IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

85,651

CASE NO. 95-85,651
(DCA No. 94-864)

PETITIONER'S AMENDED REPLY BRIEF

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

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TABLE OF CONTENTS

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TABLE OF CONTENTS (CONT.)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT).

LAW OFFICE OF MARK EVAN FREDERICK, P. A., P. O. BOX 385, DESTIN, FLORIDA 32541 (904) 837-2115

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KIT GOINS,

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vs.

CASE NO. 95-85,651
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THE STATE OF FLORIDA,

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PETITIONER'S AMENDED REPLY BRIEF

LAW OFFICE OF MARK EVAN FREDERICK, P. A., P. O. BOX 385, DESTIN, FLORIDA 32541 (904) 837-2115

SUMMARY OF ARGUMENT

ISSUE ONE

The First District Court has expressly held that a trial court has no affirmative duty to give a defendant an opportunity to withdraw his or her plea when it decides to impose a different sentence.

The First District Court's decision is in direct conflict with the decision in Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987) and Rodriguez v. State, 610 So.2d 476 (Fla. 2d DCA 1992); and, Kiefer v. State, 295 So.2d 688 (Fla. 2d DCA 1974), wherein the Second District Court has held that a trial court has an affirmative duty to present a defendant with an opportunity to withdraw his plea, when it decides to impose a different sentence and no motion to withdraw is required prior to an appeal.

ISSUE TWO

The failure of the trial court to inform Petitioner that it was not bound by the negotiated plea agreement, and the failure of the trial court to affirmatively give Petitioner an opportunity to withdraw his plea, when the court declined to follow it, is in direct violation of the Rules of Criminal Procedure. Under Robinson v. State, 373 So.2d 898 (Fla. 1979) a defendant may appeal an illegal sentence.

Also, under the authority of Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987), a defendant who is not affirmatively given the opportunity to withdraw his plea, when the trial court declines to follow it may take a direct appeal.

ISSUE THREE

It is true that a plea offer from the state is not binding upon the trial judge. Nevertheless, should the court determine it cannot accept a negotiated plea agreement, it should permit a defendant to withdraw the plea, if he so desires. A defendant should be allowed to withdraw his plea agreement, when he has conditioned it upon the understanding that his plea is only being entered upon a joint recommendation by the State and defense counsel as to the length of incarceration his sentence should be. When a trial court does not follow the negotiated plea agreement, then it is legally obligated to allow the defendant to withdraw the plea.

ISSUE FOUR

Where a defendant does not take the initiative by objecting to the different sentence at the time of sentencing then the trial court must affirmatively permit the defendant to withdraw his plea. It is incumbent upon the judge to take action in permitting the defendant the opportunity to withdraw his plea. A defendant should be informed by the court that he could withdraw his plea when it is determined that the sentence is longer than that contemplated when the plea was entered.

ARGUMENT

ISSUE ONE

The decision of the First District Court of Appeal in this case expressly and directly conflicts with the decision of the Second District Court in Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987); Rodriguez v. State, 610 So.2d 476 (Fla. 2d DCA 1992); and Kiefer v. State, 295 So.2d 688 (Fla. 2d DCA 1974).

The First District Court and the Second District Court are in

direct conflict regarding whether a trial court has an affirmative duty to offer a criminal defendant the opportunity to withdraw his or her plea, when the trial court imposes a different sentence than that presented with the plea agreement. The First District Court holds that there is no affirmative duty, and the Second District Court holds that there is an affirmative duty. Thus, the Petitioner contends that the decision of the two district courts are expressly and directly in conflict.

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal, that expressly and directly conflicts with a decision of another district court of appeal, on the same point of law. Art. V, section (3)(b)(3) Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv).

This Court has already been briefed by both parties on the jurisdictional issue and this Court has accepted jurisdiction by order dated July 18, 1995. (See Appendix "A"). Both sides had an opportunity to present to this Court their arguments on whether there is a conflict between the district courts on the issues presented herein. The issue of whether there is jurisdiction is now res judicata, and the law of this case is that there is jurisdiction to proceed with this appeal.

However, should this Court decide to re-visit the issue, Petitioner, KIT GOINS, will stand by his arguments presented in Petitioner's Initial Brief on Jurisdiction.

