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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Antonio Perez, was the appellee in the district court of appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellant in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Antonio Perez was charged with carrying a concealed firearm and possession of a firearm by a convicted felon (R. 1-2A). A written motion to suppress the firearm was filed prior to trial (R. 3-4). Following a hearing (R. 8-15), the trial judge granted the motion to suppress (R. 21-22). The motion was granted based on the trial judge's finding that the firearm was seized as the direct result of an illegal detention not supported by a reasonable suspicion of criminal activity (R. 21-22).

The State of Florida timely appealed the order granting the motion to suppress (R. 23). The District Court of Appeal, Third District, reversed the order granting the motion to suppress. State v. Perez, 15 FLW 1355 (Fla. 3d DCA May 15, 1990). The district court accepted the trial judge's conclusion, and the state's concession, that Mr. Perez had been illegally stopped because the police officers did not have a founded suspicion which would support an investigative stop of Mr. Perez. However, the district court held that the illegal detention did not require that the firearm be suppressed:

> The present case is controlled by State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). There, the court stated:
>
> > Admittedly, the cases here are in some conflict, but the weight of authority is that a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person . . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search . . . and even that result may vary depending on the facts of the case."

> Id. at 1335-36 (Citations omitted). Since the present case involved an illegal stop, not an illegal search, the police were entitled to seize the revolver as abandoned property and the motion to suppress it should have been denied.

15 FLW at 1355 (emphasis in original). In reaching this conclusion, the district court certified that its decision is in conflict with the decision of the Fourth District Court of Appeal in Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988).

On June 11, 1990, the district court granted a motion to stay mandate, and on December 3, 1990, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

The relevant facts are set forth in the opinion of the district court as follows:

> Two uniformed City of Miami police officers were on patrol in an area known to be high in narcotics activity. They observed Perez and another male, who appeared to be passing an object between them. Believing that the two might be engaging in a narcotics transaction, one officer exited the police car and started to walk toward Perez. He either told Perez to freeze, or to stop. Perez fled on foot and the officer chased him. Perez ran into an alley while pulling something from his waistband. The officer heard a loud metallic noise of something dropping in the alley. The officer caught Perez who, after being given Miranda warnings, volunteered that he became nervous and ran "because he knew the gun that he had was stolen." A revolver was recovered in the alley.

State v. Perez, 15 FLW at 1355.

SUMMARY OF ARGUMENT

The decision of the district court in the present case is grounded on a per se rule of law that a person's otherwise voluntary abandonment of property can never be tainted or made involuntary by a prior illegal police stop of such person. The primary source of this per se rule is the decision of the Third District Court of Appeal in State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). Numerous decisions from other jurisdictions, as well as a leading treatise on the Fourth Amendment, demonstrate that the Third District's per se rule cannot be reconciled with the principles established by the United States Supreme Court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) and Brown v. Illinois, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 (1975).

It is respectfully submitted that the Oliver per se rule should be expressly disapproved by this Court, and this Court should approve decisions such as Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988), in which the state's abandonment theory was rejected because the facts of the case established that the defendant had abandoned the contraband as a direct result of an illegal detention. Where the facts of a case demonstrate that contraband was discarded immediately after a police illegality such as an order to stop or freeze not based on a founded suspicion of criminal activity, the conclusion is inescapable that the abandonment was a direct result and exploitation of the illegality. An individual's act of abandoning evidence after

being ordered to stop or freeze certainly cannot be deemed a mere coincidence, and to say that police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

In the present case, the trial judge found that Antonio Perez abandoned a firearm as the direct result of an illegal detention. The facts developed at the hearing on the motion to suppress fully support that finding. Perez threw down the firearm while fleeing from a police officer who had either told Perez to freeze, or to stop. There were no intervening circumstances, as Perez fled and discarded the firearm immediately after he was ordered to stop or to freeze. Under these circumstances, Perez's immediate discard of the firearm cannot be deemed to have been anything other than a direct result of what the trial judge found, and the state has conceded, was an illegal detention not supported by a founded suspicion of criminal activity. That being the case, the trial judge properly suppressed the firearm as the product of the illegal detention. The decision of the Third District Court of Appeal reversing the trial court's suppression order based upon the Oliver per se rule should be quashed.

