IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,784



THE STATE OF FLORIDA,

Petitioner,

vs.

BARTRAVILLE VICENTE DELVA,

Respondent.

* * * * * * * * * * * * * * * * * * * * *

# INITIAL BRIEF OF PETITIONER

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ON DISCRETIONARY REVIEW - CERTIFIED QUESTION

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## INTRODUCTION

This is an appeal by the State of Florida from an Order certifying a question as one of great public importance. The defendant was found guilty of and sentenced for trafficking in cocaine and the Third District Court of Appeal reversed the conviction and remanded for a new trial. The Petitioner, THE STATE OF FLORIDA, is referred to as "STATE," while the Respondent, BARTRAVILLE VICENTE DELVA is referred to as "DEFENDANT."[1]

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[1] All references to the record on appeal, transcript of proceedings and appendix are designated by the symbols "R.", "TR." and "App." respectively.

## SUMMARY OF THE ARGUMENT

For an error to be so fundamental that it may be urged on appeal though not properly preserved below the asserted error must amount to a denial of due process. The standard jury instruction prior to Dominguez v. State, 509 So.2d 917 (Fla. 1987), was not so flawed as to deprive defendants charged with and convicted of trafficking in cocaine a fair trial. Furthermore, in the instant case, the was no real dispute as to the omitted element; the jury could reach no other conclusion than that the defendant knew the substance was cocaine because of the cocaine pricing list also found in his possession. Therefore, the Opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

## STATEMENT OF THE CASE AND FACTS

The defendant was charged by information with Trafficking in Cocaine in excess of 400 grams in violation F.S. § 893.135 (1983). (R. 1). The case was tried before a jury. (TR. 1-295).

At trial the state called Officer Daniel Artesani. (TR. 28-37; 74-93). Officer Artesani testified that he was on patrol when he saw the defendant run a red light. (TR. 76). Officer Artesani pulled the defendant over; the defendant produced a license and registration. (TR. 76). Officer Artesani ran a computer check on defendant's license; his investigation revealed defendant's license was suspended. (TR. 77). Officer Artesani placed the defendant under arrest for driving with a suspended license. (TR. 7). Officer Artesani testified that he conducted an inventory search of the car after the defendant declined to have someone he knew pick up the car. (TR. 78-79). Officer Artesani found what he believed to be a kilo of cocaine underneath the front passenger seat. (TR. 79; 89). Upon discovering the cocaine, Officer Artesani radioed and asked for the assistance of an Organized Crime Bureau Officer. (TR. 83).

Detective Edwardo Pijuan and Detective Ayers responded to the call. (TR. 92; 116). Officer Pijuan testified that when he arrived on the scene the stop had been made and the defendant was already in custody. (TR. 114). Detective Pijuan obtained the

defendant's wallet from Officer Artesani; Detective Pijuan found what he identified at trial, as being a cocaine pricing list in defendant's wallet. (TR. 125). Detective Pijuan's testimony was that he could identify it as a cocaine pricing list because it gave the price for one ounce as being $1100.00, half an ounce for $550.00, all the way down to a half a gram for $25.00. (TR. 125). The cocaine pricing list also refers to a "dime" which is a dime piece of cocaine, and contains calculations for forty-two (42) dimes. (TR. 126; R. 27). Detective Pijuan testified that he registration papers presented by defendant indicated that defendant owned the car. (TR. 127).

The state rested, and defendant's motion for judgment of acquittal was denied. (TR. 168). The parties stipulated that the package found in defendant's car contained 988.9 grams of cocaine. (TR. 170).

The defense called Cecilia Jackson, the defendant's fiancee. (TR. 171). She testified that the car in which the cocaine was found was registered in both their names. (TR. 172). She did not produce any of the registration papers as evidence of joint ownership. (TR. 171-183). She also testified that on the day the defendant was arrested, defendant's brother had access to the car. (TR. 173-174).

