N THE SUPREME COURT OF FLORIDA

ANTHONY A. STUART,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 96,208

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

# RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaces.

## TABLE OF CITATIONS



## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

The respondent accepts petitioner's statement of the case and facts with the following addition:

The trial court entered written reasons for a downward departure sentence, to wit: "The opinion of the Second District Court of Appeal, a copy of which is appended to Petitioner's Brief on Jurisdiction, outlines the relevant facts at this stage of the proceedings.

## SUMMARY OF THE ARGUMENT

The Second District Court of Appeals did not err in dismissing the petitioner's direct appeal. Although the trial court imposed an illegal sentence because the downward departure sentences imposed - imprisonment followed by probation exceeded the statutory maximum for the offenses in question - petitioner failed to properly preserve the sentencing error for review on direct appeal because it was never brought to the attention of the trial court either at the time of sentencing or by filing a motion to correct sentencing error pursuant to Fla. R. Crim. Pro. 3.800(b) (1998) as required by Fla. R. App. Pro. 3.140(d) (1998). The petitioner can still raise this issue in a motion to correct illegal sentence pursuant to Fla. R. Crim. Pro. 3.800(a) (1998).

## ARGUMENT

**WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN DISMISSING PETITIONER'S DIRECT APPEAL OF THE TRIAL COURT'S IMPOSITION OF AN ILLEGAL SENTENCE ON THE GROUNDS THAT THE SENTENCING ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW ON DIRECT APPEAL (RESTATED).**

The issue before this Court is not, as alleged by petitioner, whether the trial court erred in sentencing him to combined sentences of incarceration and probation which exceeded the statutory maximum provided by law for those offenses when the trial court imposed a downward departure sentence. Respondent acknowledged on direct appeal that the appellant's argument that his sentence was illegal was meritorious (see respondent's answer brief as filed with the Second District Court of Appeals - copy attached as an appendix to this brief). This issue before this Court is whether the Second District Court of Appeals erred in dismissing the direct appeal of the petitioner without reaching the merits of his argument because the appellant court relying upon its previous ruling in Leonard v. State, 731 So.2d 2 (Fla. 2d DCA 1998), *review granted* No. 93,332.

In Leonard, *id.*, appellant appealed a 30 year sentence he received when his probation was revoked on a second degree felony. The Second District Court of Appeals held that:

> Because Leonard pleaded guilty to the underlying offense and failed to bring this error to the trial court's attention first, pursuant to section 924.051(4), Florida Statutes (1996), we are without jurisdiction to entertain this issue on direct appeal. Therefore, we dismiss this appeal without prejudice to Leonard to seek correction of this possible error by filing a motion pursuant to Florida Rule of Criminal Procedure 3.800(a).

S. 924.051(4) provides:

> If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence.

In Amendments to Florida Rules of Appellate Procedure, 696 So.2d 1103, at 1105 (Fla. 1996), this Court stated:

> [w]e believe the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error...[t]his Court on June 27, 1996, promulgated an emergency amendment designated as a new Florida Rule of Criminal Procedure 3.800(b) to authorize the filing of a motion to correct a defendant's sentence within ten days. *amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800,* 675 So.2d 1374 (Fla. 1996). Because many sentencing errors are immediately apparent at sentencing, we felt this rule would provide an avenue to preserve sentencing errors and thereby appeal them. However, since our adoption of the emergency amendment, a number of parties have expressed the view that the ten-day period id too short....For these reasons we have extended the time for filing motions to correct sentencing errors under rule 3.800(b) to thirty days.

* * *

> ...[S]ection 924.051(b)4 also states that a defendant pleading guilty or nol contendere without expressly reserving the right to appeal a legally dispositive issue cannot appeal the sentence. However, a defendant has not yet been sentenced at the time of the plea. Obviously, one cannot expressly reserve a sentencing error which has not yet occurred. By any standard, this is not a reasonable condition of the right to appeal. Therefore, ***we construe this provision of the Act to permit the permit a defendant who pleads guilty or nolo contendere without reserving a legally dispositive issue to nevertheless appeal a sentencing error, providing that it has been preserved by a motion to correct sentence.*** (citations omitted).
>
> Accordingly, we have rewritten rule 9.140 to accomplish the objectives set forth above.