The issue raised by the State is that the line of cases cited by the First District Court in its April 13, 1995 order (See

Appendix "B"), Lepper v. State, 451 So.2d 1020 (Fla. 1st DCA 1984); and the holding of the order itself, do not present a conflict with the Second District Court in Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987); Kiefer v. State, 295 So.2d 688 (Fla. 2d DCA 1974); and Rodriguez v. State, 610 So.2d 476 (Fla. 2d DCA 1992). This argument fails for the following reasons:

The facts of Kiefer, Rodriguez and Perry all relate to a different sentence being imposed on a defendant, than that which was contemplated in the plea bargain. The Second District Court has recognized that the plea proceedings must be protected and one mechanism to accomplish this is to place an affirmative duty on the court to ask the defendant if he wants to withdraw his plea, when the court declines to follow the negotiated sentence.

The First District Court has made a blanket statement in its opinion below, that if the "Trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant with a clear opportunity to withdraw his or her plea at sentencing, when it decides to impose a sentence greater than that recommended in the plea agreement." The Second DCA cases do not limit the duty of a the trial court in the same manner.

The Second DCA case holdings do not set forth the distinction between a trial court actively being involved in the plea agreement or the broken promise of the trial court, as being the basis for determining whether or not there is an affirmative duty on the trial court to give a clear opportunity to withdraw. The Second

DCA holdings are all based upon the fact that where the trial court does not honor a plea agreement, there is an affirmative duty on the trial court to permit the defendant to withdraw his plea.

ISSUE TWO

Whether there is a right to an appeal where the sentence imposed is done so contrary to the law of Florida?

The State in this case is attempting to argue that Petitioner has no legal basis for bringing this appeal. The State even stated that if it had filed a Motion to Dismiss, this case would never have reached this Court. The fact of the matter is, the State did not file a Motion to Dismiss and is only now, for the first time, arguing that this case should be dismissed for lack of grounds upon which to appeal. The Court below, took the case on appeal and made a ruling. The issue as to whether there are grounds for the appeal were not an issue with the First District Court and should not now become one.

This Court in Robinson v. State, 373 So.2d 898 (Fla. 1979), held that a defendant who pleads guilty (or nolo contendere) has the right to direct appeal of an illegal sentence. Robinson also held, there is an unrestricted right to appeal any "issues which occur at the time the plea is entered . . . and neither the statue nor our present rules cut off a right of appeal from conduct that would invalidate the plea itself." See Ford v. State, 575 So.2d 1335 (Fla. 1st DCA 1991), rev. denied, 581 So.2d 1381 (Fla. 1991).

The Petitioner, in this case, plead nolo contendere and entered into a written negotiated plea agreement. At the plea hearing, the trial court failed to inform Petitioner that it had

the right to decline to follow the recommended sentence. At his sentencing hearing, the trial court declined to follow the written negotiated plea agreement, and sentenced Petitioner to a higher sentence. At this time, the trial court failed to inform Petitioner that he had the right to withdraw his plea.

The failure of the trial court to inform Petitioner of these rights is in direct violation of the Rules of Criminal Procedure, Rule 3.171(d) and 3.172(g) and therefore, the sentence imposed on Petitioner was illegal. See Walker v. State, 579 So.2d 348 (Fla. 1st DCA 1991)(the appellate courts of this state exist for the sole purpose of challenging errors committed by the lower tribunals. While this jurisdiction is limited, the Florida Supreme Court has held there is jurisdiction to consider on direct appeal whether a sentence is illegal).

Furthermore, the error occurred at the time of the plea hearing and at sentencing, thus under Robinson, Petitioner is entitled to this appeal.

The State is also attempting to argue that the case should be dismissed, because the proper remedy was a Motion to Withdraw Plea. However, where a defendant is given an invalid sentence and if no contemporaneous objection is made and there is provision for a direct appeal, the Petitioner has only that avenue left to pursue and must do so in lieu of a Motion for post-conviction relief.

The issue presented in this case is factually similar to Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987). In Perry, the Second District Court held that where a trial court cannot honor a plea

agreement, and even though the defendant did not file a motion to withdraw his plea, the District Court has jurisdiction, and that on appeal, the court was required to reverse and remand, giving the defendant the opportunity to withdraw his plea. See also, Keifer v. State, 295 So.2d 688 (Fla. 2d DCA 1979); Dunkle v. State, 432 So.2d 201 (Fla. 2d DCA 1983)(when the terms of a plea cannot be honored, the defendant should be given the opportunity to withdraw the plea, and the judge has an affirmative duty to so advise); Davis v. State, 308 So. 2d 27 (Fla. 1975)(where a trial judge decides on a different sentence than he had earlier contemplated, he must be liberal in permitting a withdrawal of the plea--in this case the trial court affirmatively offered the defendant the opportunity to withdraw his plea).