The defendant then called Lois Puize, the Record's Custodian at defendant's place of employment. (TR. 183). Ms. Puize testified that she does not know if the defendant was at work the day of his arrest although his time card shows that he punched in at 7:55 a.m., and out at 5:00 p.m. and did not take a lunch break. (TR. 187-189). Ms. Puize testified that the cards are kept in an area that is accessible to everyone. (TR. 191).

Vanessa Brown, defendant's coworker, was called by the defense. (TR. 196-208). Ms. Brown testified that she drove the defendant to work on the day he was arrested. (TR. 199). On that day she did not drive him home because she left work early; however, when she left she saw the defendant's car in the parking lot; she did not know how the defendant's car arrived to the lot. (TR. 200).

Defense rested, the jury was excused, and the defendant moved for a judgment of acquittal. (TR. 209-210). The court denied the motion. (TR. 214). Counsel and the court discussed the jury instructions. (TR. 215-221). In discussing the lesser of possession of cocaine, the court stated:

> **THE COURT:** I will say that the definition for possession are [sic] the same that I read to you under trafficking, unless you want me to ready possession again?

**DEFENSE COUNSEL:** You end up reading the same thing twice.

**THE COURT:** I don't mind doing it if you feel its complicated enough to read twice.

**DEFENSE COUNSEL:** I don't.

**THE COURT:** Anybody have any special instructions?

**DEFENSE COUNSEL:** No, Your Honor.

**THE COURT:** Mr. Daniel?

**ASSISTANT'S STATE ATTORNEY:** No, Sir.

**THE COURT:** All right.

(TR. 217-218)(emphasis supplied). After closing statements the court charged the jury as follows:

**THE COURT:** Certain drugs and chemical substances are by law known as controlled substances.

Cocaine or any mixture containing cocaine is a controlled substance.

Before you can find the Defendant guilty of trafficking in cocaine, the State must prove the following three elements beyond a reasonable doubt.

One, that Mr. Delva knowingly possessed a certain substance.

Two, the substance was cocaine or a mixture containing cocaine.

Three, the quantity of the substance involved was 28 grams or more.

To "possess" means to have personal charge of or exercise the right of

ownership, management, or control over the thing possessed.

"Possession" may be actual or constructive.

If a thing is in the hand of or on the person or in a bag or container in the hand of or on the person or so close as to be within ready reach and is under the control of the person it is in the actual possession of that person.

If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.

"Possession" may be joint. That is, two or more persons may jointly have possession of an article exercising control over it.

In that case, each of those persons are considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.

Therefore, if you decide that the main accusation has not been proved a reasonable doubt, you'll next need to decide if the Defendant is guilty of any lesser included crime.

The lesser crime indicated in the definition of trafficking and cocaine is possession of cocaine.

The definition for "possession" is the same under this statute as it was under the statute that I previously read, under the charge that I previously read.

(TR. 268-272).

The jury found the defendant guilty of trafficking in cocaine, 400 grams or more. (TR. 284). The court sentenced the defendant to fifteen years in state prison. (TR. 292). A timely notice of appeal followed. (TR. 41).

On appeal the defendant raised two issues, to wit: 1. that the lower court committed fundamental error in failing to properly instruct the jury; and, 2. that the state failed to prove actual or constructive possession and therefore, the motion for judgment of acquittal should have been granted. The state argued that: 1. the lower court did not commit fundamental error because fundamental error exists only where the defendant is denied due process and if the omitted element is not in dispute, fundamental error cannot exist, and 2. since the cocaine was found in the exclusive possession of the defendant, knowledge and control may be inferred. The Third District Court of Appeal issued the following opinion:

> Appellant requests reversal of his conviction for trafficking in cocaine, urging that a jury instruction given without objection constituted fundamental error. We reverse.
>
> Appellant was stopped for running a red light and arrested for driving with a suspended license. An inventory search of his vehicle turned up one kilogram of cocaine. Appellant's

wallet contained a cocaine pricing list. The thrust of the defense was that appellant co-owned the vehicle with another person; that others had access to the vehicle on the day in question; and that the state had failed to demonstrate appellant's knowing possession of the package of cocaine. The trial judge gave the standard jury instruction as it exited prior to State v. Dominguez, 509 So.2d 917 (Fla. 1987):

> Before you can find the Defendant guilty of trafficking in cocaine, the State must prove the following three elements beyond a reasonable doubt.
>
> One, that Mr. Delva knowingly possessed a certain substance.
>
> Two, the substance was cocaine or a mixture containing cocaine.
>
> Three, the quantity of the substance involved was 28 grams or more.

