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THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER 79,162

THIRD DISTRICT COURT OF APPEAL CASE NUMBER 91-191

RAFAEL JOSE PUERTAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee,

APPELLANT'S AMENDED INITIAL BRIEF ON THE MERITS

The following is an appeal from the opinion given by the Third District Court of Appeal on the 24th day of December, 1991.

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STATEMENT OF JURISDICTION

This appeal is sought under Fla. R. App. P. 9.030 (a)(2)(iv). The appellant/defendant, Rafael Jose Puertas, is presently incarcerated as a result of adjudication by the lower court.

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STATEMENT OF THE ISSUES

1. The trial Court erred by:

   (i) denying defense counsel's continuing Motion In Limine to exclude witnesses hearsay testimony at trial with reference to Y.P.'s out of Court statements, which testimony constituted unfair and prejudicial bolstering of the child's in-Court testimony;

   (ii) allowing the State Attorney to introduce a video taped interview and also allow the child to testify as to the allegation contained therein, thereby unfairly bolstering the child/victim's credibility.

2. The trial Court erred in denying defense counsel's Motion For Judgement of Acquittal as there is insufficient evidence to convict the appellant of Count II and III of the Information; Sexual Battery by penetrating the vagina of the child/victim, Y.P., with the use of his fingers and/or hand.

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STATEMENT OF THE CASE

On September 18th, 1990 the trial Court heard the State's Motion To Admit Child Hearsay at trial. This matter was heard before the Honorable Judge Arthur Rothenberg, Circuit Court Judge of the Eleventh Judicial Circuit. At said hearing present were Assistant State Attorney Sally Weintraub, defense counsel, Miguel San Pedro, and the defendant, who was brought before the Court during the hearing. The Court took the State's Motion under consideration and on September 20th entered a ruling granting the State's Motion To Admit Child Hearsay at trial, despite the defense's objections.

This case came up for trial on the 15th of October, 1990, before the Honorable Thomas M. Carney, Circuit Court Judge, of the Eleventh Judicial Circuit in and for Dade County, Florida; as a special back up judge, used to expedite cases back-logged in each division. The trial lasted until October 22, 1990. The Assistant State Attorney present was Sally Weintraub and defense counsel was the undersigned, Miguel San Pedro. On October 22nd, 1990 the jury, after deliberations were interrupted on Friday, in order for the jury to go home for the weekend rather than being sequestered, the jury returned with a verdict on the following Monday as follows: as to Count one (1), guilty of Simple Battery, a lesser but included offense; as to Count two (2), guilty of Sexual Battery; as to Count three (3), guilty of Sexual Battery; as to Count four (4),

guilty of Simple Battery, a lesser but included offense; as to Court five (5), guilty of Lewd Assault Act; as to Count Six (6), not guilty of Lewd Acts.

The undersigned attorney filed a Notice of Appeal to the Third District Court of Appeal on February 4th, 1991. The appellant filed a Motion For Leave To Appear Amicus Curiae in the case of Pardo v. State, case number 78,318, with this Honorable Court; said Motion was denied on August 30th, 1991. An initial brief was filed with the Third District Court of Appeal on September 10th, 1991. On December 24, 1991, the Third District Court of Appeal issued a "PER CURIAM" decision, stating "Affirmed on the authority of State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991)."

The undersigned attorney filed a Notice of Appeal with this honorable Court on December 27th, 1991 and subsequently filed an Amended Notice To Invoke Discretionary Jurisdiction on the 3rd day of January, 1992. A Jurisdictional Brief was filed with this Court on January 3rd, 1992.