In Perry, supra, at the sentencing hearing, the State and the Public Defender agreed to two years incarceration in exchange for his plea of nolo contendere. The Trial Court accepted the Defendant's plea and ordered a presentence investigation, deferring sentencing. The plea was not conditioned upon the presentence investigation. Id. At the second hearing the Defendant was sentenced to a longer incarceration period than had been agreed upon. The Defendant did not object to the sentence in the Trial Court and did not file a motion to withdraw his plea, instead raising it for the first time in the Appellate Court. Id. The Second District Court reversed the judgment and sentence and remanded for further proceedings at which the Defendant had to be given the opportunity to withdraw his plea. Id., see also Rodriguez

v. State, 610 So.2d 476 (Fla. 2d DCA 1992).

As in Perry, supra, the Defendant in the case at bar, had an agreed upon sentence, and yet, was sentenced to a longer sentence than was recommended by the State and the defense counsel. Defendant did not object at the sentence proceedings, and was never told by the trial court that he had a right to withdraw his plea. This lack of notification by his counsel and the Court, has denied Defendant his right to withdraw his conditional plea. See also Parker v. State, 616 So.2d 1121 (Fla. 1st DCA 1993), Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988).

The Petitioner is in the position where the issues sought to be raised should be raised on direct appeal. Of great concern to the State and the citizen of this State, is the issue of fairness in the pleading and sentencing process and testing the issue of whether the plea was given voluntarily. By not inquiring of the Petitioner as to whether or not he was aware that the trial court was not bound to follow the written plea agreement, and then by declining to honor the written plea agreement, without affirmatively giving Petitioner the opportunity to withdraw, does not comport with the purpose and intent of the Rules of Criminal Procedure, or the laws of this State.

ISSUE THREE

Whether a defendant who was reasonably led to believe that a negotiated plea was conditional upon the trial court following the recommendation must be given the opportunity to withdraw his plea when the trial court declines to follow the recommended negotiated plea agreement?

Petitioner has distinguished the cases cited by the State in

his Initial Brief to this Court, and relies on the same herein.

The State is attempting to indicate that Petitioner understood and had knowledge that the court could exceed the recommendations of the written plea agreement and could impose a sentence up to the maximum permitted by the guidelines. The State is basing this on the small print of the written plea agreement. The language is as follows:

> I understand that the maximum period of imprisonment and fine that I could receive on each offense is as follows: Count 1- sexual activity with a child- 30 years, Count 3- solicitation of sexual activity with a child- 5 years.

(R. 7).

> I further understand that my sentence will be imposed under the Uniform Sentencing Guidelines. A presumptive sentence will be determined based upon certain factors. The Court can exceed this presumptive sentence and impose up to the maximum sentence permitted by law by stating clear and convincing reasons for such departure.

(R.7).

A careful reading of the above language shows that, at the most, Petitioner could have been on constructive notice that the charges against him had a maximum sentence, as stated above. The fact that he signed the agreement does not indicated that he thought that this was what was going to happen. In fact, the testimony in front of the court, showed that he thought he would be receiving the terms he had agreed to in the agreement, why else would he have signed the agreement.

Secondly, the second paragraph indicates that Petitioner Goins knew that his sentence was imposed under the Uniformed Sentencing Guidelines, and that the court could exceed the guidelines. The language as set forth in the agreement is not conclusive to show

that by signing the agreement, he knew that the court was going to or even could exceed the terms, as set forth in the written agreement, after he had signed the agreement.

Petitioner signed a contract, which stated that the court could impose a certain sentence and it would be one under the guidelines or one which exceeds the guidelines, with convincing reason. Nothing in the agreement indicated that after he had made the agreement with the State, that court was going to decline the agreement. The testimony was that he signed the agreement and believed the terms were in his best interest (R. 49). These were the terms for which he thought he was bargaining, there was no mention at any time by the court that it did not have to follow these terms, during the plea hearing.

Furthermore, there is no evidence that Petitioner knew that he would not be affirmatively given an opportunity to withdraw his plea, when the judge declined to follow the agreement.

In a criminal case, a trial court is not bound to impose a sentence recommended by the defense counsel or the state. Sharpe v. State, 547 So.2d 334 (Fla. 1st DCA 1989). However, where a defendant enters a plea, understanding that it is conditioned upon the court following the recommendation, and the court declines to follow the recommendation, then the defendant must be permitted to withdraw his plea and must be so informed. Id. Should a defendant not be allowed to withdraw his plea, then the voluntariness of the plea becomes suspect, since it was agreed to in reliance upon the offer and acceptance of the plea agreement. Humphries v. State,

563 So.2d 1124 (Fla. 2d DCA 1990), Demcak v. State, 616 So.2d 519 (Fla. 5th DCA 1993).

ISSUE FOUR

Whether the trial court had an affirmative duty to provide the defendant with a clear opportunity to withdraw his plea when the trial court declined to follow the recommended negotiated plea agreement?

