IN THE SUPREME COURT OF FLORIDA

DAVID M. HARRIEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 70,852

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Nineteenth Judicial Circuit, in and for Martin County, Florida and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

In the brief, the parties will be referred to as they appear before this honorable court of appeal.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case as found on page two (2) of Petitioner's Brief on the Merits.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts as found on pages three (3) through four (4) of Petitioner's Brief on the Merits, with the following additions and clarifications:

Prior to observing Petitioner, Deckard had positioned himself in the parking lot of the DYS Building only a couple hundred yards from the Cherokee Motel. (R 38, 40, 44). There was lighting in front of the Cherokee in addition to street lighting. (R 41, 42). Deckard testified he observed a black male approach Bozeman's truck. Once Deckard realized the conversation concerned drugs, he left his position in the parking lot and drove past the Cherokee where he was just a few feet away from the subject. (R 45). He was able to identify Petitioner at that time. After driving by, Deckard made a U-turn and drove back by the Cherokee. The person originally present

was still there but another subject had joined them. (R 46). Deckard was able to identify the voice he heard on the transmitter after seeing Harriel. (R 52). Deckard testified that not only was there sufficient lighting to positively identify Petitioner at the Cherokee, but that he had also seen Petitioner earlier that evening in the same clothing at the Cherokee Motel. (R 55). Deckard had come into contact with Petitioner numerous times in the past and believed that Petitioner used to work for the City. (R 55).

Bozeman similarly testified that there was a spotlight outside the building of the Cherokee Motel. (R 112). Bozeman was able to see Petitioner because he came right up to his vehicle's door. (R 112-113).

SUMMARY OF THE ARGUMENT

POINT I

The trial court did not abuse its discretion in denying Petitioner's motion for mistrial and overruling his objection where the comment made by the officer did not prejudice Petitioner in any way. This is particularly true in light of the fact that the same information objected to by Petitioner was elicited by Petitioner during direct examination of the only defense witness. Yet that remark was not objected to nor was a motion for mistrial made. Respondent submits that any error was rendered harmless by this subsequent testimony and the overwhelming evidence of guilt against Petitioner.

POINT II

The trial court did not err in imposing costs where the costs statute is constitutional. The statute is not subject to Eighth Amendment challenge where the costs are not punitive in nature nor is equal protection of the law violated where the same costs are imposed regardless of whether a defendant pleads guilty before trial or is found guilty after trial.

POINT III

The trial court did not err in imposing costs where Petitioner did not contemporaneously object to the ex post facto imposition of these costs. A contemporaneous objection is required to preserve a constitutional issue for review and the imposition of these costs does not render the sentence illegal. Judicial efficiency is best served by applying the contemporaneous objection rule where Petitioner contends that the statute is unconstitutional as applied, rather than challenging the facial validity of the statute.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR MISTRIAL AND OVERRULING PETITIONER'S OBJECTION WHERE THE INVESTIGATING OFFICER TOLD THE JURY THAT WHEN PETITIONER WAS ARRESTED IN THE INSTANT CASE, HE WAS ALREADY IN THE STOCKADE.

Petitioner in the initial brief on the merits has added an issue for review which is unrelated to the jurisdictional basis under which this Court accepted review of this cause. Petitioner contends that the trial court erred in overruling Petitioner's objection and denying his motion for mistrial based upon a comment made by the investigating officer. The Fourth District Court in its opinion specifically held "the trial court properly denied the motion for mistrial pursuant to Meade v. State, 96 So. 776 (Fla. 1957), cert. denied 355 U.S. 920, 78 S.Ct. 351, 2 L.Ed.2d 279 (1985); Cooper v. State, 261 So.2d 859 (Fla. 3d DCA 1972); State v. Murray, 443 So.2d 955 (Fla. 1984); and Kothman v. State, 442 So.2d 357 (Fla. 1st DCA 1983)." Harriel v. State, 508 So.2d 509 (Fla. 4th DCA 1987). In 1980, Article V was amended to limit this Court's mandatory review of district court of appeal decisions, and to provide for discretionary review jurisdiction. This amendment was necessary due to the staggering number of cases reaching this court. The amendment thus turned the district courts of appeal into courts with final appellate jursidiction in most cases. See, Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983). Although this Court does have jurisdiction to consider issues ancillary to those directly before

this Court on conflict jursidiction, Respondent urges this Court to decline to entertain this issue as the issue has already been resolved by the Fourth District and would not affect the outcome of the petition. See, Trushin v. State, 425 So.2d 1126, 1130 (Fla. 1983); State v. Hill, 492 So.2d 1072 (Fla. 1986); Lee v. State, 501 So.2d 591 (Fla. 1987).