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STATEMENTS OF FACT

Ms. Anna Torrance, the child/victim's school teacher, first noticed that the child was crying in class and the child would not state any reason why she was crying. (T. Page 46, Line 23). Myladis Morales, Y.P.'s school friend, and classroom pal, stated to the teacher that something was wrong. (T. Page 47, Line 7). The teacher pulled both children out of the classroom and while apart from the rest of the class, the teacher stated that Y.P. said she had been raped. (T. Page 47, Line 4). However, under cross-examination, the teacher admitted that both children were together, that Myladis Morales did most of the talking, that Myladis would say something and would look at Y.P. to see if it was true, Y.P. would then nod agreeing or disagreeing, (T. Page 79, Line 15 through 25; Page 80, Line 1 through 12). The teacher admitted to being new and never having confronted this type of situation before. (T. Page 49 through 50). She also stated she sought help from the school principal, and was told to take the child to the Guidance Counselor, Ms. Wilson. (T. Page 50). While at the counselor's office, the teacher stated "What we found out was that it didn't just happen once, that it was something that was a continuous thing, that had been happening." (T. Page 52, Line 17). That the child stated this happened once when she was in the second grade. (T. Page 53, Line 6). This last statement was permitted into evidence despite Defense Counsel's objection, that said statement was not even part of the State's Motion To Introduce Hearsay. The teacher further stated that the perpetrator was a

close friend of her father's and that she relaxed upon finding out who the person was, because his identity would be ultimately known. (T. Page 54, Line 4). The teacher stated that the child said the perpetrator's name was Rafael Puertas (T. Page 54, Line 18) and after a nod by the State Attorney, changed her response to saying that she heard the last name to be Puentas or Fuentes. (T. Page 54, Line 19 through 35; Page 55, Line 1 and 2). During cross-examination, the teacher admitted to not being certain of the man's name and furthermore, admitted that she could not recall having told the detective the man's name, and at deposition, she had admitted to learning the name of Rafael Puertas subsequent to his arrest. (T. Page 65 through 67). Ms. Torrance, described one incident that apparently occurred, while the child was walking to the defendant's apartment, with very little detail, alleging the child stated, the defendant had touched Y.P.'s pipi. (T. Page 56, Line 12 through 17). The teacher denied having heard the child make allegations of any wrong-doings by the defendant's at the family apartment. (T. Page 56, Line 18 through 21). The teacher stated, the child alleged some wrong-doing at the apartment complex swimming pool, without being able to pin point exactly what had happened. (T. Page 57, Line 1 through 6). She admitted to being surprised by the allegation of wrong-doing at the complex pool as the pool is such a public place. (T. Page 57, Line 1 through 6). She went on to further describe that the man was swimming between her legs or something to that effect. (T. Page 57, Line 14 through

18). The teacher again repeated, among other things, that her main concern was to help the child feel better and knew that eventually the person would be identified, as the person was alleged to be a close friend of the family. (T. Page 58, Line 2 through 9).

Ms. Anelle Wilson, testified that both children were upset and crying and that she began to feel that Y.P. was making allegations of sexual advances, without being able to exactly repeat Y.P.'s words. (T. Page 91, Line 1 through 13). She remembered that the child spoke of the person, as being a friend of the family, (T. Page 98, Line 16 through 20), someone who lived nearby, someone who was seen by the family on a social basis, vaguely that something had happened at the pool, that there was an episode involving oral sex, (T. Page 99, Line 7 through 8), and the child was aware of the body parts, including the penis. (T. Page 99, Line 12). The counselor went on to describe the child as being quiet and shy. (T. Page 105, Line 16).

Upon completion of the Counselor's Interview, Ms. Wilson telephoned, The Child Protection Agency Hotline in Tallahassee, Florida, and filed a preliminary report of the alleged incident. (T. Page 17, Line 2 through 7). Said report was introduced into evidence by the defendant through Carol Strickland, the employee of H.R.S. who wrote down the information of the alleged abuse report from Ms. Wilson. (T. Page 90, Line 2 through 6). The report was

introduced into evidence and therein it stated the perpetrator was the uncle of the child and not the defendant. (T. Page 95, Line 7 through 10).

The child/victim, Y.P., stated that on or near the dates of the alleged incidents, her uncle was in Miami, she stayed overnight at his home, (T. Page 102, Line 20 through 22), and on occasions went swimming at his house. (T. Page 103, Line 1 through 9).