The present case was tried in January, 1987. In June, 1987 the Florida Supreme Court rendered its decision in Dominguez. Answering a certified question, the Dominguez Court concluded that the then-existing standard jury instruction was inadequate in the circumstances revealed by that case, namely, where the defendant was clearly in possession of a package but contended he did not know the contents were contraband. The Court amended the standard jury instructions applicable to trafficking cases by adding a fourth element: "4. (Defendant) knew the substance was (specific substance alleged)." 509 So.2d at 918. As Dominguez had requested an appropriate instruction at trial, his conviction was reversed.

In the present case the defense was lack of knowledge the package was in the car and a fortiori, lack of knowledge of the contents.

These issues were interwoven in the defense argument to the jury: "The State has to prove that he knew that cocaine was hidden under the seat." No objection was made to the use of the then-existing standard jury instruction.

Appellant contends that, in light of Dominguez, the jury instruction was inadequate as a matter of law. As no contemporaneous objection to the instruction was made, appellant concedes that it is his burden to demonstrate that the instruction given constituted fundamental error.

It is well established that "'[f]undamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Clark v. State, 363 So.2d 331, 333 (Fla. 1978). It is frequently said that the error complained of must amount to a denial of due process. Ray v. State, 403 So.2d 956, 960 (Fla. 1981).

Appellate courts invoke the doctrine of fundamental error "very guardedly," id. at 960, especially where jury instructions are involved. Not only do the Rules of Criminal Procedure explicitly require a contemporaneous objection to jury instructions, Fla.R.Crim.P. 3.390(d), but "[t]he failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful or prejudicial." Ray v. State, 403 So.2d at 960.

Fundamental error in jury instructions does occur "when an omission or error in the definition of a crime is pertinent or material to what must actually be considered by the jury in order to convict." Williams v. State, 400 So.2d 542, 543 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149, 103 S.Ct. 793, 74 L.Ed.2d 998 (1983). The omitted or misstated instruction must relate to a critical and disputed jury issue in the case, id. at 544, and not to an issue on which there is no real dispute. Id. at 545.

In the present case there was no dispute that the package of cocaine was in the car when the

> defendant was arrested. The court's instruction on possession stated, in part, "If a thing is ...so close as to be within ready reach and is under the control of a person it is in the actual possession of that person...If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed." The defendant's knowledge that the package contained cocaine was an essential and disputed element of the offense charged. As in Dominguez the instructions were susceptible of the reading that knowing possession of the package containing the substance was sufficient to convict, without proof that defendant had knowledge of the contents. Under the principles set forth in Williams, we believe there was fundamental error, and, defendant must be retried.
>
> As to defendant's second point on appeal, the motion for judgment of acquittal was properly denied.
>
> Reversed and remanded.

Delva v. State, 557 So.2d 52 (Fla. 3d DCA 1989)(Footnotes omitted).

The state then filed a Motion for Rehearing and Suggestion for Certification. The Third District Court of Appeal certified the following question as being one of great public importance:

> In a case tried prior to the decision in Dominguez v. State, 509 So.2d 917 (Fla. 1987), is it fundamental error to fail to instruct the jury that in order to convict, the State must prove that defendant knew the substance contained in the package in defendant's car was cocaine, where the instructions were susceptible of the reading that knowing

possession of the package containing the substance was sufficient to convict, and where the error is urged on direct appeal from the conviction, not on collateral attack.

(App. 2).

