IN THE SUPREME COURT OF FLORIDA

HECTOR FUENTE,

Appe1lant,

v.

CASE NO. 69,196

STATE OF FLORIDA,

Appellee.

FIRST SUPPLEMENT BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On December 3, 1987, this Court rendered an Order relinquishing the case to the trial court for a factual determination as to whether Hector Fuente's request for final disposition under §941.45(3)(a) was tolled due to his inability to stand trial within the meaning of §941.45(6)(a), Florida Statutes. (R. 2621-2623)

A hearing was held before the trial court. At that time, the deposition of Philip Judson Campbell, M. D. (R. 2649-2705) was introduced and received into evidence. (R. 2744) Dr. Campbell testified as to his concerns about Mr. Fuente's medical needs. The trial court rendered an Order setting forth the transfers and movements of Mr. Fuente from the sending state (United States District of Tennessee) to the sending state (United States District of California) to the sending state United States District of Tennessee). (R. 2742-2745)

A review of the record and of Dr. Campbell's deposition supports the trial court's finding that 78 days were tolled pursuant to 5941.45 (6)(a), Florida Statutes (1985). Dr. Campbell received Mr. Fuente with the following diagnosis and prognosis:

> A. Well, I gave him no new diagnosis, but I had written down to keep it fresh what diagnosis he had received; one was aortic valve replacement with a porcine pig valve in 1976 and later in 1979 and since the 1979 time period, I think that he was on an anticoagulant since that time, he was when he was here. A history of rheumatic fever was one of the diagnoses, blindness of the right

> eye secondary to embolism which is a blood clot that came from the heart prior to his anticoagulation therapy as I understand it; a typical seizure one thought in Springfield, a specialist, was secondary to embole, to the brain, pulmonary inferior myocardial infarction; I do not see that in another area, but it was on there as one reading of an electrocardiogram. Episode of slow heart beat, I think probably lowered it down to about 30 which is extremely slow and rapid heart beat. It was -- it would oscillate and -- sometimes normal, very, very slow, very rapid and sometimes normal, so this was an arrhythmia of some proportion which gave him episodes of irregular heart beat which would mean -- had skips and lengthing of heart beat, irregular beat, high blood pressure, slight left atria enlargement which was an increase in one of the upper chambers of the partus like degree. I think one area of material had said he had left ventricular infiguration. I don't know exactly what that means, but it said also, I believe, no congestive heart failure, so something about the heart -- of the ventricle was not exactly normal, what they called for normal.
>
> **(R. 2655-2656)**

Defense counsel objected to Dr. Campbell responding as to whether Mr. Fuente needed a "pacemaker". (R. **2658)** Dr. Campbell recommended that Mr. Fuente be transferred to "Springfield" where more sophisticated medical support was available to accomodate Mr. Fuente's treatment protocol. (R. **2662-2663)** Dr. Campbell was concerned about Mr. Fuente's complaints focusing on dizziness and shortness of breath. (R. **2664)** Dr. Campbell recalled that when Mr. Fuente "threw an embolism" it resulted in eye blindness. (R. **2664)** Because of this medical history, Dr. Campbell was guarded in that Mr. Fuente was a candidate to throw an embolism to either the heart or brain; thus, cardiac and neurological support was

indicated. (R. **2664-2665)** As a consequence, Mr. Fuente was transferred. (R. **2426)**

The record before Judge Coe contains an **18** USC §4082 transfer Order which removed Mr. Fuente from the Memphis, Tennessee Federal Correctional Institution to the Lompoc, California United States Prison. (R. **2426)** Medical treatment was the basis of the transfer; and, the medical history of Hector Fuente speaks for itself. (R. **2426-2427)** Mr. Fuente presented himself to federal authorities as an individual suffering from chronic coronary dysfunction; and, specifically on August 1, **1985,** Mr. Fuente suffered from epilepsy, memory loss, and unconsciousness. (R. **2427-2428)**

The "State" requested judicial notice of the entire circuit court file and the record proper before this Court. (R. **2644-2645)** Judge Coe rendered on Order Finding Facts on April **7, 1988.** (R. **2742-2745)** The supplemental record proper was transmitted to this Court and supplemental briefing has ensued. (R. **2749)**

SUMMARY OF THE ARGUMENT

This cause was relinquished to the trial court for factual findings. There is evidentiary support for the factual findings made by Judge Coe as Hector Fuente was unavailable for trial. This Court must not reweigh evidence and substitute its judgment for that of Judge Coe.