ARGUMENT

THE SEIZURE OF EVIDENCE CANNOT BE UPHELD ON GROUNDS OF ABANDONMENT WHERE THAT ABANDONMENT IS THE DIRECT RESULT OF AN ILLEGAL STOP BECAUSE THE ABANDONMENT OF THE EVIDENCE DOES NOT REMOVE THE TAINT OF THE PRIOR POLICE ILLEGALITY.

The decision of the district court in the present case is grounded on the following rule of law:

> [A] person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person . . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search . . . and even that result may vary depending on the facts of the case.

State v. Perez, 15 FLW 1355 (Fla. 3d DCA May 15, 1990)(emphasis in original). The primary source of this per se rule that a person's otherwise voluntary abandonment of property can never be tainted or made involuntary by a prior illegal police stop of such person is the decision of the Third District Court of Appeal in State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). It is respectfully submitted that State v. Oliver was wrongly decided, as the per se rule of law announced in that decision runs contrary to well-established principles of Fourth Amendment law.

The seminal decision on the subject of suppression of evidence as the product of police violations of the Fourth Amendment is Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The test established by that decision for determining whether evidence must be suppressed as the product of a prior police illegality is "whether, granting

establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488, 83 S.Ct. at 417.

In Brown v. Illinois 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 (1975), the Court listed several factors to be utilized in applying the Wong Sun test to determine whether evidence is a product of police illegality. Those factors include whether the evidence was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.

Neither the Wong Sun test for determining whether evidence is a product of police illegality, nor any of the factors set forth in Brown v. Illinois, were utilized by the Third District in State v. Oliver. Rather, the court in Oliver simply adopted a per se rule that a person's otherwise voluntary abandonment of property can never be tainted or made involuntary by a prior illegal police stop of such person. The court used the following reasoning to support the per se rule:

> Until an actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action . . . As a consequence, a person's abandonment of property subsequent to an illegal police stop can hardly be considered the product of a stop.

Id. at 1336 (citation omitted).

Professor Wayne R. Lafave, in his well-respected treatise on the Fourth Amendment, discusses Oliver at some length. After setting forth the per se rule announced in the case and the reasoning given by the court to support the per se rule, Professor LaFave sharply criticizes both the rule and the reasoning behind the rule:

> The Oliver reasoning is not convincing. The question is not whether, but for the throwing away of the objects, the police would have found them. Rather, the question is whether the prior illegality has promoted the disposal, which it most assuredly did. Oliver is an invitation to police to engage in illegal stops.

2 W. LaFave, Search and Seizure §2.6(b), at 471-472, n. 62. Professor LaFave states the preferred rule as follows:

> Property is not considered abandoned when a person throws away incriminating articles due to the unlawful activities of police officers. Thus, where a person has disposed of property in response to a police effort to make an illegal arrest or illegal search, courts have not hesitated to hold that property inadmissible.

2 W. LaFave, Search and Seizure §2.6(b), at 471-472 (footnotes omitted).

In United States v. Beck, 602 F.2d 726 (5th Cir. 1979), one of the cases cited by LaFave in support of the foregoing rule, the rationale behind refusing to find abandonment under such circumstances is more fully set forth. After finding that police officers had illegally stopped an automobile driven by Beck, the Court turned to the issue of whether Beck's act of throwing contraband out of the car window after the illegal stop

constituted a voluntary abandonment:

> While it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, see United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (en banc), it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct. United States v. Maryland, 479 F.2d 566, 568 (5th Cir. 1973) (per curiam). In this case, it seems clear that the contraband was abandoned because of the illegal stop of the Chevrolet. After the stop was made, and while Spears was pulling his patrol car in front of the Chevrolet, he observed the marijuana cigarette thrown out Beck's window. The bag containing marijuana and the syringe were presumably discarded at the same time. These acts of abandonment do not reflect the mere coincidental decision of Beck and his passenger to discard their narcotics; it would be sheer fiction to presume they were caused by anything other than the illegal stop. Had Spears observed these items inside the Chevrolet during an unlawful stop they would be suppressed, see Delaware v. Prouse, [440] U.S. [648], 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979); the fact that Beck and his passenger threw them out the window onto the ground after the commencement of an illegal stop and just prior to an unlawful arrest does not change this result. Here, because there was "a 'nexus between . . . lawless [police] conduct and the discovery of the challenged evidence' which has not 'become so attenuated as to dissipate the taint,' . . . the evidence should be suppressed." United States v. Maryland, 479 F.2d at 568 (quoting Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968).

602 F.2d at 729-730 (emphasis in original).

Similar sentiments were expressed in People v. Hodari D., 265 Cal. Rptr. 79, 216 Cal.App.3d 745 (1989), U.S. cert. granted, 111 S.Ct. 38, 112 L.Ed.2d 15 (1990). There, the appellant had discarded contraband after being confronted by a police officer running head on at him. After finding that the police activity

constituted an illegal detention[1] without a reasonable suspicion of criminal activity, the court then determined that the illegality of the police activity required suppression of the discarded contraband:

> Respondent argues that appellant failed to show a nexus between the police action and the evidence, as there was no showing that the police intended to search him as opposed to merely detaining him. . . . We cannot agree that the illegality involved must be a search in order for discovered evidence to be suppressed as a direct result or exploitation of the illegality.

265 Cal.Rptr. at 85. The court reached this conclusion by applying the test established by the United States Supreme Court in Brown v. Illinois, supra, for determining whether evidence must be suppressed as the product of police illegality:

> Factors to be considered in determining whether evidence is a product of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. (Brown v. Illinois (1975) 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 [considering whether a confession was obtained by exploitation of an illegal arrest].) None

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[1] It would appear that this holding forms the basis for the grant of certiorari by the United States Supreme Court. In the California appellate court, the government contended that the police officer's act of running toward the defendant in a manner indicating an intent to block his path and confront him did not constitute a detention under Brower v. County of Inyo, 489 U.S. ___, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) and Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988). There is no such question in this case, as Mr. Perez was ordered to freeze or stop by a police officer prior to the time he discarded the evidence. The trial court's finding that Mr. Perez was illegally detained, and the State's concession that such an illegal detention had occurred, were accepted by the district court of appeal.

> of these factors require a showing of an illegal search as the triggering illegality, as opposed to an illegal arrest or detention.
>
> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. . . . Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. . . . To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

Id. at 85-86. The court pointed out that its result was mandated not only by United States Supreme Court precedent, but also by the policy considerations underlying the Fourth Amendment exclusionary rule:

> The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, op. cit. supra, § 11.4(j), pp. 459-460). If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

Id. at 86.

Wong Sun was again held to require suppression of evidence notwithstanding the government's claim of abandonment in People v. Shabaz, 424 Mich. 42, 378 N.W.2d 451, 462 (1985), cert. dismissed, 478 U.S. 1017, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986):

> Regardless whether abandonment was intended, defendant's actions cannot be used to dissipate the taint flowing from the unreasonable police conduct. Where, as here, the police activity is coercive in nature, we

> find that it serves to nullify any claim of abandonment. . . . Defendant's divestment of the bag was in direct response to his unjustified seizure. Following Wong Sun v. United States, supra, the fruits of the officers' illegal action are not to be admitted as evidence unless an intervening independent act of free will purges the primary taint of the unlawful invasion. In light of the coercive effect of the seizure of the defendant, we find that his divestment of the paper bag, and the revolver it contained, does not constitute an independent act sufficient to purge the primary taint of the unlawful seizure.

