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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 85,444
THIRD DCA CASE NO.: 94-2585

JONATHAN SIMMONS,
Petitioner,

VS.

THE STATE OF FLORIDA,
Respondent.

****

PETITIONER'S BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Third District, State of Florida.

****

Submitted By:

Jonathan Simmons, Petitioner
#A-084722 / A-202
Glades Correctional Inst.
500 Orange Avenue Circle
Belle Glade, Florida 33430

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final order denying the Petitioner's 3.800(a) Motion to Correct Illegally Imposed Sentence.

On February 2, 1990, the Petitioner was found guilty by a jury in accordance with the information filed of numerous offenses. Among said offenses was Count XII, Second Degree Felony Murder. (Appendix "A").

On March 20, 1990, the Petitioner was classified to be a Violent Habitual Offender pursuant to § 775.084, Fla.Stat. (Supp. 1988), and based on a prior Armed Robbery Conviction from 1982. Sentencing were imposed as follows:

Ct. I, Thirty (30) years imprisonment with a ten (10) year Minimum Mandatory, Cts. II, III, V, VII, IX, and XII Life Imprisonment with a fifteen (15) year minumum mandatory on each, and Ct. XIII, Thirty (30) years imprisonment with a ten (10) year minimum mandatory. Cts. II, III, V, VII, IX, and XIII consecutive to Ct. I, and each other. Ct. XIII Consecutive to Ct. XII.

A timely notice of appeal was filed. The Petitioner's appeal was denied on November 12, 1991, **SIMMONS V. STATE**, 588 So.2d 338 (Fla. App. 3rd Dist. 1991).

On or about August 5, 1994, the Petitioner submitted a Motion to Correct Illegally Imposed Sentence 3.800(a), alleging three grounds for relief. Without conducting an evidentiary hearing and minus attachments of portions of the records, refuting the Petitioner's allegations, the trial court denied the Petitioner's

3.800(a) Motion to Correct Illegally Imposed Sentence.

The Petitioner submitted a timely notice of appeal, in September, 1994. On February 1, 1995, the Third District Court of Appeal issued its ruling on the Petitioner's Appeal. (Appendix "B").

The Third DCA, in its decision also certified a question of great public importance to this Court. In response to said order, the Petitioner submitted the following:

1. Suggestion for Certification; (Appendix "C")
2. Motion for Rehearing and Motion for Rehearing Enbanc (Appendix "D"); and
3. Motion for Clarification. (Appendix "E").

On March 8, 1995, the Third DCA issued its order denying the Petitioner's MOTION FOR REHEARING AND FOR CLARIFICATION AND MOTION FOR REHEARING EN BANC. (Appendix "F"). The Petitioner's SUGGESTION FOR CERTIFICATION MOTION has went unanswered. It is well settled law that a District Court must apply Supreme Court Precedent and may not intentionally render a decision in conflict with a Supreme Court Precedent, **HOFFMAN V. JONES**, 280 So.2d 431 (Fla. 1973).

The Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely submitted on March 20, 1995. The Petitioner submitted his Jurisdictional Brief on March 29, 1995. On April 4, 1995, this Court issued its order for the Petitioner to serve on or before May 1, 1995, a brief on the merits. This Brief on the Merits follows:

SUMMARY OF THE ARGUMENTS

I.

The question presented to the Lower District Court of Appeal Third District was as follows:

> **WHERE THE TRIAL COURT ERRONEOUSLY APPLIED FLORIDA STATUTES 775.084(1)(b) IN FINDING THE DEFENDANT TO BE A HABITUAL VIOLENT FELONY OFFENDER, DUE TO THIS SECTION'S EXCLUSION OF ARMED ROBBERY AS ONE OF THE ENUMERATED FELONIES**

In the case at bar, it is clear that the Court of Appeal "Judicially Legislated" by putting the word of "Armed" Robbery into the precepts of Florida Statutes 775.084(1)(b)1. And this act of Judicial Legislation created an ursupation of power, because clearly the Legislature, in composing the Statutes 775.084(1)(b)1., was fully aware of the crime of Armed Robbery, Robbery, and all of the enumerated offenses contained and not contained in the habitual violent felony offender statute.

