DA 5-7-86 Reg Appt

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,659

ROBERTO VASQUEZ,

Petitioner,

-v-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
TO THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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II.

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INTRODUCTION

The petitioner was the appellant in the Third District and the defendant in the circuit court. The respondent was the appellee in the Third District and the prosecution in the circuit court. The parties will be referred to as they stood in the trial court.

As filed in the Third District, the supplemental record consists of the transcripts of trial court proceedings which will be designated by "T". The remainder of the record on appeal will be designated by "R".

SUMMARY OF THE ARGUMENT

The Third District held that orders denying motions to dismiss pursuant to Rule 3.213, Florida Rules of Criminal Procedure, are not reviewable. For several reasons discussed in greater detail in the argument, the Third District is wrong. Such orders are reviewable by appeal, mandamus, and certiorari.

Upon review of the merits, this Court should conclude that the trial court erroneously denied the motion to dismiss because the testimony established that all the prerequisites for dismissal under Rule 3.213(b) were met.

STATEMENT OF THE CASE AND FACTS

Proceedings in the Trial Court

On April 10, 1979, the defendant was arrested for first degree murder. (R. 3). On April 12, 1979, an Order for Psychiatric Evaluation was entered by the County Court. (R. 4). On April 25, 1979, Circuit Judge Richard Hickey appointed physicians to examine the defendant as to his

sanity. (R. 5). On April 26, 1979, an indictment was filed charging the defendant in Count I with first degree murder, and in Count II with unlawful possession of a firearm while engaged in a criminal offense. (R. 1-2).

On May 4, 1979, Judge Hickey entered an order adjudicating the defendant incompetent and committing him to the Department of Health and Rehabilitative Services. (R. 6-7).

On September 9, 1981, Circuit Judge Maria Korvick entered an Order for Psychiatric Evaluation of the defendant. (R. 8). Judge Korvick directed Doctors Albert Jaslow and Andres Jimenez to examine the defendant. (R. 9).

On September 25, 1981, Judge Korvick entered an "Order Re-committing Defendant Pursuant to Florida Statute 916.13 and FRCrP 3.212". The order also adjudicated the defendant incompetent. (R. 10-11).

On May 14, 1984, Judge Korvick entered an "Order Appointing Disinterested Qualified Experts" to examine the defendant. Doctors Jaslow, Jimenez, and Castiello were appointed. (R. 12).

Judge Korvick was advised by the Department of Health and Rehabilitative Services ("HRS") that the defendant remained incompetent to stand trial and it was unlikely that he would regain competency within the foreseeable future. Accordingly, upon the recommendation of HRS, Judge Korvick entered an "Order to Transport and Notice of Hearing", directing that a hearing be held to determine whether the criminal charges against the defendant should be dismissed and the defendant involuntarily hospitalized pursuant to the

provisions of Rule 3.213, Florida Rules of Criminal Procedure. (R. 13). On July 9, 1984, Judge Korvick appointed Drs. Jaslow, Castiello, and Jimenez to examine the defendant. (R. 16).

On August 27, 1984, the cause came on for hearing before Judge Korvick. The parties stipulated that the defendant had been hospitalized for at least five years (T. 17), and that the defendant met the criteria for involuntary hospitalization. (T. 21).

Five doctors and one rehabilitation therapist testified at the hearing. (T. 1-123). The therapist, Israel Acevedo, employed with Florida Evaluation and Treatment Center in Gainesville, testified that the defendant came to the center in August, 1982. Prior to coming to Gainesville, the defendant was hospitalized in South Florida Mental Hospital.

After unsuccessful treatment with various medications, the dosages were increased, which seemed to help somewhat, but the hospital was concerned about side effects, which could lead to death. In February, the treatment team concluded that the defendant would not gain any more advantage from medication or other treatment and that in all likelihood, the defendant would not gain competency in the foreseeable future. (T. 16-19; 28).

