis added.]

Id. at 1072.

The facts in the Griffin case were at odds to the stated policy. Since Mr. Griffin's car was found stationary in a traffic lane facing the opposite direction to that in which traffic was flowing, it can hardly be said that he had pulled over to sleep it off. Under the case at bar, however, the car in which the Defendant was found was parked in a private parking lot with the engine turned off. The location of the vehicle did not pose a

hazard to traffic. One can further infer from the Griffin opinion that the Court did not believe Mr. Griffin had intentionally pulled off the highway to "sleep it off". The statement is made at the conclusion of the opinion that:

> "We find no error, certainly no error constituting a miscarriage of justice".

Id. at 1072.

The Arizona Supreme Court has established public policy in accordance with the policy encouraged by the Second District court of Appeal. The Arizona statutory language pertaining to the crime of driving under the influence is substantially similar to § 316.193, Fla. Stat. In State v. Zavala, 666 P.2d 456 (Ariz. 1983), the The Zavala court clearly and concisely set forth the public policy that its is reasonable to allow a driver when he believes that he is becoming impaired to pull completely off the highway and sleep until he is sober. Zavala states:

> The interpretation we place on the Legislature's imprecise language is compelled by our belief that it is reasonable to allow a driver, when he believes his driving is impaired, to pull completely off the highway, turn the key off and sleep until he is sober, without the fear of being arrested for being in control. To hold otherwise might encourage a drunk driver, apprehensive about being arrested, to attempt to reach his destination while endangering others on the highway.

Id. at 459.

If this public policy is to be left to the Legislature as is suggested by the Third District, the type of policy statement

which would be required to pass through the Legislature could not occur for years. Public concern has been increased through the efforts of the media and the Legislature of the harms of operating a motor vehicle while under the influence. A policy statement is immediately needed from this Court to provide additional encouragement. To do otherwise might cause impaired drivers to continue to drive toward their destination for fear of being arrested for the offense of being in actual physical control of a vehicle while under the influence. Petitioner urges this Court to favorably consider issuing a policy statement at this time thereby not leaving the issue to be determined by the Legislature at some future date.

CONCLUSION

For the foregoing reasons Petitioner requests this Court affirm the exercise of certiorari jurisdiction by the Third District Court of Appeal and to overrule or modify Baker vs. ~~State~~, 518 So.2d 457 (Fla. 5th DCA 1988). Petitioner further requests that this Court reverse the decision on the merits issued by the Third District Court of Appeal and reinstate the dismissal of the traffic citation by the trial court in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S MAIN BRIEF was mailed to Richard L. Kaplin, Esquire, Assistant Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 6th day of March, 1989.

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