By the wording of the Statutes, there is no enumerated felony of "Armed Robbery", but simply "Robbery." The Third District Court of Appeals not only began to legislate itself, but failed to follow the clear and expressed intent of Florida Statutes 775.021(1), Rules of Construction.

The Petitioner contends that under Florida Law, criminal statutes must be strictly construed. For if a statute, in defining criminal offenses, omits certain necessary and essential provisions which serve to impress the acts committed as being wrong and criminal, Courts are not at liberty to supply deficiencies or undertake to make the statute definite and certain,

State ex rel. LEE V. BUCHANAN, 191 So.2d 33 (1966).

At Bar, the Court of Appeals disagreed with the clearly defined intent of the Florida Legislature, and took it upon itself to began to rewrite the Statutes in such a way that the Legislature's action was rendered frivolous, and without substance.

Clearly, there is no mention of "ARMED ROBBERY" in the Violent Habitual Felony Offender Statute as one of the enumerated priors to support habitualization. It is from this point and summary of the argument that the Petitioner seeks this Court's power to clearly define whether "Robbery" means "Armed Robbery", since there was no mention of ARMED ROBBERY in the gamut of said statute.

II.

The Petitioner argues on this issue that the Third DCA and the Trial Court errored when it found that the Petitioner's conviction of Second Degree Felony Murder, in Count XII of this cause occurred in a separate criminal episode from the underlying felonies. The Petitioner points out that in order for a conviction of Second Degree Felony Murder to stand, it must be found that the Murder (death) occurred in the perpetration of or the attempt to perpetrate one of the enumerated felonies. Thus, the Second Degree Felony Murder would be a part of the same criminal episode of the underlying felonies. (782.04(3), Florida Statutes 1988 Supp.).

The facts are not in dispute. Petitioner was charged with a second degree felony murder, as a result of the attempted escape of his co-defendant/victim, **WELTON LOPEZ**, who was shot and killed by the police department. The nexus of this offense tied the Petitioner to that murder, therefore clearly a second degree felony murder based upon the attempted escape of the co-defendant/victim, resulting in his death was a part of the same criminal transaction. And the decision of the Third DCA was contrary to the facts of this case, which requires further review, by this Court.

III.

The Habitual Offender Statute provides that all evidence presented in open court should be subject to full righst of confrontation and cross-examination. The Petitioner contends that this right was denied him when the Trial Judge cut off his Trial Attorney during cross-examination of the State's witness who was presented at the sentencing hearing in this cause.

By Affirming the Petitioner's argument on this point, the Trial Court and the Third DCA has violated the Pettiioner's Constitutional Rights as secured him through the Fourteenth Amendment of the Untied states Constitution. Such violation of a Constitutional nature requires that the Petitioner's sentence be reversed and a new sentencing hearing provided.

ISSUE ONE

THE DISTRICT COURT'S INTERPRETATION THAT THE VIOLENT HABITUAL OFFENDER STATUTE AUTHORIZES THE USE OF A PRIOR ARMED ROBBERY CONVICTION, WHEN THE PLAIN LANGUAGE OF THIS STATUTE CALLS FOR A PRIOR ROBBERY CONVICTION - HAS EXTENDED THE HABITUAL VIOLENT FELONY OFFENDER STATUTE BREADTH BEYOND THE STRICT LANGUAGE APPROVED BY THE LEGISLATURE AND VIOLATED THE SEPARATION OF POWERS.

The Power of the State Government is divided into three branches, i.e., Executive, Legislative and Judicial Branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches. Article 2, Sect. 3, Florida Constitution; WHITE V. JOHNSON, 59 So.2d 532 (1952).

