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IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

AUG 10 1998

CLERK, SUPREME COURT

By Chief Deputy Clerk

DARYELL CALLIAR,

:

Petitioner,

:

v.

:

CASE NO. 93,592

STATE OF FLORIDA,

:

Respondent.

:

JURISDICTIONAL BRIEF OF PETITIONER

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

MARK E. WALKER  
ASSISTANT PUBLIC DEFENDER  
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ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I. STATEMENT OF THE CASE AND FACTS	1
II. SUMMARY OF THE ARGUMENT	4
III. DISCUSSION	5
IV. CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASE(S)</u>	<u>PAGE(S)</u>
<u>Calliar v. State,</u> 23 Fla. L. Weekly D1674 (Fla. 1st DCA July 15, 1998)	2-3, 4, 5
<u>Hierro v. State,</u> 608 So. 2d 912 (Fla. 3d DCA 1992)	1-3, 4, 5
<u>CONSTITUTION(S)</u>	
Art. V., § (3)(b)(3), Fla. Const.	4, 5

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**JURISDICTIONAL BRIEF OF PETITIONER**

**I. STATEMENT OF THE CASE AND FACTS**

The pertinent facts are these. A middle school teacher observed appellant attempting to cut the chain of a bicycle with wire cutters. The bicycle was chained to a rack located within a fenced area of the school. It is undisputed that appellant entered the school premises through an open gate. Following a trial by jury, appellant was convicted of possession of burglary tools.<sup>1</sup>

Appellant appealed to the First District Court of Appeal arguing that

[i]n Hierro v. State, 608 So. 2d 912, 915 (Fla. 3d DCA 1992), the Third District held that section 810.06 proscribes the possession with intent to use a tool to commit a burglary or trespass but that section 810.06 does not proscribe the possession with intent to use a tool to commit a theft. Neither this court nor

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<sup>1</sup> Appellant was also convicted of burglary of an occupied structure and resisting an officer without violence.

any other district court has held otherwise. In the instant case, the State presented no evidence from which the jury could find that appellant intended to use a tool to commit a burglary or trespass. At most, the evidence supports a finding that appellant intended to use a tool to commit a theft.

The State responded that Hierro was wrongfully decided. The First District agreed, ruling that

Hierro appears to hold that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary cannot be convicted of possession of burglary tools. See Hierro, supra at 915. The analysis in Hierro ignores the fact that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent.

Section 810.06, Florida Statutes (1995), provides in pertinent part that

[w]hoever has in his or her possession any tool, machine, or implement with intent to use same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree . . . .

Florida Statutes define burglary as follows:

"Burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein . . . .

§ 810.02(1), Fla. Stat. (1995). Thus, by definition, a burglary tool may be one that a perpetrator intends to use to enable him to gain entry or remain within the premises, or may be a tool which the perpetrator intends to use to commit an offense while within the premises.

Calliar v. State, 23 Fla. L. Weekly D1674, 1674-75 (Fla. 1st DCA

July 15, 1998). Judge Joanas dissented, reasoning that

the interpretation of the language of Section 810.06, Florida Statutes, regarding burglary tools, set out in Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), is more reasonable than the one offered by my colleagues in the majority opinion. However, assuming that the statute can be reasonably interpreted both ways, we must construe the provision most favorably to the accused. See § 775.021(1), Fla. Stat. (1995). The conviction on the charge of possession of burglary tools should be reversed.

Id. at D1675.

## II. SUMMARY OF THE ARGUMENT

The case at bar, Calliar v. State, 23 Fla. L. Weekly D1674 (Fla. 1st DCA July 15, 1998), expressly and directly conflicts with Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992). Accordingly, this Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

### III. DISCUSSION

In the case at bar, the First District Court of Appeal affirmed appellant's conviction for possession of burglary tools holding that

by definition, a burglary tool may be one that a perpetrator intends to use to enable him to gain entry or remain within the premises, or may be a tool which the perpetrator intends to use to commit an offense [read: theft] while within the premises.

Calliar v. State, 23 Fla. L. Weekly D1674, 1675 (Fla. 1st DCA July 15, 1998). More specifically, the First District held that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary can be convicted of possession of burglary tools. Id. Conversely, in Hierro v. State, 608 So. 2d 912, 915 (Fla. 3d DCA 1992), the Third District Court of Appeal held that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary cannot be convicted of possession of burglary tools. In short, the First District's decision in the case at bar expressly and directly conflicts with the Third District's decision in Hierro. Accordingly, this Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.



#### IV. CONCLUSION

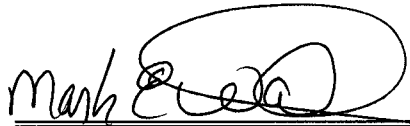
Based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court exercise its jurisdiction to review the decision of the district court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished to J. Ray Poole, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 10<sup>th</sup> day of August, 1998.

Respectfully submitted,

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT



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**INDEX TO APPENDIX**

APPENDIX A: Calliar v. State, 23 Fla. L. Weekly D1674 (Fla. 1st DCA July 15, 1998).

APPENDIX B: Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992).