Petitioner has distinguished the cases cited by the State in his Initial Brief to this Court, and relies on the same herein.

The State is attempting to make a distinction regarding a plea that is negotiated between the State and a defendant versus one where the lower court was participating in the plea agreement, by indicating that it would follow the recommendation of the plea agreement. This distinction begs the point.

In any situation where a defendant consents to enter into a plea agreement, the terms are negotiated. In essence, the trial court is always participating in the plea negotiations by the fact that it is the pivotal party in the negotiations. By definition, a negotiation involves all interested participants, and an agreement is contingent upon all participants agreeing to the final result. Petitioner is not arguing that a trial court is bound by a plea agreement, however, where the lower court is not going to follow the plea, the defendant should be granted the opportunity to withdraw from the agreement, and it is the duty of the trial court to so inform a defendant.

The constitutional rights of a defendant are at issue, and the lower court should be held to protect those rights by affirmatively giving a defendant the opportunity to withdraw his plea, when the

trial court declines to follow the plea agreement.

Since at the plea hearing in this case, the trial court did not make known to the defendant the fact that it was not bound to the negotiated agreement, the burden shifted to the trial court to make certain that the defendant had an opportunity to withdraw his plea, when the agreement was not followed. The very silence of the trial court on this issue at the plea hearing implicitly indicated that it was in concurrence with the negotiated plea agreement.

In the case at bar, the defendant was asked if he knew the terms of the agreement and if he understood them. He said, "Yes, sir." (R. 509). The record indicates that the Petitioner thought that these terms were the ones he was agreeing to when he signed the plea agreement. Furthermore, he was never asked if he knew the trial court was not bound to this agreement or told that the trial court could impose a different sentence. See Sharpe v. State, 547 So.2d 334 (Fla. 1st DCA 1989); Lepper v. State, 451 So.2d 1020 (Fla. 1st DCA 1984); Wood v. State, 357 So.2d 1060 (Fla. 1st DC 1978); Peterson v. State, 350 So.2d 565 (Fla. 1st DCA 1977); and State v. Adams, 342 So.2d 818 (Fla. 1977).

In a similar case, Sharpe, supra, the trial court declined to follow the joint recommendation of the State and defense counsel regarding the sentence to be imposed. At the sentencing proceeding, the Defendant moved to withdraw his plea, but the Trial Court denied the motion. The First District held that "if a defendant enters a plea with the understanding that the recommendation will be followed and the court declines to follow

it, the defendant must be permitted to withdraw the plea." Id. at 335. Furthermore, a trial court should determine whether the defendant was aware, prior to the entry of the plea, that it was not bound to abide by counsels' sentencing recommendation. Id. If a trial court determines that a defendant was reasonably led to believe that the plea was conditional upon the trial court following the recommendation, then "the court must either allow defendant to withdraw the plea or sentence defendant according to the recommendation." Id. In the case at bar, it is clear from the transcript to the plea hearing and the sentencing proceedings, that Defendant was never informed, by either his counsel or the Court, that he had the right to withdraw his plea, when the Court declined to follow the plea agreement. Therefore, just as in Sharp, Supra, Defendant should be given the opportunity to withdraw his plea.

Nevertheless, even if the Petitioner knew that the trial court could impose a different sentence, rather than the written negotiated agreement, the trial court still had an affirmative duty to give the defendant an opportunity to withdraw his plea. This affirmative duty is placed upon the trial court by the Rules of Criminal Procedure, Rules 3.171(d) and 3.172(g).

Rule 3.171(d):

> (d) Responsibilities of the Trial Judge. After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefore prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.

Rule 3.172(g):

Withdrawal of Plea When Judge Does Not Concur. If the trial

judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.

The trial court is under a duty to grant a defendant a clear opportunity to withdraw his plea, if the judge determines he cannot accept the recommended disposition. The Rules of Criminal procedure are the cornerstone of this principle. See State ex re. Wilhoit v. Wells, 356 So.2d 817 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1222 (Fla. 1978).