Detective Ellen Christopher, of the Metro Dade Police Department Sexual Battery Unit, stated the child had said Rafael, (T. Page 120, Line 10 and 11), was bothering her. (T. Page 120, Line 6 through 9). The child was unable to tell her when was the last time something had happened. (T. Page 121, Line 5 through 7). The officer stated that the child said it had happened during the second grade. (T. Page 121, Line 12 through 15). Detective Christopher then spoke about an alleged incident that had occurred at the defendant's family domicile. (T. Page 121, Line 20). The Detective described another instance the child had told her when, near the mail boxes, the child's underwear was pulled down an the penis of the defendant was placed against her vagina. (T. Page 122, Line 5 through 16). Detective Christopher also stated Y.P. told her about an instance at the pool, while Y.P. was in the pool with her mother, and brother, the defendant touched her vagina. (T. Page 122, Line 17 through 23).

On cross-examination, Detective Christopher, stated "She wasn't able to explain it and not to my satisfaction." (T. Page 136, Line 12 through 18; Page 137, Line 13 through 16).

Dr. Valerie Rao stated that Y.P. had told her the name of the person was Rafael. (T. Page 153, Line 24 and 25; Page 154, Line 1 through 6).

Daisy Polo, the Mother of Y.P., testified that she took the child aside to question her about her suspicions; which statements were introduced at trial in their entirety, despite Defense's objections as it was not part of the State's Motion. (T. Page 16, Line 1 through 24; Page 17, Line 18 through 22).

Mercy Restani, the State Attorney's Office Child Interviewer, described the contents of the video interview in detail, and on numerous occasions discussed what the child had stated to her during the interview. (T. Pages 39 through 46). Defense counsel objected to repeating the child's hearsay and then having the statements heard again, while playing the video tape. Judge Carney, sustained the objection and later reversed his ruling upon the prosecution commenting that this had been heard by Judge Rothenberg at the pre-trial hearing, [emphasis added]. (T. Page 40, Line 7 through 17).

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SUMMARY ARGUMENT

Summary of Issue 1

The appellant herein contests the present use of section §90.803 (23), Florida Statutes, (1989) by the trial courts. At present the trial courts provide the Office of the State Attorney an unfair trial advantage over the defense, as prosecutors may apply to the courts to admit out-of-court prior consistent statements of the child/victim into testimony, pursuant to Fla. Stat. §90.803 (23), and have the testimony repeated over and over again by several persons, even if the child has competently or will testify as to the facts and circumstances of the case. The admission of the hearsay of a child prosecutrix leads to the credibility of a child/victim being bolstered or supported by the repetition of the same out-of-court consistent statements by numerous witnesses, a video tape, and later by the child/victim herself. Chief Justice Carroll's had foreseen this very same issue almost thirty years ago and stated that a group of citizens, can parade into a courtroom and needlessly repeat statements time and time again until the jury forgets that the truth of the statement was not backed by the citizen's integrity or reputation, but is solely founded upon the words of the child prosecutrix, which statements could be true or not. Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964).

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Summary of Issue 2

It was improper for the trial court to permit the jury to decide the issue of whether the defendant committed sexual battery by penetration with the penis or the finger. The evidence with regard to this issue was clearly presented in court through the State's medical expert Dr. Valerie Rao, who during cross examination affirmatively stated that there was no evidence of penetration by the penis and there was no evidence of any penetration whatsoever. Dr. Rao was accepted as an expert and her testimony was convincing on this issue. The only other evidence came in the form of very basic childish statements, which were very general in nature and were introduced into evidence by the child. None of the child's statements say any indicative language that would constitute a reasonable showing that the defendant made any penetration whatsoever. The only reference made by the child which can be misconstrued as referring to inside or outside the vagina was when the child made a reference to "inside or outside" during an interview with the State Attorney Children's Center Interviewer, Mercy Restani. At the interview the child was clearly referring to whether any contact was made inside or outside the clothing not the vagina. The defendant was found not guilty of sexual battery by way of any union with the penis.

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ARGUMENTS AND CITATIONS OF AUTHORITIES

ISSUE NUMBER 1

The trial Court erred by:

(i) denying defense counsel's continuing Motion In Limine to exclude witnesses hearsay testimony at trial with reference to Y.P.'s out-of-court statements, which testimony constituted unfair and prejudicial bolstering of the child's in Court testimony;

(ii) allowing the State to introduce a video taped interview and also allow the child to testify as to the allegation contained therein, thereby unfairly bolstering the child/victim's credibility.