Numerous decisions from other jurisdictions have reached a similar result. See e.g. State v. Lemmon, 318 Md. 365, 568 A.2d 48 (1990)(defendant's abandonment of contraband did not render contraband admissible where abandonment followed illegal seizure of defendant, as abandonment was forced by illegal police conduct); Comer v. State, 754 S.W.2d 656 (Tex.Cr.App. 1988)(decision to abandon contraband after illegal stop of truck found to have been direct result of the illegal detention, therefore relinquishment of contraband did not remove taint of the illegal police conduct); Hawkins v. State, 758 S.W.2d 255 (Tex.Cr.App. 1988)(abandonment of contraband found to have been direct result of illegal detention, consequently, defendant's relinquishment of the contraband did not remove the taint of the illegal conduct); Salcido v. State, 758 S.W.2d 261 (Tex.Cr.App. 1988)(where contraband was discarded as a spontaneous reaction to an illegal police detention, and not as an independent act involving a calculated risk, appellant's relinquishment of the contraband did not remove the taint of the illegal police conduct); People v. Santiago, 136 A.D.2d 942, 524 N.Y.S.2d 893

(1988)(as defendant's act of throwing his jacket down to the ground during police chase was a provoked and spontaneous response to an illegal police detention, suppression of contraband found in the jacket was required); State v. Bennett, 430 A.2d 424 (R.I. 1981)(paper bag dropped to ground after officer yelled out, "Police, hold it"; state's abandonment theory rejected and evidence in paper bag suppressed because that evidence was procured as a result of an illegal seizure of the defendant); Commonwealth v. Barnett, 484 Pa. 211, 398 A.2d 1019 (1979)(suppression of property abandoned by defendant required where police had no right to stop defendant and property was abandoned following the illegal stop); Moss v. Commonwealth, 7 Va.App. 305, 373 S.E.2d 170 (1988)(property abandoned by defendant when police officer jumped in front of him and shined his flashlight on the defendant required to be suppressed where officer's actions not supported by a reasonable suspicion of criminal activity).

The per se rule adopted by the Third District Court of Appeal in Oliver that a person's otherwise voluntary abandonment of property can never be tainted or made involuntary by a prior illegal police stop of such person cannot be reconciled with the decisions of the United States Supreme Court in Wong Sun and Brown v. Illinois, as demonstrated by the foregoing decisions from other jurisdictions and Professor LaFave's treatise on the law of search and seizure. Similarly irreconcilable with Wong Sun and Brown v. Illinois are the three Florida decisions cited by the Oliver court in support of its per se rule, and two

Florida cases decided after Oliver which adopt the per se rule announced in that case.

As for the pre-Oliver decisions, in Freyre v. State, 362 So.2d 989 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 468 (1979), U.S. cert. denied, 444 U.S. 857, 100 S.Ct. 118, 62 L.Ed.2d 76 (1979), as in Oliver, the Third District found an insufficient nexus between an illegal detention and a subsequent abandonment, but did so without any consideration of the tests set forth in Wong Sun and Brown v. Illinois. In Smith v. State, 333 So.2d 91 (Fla. 1st DCA 1976) and Riley v. State, 266 So.2d 173 (Fla. 4th DCA 1972), the courts upheld the denial of motions to suppress based simply on the principle that it is not a search to retrieve evidence voluntarily abandoned by a defendant. Unquestionably, it is not a search for police to retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). However, where property is abandoned as the direct result of a prior illegal detention, suppression is required not because the police retrieval of the property constitutes a search, but rather because the police retrieval of the property is tainted by the police illegality preceding the retrieval of the property. Wong Sun; Brown v. Illinois. By failing to consider whether the police retrieval of property was tainted by the prior illegal detention, the decisions in Smith and Riley are fatally flawed.