Dr. Segundo Corrippio, a psychiatrist, treated the defendant at the Gainesville center. The defendant suffered from a major depressive illness that reached schizophrenic proportions. (T. 48-9). His primary condition was characterized by anxiety, deep depression, and suicidal ideation. When the depression was deep enough, he suffered

from auditory and visual hallucinations and on several occasions he became delusional. (T. 33-7).

Dr. Corrippio identified the defendant's medications as Stelazine, an anti-psychotic drug, Tofranil, and Artane (T. 38), and indicated that the dosages were sizeable. (T. 42-3). Other medications were not tried because they produce more side effects and would be dangerous for a person of the defendant's age. (T. 45). The doctor stated that the best medications were tried. (T. 51-2).

The doctor concluded that the defendant was not competent to stand trial. (T. 40). When asked if the defendant was likely to regain competency, the doctor expressed a dislike for predicting. However, he stated that he did not foresee any changes. (T. 40). He did not know if the defendant would ever regain competency. (T. 41).

Dr. Andres Jimenez, a psychiatrist, examined the defendant in July 21, 1984, in the Dade County Jail. The defendant was suffering from extremely severe mental illness and needed psychiatric hospitalization. The doctor concluded that the defendant was incompetent to stand trial and should be involuntarily hospitalized on a long-term basis. (T. 55-7). The defendant was receiving forty milligrams of Stelazine a day, one hundred fifty milligrams of Tofranil, and twenty-five milligrams of Benadryl. (T. 66).

The doctor was asked whether the defendant would regain competence in the foreseeable future. According to the doctor, the defendant would remain incompetent at least for the next six months. The doctor could not predict the

defendant's condition beyond those six months. However, he noted the unsuccessful treatment of the past five years. (T. 57-8).

Upon questioning by Judge Korvick, Dr. Jimenez stated that other medicines and treatments could be tried, and dosages could be increased, but side effects would come into play. (T. 59-61).

Dr. Jesus Rodriguez, a psychiatrist, examined the defendant in April, 1979, and concluded that he was incompetent to stand trial. The defendant was a paranoid schizophrenic with depression fissure. At the time, the defendant complained of auditory and visual hallucinations. The doctor testified that forty milligrams of Stelazine daily was a heavy dose. When asked if the defendant would regain his competency in the near future, the doctor answered that it would be difficult given the extensive treatment which had been unsuccessfully administered during the past five years. (T. 67-73).

Dr. Albert Jaslow, a psychiatrist, examined the defendant in May, 1979. The defendant was psychotic and was not competent to stand trial. Two years later, the defendant remained incompetent. (T. 77-80). Dr. Jaslow described Loxitane as a major psychotropic drug which was being administered to the defendant within the level of therapeutic use. Other psychotropic drugs were tried as well. (T. 81). Despite the medication, the defendant was "quite disturbed" as of July, 1984, and remained incompetent and in need of further hospitalization. (T. 82-3). While recognizing that other or additional medications or

treatments could be tried, including those more apt for depression, such as electroshock therapy, the doctor could not disagree with the defendant's treatment, and he concluded that no person could give a specific time limit or date when the defendant might become competent. (T. 84-86; 96-7). The doctor could not say that it was medically probable as opposed to possible that the defendant could gain compentency in the near future. (T. 103-4).

Dr. Anastasio Castiello examined the defendant in 1979, 1981, and 1984. He could not rule out the possibility that to some extent the defendant was malingering, and he believed the defendant could regain competency. (T. 105-113; 114). When asked to give a percentage, the doctor stated there was a 30% possibility of malingering. (T. 114-5). The doctor concluded that on each occasion, the defendant was incompetent. (T. 116, 118, 119). He did not know when the defendant would become competent. (T. 119).

By order dated September 6, 1984, the trial court denied the defendant's motion to dismiss. (R. 22-26). A notice of appeal was filed September 27, 1984. (R. 27).