(Emphasis added)

The changes to Florida Rule of Appellate Procedure 9.140 as regarding the preservation of sentencing issues for purposes of appeal, as set forth by this Court in Amendments to Florida Rules of Appellate Procedure, 696 So.2d at 1129-1131 are as follows:

> **RULE 9.140. APPEAL PROCEEDINGS IN CRIMINAL CASES**
>
> * * *
>
> (b) **Appeals by Defendant.**
>
> (1) **Appeals Permitted.** A defendant may appeal
>
> * * *
>
> (D) an unlawful or illegal sentence;
>
> (e) a sentence, if appeal is required or permitted by general law;
>
> * * *

> **(2) PLEAS.** A defendant may not appeal from a guilty plea or nolo contendere plea except as follows:
>
> (A) A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal identifying with particularity the point of law being preserved.
>
> (B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only
>
> * * *
>
> (iv) a sentencing error, if preserved;
>
> * * *
>
> (d) **Sentencing Errors.** A sentencing error may not be raised on direct appeal unless the alleged has first been brought to the attention of the lower tribunal:
>
> (1) at the time of sentencing: or
>
> (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b)

It is the position of the respondent that the reasoning of this Court as cited above and the changes made to the Florida Rules of Criminal Procedure and Florida Rules of Appellate procedure as set forth above, establish the procedural principle that sentencing errors of any kind - whether fundamental error or not - cannot be raised for the first time on direct appeal. Such errors must be raised initially in the trial court either at the time of sentencing or by a motion to correct sentencing error pursuant to Fla. R. Crim. Pro. 3.800(b) as required by Fla. R. App. Pro.

91.140(d). If not preserved then most minor sentencing issues will be waived; however, the defendant will still have the right to seek redress at the trial level for "illegal sentences" and or incorrect calculations in sentencing score sheets by filing a motion pursuant to Fla. R. Crim Pro. 3.800(a).

This Court has recognized the division among the district court's of appeal regarding the preservation of sentencing issues for purposes of direct appeal. In Amendments To Florida Rules of Criminal Procedure 3.111(e), 3.800 and Florida Rules of Appellate Procedure 9.010(h), 8.140, and 9.600, 24 Fla. L. Weekly S530, at 531 (Fla. November 12, 1999) has stated:

> Rule 3.800(b) currently allows criminal defendants to file a motion correct sentencing errors in the trial court within thirty days after the sentencing proceeding. Operating in tandem with rule 3.800(b), Florida Rule of Appellate Procedure 9.020(h) delays the "rendition" of the final order until the trial court disposes of the 3.800(b) motion. Thus the Defendant currently has thirty days to file the notice of appeal after the trial court rules on any sentencing error preserved through a 3.800(b) motion.
>
> These statutory and rule changes embody a policy decision intended to "relieve the workload of appellate courts" and "place correction of alleged errors in the hands of the judicial officer [ the trial judge] best able to investigate and correct any error." *Maddox v. State*, 708 So.2d 617, 621 Fla. Th DCA 1998)(en banc), *review granted*, 718 So.2d 169 (Fla. 169 (Fla. 1998). Unfortunately, these statutory and rule changes did not have their intended effect of conserving the judicial resources of the appellate courts, while at the same time providing for sentencing errors to be addressed at their earliest opportunity

in the trial courts.

> The Act has opened an entirely new debate in the appellate courts as to what constitutes fundamental sentencing error on appeal and whether any unpreserved sentencing error, no matter how egregious, can be considered on direct appeal. The Fifth District has broadly stated that *no* unpreserved sentencing error will be considered fundamental or correctable on direct appeal. *See Maddox*, 708 So.2d at 620. In contrast the First, Second, Third, and Fourth District continue to recognize that errors in sentencing can constitute "fundamental error" that can be raised on direct appeal despite the lack of preservation, *See Nelson v. State*, 719 So.2d 1230 (Fla. 1st DCA 1998)(en banc); *Bain v. State*, 730 So.2d 296 (Fla. 2d DCA 1999) (en banc); *Harriel v. State*, 710 So.2d 102 (Fla. 4th DCA 1998); *Jordan v. State*, 728 So.2d 748 (Fla. 3d DCA 1998), *review granted*, 735 So.2d 1235 (Fla. 1999). This Court has accepted jurisdiction over the Fifth District's decision in *Maddox*, and dozens of other related cases, in which this Court has been asked to resolve the split in the district courts by determining whether unpreserved sentencing errors can be raised on direct appeal.