As for the post-Oliver decisions, the Fourth District in State v. Arnold, 15 FLW 292 (Fla. 4th DCA January 31, 1990)(pending on motion for rehearing) and the Fifth District in Curry v. State, 15 FLW 2902 (Fla. 5th DCA November 29, 1990), like the Third District in Freyre and Oliver, found an insufficient nexus between an illegal detention and a subsequent abandonment, but did so without any consideration of the tests set forth in Wong Sun and Brown v. Illinois. In addition to its failure to utilize the tests set forth in Wong Sun and Brown v. Illinois, the court in Curry finds the Oliver per se rule "to be more consistent with the one developed in the consent to search cases, after an illegal Terry stop." 15 FLW at 2903 (footnote omitted). In fact, the direct opposite is true. In Norman v. State, 379 So.2d 643, 646-647 (Fla. 1980), this Court, citing Wong Sun and Brown v. Illinois, established the following rule to determine the validity of consent given after an illegal stop:

> [W]hen consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. . . . The consent will be held voluntary only if there is clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action.

(citations omitted). Clearly, the Oliver per se rule that an abandonment of evidence following an illegal stop can never be tainted or made involuntary by the illegal stop is totally inconsistent with the rule announced by this Court in Norman that an illegal stop presumptively taints a consent to search given after the illegal stop.

Consistent with this Court's decision in Norman, and the decisions of the United States Supreme Court in Wong Sun and Brown v. Illinois, are the pre-Oliver and post-Oliver decisions which reach a different result than that required by the Oliver per se rule. See e.g. Stanley v. State, 327 So.2d 243, 245 (Fla. 2d DCA), cert. denied 336 So.2d 604 (1976)(contraband thrown out of automobile window after illegal stop required to be suppressed as "the fruits of the improper exercise of police power"); Mattier v. State, 301 So.2d 105 (Fla. 4th DCA 1974)(contraband which fell to ground as defendant exited car following illegal stop required to be suppressed as "the fruits of that improper exercise of the police power"); Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988)(state's abandonment theory rejected because facts of case established that defendant had dropped contraband as a direct result of an illegal stop); Dames v. State, 566 So.2d 51 (Fla. 1st DCA 1990)(contraband dropped to the ground after illegal stop required to be suppressed, as seizure of contraband was tainted by illegality of the stop); State v. Bartee, 568 So.2d 523 (Fla. 1st DCA 1990)(trial court's suppression of contraband abandoned following illegal detention affirmed on the basis of Dames and Spann).

Based on the foregoing analysis, it is respectfully submitted that the Oliver per se rule should be expressly disapproved by this Court, and this Court should approve the decisions such as Spann v. State, supra, in which the state's abandonment theory is rejected because the facts of the case establish that the defendant had abandoned the contraband as a

direct result of an illegal detention. Where the facts of a case demonstrate that contraband was discarded immediately after a police illegality such as an order to stop or freeze not based on a founded suspicion of criminal activity, the conclusion is inescapable that the abandonment was a direct result and exploitation of the illegality. An individual's act of abandoning evidence after being ordered to stop or freeze certainly cannot be deemed a mere coincidence, and to say that police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

In the present case, the trial judge found that Antonio Perez abandoned a firearm as the direct result of an illegal detention. The facts developed at the hearing on the motion to suppress fully support that finding. Perez threw down the firearm while fleeing from a police officer who had either told Perez to freeze, or to stop. There were no intervening circumstances, as Perez fled and discarded the firearm immediately after he was ordered to stop or to freeze. Under these circumstances, Perez's immediate discard of the firearm cannot be deemed to have been anything other than a direct result of what the trial judge found, and the state has conceded, was an illegal detention not supported by a founded suspicion of criminal activity. That being the case, Wong Sun and Brown v. Illinois require that the firearm be suppressed as the product of the illegal detention. The decision of the Third District Court of Appeal reversing the trial court's suppression order based upon the Oliver per se rule should be quashed.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the district court of appeal, and remand the case to the district court with directions that the trial judge's suppression order be affirmed.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 28th day of December, 1990.

HOWARD K. BLUMBERG
Assistant Public Defender