The law making function is the chief legislative power. Upon exercising its power to write the law, the Legislature enacted Section 775.084(1)(b)1., Florida Statutes (Supp. 1988). In its strict language, this statute provides:

> ***...(b) "Habitual Violent Felony Offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The Defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:
>
> a. Arson, b. Sexual Battery, c. Robbery, d. Kidnapping, e. Aggravated child abuse, f. Aggravated assault, g. Murder, h. Manslaughter, i. Unlawful throwing, placing, or discharging

of a destructive device or bomb, or
j. Armed Burglary...***

Applying the provisions of this Habitual Violent Felony Offender Section is the chief judicial power. One of the most fundamental principles of Florida Law is that penal statutes must be strictly construed according to their letter, e.g., STATE V. JACKSON, 526 So.2d 58 (Fla. 1988); STATE ex rel. CHERRY V. DAVIDSON, 103 Fla. 954, 139 So. 177 (1931). The principle ultimately rests on the due process requirement that criminal statutes must say with some precision exactly what is prohibited. E.g., BROWN V. STATE, 358 So.2d 16 (Fla. 1978); FRANKLIN V. STATE, 257 So.2d 21 (Fla. 1971); STATE V. MOO YOUNG, 566 So.2d 1380 (Fla. 1st DCA 1990). Words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute.

Indeed our system of jurisprudence is founded on a belief that everone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property. SCULL V. STATE, 569 So.2d 1251 (Fla. 1990); FRANKLIN, 257 So.2d at 23. For this reason,

> **a penal statute must be written in language sufficiently definite, when measured by common understanding and practice to apprise ordinary persons of common intelligence of what conduct will render them liable to be prosecuted for its violation.**

GLUESENDAMP V. STATE, 391 So.2d 192, 198 (Fla. 1980), cert. denied, 454 U.S. 818, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981) (citations omitted). Elsewhere, it is said that:

> **statutes criminal in character must be strictly construed. In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance.**

STATE ex rel. LEE V. BUCHANAN, 191 So.2d 33, 36 (Fla. 1966) (citations omitted); accord STATE V. VALENTIN, 105 N.J. 14, 519 A.2d 322 (1987). Thus, to the extent that definiteness is lacking, a statute must be construed in the manner most favorable to the accused. PALMER V. STATE, 438 So.2d 1, 3 (Fla. 1983); FERGUSON V. STATE, 377 So.2d 709 (Fla. 1979).

The rule of strict construction also rests on the doctrine that the power to creat crimes and punishments in derogation of the common law inheres solely in the democratic process of the legislative branch. BORGES V. STATE, 415 So.2d 1265, 1267 (Fla. 1982); accord UNITED STATE V. L. COHEN GROCERY CO., 255 U.S. 81, 87-93, 41 S.Ct. 298, 299-301, 65 L.Ed. 516 (1921) (applying same principle to congressional authority). As the Florida Supreme Court has stated:

> **the Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See Article II, Section 3, Florida Constitution. BROWN 358 So.2d at 20; accord PALMER, 438 So.2d at 3.**

This principle can be honored only if criminal statutes are applied in their strict sense, not if the Court use some minor vaguness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise, as the Third DCA has did in the case subjudice, would violate the

separation of powers, Article II, Section 3, Florida Constitution.

Now, we must determine whether habitualizing an individual under the habitual violent felony offender section of 775.084, when the offender has been convicted of a prior **"Armed Robbery"**, fits within the confines of the law described in § 775.084(1)(b) l.c. This question hinges on the exact meaning of the crime **"Armed Robbery"**, as opposed to **"Robbery."**

The trial court, and the Third District Court of Appeal has construed the word **"Robbery"** in section 775.084(1)(b)l.c. -- to include **"Armed Robbery."** The Petitioner contends that this is error and by such the trial court has extended the Habitual Violent Felony Offender Statute beyond its breadth and has Judicially Legislated by including the word **ARMED ROBBERY** within this Statute, when the statute plainly states **ROBBERY.**

Taken in its ordinary and plain meaning, the Habitualization Statute only authorizes the use of a prior conviction of **Robbery"** to be used for supporting a habitual violent felony offender status - See: **775.084(1)(b)** of Florida Statutes (Supp. 1988), wherein it states, in relevant part:

> **1. The Defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:**
>
> **c. Robbery. . .j. Armed Burglary**

Thus, the Petitioner submits that the use of his prior conviction for **Armed Robbery** was erroneous, because the plain language of this statute **DOES NOT PERMIT** the use an an **Armed Robbery** as one of the listed enumerated felonies.