This Court further found that despite the Fifth District's rhetorically asked question of "why should there be 'fundamental' error where the courts have created a 'failsafe' procedural device to correct any sentencing error or omission at the trial level?" Maddox, *supra* at 520, the CARA Committee [Criminal Appeal Reform sct Committee] has discovered that in reality rule 3.800(b) as currently written has fallen far short of the goal of providing a "failsafe" method for defendants to seek to have sentencing errors corrected in the trial court and thereby preserve them for appellate review. Amendments to Florida Rules of Criminal Procedure

3.111(e), 3.800, 24 Fla. L. Weekly at S531.

This Court in Amendments to Florida Rules of Criminal Procedure 3.111(e), 3.800, 24 Fla. L. Weekly at S531-532, S533-534, amended rule 3.800(b) to allow additional time to file a motion to correct sentencing errors . As this Court stated:

> The most important change in the new rule is that it significantly expands the period in which a motion to correct sentencing error can be filed in the trial court. As with the current rule, rule 3.800(b)(1) will allow a motion to correct a sentencing error to be filed in the trial court during the period allowed for the filing of a notice for appeal. However, under the new rule 3.800(b)(2), if a notice of appeal has been filed, a motion to correct sentencing error can also be filed in the trial court at any time up until the first the first appellate brief is filed. The deadline for filing the first appellate brief is then extended until ten days after the clerk of the circuit court transmits the supplemental record from the proceeding held on the motion to correct sentencing error, which includes the motion, the order, any amended sentence, and the transcript if designated.

This Court felt that these amendments "will provide an effective, and hopefully more 'failsafe," procedural mechanism through which defendants may present their sentencing errors to the trial court and thereby preserve them for appellate review." *Id.* at S531.

This Court went on and described the interplay between rule 3.800(a) and 3.800(b):

> We secondly address the concern of some public defenders and the Florida Appellate and Criminal Rules Committee that the amend-

ments would not allow a rule 3.800(a) ,motion to be filed during the pendency of the appeal. However, the amended rule is intended to provide one mechanism whereby all sentencing errors may be preserved for appellate review. The comments to the proposed rule defines a "sentencing error" as including "harmful errors in orders resulting entered as a result of the sentencing process. This includes errors in orders of probation, orders of community control, cost and restitution orders, as well as errors within the sentence itself." The amendment to rule 3.800(a) will make it clear that a rule 3.800(b) motion can be used to correct any type of sentencing error, whether we had formally called that error erroneous, unlawful, or illegal. Thus a party can correct and illegal sentence through a 3.800(b) motion, or alternatively, following the appeal, a party may file a 3.800(a) motion to correct the sentence in the trial court.

Allowing a 3.800(a) motion to be filed during the pendency of the appeal could frustrate the entire scheme of the amendments to rule 3.800(b) proposed by the CARA Committee. This is especially so in light of the continuing difficulty of defining precisely what type of sentencing error constitute illegal sentences. In those small number of cases involving illegal sentences discovered after the briefs have been filed, which necessitate immediate resolution because the defendant would have served the legal portion of the sentence before prior to the conclusion of the appeal, we would urge the State and the defendant to work cooperatively to correct those errors.[5]

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[5] If the justice of the individual case requires it due to circumstances such as a short sentence, a joint motion by the parties requesting relinquishment of jurisdiction to the trial court for the limited purposes of correcting an illegal sentence may be appropriate.

This Court concluded, "the primary purpose of these amendments is to insure that sentencing errors will be corrected at the earliest possible opportunity by the trial court." *Id.* at S532.

Respondent has cited extensively from this Court's reasoning in Amendments to Florida Rules of Criminal Procedure 3.11(e) and 3.800., 24 Fla. L. Weekly S530, because respondent submits that the reasoning clearly reflects the Court's reasoning to date, that sentencing errors, even if regarded as "fundamental error" should first be brought to the attention of the trial court before it can reviewed on appeal.

The respondent urges the Court to adopt the reasoning in Maddox, *supra*, that claims of fundamental sentencing error are no longer cognizable on appeal because the provisions of rules 3.800, 3.850, and 9.140(d) provide comprehensive, fail-safe remedies in the trial court which obviate any need to address such claims for the first time on appeal.

The wisdom of Maddox is that it eliminates the need to struggle with the uncertain meaning of fundamental error by holding that there are now remedies for **all** prejudicial sentencing errors, not merely fundamental, through contemporaneous objection, or motion pursuant to rule 3.800(b) to correct sentence; 3.800(a) to correct an illegal sentence or error in the calculation of the sentencing score sheet at any time -although not while an appeal is pending; or a motion pursuant to Florida Rule of Criminal Procedure 3.850 to claim ineffective assistance of counsel if trial

counsel overlooks any prejudicial error and fails to file a rule 3.800(b). Failure of counsel to challenge a prejudicial error, when provided with a full thirty-day period of review, would be ineffective assistance of counsel on its face and there would be, of course, a right to appeal the denial of any rule 3.850 motion.