In the alternative, Hector Fuente has [on this record proper] waived his rights to IAD consideration by seeking a restraining order in the United Sates District Court. See, Fuente v. Keohane, No. **85-3053** GB (D. Tenn. Dec. **20, 1985)** (Order Denying Motion for Temporary Restraining Order) (R. **2411-2412)** This action constituted an affirmative by-pass of IAD relief, and, as such, the "State" asserts its procedural default rule as a bar to consideration of the claim.

ARGUMENT

ISSUE I

WHETHER HECTOR FUENTE AFFIRMATIVELY WAIVED HIS RIGHTS UNDER THE IAD BY SEEKING INJUCTIVE RELIEF IN THE FEDERAL SYSTEM TO PROHIBIT HIS TRANSFER TO FLORIDA [THE RECEIVING STATE]?

Prior to consideration of the Order Finding Facts of the trial court R. 2742-2745, the "State" advocates "waiver" as a bar to consideration of the claim.

In the State's lead brief and at Oral Argument, your undersigned pointed out that Mr. Fuente resisted his return to Florida by filing a Motion for Temporary Restraining Order in the United States District Court. (R. 2397-2399) The United States District Court denied relief. (R. 2411-2413) Is there a legal consequence to this litigation? Yes, there is. The rights afforded Hector Fuente under the IAD are not constitutionally guranteed and can be waived by the prisoner. See, State v. Grizzell, 399 So.2d 1091 (Fla. 1981) relying on Jones v. State, 386 So.2d 804 (Fla. 1st DCA 1980) for the constitutional analysis of the IAD ; and Gray v. Benson, 608 F.2d 825 (10th Cir. 1979); United States v. Black, 609 F.2d 1330 (9th Cir. 1979); United States v. Eaddy 595 F.2d 341 (6th Cir. 1979); United States v. Ford, 550 F.2d 732 (2d Cir. 1977), affi'd sub nom. United States v. Mauro, 436 U.S. 340 (1978); and, United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977) cert. den. 436 U.S. 943 (1978). Under this line of authority, Florida advocates that Hector Fuente waived his rights under the Interstate Agreement on Detainers Act by seeking injunctive relief in the federal

system. The "State" now calls on Hector Fuente to answer the "waiver" defense as a bar to further consideration of this claim.

ISSUE II

WHETHER THE TRIAL COURT ERRED AS MATTER OF LAW IN MAKING A FACTUAL DETERMINATION, PURSUANT TO THIS COURT'S ORDER RELINQUISHING JURISDICTION FOR SUCH PURPOSE, FINDING THAT HECTOR FUENTE'S REQUEST FOR FINAL DISPOSITION WAS "TOLLED" DUE TO HIS INABILITY TO STAND TRIAL WITHIN THE MEANING OF §941.45(6)(a), FLORIDA STATUTES (1985)?

This Court, in remanding the cause to the trial court for a factual determination, recognizes that it is the function of the circuit court to make the determination on whether the time period involved was tolled. §941.45(6)(a), Florida Statutes (1985) provides:

> TOLLING PERIOD AND LIMITATIONS.--
>
> In determining the duration and expiration dates of the time periods provided in subsections (3) and (4), the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

The sole question [now that Judge Coe has made that statutory determination] (R. 2742-2746] is where has Judge Coe erred as a matter of law in making his determination? He has not; and, Mr. Fuente has not shown otherwise.

For purposes of brevity and clarity, the "State" combines its answer into one section.