Proceedings in the Third District

The District Court of Appeal for the Third District dismissed the appeal, Vasquez v. State, 474 So.2d 394 (Fla.3d DCA 1985), expressly declining to follow Ricciardelli v. State, 453 So.2d 100 (Fla.4th DCA 1984), which held that orders denying motions to dismiss under Rule 3.213 are reviewable by appeal. This ruling is discussed in detail in Point I.

ARGUMENT

I.

THE THIRD DISTRICT ERRONEOUSLY RULED THAT AN ORDER DENYING A MOTION TO DISMISS PURSUANT TO RULE 3.213, FLORIDA RULES OF CRIMINAL PROCEDURE, IS NOT SUBJECT TO REVIEW.

In the trial court, Vasquez moved to dismiss the criminal charges against him pursuant to Rule 3.213(b), Florida Rules of Criminal Procedure, which provides in pertinent part:

> If at any time after five years after determining a person incompetent to stand trial when charged with a felony or one year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial, that there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future and that the defendant does meet the criteria for involuntary hospitalization set forth by law, the court shall dismiss the charges . . .

The parties stipulated that Vasquez met the criteria for involuntary hospitalization and that five years had passed since he was first adjudicated incompetent to stand trial. Thus, the only issue before the trial court was whether there was "no substantial probability that the defendant will become mentally competent to stand trial."

Upon a finding that there is no such substantial probability, "the court shall dismiss the charges". In such event, the rule goes on to provide that the court shall

> commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or residential services solely under the provisions of law, or may order that he receive outpatient treatment at any other facility or service on an outpatient basis subject to the provisions of those statutes.

If the facility determines that the defendant should be released, the rule requires that order of the circuit court

direct that "the administrator of the facility notify the State Attorney of the committing circuit no less that 30 days prior to the anticipated date of release of the defendant." The 30 days affords the State Attorney the opportunity to decide whether the charges should be refiled. (Section 925.24, Florida Statutes makes the statute of limitations and defense of former jeopardy inapplicable to criminal charges dismissed because of incompetence of the defendant to stand trial.)

If the trial court finds that there is a substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future and denies the motion to dismiss, as in the case at bar, the defendant is returned to forensic custody. Apparently, a defendant can remain in that status indefinitely. And according to the decision of the Third District, there is no review available to such a defendant.

It is certainly desirable to have review available. Otherwise, mentally incompetent defendants could be perpetually incarcerated without any review for errors, violation of applicable standards, or other irregularities, correction of which could result in the dismissal of criminal charges and placement in a non-forensic facility or release. By failing to recognize that review is both desirable and available, the Third District also ignored the competing interests that the judiciary must balance as recently enunciated by this Court in a different but related context:

> On the one side stands the state's interest in protecting society from dangerous individuals; on the other, we have the acquittee's [here the accused's] right not to be wrongfully incarcerated when he is no longer dangerous [or here, when his competency cannot be restored].

Johnson v. State, ___ So.2d ___ (Fla.1986)(Case No. 66,554, opinion filed March 20, 1986). Under Rule 3.213, society is protected because even if the charges are dismissed, the State Attorney retains the option to file the charges again. But the wrongfully incarcerated accused is not protected by any system of review if the decision of the Third District is allowed to stand. An examination of the reasoning of the Third District demonstrates several fallacious premises warranting reversal.

The Third District did recognize that where there was no substantial probability of competence, the trial court is under a duty to dismiss the charges:

> The rule authorizes - indeed mandates - that charges against a defendant be dismissed by the court under the circumstances described ... (Emphasis supplied)

Vasquez, 474 So.2d at 394. But the court failed to logically conclude therefrom that review of a denial of a motion to dismiss under the rule is available by means of a petition for a writ of mandamus. Where a rule of criminal procedure directs that the trial court "shall" perform an act when conditions set forth in the rule are met, mandamus lies to compel the performance of that act. State v. Hamilton, 448 So.2d 1007 (Fla.1984). Rule 3.213(b) is such a rule because it mandates that the trial court "shall" dismiss the charges if the prerequisites are met. Therefore, even if appeal were unavailable, the Third

District should have treated the notice of appeal as a petition for a writ of mandamus, rather than dismiss the appeal. See Rule 9.140(c), Florida Rules of Appellate Procedure.