Although the statutes allows the use of a prior Robbery to be used (See "c." of enumerated felonies), it says nothing of an Armed Robbery.

In "b." of these enumerated felonies it separates sexual battery from the simple battery; "f." Aggravated assault from assault, and in "j." it plainly states **ARMED BURGLARY** and not just **BURGLARY**. Thus, it must be concluded that the Legislature was fully aware of the difference between the crime of **Armed Robbery** and **Robbery** when it enacted this section of the habitual violent felony offender statute, as the Legislature clearly listed **ARMED BURGLARY** and not **BURGLARY** in "j." of these enumerated felonies.

Both Armed Burglary and Burglary are defined under Florida Statutes 810.02, Burglary; however, as listed in the enumerated felonies in Section (1)(b) of Fla.Stat. 775.084 (Supp. 1988), it omits "Burglary" from qualifying as one of these enumerated felonies by not listing it (See: "j." of this Section), but PLAINLY refers to "Armed Burglary" as qualifying to support Habitualization.

This Court has reached the same conclusion in their decision in the case of **WASHINGTON V. STATE**, 19 Fla.L.Weekly S647 (Dec. 9, 1994), wherein it was held:

> **the crimes of burglary, burglary of an occupied dwelling, burglary of a dwelling, burglary of a conveyance are not listed in the Habitual Violent Felony Offender Statute.**

For this reason, the Petitioner contends that with Burglary and Armed Burglary, both Robbery and Armed Robbery ared defined under Florida Statutes 812.13, and when reading the plain language of Florida Statutes 775.084(1)(b), it clearly omits the use of a Prior "ARMED ROBBERY" as one of the enumerated felonies to support habitualization (See "c." of the listed enumerated felonies in Fla.Stat. 775.084(1)(b)1.

Thus, as **WASHINGTON** couldn't be habitualized because of a prior "burglary" because the Statute calls for an "armed burglary" - the Petitioner couldn't be habitualized with the use of a prior "armed robbery" because the Statute calls for a "robbery."

This Statute and the Legislative intent must be compared with the Felony Murder Statute (782.04(3); and 782.04(4)), wherein the language provides the word **"any."** See 782.04(3):

> ***...(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any: (Underline added for emphasis)...***

Clearly, had the legislature, when writing the Statute, included the word **any**, as in the above statute, then it would be fair to say that the Legislature intended "any robbery" to support habitualization. Since this was not the case and since the legislature was fully aware of the charge of Armed Robbery, as opposed to robbery, when writing Section 775.084(1)(b) of Florida Statutes (as evident by the Armed Burglary in "j."), then for the Circuit and District Court to include Armed Robbery as one of the enumerated felonies means that they have violated the Separation of Powers by performing a function of the

Legislative Branch of the Government.

WHEREFORE, based on the fact that the Crime of **ARMED ROBBERY** is not one of the enumerated felonies listed in the Habitual Violent Felony Offender Statute (775.084(1)(b)1.c.) (Supp. 1988), and the fact that this Court has reached a similiar conclusion in **WASHINGTON V. STATE**, 19 Fla.L.Weekly S647 (Dec. 9, 1994), the Petitioner respectfully prays that this Court would further review the Trial Court's and the Third DCA's acts of legislating to include the crime of **ARMED ROBBERY** in said statutes when the statutes clearly states **ROBBERY.**