Due to the hazards of placing a child prosecutrix in a courtroom setting, as a witness in a criminal case, the Florida Legislature and the state judiciary have drafted and adopted Florida Statute §90.803 (23) in order to protect abused children from further harm. Statute §90.803 (23) allows any information known by a child/witness, who is unable to properly voice his or her testimony, as would an adult, due to their age, maturity, or psychological state of mind, to be used at trial, though the introduction of prior consistent out-of-court statements made

previously by the child prosecutrix.

The intent behind the application of the exception listed in section §90.803 (23), Florida Statutes, (1989), is justified, but the execution of the statute is entirely improper. The present use of section §90.803 (23), Florida Statutes, (1989), by the trial courts, provide the Office of the State Attorney an unfair trial advantage, as prosecutors may apply to the courts to admit out-of-court prior consistent statements of the child/victim into testimony and have the testimony voiced as many times as desired and by whomever they wish, even if the child has competently or will testify as to the facts and circumstances of the case. The use of the exception indirectly leads to the credibility of a child/victim being bolstered by the repetition of the same out-of-court consistent statements by numerous witnesses, a video tape, and later by the child/victim herself.

Under the present section § 90.803 (23), Florida Statutes, (1989), a defendant is confronted at trial with the presentation of alleged reliable hearsay, through the testimony of witnesses, other than the declarant of the hearsay, **without any limit whatsoever.** No limitation is placed on the number of times the prior consistent statements may be repeated, by whom, and whether there is a need to introduce the statements if child/victim can properly communicate

the alleged acts to the jury completely and with specificity, before the out-of-court statements are admitted into evidence. Often this is done haphazardly without regard to the **"Prejudice of Repetition."** It is not the intention of this writer to contest the arbitrariness of the admission of the statements as "hearsay," but solely to question whether a defendant is prejudiced by the repetition of the same statements, whether orally or on video, in order to bolster the credibility of the testifying child witness.

When adopting these new statutes the legislature failed to recognize that in order to have an orderly and fair trial generally, testimony cannot be bolstered up or supported by showing that the witness had made statements out-of-court similar to and in harmony with testimony on the stand. Allison v. State, 162 So. 2d 922, (Fla. App 1 Dist. 1964).

The Third District Court of Appeal erred in rendering its decision in the instant case, due in part to the reasoning offered in Kopko v. State, 577 So.2d 956 (Fla.App.5 Dist. 1991), wherein the Court stated:

> [4] Although, in this case, we cannot say that the trial court erred in ruling the child's out of court statements were admissible under section 90.803(23), Florida Statutes, we never conclude that it was reversible error to utilize this hearsay exception as a device to admit prior consistent statements. In reaching this conclusion we are convinced that the important function of section

> 90.803(23), Florida Statutes is in no way impaired. The purpose of the child victim exception to the hearsay rule is to salvage potentially valuable evidence of abuse from children who may, for many reasons, be unable or unwilling to give their evidence at trial to a jury in the same way an adult would be expected to do.

In addition the Court in Kopko, granted the state's request to certify the following issue as a matter of great public importance having a great effect on the proper administration of justice in this state:

> IN A CASE IN WHICH THE CHILD VICTIM OF A SEXUAL OFFENSE TESTIFIED FULLY AND COMPLETELY AT TRIAL AS TO THE OFFENSE PERPETRATED UPON HIM OR HER, CAN IT CONSTITUTE REVERSIBLE ERROR TO ADMIT, PURSUANT TO SECTION 90.803 (23), FLORIDA STATUTES, PRIOR, CONSISTENT OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE CUMULATIVE TO THE CHILD'S IN-COURT TESTIMONY OR MERELY BOLSTERED IT?