## POINT ON APPEAL

WHETHER ON A CASE TRIED PRIOR TO THE DECISION IN DOMINGUEZ v. STATE, 509 So.2d 917 (Fla. 1987), IS IT FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT, THE STATE MUST PROVE THAT DEFENDANT KNEW THE SUBSTANCE CONTAINED IN THE PACKAGE IN DEFENDANT'S CAR WAS COCAINE, WHERE THE INSTRUCTIONS WERE SUSCEPTIBLE OF THE READING THAT KNOWING POSSESSION OF THE PACKAGE CONTAINING THE SUBSTANCE WAS SUFFICIENT TO CONVICT AND WHERE THE ERROR IS URGED ON DIRECT APPEAL FROM THE CONVICTION, NOT ON COLLATERAL ATTACK?

## ARGUMENT

ON A CASE TRIED PRIOR TO THE DECISION IN DOMINGUEZ v. STATE, 509 So.2d 917 (Fla. 1987), IT IS NOT FUNDAMENTAL ERROR TO FAIL TO INSTRUCT THE JURY THAT IN ORDER TO CONVICT, THE STATE MUST PROVE THAT DEFENDANT KNEW THE SUBSTANCE CONTAINED IN THE PACKAGE IN DEFENDANT'S CAR WAS COCAINE, WHERE THE INSTRUCTIONS WERE SUSCEPTIBLE OF THE READING THAT KNOWING POSSESSION OF THE PACKAGE CONTAINING THE SUBSTANCE WAS SUFFICIENT TO CONVICT AND WHERE THE ERROR IS URGED ON DIRECT APPEAL FROM THE CONVICTION, NOT ON COLLATERAL ATTACK.[2]

It is undisputed that the trial court instructed the jury in accordance with the standard instruction on trafficking in cocaine in effect at the time. It is also undisputed that the defendant's sole defense at trial was that he did not have *knowing possession* of the cocaine. The decision in Dominguez v. State, 509 So.2d 917 (Fla. 1987), which disapproved the prior standard instruction on trafficking in cocaine, and added the fourth element, knowledge that the substance is cocaine, had not been rendered at the time of the defendant's trial. Therefore, the issue before this Court is: whether it is fundamental error to fail to give an instruction as to knowledge of the nature of

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[2] In State v. Austin, 532 So.2d 19 (Fla. 5th DCA 1988), rev. denied, 537 So.2d 568 (Fla. 1988), the Fifth District Court of Appeal held that the decision in State v. Dominguez, 509 So.2d 917 (Fla. 1987) is not to be retroactively applied on challenges raised on collateral attack.

the substance in a trafficking case. The state submits that the trial court did not commit reversible error in giving the standard instruction in effect at the time, where the defense did not object to the instruction given nor did it submit an alternative instruction, and that the Dominguez, supra, decision should only be prospectively applied. Accordingly, the defendant is not entitled to a reversal, the opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

Any discussion of a preservation/fundamental error issue in general, and as it relates to unchallenged jury charges in particular, must begin with Castor v. State, 365 So.2d 700 (Fla. 1978). In Castor this Court pointed out that "the requirement of a contemporaneous objection is based on the practical necessity and basic fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." Castor, 365 So.2d at 703. Only in the rare case of fundamental error is the defendant's right to appeal preserved without a contemporaneous objection. Id. For an error to be so fundamental that it may be urged on appeal though not properly preserved below the asserted error must amount to a denial of due process. Smith v. State, 240 So.2d 807 (Fla. 1970).

In Street v. State, 383 So.2d 900,901 (Fla. 1980) the defendant argued that an improper instruction was given as to the state's burden of proof; this Court affirmed the conviction, holding that without an "objection or request for instructions by the defense below," the contention could not be considered on appeal. In Smith v. State, 521 So.2d 106 (Fla. 1988), this Court held that the giving of the jury instruction disapproved in Yohn v. State, 476 So.2d 123 (Fla. 1985), was not fundamental error requiring reversal in the absence of an objection; the instruction disapproved in Yohn, supra, impermissibly placed the burden of proof regarding an insanity defense on the defendant. Smith, 521 So.2d at 107.[3] Similarly in United States v. Davanzo, 699 F.2d 1097, 1102 (11th Cir. 1983), the court refused to consider an appeal based on the sufficiency of the jury instructions where the defendants had the opportunity to discuss the matter with the trial court and failed to object to the instruction as proposed and given.