ISSUE TWO

ONCE THE PETITIONER'S SENTENCES FOR MULTIPLE CRIMES COMMITTED DURING SINGLE CRIMINAL EPISODE WERE ENHANCED THROUGH HABITUAL VIOLENT FELONY OFFENDER STATUTE THE TOTAL PENALTY COULD NOT BE FURTHER INCREASED BY ORDERING THE SENTENCES TO RUN CONSECUTIVELY

Once the Petitioner's sentences for multiple crimes committed during single criminal episode were enhanced through HVFO statute, the total penalty could not be further increased by ordering the sentences to run consecutively, HALE V. STATE, 630 So.2d 521 (Fla. 1993).

Even though the State Conceded error, and the 3rd DCA issued its order directing the sentences on all counts to run concurrent, except Count XII, they have still committed error in that Count XII is a Second Degree Felony Murder and thus, it is essential for the State to prove that the Felony Murder, in Count XII, occurred in the commission or the attempt to commit the underlying felonies, **(782.04(3), Florida Statutes (1989)).**

It appears that the Third District Court of Appeals have construed the Second Degree Felony Murder conviction to be a Second Degree Murder, and in doing so has construed it to be committed in a separate criminal episode.

If this is the case (the 2° felony murder being a separate criminal episode) then the Second Degree Felony Murder conviction and sentence cannot stand - in that the State has not proved Second Degree Felony Murder.

The Petitioner has included, as reference, a copy of the information charging Count XII, the Second Degree Felony Murder. (Appendix "A").

A review of the records and files in this cause would reveal that the Second Degree Felony Murder is part of the same criminal episode as the underlying felonies, and thus the Life Sentence in Count XII should have been ordered to run concurrent along with the other counts.

WHEREFORE, it is the Petitioner's contention that the Third District Court of Appeal's order is in error when it finds that the Second Degree Felony Murder occurred as part of a separate criminal episode. The order should be reversed and corrected.

ISSUE THREE

IT WAS REVERSIBLE ERROR AT SENTENCING FOR REFUSING TO ALLOW ALL THE EVIDENCE PRESENTED IN COURT TO BE CROSS-EXAMINED AS PROVIDED IN 775.084(3)(c), FLORIDA STATUTE (SUPP. 1988), AND VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION

In the case before this Court, under Florida Law, sentencing is now a "Critical Stage" of the Court proceedings. During the Petitioner's sentencing hearing on March 20, 1990, the following testimony (evidence) took place:

CROSS EXAMINATION

BY MR. BRUCE:

Q: Sir, can you Identify the people who did this to you?

A: Yes.

Q: You Can?

A: Uh-huh (Affirmative).

Q: Would you tell me which of these genglemen - Which of these gentlemen over here, if any, were involved with this?

A: They have changed since 19--

THE COURT:

This Case is not on trial. It was tried 8 years ago. Thank you. (See page 5 and 6 of sentencing transcripts, Appendix "G").

The State of Florida elicited information from this witness in order to introduce as evidence that the Petitioner was the person who committed an Armed Robbery in 1982; however, upon cross-examination, the Judge interrupted counsel for the Petitioner and thus, denied him his FULL RIGHT TO CONFRONTATION AND CROSS-EXAMINATION.

The question now before this Court is where the Petitioner's right to confront this valuable State witness was impeded by the Trial Court. And the Trial Court thus departed from the essential requirements of the habitual felony offender statute. It appears from reading of the Statutes (775.084, (Supp. 1988)), that the language is **mandatory** which provides "Full Rights of Confrontation, Cross-Examination, and Representation by Counsel."

Because the Court denied the Petitioner's counsel the opportunity to cross-examine the State's witness, it was contrary to the mandates of the language of the Statute, and thus, this habitual violent felony offender treatment is now VOID and to no FORCE and EFFECT. It was the intent of the Florida Legislature in the instant case that full right to confrontation and cross-examination shall be had and the Trial Judge erred in denying the Petitioner's motion on this ground - likewise the Third DCA erred in Affirming the same.