This issue was specifically contested at the trial of this matter and was submitted to the Third District Court of Appeal by the appellant, Rafael Jose Puertas. The undersigned counsel made an objection to the bolstering of the child/victim's testimony at trial, specifically by a Motion in Limine at page 37, line 10 through 24, of the trial record. In said Motion the undersigned counsel stated:

> "I am anticipating, your Honor, that with this questions Ms. Weintraub seeks to enhance the credibility of the child and I would ask in a Motion in Limine to protect the record to request that the child's testimony or credibility not be bolstered unless it has been

> thoroughly attacked. At this point it has not occurred." (T. Vol. Oct. 16, 1990, P. 37).

The foregoing objection suggests a noted exception by counsel, to the introduction of the testimony, according to the guidelines in sections §90.803 (23) and §90.403, Florida Statutes (1989).

The Third District Court of Appeal in State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991), took the same issue we present herein, to wit: the prejudicial effect of bolstering a child victim's testimony, under advisement and certified the question to this Honorable Court [Case Number 78,318]. In the instant case, State v. Puertas, the defendant was confronted at trial with having to defend himself, from numerous out of Court declarations of the child victim, which were introduced by the live testimony of Ana Torrance, the child's School Teacher, Anelle Wilson, the School Guidance Counselor, Detective Ellen Christopher, Lead Investigator assigned to the case, Dr. Valerie Rao, a Forensic Physician, Daisy Polo, the child's mother, and Mercy Restani, the State Attorney Office Child Interviewer. They each were permitted to testify as to the child's out of Court verbal statements, non-verbal conduct, demeanor and behavior, clearly for the purpose of bolstering the child's credibility, even though at the introduction of the testimony the child's credibility was not at issue, since the child had not yet even testified.

During the testimony of Mercy Restani, the witness gave live

declarations regarding the statements given to her by Y.P., the child victim. The prosecutor then sought to introduce the same declarations by way of a video taped statement taken during an interview by Ms. Restani with the child/victim. It is true that the act of testifying in and of itself can be difficult for a child, but if the child/victim testifies via video, to ease the child then the child should not be allowed to repeat the same statements over and over again at trial. If a video taped interview is permitted, due to the psychological effect of testifying, then the child should not be called as a live witness as well. Ronnie Keller v. State of Florida, _____ So. 2d. _____, 16 FLW D2009. The Court permitted both the live testimony and the video statement of the child. After all this was said and done, the child took the stand and competently testified as to all these matters all over again.

In 1964 the First District Court of Appeal had the wisdom to foresee this very same issue developing in the case of Allison v. State, 162 So.2d 922, (Fla.), Chief Judge Carroll writing for the Court suggested that the rule against bolstering of credibility by other witness was necessary. The Chief Judge wrote:

> "The salutary nature and the necessity of such a rule are clearly apparent upon reflection in cases like the present, for without that rule a witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens,

> who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of said witness. This danger would seem to us to be especially acute in a criminal case like the present when the prosecutrix is a minor whose previous out of court statement is repeated before the jury by adult law enforcement officer." [sic] at 924.

The reasoning by the First District Court follows a sound established principal that had been decided in the same manner since Van Gallon v. State, 50 So.2d 882 (Fla. 1951). In Van Gallon, the Court recognized the rule that a witnesses testimony may not be corroborated by his/her own prior consistent statements.

In Allison and Van Gallon, the appellate Courts were primarily concerned with insuring that a defendant could receive an unfair trial, merely as a result of an instance of repetitious bolstering of an out-of-court statement by a witness. In the instant case, the defendant did not receive a fair trial as the jury was tainted by the repetition of the child's hearsay statements **seven (7)** different times by six different witnesses and one video tape, containing two of the same witnesses.

Chief Justice Carroll's foresight, has become reality almost thirty years after the Allison decision was rendered, as a group of citizens, can parade into a courtroom and needlessly repeat statements time and time again until the jury forgets that the truth of the statement was not backed by the citizen's integrity or

reputation, but is solely founded upon the words of the child prosecutrix to them, which could be true or not.

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ISSUE NUMBER II

The trial Court erred in denying Defense Counsel's Motion For Judgement of Acquittal as there is insufficient evidence to convict the appellant of Count II and III in the Information, of Sexual Battery by penetrating the vagina of the child/victim, Y.P., with the use of his fingers and/or hand.

