017

IN THE SUPREME COURT OF FLORIDA

Case No. 87,342

FILED
SID J. WHITE
MAY 28 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

the LIBERTARIAN PARTY OF FLORIDA; the LIBERTARIAN PARTY OF FLORIDA EXECUTIVE COMMITTEE; and ROBERT WILSON,

Petitioners

v.

JIM SMITH, in his official capacity as Secretary of State; and DOROTHY JOYCE, in her official capacity as Director of the Division of Elections,

Respondents

---/

On Appeal from the First District Court of Appeal

PETITIONERS' INITIAL BRIEF

Daniel F. Walker
D. Fleming Walker, P.A.
221 E. Seventh Ave.
Tallahassee, FL
32303

(904)-224-5545

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NOTE

References to pages of the Record shall be to the letter "R" and the appropriate page number, in brackets (e.g., [R 148] refers to page 148 of the Record).

STATEMENT OF THE CASE

The Libertarian Party of Florida, the Libertarian Party of Florida Executive Committee, and Richard Vajs filed a complaint in the fall of 1993, challenging the Federal and state constitutionality of the fee-distribution features of s. 99.103, Fla. Stat. (1993), insofar as the state executive committees of minor parties receive no percentage of the filing fees paid by their respective candidates for state and federal office, but the state executive committees of "major" parties are statutorily entitled to a percentage of the filing fees paid by their respective candidates for state and federal office. [R 1-9]

When the Libertarian Party did not obtain sufficient valid petition signatures to place Vajs on the general election ballot, a second amended complaint was filed to substitute for Richard Vajs as plaintiff Robert Wilson, a Libertarian candidate for District 4 in the State House of Representatives and for whom sufficient petition signatures were obtained for general election ballot placement. [R41-49]

The parties stipulated to the facts listed in the Statement of the Facts below, and the circuit court heard arguments in chambers on November 29, 1994, on the parties' respective motions for judgment on the merits. The circuit court rendered its opinion on January 11, 1995, granting the respondents' motion. [R 148-162] The petitioners filed Notice of Appeal on Feb. 10, 1995, oral arguments were held on October 25, 1995 before the First District Court of Appeal, and on January 4, 1996, the district court of appeal issued an opinion affirming the circuit court by a 2-1 margin.

The petitioners filed a Notice to Invoke Discretionary Jurisdiction in a timely fashion, followed by submittal to the Supreme Court of the petitioners' and respondents' briefs on jurisdiction. This court accepted jurisdiction on May 3, 1996.

STATEMENT OF THE FACTS

The Libertarian Party of Florida is a minor party under s. 99.021(15), Fla. Stat. (1995); at least three-fourths of its state executive committee was elected at each annual convention in 1992, 1993, and 1994. [R 149]

Robert Wilson was the Libertarian Party of Florida nominee in 1994 for District 4 of the Florida House of Representatives; he paid a qualifying fee of $1,278.42 to the Department of State and appeared on the November 8, 1994 general election ballot. [R 149]

As part of the joint stipulation referred to earlier, the parties filed copies of documents that had been submitted to the Secretary of State by candidate Robert Wilson. Some of those documents are from Wilson's campaign treasurer report. [R 95-97] The summary shows that for the period ending July 29, 1994, Wilson's campaign account had $1,550.00 in contributions and $1,278.42 in expenditures. [R 95] Of the $1,550.00 in contributions, $1,200.00 was contributed by the Libertarian Party of Santa Rosa County. [R 96] The $1,278.42 represents Wilson's filing fee. [R 97]

SUMMARY OF ARGUMENT

It is the position of the petitioners that once a party and its candidate are similarly situated vis a vis a ballot-qualified candidate (of another party) seeking the same office, then any governmental interest in preventing factionalism is obviated. Once the government's "compelling interest" of preventing factionalism falls in this case, the particular inherent attribute -- the disparate funding of parties based upon size of the parties with which ballot-qualified candidates are associated -- of the filing fee scheme set forth in s. 99.103, Fla. Stat. (1995) fails constitutional scrutiny.