The state urges that if there is no fundamental error in the giving of an instruction that impermissibly places the burden of proof on the defendant, there is no constitutional infirmity herein. The standard jury instruction prior to

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[3] See, also, Hill v. State, 511 So.2d 567 (Fla. 1st DCA 1987)(by failing to object at trial or request proper instruction, defense counsel did not preserve error of trial court in giving an insanity instruction which did not put burden of proof of defendant's sanity on the state).

Dominguez was not so flawed as to deprive defendants charged with and convicted of trafficking in cocaine a fair trial.

Indeed, the Fourth District Court of Appeal has held that the failure to give the instruction in question in this case was not fundamental. In Lawson v. State, 552 So.2d 257 (Fla. 4th DCA 1989), the trial court instructed the jury with an outdated jury instruction which omitted the fourth element, specifically that the defendant knew the substance was cocaine. Despite the fact that the opinion in Dominguez had already been rendered, the defendant offered no objection to the instruction given. Lawson, 552 So.2d at 257. In holding that the error was not fundamental the court noted that: (1) "the admittedly outdated charge given would not have been any kind of error a mere nine months before;" and, (2) the determination of whether "the failure to include, in a jury instruction, an element of the crime that *must be proved* is reversible depends on the whether there was a genuine dispute as to that element." Lawson, 552 So.2d at 259 (emphasis supplied).[4]

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[4] See, also, Williams v. State, 400 So.2d 542, 544 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149, 103 S.Ct. 793, 74 L.Ed.2d 998 (1983)(the omission from a jury instruction of an element of a crime constitutes fundamental error only when it concerns a "critical and disputed jury issue in the case"); Jones v. State, 465 So.2d 566 (Fla. 3d DCA 1985)(if it does not appear that the omitted charge was an issue at trial, review should be declined absent objection).

In Lawson the court reasoned that "common sense" dictated that the jury could reach no other conclusion than that the defendant knew the substance was contraband because of his actions in fleeing and attempting to discard his satchel. Lawson, 552 So.2d at 258. The court then made a "harmless error" analysis wherein it deduced that "if application of the harmless error test results in a finding that the type of error is not always harmful, then it is improper to categorize the error as per se reversible.[5] Id., at 259(Emphasis supplied). Thus it was held that even though the standard jury instruction on trafficking in cocaine had been changed at the time of the defendant's trial, an objection was required to preserve for review the nonfundamental error.

In the instant case the undisputed facts demonstrate that defense counsel participated in the charging conference. (TR. 215-221). The record establishes, and in fact the defendant admits, that he did not request an instruction which included the knowledge element, nor did he object to the instruction as given. (TR. 215-272). The court charged the jury as follows:

> **THE COURT:** Certain drugs and chemical substances are by law known as controlled substances.

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[5] In its analysis the court relied on this Court's decision in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Cocaine or any mixture containing cocaine is a controlled substance.

Before you can find the Defendant guilty of trafficking in cocaine, the State must prove the following three elements beyond a reasonable doubt.

One, that Mr. Delva knowingly possessed a certain substance.

Two, the substance was cocaine or a mixture containing cocaine.

Three, the quantity of the substance involved was 28 grams or more.

To "possess" means to have personal charge of or exercise the right of ownership, management, or control over the thing possessed.

"Possession" may be actual or constructive.

If a thing is in the hand of or on the person or in a bag or container in the hand of or on the person or so close as to be within ready reach and is under the control of the person it is in the actual possession of that person.

If a thing is in a place over which the person has control or in which the person has hidden or concealed it, it is in the constructive possession of that person.

"Possession" may be joint. That is, two or more persons may jointly have possession of an article exercising control over it.

In that case, each of those persons are considered to be in possession of that article.

If a person has exclusive possession of a thing, knowledge of its presence may be inferred or assumed.