Instead, the Third District reasoned that denial of such a motion to dismiss the charges could not have any effect upon an accused who meets the criteria for involuntary hospitalization and therefore, standing to seek review is lacking:

> [W]e decline to reach the merits and instead dismiss the defendant's appeal upon a holding that an order, as here, declining to dismiss charges under Rule 3.213(b) against a defendant who indisputably must remain involuntarily hospitalized, has no real effect upon the defendant, and thus, he cannot be heard to complain about the ruling. As Rule 3.213(b) tells us, if the charges are dismissed, the judge must order that the hospital administrator notify the State Attorney at least thirty days prior to the anticipated date of the release of the defendant, and the State Attorney may refile the charges; a dismissal vests in the defendant no substantive right to oppose the later reinstitution of the charges, or to assert that the delay violates his right to a speedy trial or any right created by a statute of limitation. Ricciardelli v. State, 453 So.2d 199 (Fla.4th DCA 1984). And, where, as here, the defendant meets the criteria for involuntary hospitalization, a dismissal does nothing to change his status - he will remain hospitalized.

Id. (footnotes omitted).

From this, the Third District concluded that an accused would not be entitled to review because he could not be an injured party:

> Therefore, in keeping with the time-honored proposition that only a party injuriously affected by the judgment or order sought to be reviewed may appeal therefrom, we dismiss the instant appeal.

Id.

The basic premise of the Third District's opinion, that Vasquez is not "injured" by the retention of the criminal

charges and that his "status" would not change even if the charges were dismissed, ignores the differences between those in custody under criminal charges pursuant to Chapter 916, and those in custody under the Baker Act pursuant to Chapter 394. The following are some of the more significant differences between forensic clients who are governed by Chapter 916, and Baker Act clients who are governed by Chapter 394:

-- Forensic inmates are separated from other mental health clients unless there is a transfer to a civil facility, § 916.105(1); there is no such provision in the Baker Act.

-- Ingress and egress are strictly controlled in forensic units, § 916.105(1); there is no such provision in the Baker Act.

-- The Baker Act specifically provides for protection of constitutional rights, § 394.459(1); the parallel provision for forensic inmates does not have a similar guarantee, § 916.107(1) (suggesting that corrections standards are applicable, such as those recognized in prisoners' rights cases where rights can be limited if there is a rational basis).

-- Law enforcment personnel are prohibited from transporting Baker Act clients. § 394.459(11); forensic inmates are transported by the sheriff; § 916.107(10);

-- Baker Act patients have a right to participate in their treatment and plan for discharge, § 394.459(14); there is no such right accorded forensic inmates.

-- Escape by a forensic inmate is a second degree felony, § 916.175; escape by a Baker Act patient is not a crime.

-- Chemical weapons may be used against forensic inmates, § 916.19; there is no such authorization in the Baker Act.

-- Release of a forensic inmate cannot be effected by the administrator alone -- a plan must be filed with and approved by the court, § 916.17(1); the Baker Act authorizes discharge by the administrator, § 394.469. (Thus, for example, if two persons are admitted and are identical in all respects except one has pending criminal charges and the administrator for each concludes that each is ready for discharge, only the Baker Act patient is immediately released. The other inmate is in the same position as Vasquez.)

-- A forensic inmate may be jailed for up to 15 days from the order of commitment, § 916.107(1)(a); criminal facilities, restraining devices, and the like cannot be used for a Baker Act patient, § 394.459(1).

-- The forensic inmate is entitled to a treatment plan within 30 days after admission, § 916.107(2)(d); the Baker Act patient is entitled to such a plan within 5 days, § 394.459 (2)(e).

-- The circuit court can order involuntary treatment of a forensic inmate, § 916.107(3); if a Baker Act patient refuses treatment and is not competent to make an informed decision, a guardian advocate must be appointed, § 394.459(3)(a).