A "filing fee" is one component of a "qualifying fee." The "qualifying fee" consists of the filing fee, the party assessment, and the election assessment. Only the "filing fee" component is at issue in this case. Party assessments and election assessments are applied equally against all partisan party candidates; however, filing fees are distributed differently based upon the party with which a candidate is affiliated. "Major" parties with 5% or greater statewide voter registration are given approximately 53% of the filing fees paid by their state- and federal-office candidates. Minor parties (with less than 5% statewide voter registration) receive zero per cent of the filing fees paid by their ballot-qualified candidates for state and federal office.

Laws which prevent factionalism are those which are legitimately employed to ascertain public support to justify ballot placement *or* to prevent "party-jumping" so as to prevent voter confusion. Once a requisite number of petition signatures have

been obtained, and submitted by a certain deadline, and the candidate for whom ballot placement is sought has not "party-jumped" soon before qualifying, then the governmental interest in legitimately desiring to prevent factionalism has been satisfied.

How a candidate's filing fee is distributed has nothing to do with ascertaining public support for that candidate's ballot placement. How the filing fee of a candidate (who has earned ballot placement) is distributed has nothing to do with preventing factionalism within a different political party.

Disparate treatment of candidate filing fees -- using said fees to fund the parties of some ballot-qualified candidates, but denying that same funding mechanism to ballot-qualified candidates of other parties -- is nothing less than a punitive measure applied against minor parties and their candidates *who have already shown the necessary "modicum of public support" to merit being placed on the ballot and thus satisfied governmental standards to overcome concerns of factionalism and a multiplicity of parties.* Such a punitive measure, a legally institutionalized preference for the major parties, diminishes rights of political association and participation under the U.S. and Florida constitutions.

To allow the government to justify disparate fee-distributions of filing fees based upon whether a ballot-qualified candidate is a nominee of a minor party or a major party, on grounds of "preventing factionalism," is no different, in principle, than invoking "preventing factionalism" to impose different contribution limits on

minor parties and their candidates or mandating that a vote for a minor party candidate shall equal one-half of a vote for a major-party candidate. Would such laws prevent factionalism? Sure. Would such laws be constitutionally legitimate based upon an interest of preventing factionalism at the cost of penalizing the exercise of the right of political association by developing a new party?

That is the principle at issue in this case. *Not* whether there exists a governmental interest in preventing factionalism, but whether that interest can be legitimately invoked *even when* a minor party and its candidate have earned ballot placement and are similarly situated with major-party nominees seeking the same office.

The petitioners assert that the governmental interest in preventing factionalism is an illegitimate interest to justify the filing-fee distribution scheme; furthermore, the governmental interests in (1) providing support to parties and (2) offsetting election administration costs, though capable of being legitimately relevant in a constitutional sense, are not met in a constitutional manner by the challenged statutory provision.

ARGUMENT

Issue 1

THE 1st DISTRICT COURT OF APPEAL MISAPPLIED PRECEDENT BY IMPUTING AN IRRELEVANT GOVERNMENTAL INTEREST AS JUSTIFICATION FOR THE CHALLENGED STATUTE AND BY FAILING TO FULLY RECOGNIZE THE BURDENS UPON THE PETITIONERS' RIGHTS OF POLITICAL ASSOCIATION.

A. ***The 1st District Court of Appeal majority opinion improperly rests upon a governmental interest used to justify ballot-access requirements, and supported only by precedent concerning ballot-access requirements, while the case at hand does not concern a ballot-access requirement.***

The district court majority opinion relies heavily upon precedential cases concerning statutes concerning requirements for access to the ballot. Burdick v. Takushi, 504 U.S. 428, 112 S.Ct. 2059 (1992), was about a prohibition of write-in candidacies (restricting ballot access) in a state in which more than two parties generally gained ballot access. Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274 (1974) was concerned with an array of ballot-access requirements: party-disaffiliation standards for independent candidates, the time frame during which petition signatures could be collected, and eligibility standards regarding who could sign a petition. McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215 (4th Cir. 1995) was concerned with the necessity to petition (and thus obtain ballot-access) in light of a party's voter support demonstrated at a previous election. Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 99 S.Ct. 983 (1979) dealt with the issue of numerical petition standards for ballot-access for non-statewide-office candidates. Anderson v. Celebrezze, 460 U.S. 780, 103 S.Ct. 1564 (1983) was about ballot-access standards required of independent candidates. Likewise, the recent case of Libertarian Party of Florida v. Smith, 660 So.2d 807 (Fla. 1st DCA 1995), rev. denied 669 So.2d 251 (Fla. 1996) was concerned with ballot-access petitioning standards for minor party ballot placement. Fulani v. Smith, 640 So.2d 1188 (Fla. 1st DCA 1994), rev. denied 651 So.2d 1193 (Fla. 1995) was a ballot-access case