The lead case interpretting the IAD provision under review is United States v. Roy, 830 F.2d 628 (7th Cir. 1987). Michael Roy stood convicted of escape; and, on direct appeal he urged that a federal indictment should have been dismissed because the

government failed to comply with the Interstate Agreement on Detainers. In the opinion, Judge Ripple publishes the chronology which served as a basis of the analysis. The position of the government was:

> Relying on Bush v. Muncy, 659 F.2d 402, 408-09 n. 4 (4th Cir. 1981). cert. denied, 455 U.S. 910, 102 S. Ct. 1259, 71 L.Ed.2d 449 (1982), and Young v. Mabry, 596 F.2d 339, 343-44 (8th Cir.), cert. denied, 444 U.S. 853, 100 S.Ct. 107, 62 L.Ed.2d 69 (1979), the government argues that, under article V1(a), the running of the 180-day period provided in article III(a) was tolled during the time the prisoner was before courts in California and Florida, as well as the time he was before the federal district court in Connecticut. The government argues that during these times, the defendant was "unable to stand trial."
>
> During the period in question, Mr. Roy was in California for approximately 50 days for a trial on state charges, and in Florida for about 114 days for a trial on federal charges. Thus, Mr. Roy was out of the "sending state" for approximately 164 of the 329 days here in question. As a result, Mr. Roy was in the "sending state" for a period of approximately 165 days during the relevant period. Moreover, during this entire period, Mr. Roy was being prosecuted in the district of Connecticut.
>
> (Text of 830 F.2d at 634)

Judge Ripple found Young v. Mabry, 596 F. 2d 339 (8th Cir. 1979) to be the preferable approach to resolve the IAD claim raised in Roy. Here, as in Young, it is clear that Hector Fuente was neither "legally" nor "administratively" available for trial in the Florida circuit court from August 1, 1985, until October 18, 1985. There was no way that Mr. Fuente was available for trial as he was being transferred from one federal facility to

another for medical evaluation and treatment. Judge Coe has published a "chronology" with record support establishing the administrative unavailability of Mr. Fuente. There was nothing that the state officials had done in frustrating the return of Mr. Fuente. In fact, if there was frustration in obtaining a "final disposition", it was when Mr. Fuente sought the help the United States District Court requesting injuctive relief so that federal custody would not be relinquished to Florida. See, Fuente v. Keohane, No. 85-3058 GB (D. Tenn. Dec. 20, 1985) (Order Denying Motion for Temporary Restraining Order) (R. 2411-2412) Also, see "waiver" argument under Appellee's Supplemental Issue One.

Support for Judge Coe's Order is also found in State ex rel. Taylor v. McFarland, 675 S.W.2d 868 (Mo. App. 1984) and State v. Wood, 241 N.W.2d 8 (Iowa 1976). In the former, Jay Taylor was being held, under a California court order, as a material witness; wherein, he was charged with sodomy, rape and robbery in Missouri. Because of these administrative reasons, the Missouri appellate court held that Jay Taylor was "unable to stand trial" under the IAD. In the latter, Donald Wood had bee arrested in Wisconsin for a parole violation. Mr. Wood communicated a request to the Iowa prosecutor for a final disposition. The Wisconsin officials advised that Kansas had a prior request for Donald Wood; and, that the Kansas request had a priority. Inherently recognized in the Iowa opinion is the IAD policy consideration that prisoners are to be protected against endless

interruptions of the sending state's rehabilitation program because of pending criminal proceedings in other jurisdictions. In reliance on State v. Mason, 218 A.2d 158 at 163 (N. J. 1966), Iowa adopted the following principle: ". . . nothing can toll the running of the 180-day period except inability of the prisoner to stand trial if so determined by the court." Donald Wood was found unable to stand trial during the pendency of the Kansas proceedings. Under the teachings of State v. Ivey, 410 So.2d 636 (Fla. 2d DCA 1982), there is no error.

Because Hector Fuente was administratively unavailable for trial [being transferred between Tennessee and California], Judge Coe has not erred in fact-finding. Obviously, this Court recognizes that it does not sit as a trier of fact; otherwise, jurisdiction would not have been relinquished to the trial court. See, Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972). Thus, as Judge Coe's Order determing that Hector Fuente was unable to stand trial is correct, this Court must not reweigh evidence and substitute its judgment for that of Judge Coe. See, Cripe v. Atlantic First National Bank, 422 So.2d 820 (Fla. 1982)

CONCLUSION

WHEREFORE, based on the foregoing argument, reasons, and authority, the "State" continues to pray that this Court make and enter an Opinion affirming the judgment of guilt and sentence of death.

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 Simson Unterberger, Esquire, 725 East Kennedy Blvd., The Legal Center, Suite 302, Tampa, Florida 33602 on this 23rd day of May, 1988.

OF COUNSEL FOR APPELLEE