These contrasts, which are by no means exhaustive, point up the fallacy of the Third District's ruling that Vasquez could not be injured nor his status chagned if the trial court had dismissed the criminal charges. Had the charges been dismissed, Vasquez' custodial status and attendant rights and freedoms would have been dramatically altered. Therefore, he and others similarly situated have "standing" to seek review in the appellate court.

There remains to be decided whether appeal is available. As already noted, review by mandamus is available. Similarly, review by certiorari should be held available and the petitioner should prevail where the circuit court departs from the essential requirements of the law. Compare State v. Vigil, 410 So.2d 528 (Fla.2d DCA 1982)(common law certiorari review afforded the state to challenge the propriety of a trial court's order releasing a defendant who had been acquitted by reason of insanity).

Appeal should also be held available to the defendant in this case for the same reasons appeal was held available to the state in State v. White, 470 So.2d 1377 (Fla.1985). In White, the defendant was sentenced to death. Following affirmance of his direct appeal, he filed a motion to vacate in the circuit court pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The motion was granted and the circuit court vacated the death sentences. The state appealed.

The defendant sought dismissal on the ground that appellate review of criminal proceedings by the state is permitted only by statute, and the applicable statute, §

924.07, Florida Statutes, did not authorize state appeals from orders granting post-conviction relief. This Court held that the order was nevertheless appealable based upon the civil nature of the remedy:

> Appellee misunderstands the nature of collateral post-conviction remedies such as those provided by rule 3.850 and writs of coram nobis and habeas corpus. Rule 3.850 provides a judicial remedy whereby a post-conviction motion for relief may be heard in the trial court where the records and witnesses and others with knowledge of the case are likely to be. Thus, the rule avoids both the cumbersomeness of the writ of error coram nobis whereby a petition is addressed to the cognizant appellate court seeking authority to approach the trial court and the inefficiency of the writ of habeas corpus which entails approaching a court unfamiliar with the case at hand.

Id. at 1378.

The identical considerations apply here. Rule 3.213 similarly "provides a judicial remedy whereby a ... motion for relief may be heard in the trial court where the records and witnesses and others with knowledge of the case are likely to be." Id. Rule 3.213 is also similar to the "independent collateral civil" nature of Rule 3.850. Therefore, as in White, an appeal should be available to the appropriate appellate court. Accordingly, the decision of the Third District should be quashed.

II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 3.213(b), FLORIDA RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES DISMISSAL WHERE AN ACCUSED IS MENTALLY INCOMPETENT FOR MORE THAN FIVE YEARS AND THERE IS NO SUBSTANTIAL PROBABILITY THAT THE ACCUSED WILL BECOME MENTALLY COMPETENT TO STAND TRIAL IN THE FORESEEABLE FUTURE, THEREBY DEPRIVING THE ACCUSED OF DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Rule 3.213 (b), Florida Rules of Criminal Procedure, provides, in pertinent part:

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In the event of dismissal, the rule goes on to require that the defendant be committed to HRS for involuntary hospitalization or residential services or outpatient treatment, and that the order of commitment shall require the administrator of the facility to notify the State Attorney no less than 30 days prior to the anticipated release date of the defendant.

The parties stipulated to all but one of the prerequisites of Rule 3.213(b) for dismissal. The parties agreed that that the defendant had been determined incompetent, that the five year period had passed, and that the defendant met the criteria for involuntary hospitalization. The one prerequisite not agreed upon was

whether "there is no substantial probability that the defendant will become mentally competent to stand trial in the foreseeable future".

While a person is ordinarily presumed sane, "where the accused has been previously adjudged insane, there is a presumption that he is still insane. Horace v. Culver, 111 So.2d 670 (Fla.1959); Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); State v. Campbell, 123 Fla. 894, 167 So. 805 (1936)." Eason v. State, 421 So.2d 35, 36 (Fla.3d DCA 1982). Eason goes on to state: "This presumption is one which attends all stages of the criminal proceeding. Until the presumption is overcome [by the state], the accused may not be tried, convicted, or sentenced." Id.