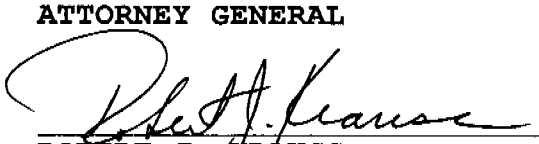
The state urges in the most emphatic terms that no one can seriously suggest that defendants who are now provided with no less than four independent and mutually supportive due process remedies in the trial court to raise claims of sentencing error are also entitled, contrary to statutory and procedural law, to demand that the judicial system also permit the claim to be raised for the first time on direct appeal. A right to a contemporaneous objection, a right to a motion to correct sentence under 3.800(b), a right to a motion to correct an illegal sentence under 3.800(a), and a right to claim ineffective assistance of counsel within two years of final judgment is due process to the ultimate degree. There is no denial of fundamental due process in requiring that defendants use trial court remedies readily available to them in raising claims of sentencing error. Maddox.

## CONCLUSION

Rspondent respectfully requests that this Court affirm the decision of the Second District Court of Appeals in Stuart v. State, *supra*.

Respectfully submitted,

**ROBERT A. BUTTERWORTH**
**ATTORNEY GENERAL**



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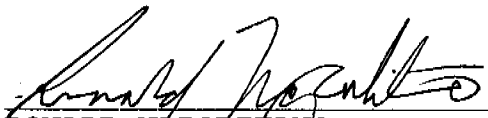

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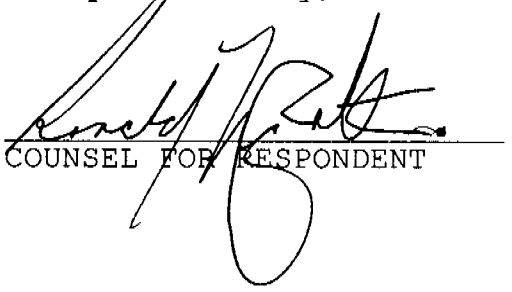
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Anthony A. Stuart, DOC No. T06549, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, Florida 32428, this 13 day of January, 2000.



COUNSEL FOR RESPONDENT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ANTHONY A. STUART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 98-02900

Opinion filed June 2, 1999.

Appeal from the Circuit Court for Hillsborough County; Daniel L. Perry, Judge.

Gerald A. Perez, Tampa, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Dismissed. See Leonard v. State, 23 Fla. L. Weekly D1438 (Fla. 2d DCA 1998), review granted, No. 93,332 (Fla. Feb. 22, 1999).

PATTERSON, A.C.J., and ALTENBERND, and CASANUEVA, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

| | |
|---|---|
| ANTHONY A. STUART,<br><br>APPELLANT,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>APPELLEE. | Case No. 98-02900 |

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# BRIEF OF APPELLEE

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## TABLE OF CITATIONS

## STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

## STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case and facts with the following additions and corrections:

The trial court entered written reasons for a downward departure sentence , to wit: "The need for payment of restitution to the victim outweighs the need for a prison sentence," and, "Defendant cooperated with the state to resolve the current offense and any other offense." (R 102)

## SUMMARY OF THE ARGUMENT

Initially, appellee submits that appellant has not preserved this sentencing issue for review on direct appeal because he failed to raise the issue that the time of sentencing or by filing a motion to correct sentencing error pursuant to Fla. R. Crim. 3.800(b) as required to preserve a sentencing error for review on direct appeal pursuant to Fla. R. App. Pro. 9.140(d). The appellant can still raise this issue in a motion to correct an illegal sentence under Fla. R. Crim. 3.800(a).

If the court should reach the merits of this issue appellee acknowledges that the downward departure sentences imposed in cases 97-12927 (20 years imprisonment followed by 15 years probation) for home invasion burglary (a first degree felony with a maximum sentence of 30 years imprisonment) and 97-20100 (two concurrent 10 year probation sentences) for two counts of vehicular homicide (a third degree felony with a maximum sentence of 5 years imprisonment) were illegal because the total sanction (incarceration and probation) exceeded the statutory maximum provided for by s. 775.082. At the time of resentencing, the trial court could refashion the sentences to accomplish the same sentencing goal of 20 years imprisonment followed by 15 years probation by sentencing the appellant to (a) 20 years imprisonment followed by 10 years probation for the home invasion robbery and (b) two concurrent terms of 5 years probation for the

two counts of vehicular homicide but consecutive to the probation for the home invasion robbery.