> If a person does not have exclusive possession of a thing, knowledge of its presence may not be inferred or assumed.
>
> Therefore, if you decide that the main accusation has not been proved a reasonable doubt, you'll next need to decide if the Defendant is guilty of any lesser included crime.
>
> The lesser crime indicated in the definition of trafficking and cocaine is possession of cocaine.
>
> The definition for "possession" is the same under this statute as it was under the statute that I previously read, under the charge that I previously read.

(TR. 268-272). The defendant never objected to the jury instruction as given, nor did he request an alternate instruction. (TR. 268-280).

In accord with the Lawson decision, common sense dictates that the jury herein could reach no other conclusion than that the defendant knew the substance was cocaine because the uncontroverted evidence was that the defendant carried in his wallet a cocaine pricing list. (TR. 125). Detective Pijuan obtained the defendant's wallet from Officer Artesani; Detective Pijuan found what he identified at trial, as being a cocaine pricing list in defendant's wallet. (TR. 125). Detective Pijuan's testimony was that he could identify it as a cocaine pricing list because it gave the price for one ounce as being $1100.00, half an ounce for $550.00, all the way down to a half

a gram for $25.00. (TR. 125). The cocaine pricing list also refers to a "dime" which is a dime piece of cocaine, and contains calculations for forty-two (42) dimes. (TR. 126; R. 27). Moreover, the instant case was tried before the change in the trafficking instruction and the trial judge gave the standard instruction on trafficking at the time.

Furthermore, during the defendant's case in chief the defense was that the car was jointly owned by the defendant and his fiance, Cecilia Jackson, and that the defendant's brother, John Delva, had possession of the car for most of the day. (TR. 171-208). The defendant's fiancee testified that the car was registered in both their names. (TR. 172). Her testimony contradicted Officer Pijuan's testimony that the photostatic copy of the car's registration indicated that the defendant was the owner. (TR. 27). Ms. Jackson also testified that the defendant's brother often used the car and that on that particular day he borrowed the car in the morning to have a car phone installed in it. (TR. 173-174). The defense also called Vanessa Brown; Ms. Brown testified that on the day of the defendant's arrest she drove him to work in the morning because he did not have a car. (TR. 199). The defendant did not tell Ms. Brown who had his car. (TR. 203). Ms. Brown did not drive the defendant home on that day because she left work early. (TR. 200). When Ms. Brown left work that day the defendant's car was in the parking lot; she does not know how the

defendant's car made it to the lot that day. (TR. 200, 203). Lois Puize, the employee in charge of the time cards at the defendant's place of employment testified that the defendant's time card showed that the defendant was at work all day on the date of his arrest, however, she admitted that the time cards were accessible to everyone and that she could not affirmatively state that the defendant was in fact at work that day. (TR. 189, 191).

None of the testimony at trial put the defendant's lack of knowledge of the substance at issue. (TR. 74-208). The defendant did not testify at trial and the only evidence of knowledge of the substance was the cocaine pricing list; that evidence was uncontroverted. The defendant argues that the record is replete with references that put the defendant's knowledge that the substance was cocaine at issue; however, all references in the record to such knowledge was presented to the jury in the form of argument by counsel. (TR. 68-74; 210-214; 244-257). Such argument by counsel is not evidence and cannot be considered by the jury. Therefore, since the uncharged element related to an issue on which there was no genuine dispute there is no fundamental error. The certified question must be answered in the negative, the opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

## CONCLUSION

Based on the foregoing, the certified question must be answered in the negative, the opinion of the Third District Court of Appeal should be quashed and the conviction affirmed.

Respectfully submitted,

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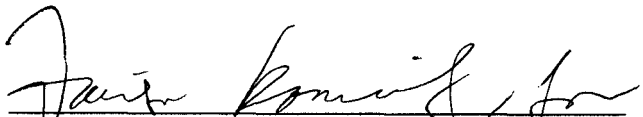
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was furnished by mail to **DAVID A. CORDEN, ESQ.**, 320 S.E. 9th Street, Ft. Lauderdale, FL 33316 and **ROBERT BARRAR, JR.**, RUBIN, RUBIN & FUQUA, P.A., 333 N.E. 23rd Street, Miami, FL 33137 on this 27th day of April, 1990.



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