regarding the deadline to file an oath to run as a write-in candidate.

None of the statutes challenged in the cases cited above were statutes which were applied because, contemporaneously or after, a minor party candidate *satisfied* ballot-access standards to earn ballot placement. The statutes challenged in the cases cited above dealt with the degree of severity of standards directly relating to gauging the sufficiency of public support to justify ballot placement, or to prevent voter confusion and party factionalism by restricting candidates from shifting party allegiance for a convenient "second bite at the apple" for ballot placement.

How a candidate's filing fee is distributed has *nothing* to do with gauging public interest to justify placing said candidate on the ballot; likewise, how a specific candidate's filing fee is distributed has *nothing* to do with preventing said candidate from jumping from one party to another, or preventing factionalism within said candidate's party.

Furthermore, the lower court's fleeting reference to Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992) curiously omits any reference to the language of that decision most pertinent to this case: *"A state might permissibly charge a nondiscriminatory fee* [emphasis added] *that advances the regulatory interest of reimbursing the state for its election expenses, particularly if it offers alternative avenues of ballot access, but it cannot use the fee to decide who deserves to be on the ballot."* Fulani at 1547. One position that Fulani does *not* stand for is the proposition that a filing fee with a discriminatory inherent attribute is a legitimate ballot access

measure supported by a compelling government interest.

The discriminatory feature of the inherent attribute of the filing fee provision, whereby minor parties receive zero percent of the filing fees paid by their state and federal candidates, while "major" parties receive more than 50% of the filing fees paid by their state- and federal-office candidates, cannot be legitimately justified as a factionalism-prevention method drawn from ballot-access jurisprudence. The district court mistakenly invoked a governmental interest which, though compelling, is not legitimately relevant to this case. This court should remove the pillar of "anti-factionalism" upon which the district court majority opinion rests so heavily. The district court was satisfied only with the reasonable relation of the statute to the interest asserted. Unfortunately, the district court simply presupposed the legitimacy of that relationship by ignoring the issues raised in the cases cited.

B. ***The district court of appeal failed to take account of the burdens placed upon the political associative rights of the Libertarian Party of Florida and the condition imposed on the exercise of associative rights by those who affiliate themselves as nominees of the Libertarian Party.***

Citizens have a "***constitutional right . . . to create and develop new political parties.***" Norman v. Reed, 502 U.S. 279, 288, 112 S.Ct. 698, 705 (1992). It is self-evident that the development of the Libertarian Party of Florida is harmed when it is denied the same percentage of filing fees paid by its candidates for state and federal office as the major parties receive from the filing fees paid by their respective candidates for state and federal office due to the effect of s. 99.103(1), Fla. Stat. (1995). The monies received by the major parties are available to them for

unrestricted legal use -- supporting candidates, public relations, voter outreach, and other measures. The challenged statute provides monetary lifeblood to *some* political parties from the filing fees paid by *their* ballot-qualified candidates, but denies *any* of that same transfusion to minor parties from the filing fees paid by their similarly situated, ballot-qualified nominees for those same state and federal offices.

The district court also failed to acknowledge or address the issue of election-administration costs raised by operation of the fee-distribution statute. The fee distribution scheme *penalizes* minor party nominees for state and federal office by forcing them to offset more election-administration costs than do their similarly situated major-party opponents. It is self-evident that when the government retains 100 per cent of the filing fee paid by a minor party nominee for the State House, and the government retains less than 50 per cent paid by a major party nominee for the State House, and the filing fees were the same, then the minor party nominee (e.g., Robert Wilson) whose fee was totally retained by the government is offsetting a far greater percentage and absolute amount of election-related costs than is his major-party opponent for that public office. The fee is *not* nondiscriminatory -- anymore than was the petition verification fee scheme challenged in Fulani v. Krivanek -- and should be declared unconstitutional.