Each of the doctors who testified in this case concluded that as of the time of the hearing, the defendant was not competent to stand trial. That is, the accused did not possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and did not possess "a rational, as well as a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)." Trucci v. State, 438 So.2d 396, 397 (Fla.4th DCA 1983). The trial court, accordingly, adjudged the defendant incompetent. (R. 23).

Although not one of the doctors was of the opinion that there was a substantial probability that the defendant would become mentally competent to stand trial in the foreseeable future, the lower court denied the motion to dismiss on the following grounds:

> In toto, there are serious disputes among the experts as to what mental illness the Defendant suffers from; the true severity of the Defendant's ailment in terms of the legal issues of incompetence to stand trial; and how treatment should proceed. However, there is no dispute that the Defendant is treatable and no dispute that the Defendant could be made competent within a period of time that this Court deems to be "the foreseeable future."

(R. 25).

Apart from the most speculative of testimony, the record is devoid of any serious alternative treatment available for the defendant that has not been properly and safely administered by the expert treatment teams for the past five years. Those who testified agreed that increased dosages of medication could present life-threatening side effects. Those who testified could not state that the treatment and medication administered for the past five years were wrong. No one testified that the defendant had been mis-diagnosed. No one disputed that the defendant was mentally ill and incompetent to stand trial. But most importantly, not one person could testify that there was a substantial probability of competence in the foreseeable future. At best, for the state, there was mere possibility for competence. Such evidence does not rise to the level necessary to meet the test under Rule 3.213.

In every case where mental illness is involved, there will be "experts" or lay persons who can second-guess the treatment teams as to possibilities. Of course, it can always be said that more medication or different medication could have been administered. But there comes a point, in cases such as these, where the experts have done all that was safe, reasonable, and medically appropriate, to restore

competence. After that point, if the doctors are unanimous that competence has not been restored, as in this case, and there appears no substantial likelihood of its restoration in the foreseeable future, as in this case, dismissal is required under Rule 3.213.

That is not to say that the public will face the prospect of the unconditional release of a potentially dangerous defendant. Safeguards are built into the law:

> Under the rule, should [the defendant] later be found by his treating physicians to no longer meet the criteria for involuntary commitment, the prosecutor is free to refile the same charges. The rule explicitly provides that if charges against an involuntarily committed defendant are dismissed then the order of dismissal shall provide that the hospital administrator notify the state attorney at least 30 days before the defendant is to be released. This scheme places the responsibility on the state attorney to promptly determine if charges should be refiled. Rule 3.214(d) provides that the provisions of Rule 3.191 (speedy trial) do not apply to a defendant who is adjudged incompetent until (in the case of a defendant whose charges have been dismissed) the date the charges are again filed. The rule also tolls the statute of limitation in cases where a defendant has been judged incompetent and has had the charges dismissed without prejudice.

Ricciardelli v. State, 453 So.2d 199, 201-202 (Fla.4th DCA 1984)(also holding that mere possibility of restored competence through use of unproven/experimental drugs was not sufficient to defeat dismissal under the test set out in Rule 3.213).

The lower court returned the defendant to the "merry-go-round" of treatment, evaluation, court appearance, and incompetence adjudication, thereby continuing the cause beyon five years, the time the rule sets for the end of the ride. Given that the testimony revealed no substantial likelihood of change, given the defendant's continued

incompetence and the state's lackadaisical attitude over the years (until the motion to dismiss was heard), the appropriate action in this case was dismissal without prejudice pursuant to Rule 3.213.

CONCLUSION

Based upon the foregoing, the defendant requests that the decision of the Third District be quashed on the ground that review of the order of the trial court is available. On the merits, the defendant respectfully requests reversal and remand with directions that the circuit court enter an order of dismissal in accordance with the provisions of Rule 3.213, Florida Rules of Criminal Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 2nd day of April, 1986.