## ARGUMENT

### ISSUE

WHETHER THE TRIAL COURT IMPOSED AN ILLEGAL SENTENCE.

Appellant attacks the sentences imposed for the offenses of home invasion robbery (case 97-17927) and for two counts of vehicular homicide (case 97-20100).

A. Procedural bar: Appellee submits that the appellant cannot raise this issue on direct appeal because he failed to raise it at the time of sentencing or by filing a motion to correct sentencing error pursuant to Fla. R. Crim. Pro. 3.800(b) (1997) as required to preserve a sentencing error for review on direct appeal pursuant to Fla. R. App. Pro 9.140 (1997). *Leonard v. State*, 23 Fla. L. Weekly D 1438 (Fla. 2d DCA June 10, 1998). Appellant can still raise the issue by filing a motion to correct illegal sentence pursuant to Fla. R. Crim. 3.800(a).

B. Merits: If this appellate court should reach the merits of the issue raised in the instant appeal, appellee acknowledges that the trial court did error in sentencing the appellant. Appellant was sentenced to 20 years imprisonment followed by 15 probation for the offense of home invasion robbery in case 97-17927 (R 104-110, 169). He was sentenced to concurrent terms of 10 years probation for the two counts of vehicular homicide in case 97-20100 (R 1666-169). Appellee acknowledges that the statutory maximum for home invasion robbery, a felony of the first degree is 30 years

imprisonment[1]. Appellant was sentenced to 10 years concurrent probation in case 97-20100 for the two counts of vehicular homicide which appellee acknowledges is a third degree felony for which the maximum penalty is 5 years imprisonment[2] (to run concurrent with the probation in case 97-17927 (R 166-169).

Fla. R. Crim. 3.703(d)(30)(1997) provides in pertinent part:

> If a split sentence is imposed, the incarcerative portion of the sentence must not deviate more than 25 percent from the recommended guidelines prison sentence. The total sanction (incarceration and community control or probation) shall not exceed the term provided by general law or the guidelines recommended sentence where the provisions of subsection 921.001(5) apply.

S. 921.001(5), Fla. Stat. (1997) provides in pertinent part:

> If a recommended under the guidelines exceeds the maximum sentence authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure. If a departure sentence, with written findings, is imposed, such sentence must be within any relevant maximum sentence limitations provided in s. 775.082.

When these sections are read *in para materia* it is clear that the rule means that the total sentence (incarceration and probation) cannot exceed (a) the guidelines recommended prison sentence (which includes the 25% deviation up or down) if that recommended sentence exceeds the statutory maximum authorized by s.

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[1] s. 812.135, Fla. Stat. (1997) and 775.082(3)(b), Fla. Stat. (1997).

[2] s. 782.071 Fla. Stat. (1997) and s. 775.082(3)(d), Fla. Stat. (1997).

775.082 **or** (b) if a departure sentence is imposed, the total sentence (incarceration and probation) cannot exceed the maximum sentence provided for by s. 775.082.

In the instant case had the trial court chose to sentence the appellant within the guidelines it could have sentenced him to 22 years imprisonment (low end of guidelines range) followed by up to 15 years probation (total 45 years). However, since the trial court chose to go below the guidelines (depart downwards) and sentence appellant to only 20 years imprisonment the total sanction could not exceed the statutory maximum as provided for by s. 775.085. Accordingly, the sentences will have to be corrected. However, at the time of resentencing, the trial court can refashion the sentences to accomplish the same total sentence of 20 years imprisonment followed by 15 years probation. This can be accomplished by sentencing the appellant as follows:

> (1) 97-17927 (Home Invasion Robbery): 20 years imprisonment followed by 10 years probation.
>
> (2) 97-20100 (Two counts of Vehicular Homicide): 5 years concurrent probation on each count but consecutive to the 10 years probation imposed in case 97-12927.

*See Blackshear v. State*, 531 So.2d 956 (Fla. 1988) and *Herring v. State*, 411 So.2d 966 (Fla. 3d DCA 1987).

## CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Gerald A. Perez, Esq.609 W. Azeele Street, Tampa, Florida 33606, this 26 day of January, 1999..

COUNSEL FOR APPELLEE