CONCLUSION

For the reasons set forth, Petitioner respectfully requests that the judgment of the District Court of Appeal of the First District of Florida be reversed, and that the conviction and sentence of the Circuit Court in and for the First Judicial Circuit, Okaloosa County, Florida be set aside, and Petitioner be given the opportunity to withdraw his plea agreement, or alternatively, the Court in the Circuit Court in and for the First Judicial Circuit, Okaloosa County, Florida, should be ordered to sentence the Defendant to a period of incarceration in the Department of Corrections, as contemplated by him in his written plea agreement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Amended Reply Brief has been furnished to ROBERT A. BUTTERWORTH, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050, by Regular U. S. Mail, this 30 day of September, 1995.

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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

vs. CASE NO. 95-85,651
(DCA No. 94-864)

THE STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

Supreme Court of Florida

TUESDAY, JULY 18, 1995

KIT GOINS,	*	
	*	
Petitioner,	*	ORDER ACCEPTING JURISDICTION & DISPENSING WITH ORAL ARGUMENT
	*	
v.	*	
	*	CASE NO. 85,651
STATE OF FLORIDA,	*	
	*	District Court of Appeal,
Respondent.	*	1st District - No. 94-864
	*	
* * * * * * * * * * * * * * * * *	*	

The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before August 14, 1995; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs.

Please send to the Court, either in Word Perfect format or ASCII text format, a 3-1/2" diskette of the briefs filed in this case. This procedure is voluntary. PLEASE LABEL ENVELOPE TO AVOID ERASURE.

The Clerk of the District Court of Appeal, First District, shall file the original record on or before September 18, 1995.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

BH

cc: Hon. Jon S. Wheeler, Clerk
Mr. Mark Evan Frederick
Mr. Douglas Gurnic

Exhibit "A"

Cite as 652 So.2d 1283 (Fla.App. 3 Dist. 1995)

1

Kit GOINS, Appellant,

v.

STATE of Florida, Appellee.

No. 94-864.

District Court of Appeal of Florida, First District.

April 13, 1995.

Defendant was convicted in the Circuit Court, Okaloosa County, Jack R. Heflin, J., after he entered guilty plea, and he appealed where court imposed sentence greater than that recommended in plea agreement. The District Court of Appeal, Ervin, J., held that trial court was under no duty to provide defendant with clear opportunity to withdraw plea at sentencing when it imposed sentence greater than that recommended in plea agreement where trial court did not participate in plea negotiations or promise defendant that it would impose recommended sentence.

Affirmed.

Criminal Law ⇐274(3.1)

If trial court does not participate in plea negotiations or promise defendant that it will impose recommended sentence, trial court is under no duty to provide defendant with clear opportunity to withdraw his plea at sentencing when it decides to impose sentence greater than that recommended in plea agreement.

Mark Evan Frederick, P.A., Destin, for appellant.

Robert A. Butterworth, Atty. Gen., Douglas Gurnic, Asst. Atty. Gen., Tallahassee, for appellee.

ERVIN, Judge.

Because appellant failed to move to withdraw his plea when the trial court imposed a sentence greater than that recommended in the plea agreement, we affirm appellant's convictions and sentences. When the trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant with a clear opportunity to withdraw his or her plea at sentencing when it decides to impose a sentence greater than that recommended in the plea agreement. *Lepper v. State*, 461 So.2d 1020, 1021 (Fla. 1st DCA 1984). *And see Perkins v. State*, 647 So.2d 202 (Fla. 1st DCA) (in order for court to properly consider voluntariness of plea on direct appeal, trial court must have been asked to resolve the issue in a prior motion to withdraw), *review denied*, 648 So.2d 723 (Fla.1994); *Robinson v. State*, 373 So.2d 898 (Fla.1979) (appeal from plea should never be a substitute for motion to withdraw plea). In so ruling, we note our apparent conflict with *Perry v. State*, 510 So.2d 1083 (Fla. 2d DCA 1987) (where trial court cannot honor plea agreement, it must affirmatively take action to permit the defendant the opportunity to withdraw the plea—no motion to withdraw required). *And see Rodriguez v. State*, 610 So.2d 476 (Fla. 2d DCA 1992); *Kiefer v. State*, 295 So.2d 688 (Fla. 2d DCA 1974).

We affirm, however, without prejudice to appellant raising the issue in a motion for postconviction relief. *See Eggers v. State*, 624 So.2d 336 (Fla. 1st DCA 1993).

AFFIRMED.

MINER and WOLF, JJ., concur.

2

Mark LEWIS, Appellant,

v.

The STATE of Florida, Appellee.

No. 94-1202.

District Court of Appeal of Florida, Third District.

April 19, 1995.

An Appeal from the Circuit Court for Dade County; Leslie B. Rothenberg, Judge.

Digest

Exhibit "B"