Florida Statute section 99.103(1) diminishes the right of the Libertarian Party of Florida by depriving it of funding from a measure statutorily geared to benefit larger parties. The challenged statute also imposes an undue condition on the

exercise of political association rights by those who are affiliated with minor parties and wish to run for state and federal office; such minor party candidates must offset more than twice as many election-administration costs as do their major-party competitors.

This fee-distribution statute is

> "[a] ***burden that falls unequally on new or small parties*** . . . [which] ***impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties.*** [citation omitted] ***By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.*** [emphasis supplied]
>
> Anderson v. Celebrezze, 460 U.S. 780, 793-794, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

The fee-distribution scheme of s. 99.103(1), Fla. Stat. (1995) certainly threatens diversity and competition in the marketplace of ideas, by aiding the financial and competitive crib death of small parties which have satisfied ballot-access requirements to place candidates on the ballot.

C. ***Precedents regarding disparate treatment of political parties concerning non-ballot-access election laws supports the petitioners' challenge for equal treatment of filing-fee distributions.***

Consider the case of Socialist Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D.N.Y. 1970), ***judgment aff'd***, 400 U.S. 806 (1970), which did not concern ballot access requirements but ***did*** concern disparate treatment of political parties.

At issue were statutory provisions that voter registration lists were to be provided free of charge to county chairmen of parties which received at least 50,000 votes in the previous gubernatorial election; other parties, even if ballot-qualified but not having satisfied the 50,000 vote standard, did not qualify for the receipt of free registration lists.

The district court held that "[t]*he state has shown no compelling interests nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have the least need therefore.*" Id., 314 F.Supp. at 995. Also, *"constitutional strictures merely require that the State treat all groups similarly situated alike. The State is not required to provide such lists free of charge, but when it does so it may not provide them only for the large political parties and deny them to those parties which can least afford to purchase them."* Id., 314 F.Supp. at 996.

The issue decided by the Federal district court in New York (and affirmed by the U.S. Supreme Court) is analagous to the fee-distribution issue. The State of Florida is not required to craft a statutory scheme to provide funding for political parties; however, it is constititutionally repugnant to craft a scheme which funds large political parties (from the filing fees of their candidates) while denying to minor parties the same benefit from filing fees paid by their respective ballot-qualified candidates.

The Court of Appeals of New York in Mandole v. Barnes, 229 N.E.2d 20 (1967) ruled that a county, *"having made its buildings available for public*

gatherings," could not discriminate as to which parties could use the buildings.

The county board implemented a rule by which only parties which received at least 50,000 votes at the previous gubernatorial election could receive permits for use of county courthouses. The tiny National Renaissance Party was denied a permit due to its failure to meet the electoral-support standard.

The court held that while the county "*was not obliged to make its buildings available for public gatherings but, when it does so,*" the federal and New York constitutions *"require that it be done in a 'reasonable and nondiscriminatory manner.'* [citation omitted]" Mandole at 22. The rule did not withstand constitutional scrutiny. The size of the party did not affect its right to equal treatment.

Providing free voter registration lists and free locations for gatherings only to some parties ***but not*** others certainly would help to "prevent factionalism and a multiplicity of parties," but that generic "compelling interest" is no shield of all election laws which impact parties in ways unrelated to ballot-access standards. Just as the Court of Appeals of New York ruled with regard to discriminatory treatment of minor party access to county courthouses, just as the U.S. Supreme Court affirmed a district court's determination that voter-registration list distribution parameters (for some but not all parties) were unconstitutional, the petitioners urge this court to find the fee-distribution provisions of s. 99.103(1), Fla. Stat. (1995) violative of the fundamental right of political association recognized through the First

and Fourteenth Amendments of the U.S. Constitution.