Florida Statute §794.011 (1)(h), defines Sexual Battery as "...oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object;...." In the instant case, the defendant was charged with six counts of various sexual misconduct, of which four counts were Sexual Battery. Count one alleged sexual battery with the penis, the defendant was found guilty of the lesser but included offense of Simple Battery. On Count two and three the defendant was charged with Sexual Battery allegedly performing vaginal penetration with the finger. The defendant was convicted on both counts. Count four charged the defendant with Sexual Battery with the use of his hand or fingers; the defendant was found guilty of the lesser, but included offense of Simple Battery as to Count four. We would like to direct the Court's attention to discussing the denial of defense counsel's Motion For Judgment of Acquittal on Counts two and three.

Counts two and three charge the defendant with sexual battery by using a finger or hand. Taking the State's evidence, in its most favorable light, demonstrates that the child, Y.P., stated during the video taped interview that the man had touched her "pipi" or "totico" (genital area). The State to support the child's claim used the testimony of Dr. Valerie Rao, a state expert witness in the field of forensic medicine. Through this witness the prosecutor presented at trial the presence of healed tears, approximately three centimeter wide, in the child's hymen, which was otherwise intact. At no point and time were said tears ever attributed to any act of the defendant, nor could the origin of the tears be determined with any medical certainty. The Jury was left to guess that the defendant was the one who inflicted this injury upon the child. During cross examination, Dr. Rao admitted, at page 167, line 20 through 24, of the trial transcript, that there was no evidence of penetration by the penis and there was no evidence of any penetration whatsoever.

Florida Statute §794.011 (1)(h), has been interpreted in state cases as requiring penetration by a finger or other object when the charge does not direct itself to any oral, anal, or vaginal union with the penis. State v. Allen, 519 So. 2d 1076 (Fla. 1st DCA 1988), Furlow v. State, 529 So. 2d 804 (Fla. App. 1st Dist. 1988), Firkey v. State, 557 So. 2d 582 (Fla. App. 4 Dist. 1989). Wallis v. State, 548 So. 2d 808 (Fla. App. 5 Dist. 1989).

In Furlow v. State, 529 So. 2d 804 (Fla. 1st DCA 1988), the Court. citing the definition of "sexual battery" under section 744.011 (1)(h), Florida Statutes, opined:

> Under the above definition, mere "union with" the victim's vagina is insufficient because an object other than the defendant's [sexual] organ was used. See State v. Allen, 519 So. 2d 1076 (Fla. 1st DCA 1988). The State was therefore required to prove that the defendant penetrated the victim's vagina with his finger. Id. at 805.

Also supporting our contention is the decision of Wallis v. State, where the Court stated:

> As distinguished from the "union" of the defendant's sexual organ with the victim's vagina "by" the defendant's hand, finger, or any other object the mere "union" of the defendant's hand or finger " with" the victim's vagina does not violate this statute....

In light of the foregoing, it is evident that the State failed to meets its burden of proof in showing the defendant violated F.S. §794.011, by penetrating the vagina of the child with the use of his sexual organ or any other object. The trial Court also failed to recognize the State's failure, and therefore, improperly and without due consideration denied the defendant's Motion For Judgment of Acquittal at the close of the State's case. The defense motion was renewed at the close of the defendant's case, and also in the defendant's Motion For New Trial as to Count two and three of the Information.

CONCLUSION

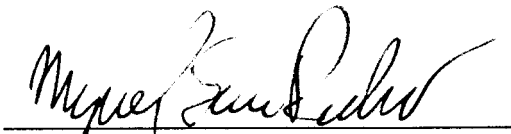
It view of the foregoing arguments and authorities listed

herein, the appellant requests this Court to grant the defendant a new trial and reverse the lower Court's decision denying defendant's Motion For Judgment of Acquittal as to Count II and III of the Information.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY**, that a true and correct copy of the foregoing brief on the merits was furnished the Clerk of the Court, State of Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399, Office of the Attorney General, Joan L. Greenberg, Esquire, P.O. Box 013241, Miami, Florida 33101, by United States Mail this 29th day of April, 1992.

Respectfully submitted,



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