CONFRONTATION CLAUSE. The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront hostile witnesses at her criminal trial. The clause serves to facilitate the truth seeking function of a trial by "ensuring

the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in adversarial proceedings." Reliability can be promoted by providing the defendant with the opportunity to directly encounter and cross-examine those witnesses who testify against her.

The Sixth Amendment provides, in part:

> **"In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him." U.S.Const.Amend. VII.**

One of the most basic tenets of Florida Law is the requirement that all proceedings affecting Life, Liberty, or Property must be conducted according to Due Process, **Article I, § 9, Florida Constitution**. While it has been said that "Due Process" is capable of no precise definition, e.g., **GILMER V. BIRD**, 15 Fla. 410 (1875), there nevertheless are certain well-defined rights clearly subsummed within the meaning of the term.

The essence of Due Process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered. **TIBBETS V. OLSON**, 91 Fla. 824, 108 So. 679 (1926). Due Process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. **State ex rel. MUNCH V. DAVIS**, 143 Fla. 236, 244, 196 So. 491, 494 (1940). In this respect the term "Due Process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See: **Article I, § 9, Fla.Const.**

In this case, the denial of the Petitioner's right to confront his accuser in this adversary court proceeding, wherein he was denied the right to adequately cross-examine and refute the facting that was being made as a direct result of the State witness' testimony during the critical stages of the proceedings, now violates the Petitioner's Rights under the Fourteenth Amendment to the United States Constitution.

This Right extends to State prosecutions through the Due Process Clause of the Fourteenth Amendment, **POINTER V. TEXAS**, 380 U.S. 400, 403 (1965). In Florida Statutes 775.084(3)(c) (Supp. 1988), it states:

> **(c) Except as provided in paragraph (a), all evidence presented shall be in open court with full rights of confrontation, cross-examination, and representation by counsel.**

It is clear under the gumut of Florida Statutes 775.084, the Florida Legislature codified the Confrontation Clause and th Right to Cross-Examination as the Statute unequivocally states. . .**Full Rights of Confrontation, Cross-Examination, and Representation by Counsel.**

WHEREFORE, the Petitioner contends that the Trial Court Violated his Constitutional Right to Cross-Examination during the March 20, 1990 sentencing hearing, and further denied him when they denied his Motion to Correct Illegally Imposed Sentence on this Ground. Likewise the Third DCA erred in affirming the Trial Court's decision. Reversal and resentencing is warranted.

CONCLUSION

The Petitioner respectfully requests that this Court grant the further review of the case at bar. It is clear that the Petitioner is correct on point one, two and three of his arguments.

The Trial and District Court has committed reversable error by violating the separation of powers, when they performed a function of the legislative branch of government.

The Trial and District Court errored by finding that the Second Degree Felony Murder was committed as a part of a separate criminal episode, when the underlying felonies are essential to obtain a conviction of said second degree felony murder.

And further, the Trial and District Court has ruled in such a manner as to Violate the Petitioner's Constitutional Right to Confrontation and Cross-Examination in his sentencing stage of this Cause.

Such errors on the part of the trial and District Courts require a reversal in the Petitioner's favor.

Respectfully submitted,

Jonathan Simmons

Jonathan Simmons, Pro'se
#A-084722 / A-202
Glades Correctional Inst.
500 Orange Avenue Circle
Belle Glade, Florida 33430

JURAT AND VERIFICATION

In pursuant to Florida Statutes 92.525 (1993), I, **JONATHAN SIMMONS**, declare under the penalty of perjury that I have read the foregoing BRIEF OF THE MERITS and that the information contained therein is true and correct.

4/20/95
DATE:

Jonathan Simmons
Jonathan Simmons, Pro'se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument has been forwarded to: Office of the Attorney General; 401 N.W. Second Avenue; Miami, Florida 33128, by U.S. Mail, on this 20th day of April, 1995.

Jonathan Simmons
Jonathan Simmons, Pro'se