D. ***The two legitimate government interests to justify a division of distribution of filing fee funds are not legitimately attained by the operation of the challenged statute.***

The petitioners recognize two legitimate, if not compelling, governmental interests which are relevant to justifying a division of filing fees between the government and political parties. There is a governmental interest in reimbursing the government for election costs (see Fulani v. Krivanek at 1547), and there is a perceived governmental interest in "***fosterfing] party growth and activity,***" per Wetherington v. Adams, 309 F.Supp. 318, 321 (N.D. Fla. 1970).

The infirmities with these interests relative to this case are those of legitimacy of the means employed to satisfy those interests. If the government had a compelling interest in reimbursement for election costs, the government could retain 100% of ***all*** candidates' filing fees, not just those of minor parties' candidates. Oddly, the state government retains the entirety of minor party candidates' filing fees, but the state retains slightly less than 50% of the filing fees paid by major-party candidates; for reasons given in the preceding pages, this inherently discriminatory penalty renders the interest illegitimately supported by the operation of the statute. With regard to the interest of "fostering party support," the fee-distribution scheme prima facie discriminates against new and small parties by denying their state parties a portion of their state and federal-office candidates' filing fees -- a handy way to suppress the financial capacity of minor parties to afford the means necessary to grow. If the court

was to declare the statute unconstitutional to the extent that minor parties are denied an equal percentage of their candidates' filing fees paid to the Department of State, with the effect that *all* parties must receive an equal percentage of the filing fees paid by their respective candidates, then the major parties would *continue* to derive the funds from their candidates' filing fees, but minor parties *also* would likewise be strengthened by the filing fees paid by their candidates for whom ballot placement was earned. For the reasons set forth in previous sections I.B and I.C, these two less-than-compelling governmental interests are insufficient to justify the disparate treatment of minor party candidates' filing fees distributed pursuant to s. 99.103(1).

Issue 2

THE 1st DISTRICT COURT OF APPEAL MISAPPLIED STATE CONSTITUTIONAL PRECEDENT REGARDING THE RIGHTS OF POLITICAL ASSOCIATION AND PARTICIPATION.

The district court erred in its brief dismissal of the state constitutional issues raised relative to Art. I, Sections 1 (political participation) and 5 (association) of the Florida Constitution. Libertarian Party of Florida v. Smith, 665 So.2d 1119, 1120 (Fla. App. 1 Dist. 1996), n. 2.

While there is no text-derived right of candidacy from the U.S. Constitution, there *is* such a text-derived *state* constitutional right. *"The declaration of rights expressly states that, 'all political power is inherent in the people.' The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable disqualifications to run.* [citations omitted] "

Treiman v. Malmquist, 342 So.2d 972, 974 (Fla. 1977). Petitioner/candidate Robert Wilson had a state constitutional right of candidacy which was unreasonably burdened by the effect of the filing-fee statute -- Wilson's right to run as the nominee of his chosen party, a minor party, came with a monetary penalty (amply discussed in the previous pages).

The U.S. Constitution has no "inherent political clause." The Florida Constitution *does* -- Art. I, Sec. 1, Fla. Const. This clause is further buttressed by reference to the Preamble of the Florida Constitution, which states that among the objectives for the existence of the state constitution is to ***"guarantee equal civil and political rights to all . . . ."*** [emphasis added] Robert Wilson's right to run for office as nominee of a minor party, and the Libertarian Party of Florida as that minor party, certainly have not enjoyed a guarantee of equal political rights of participation and association in light of the skewed distribution of candidate filing fees.

In 1990, this court declared unconstitutional a statute which prohibited candidates for legislative or statewide office from requesting campaign contributions during a regular or special session of the legislature. State v. Dodd, 561 So.2d 263 (Fla. 1990). Money to pay a filing fee either comes from the candidate or from those who support the ballot placement of said candidate (e.g., his party, contributors, etc.). As stated in Dodd, ***"the right of association is implicated here precisely because '[m]aking a contribution, like joining a political party, serves to affiliate a person withh a candidate [and] enables like-minded persons to pool their resources in furtherance***

of common political goals." Dodd at 263-264, *quoting* Buckley v. Valeo, 424 U.S. 1, 22 (1976). Money contributed to place a major party candidate on the ballot supports the operations of that major party; however, money contributed to place a minor party candidate on the ballot is funneled, by statute, to support that minor party. The unreasonable penalty on the exercise of state constitutional rights of participation and association is apparent; minor party proponents are competitively penalized by statute relative to major parties concerning filing-fee distributions.

Issue 3

THE 1st DISTRICT COURT OF APPEAL ERRED IN FAILING TO ADDRESS THE ISSUE OF THE DISPARATE FILING FEE DISTRIBUTION BEING AN IMPOSITION OF AN UNCONSTITUTIONAL CONDITION.

The doctrine of unconstitutional conditions is a theory by which to assess the relationship between statutes and the exercise of constitutional rights; special attention is paid to the attachment of governmental "strings" to the exercise of rights. See, e.g., State of Florida v. Republican Party of Florida, 604 So.2d 477, 481 (Fla. 1992) (Barkett, C.J., concurring).

The doctrine is defined:

> ***All citizens have a presumptively equal right to share in government benefits and presumptive equal obligation to bear the burden of government action. The legislative branch may adjust the benefits and burdens of government action (redistribute wealth) in the interest of democratically defined public goods. But it may not redistribute wealth on the basis of an individual's, or group's, exercise of a constitutionally protected right, unless it can show that***

it has a legitimate justification for doing so.

Michael W. McConnell, "Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause," 26 San Diego L. Rev. 255, 260 (1989).

By forcing minor party candidates to bear twice the election-administration costs per race as their similarly-situated major party opponents, the filing-fee distribution statute imposes an unconstitutional condition on the exercise of political association rights by minor parties. This is nearly the same effect in principle as taxing someone based on his beliefs. See Speiser v. Randall, 357 U.S. 513 (1957). Commenting on Speiser, Richard Epstein wrote that *"Coercive tax burdens cannot be waived selectively for those whose views conform to the dominant political position, any more than additional taxes can be imposed on those whose views do not. State gifts work as much an illicit redistribution of wealth as state fines."* Richard Epstein, "The Supreme Court, 1987 Term -- Forward: Unconstitutional Conditions, State Power, and the Limits of Consent," 102 Harv. L. Rev. 4, 75 (1988).

Florida has conditioned the right of minor party candidates to qualify for the ballot under their chosen banner of party affiliation by establishing a fee-distribution system which financially rewards only the two major parties -- parties coincidentally with 5% or greater statewide voter registration, *the opponents of minor parties.* Such a condition on the right of political association and participation is inimical to the core values of the First Amendment of the U.S. Constitution and to Article 1, Sections 1 and 5 of the Florida Constitution.

Conclusion

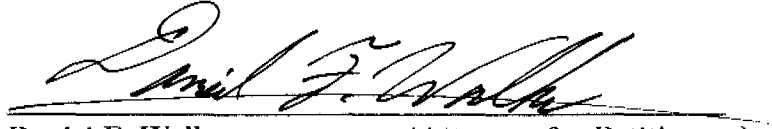
The decision of the First District Court of Appeal should be reversed. Section 99.103(1), Fla. Stat. (1995) should be determined contrary to the 1st and 14th Amendments of the U.S. Constitution, 42 U.S.C. s. 1983, and Article 1, Sections 1 and 5 of the Florida Constitution. The Secretary of State and Director of the Division of Elections should be enjoined from retaining a greater percentage of filing fees paid by minor party candidates to the Department of State than is retained from filing fees paid by major party candidates to the Department of State.

The disparate treatment of candidate filing fees, a statutory device unrelated to ballot-access interests, represents nothing less that an institutionalized preference for *and by* major parties to suppress electoral competition *even when* that competition is able to satisfy ballot-access hurdles and obtain ballot placement.

There is no "two-party" clause in either the U.S. or Florida constitution; the petitioners request that the court not read such a clause into those governing documents.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charlie McCoy, Esq., by personal delivery to his office this 28th day of May, 1996.



Daniel F. Walker {Attorney for Petitioners}
Fla. Bar No. 0935328
221 E. Seventh Ave.
Tallahassee, FL 32303
(904)-224-5545