Florida case law clearly states that a motion for declaration of mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 355 So.2d 745 (Fla. 1979); Barsden v. State, 203 So.2d 194 (Fla. 4th DCA 1967). The power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done in cases of absolute necessity. Salvatore, supra. The standard of prejudice which must be met by the defendant in order to obtain a new trial varies adversely with the degree to which the conduct of the trial has violated fundamental notions of fairness. Salvatore, supra. It should not be presumed that if error did occur it injuriously affected the substantial rights of the defendant. Id.

Respondent posits that the testimony by the investigating officer in the instant case did not constitute error, but in any event, certainly not reversible error. See Evans v. State, 422 So.2d 60 (Fla. 3d DCA 1980) (reference to a mug shot in police files does not necessarily convey to jury that defendant has committed prior crimes or has previously been in trouble with the police); Darden v. State, 329 So.2d 287 (Fla. 1976); Thomas v. State, 326 So.2d 413 (Fla. 1973); Smith v. State, 365 So.2d

405 (Fla. 3d DCA 1978).

In Kothman v. State, 442 So.2d 357 (Fla. 1st DCA 1983) the court held that reference to an outstanding warrant when the state was permitted to adduce a statement from an evidence technician that the defendant's fingerprint card had been sent to another state was error but not so harmful in terms of inferring criminal propensity as to be reversible in nature.

Respondent submits that the remark made by the investigating officer in the instant case was not prejudicial where Petitioner's own defense attorney elicited a similar statement from Petitioner's only defense witness, Dorothy Doolen, that Appellant was in jail on the day he was arrested for the instant offenses:

> Q. (By defense attorney): Was David Harriel at your home during that entire time?
>
> A. Yes, he were.
>
> Q. And you're sure about this?
>
> A. Yes.
>
> Q. Now, this wasn't the date that David was arrested, was it?
>
> A. David was not arrested.
>
> Q. On that day?
>
> A. On that day, no he was not.
>
> Q. Mr. Kilbride asked you a lot of questions about the date he was arrested, didn't he?
>
> A. Yes.
>
> Q. And did that confuse you?
>
> A. No, cause at that time Dave was in jail. (emphasis added).

(R 199).

This is substantially the same statement that was elicited inadvertently from the investigating officer by the State. Yet, Petitioner did not object to this testimony, move to strike, or move for a mistrial, thus belying any argument of prejudicial effect. Respondent thus submits that any error was rendered harmless by this subsequent testimony. In Meade v. State, 96 So.2d 776 (Fla. 1957), cert. denied 355 U.S. 920, the court held that refusal to declare a mistrial in prosecution for murder because of reference in testimony of police officer to fact that the defendnat had previously been in trouble was not reversible error, where the objection to such testimony was sustained and jury charged to ignore it and the record contained several other similar references, admitted without objection, including defendant's statement to police (emphasis added). Similarly, in Cooper v. State, 261 So.2d 859 (Fla. 3d DCA 1972), the court held that the possible error committed by a private security officer in his testimony that upon arresting defendant and warning him not to say anything, defendant responded that he already knew what to do from prior experience, was subsequently cured where defendant admitted, while testifying on his own behalf, the prior facts on which the officer's comment was based.

Respondent maintains that contrary to what Petitioner argues in her brief, the identification of Petitioner did not rest on one quick glimpse of Petitioner. To the contrary, the evidence reveals that Deckard had positioned himself only a couple hundred yards away from the Cherokee Motel. (R 38, 40, 44). There was lighting in front of the Cherokee in addition

to street lighting. (R 41, 42, 112). Deckard testified that he observed a black male approach Bozeman. Upon realization that the topic of conversation was drugs, Deckard drove past the Cherokee whereby he was just a few feet away from the subject. (R 45). After driving by, Deckard made a U-turn and drove back by the Cherokee. (R 46). Deckard was able to identify Petitioner's voice over the transmitter after seeing Harriel. (R 52). Deckard testified that not only was there sufficient lighting to positively identify Petitioner at the Cherokee, but that he had also seen Petitioner earlier that evening in the same clothing at the Cherokee. (R 55). Deckard knew Petitioner from previous contacts with him from the past. (R 55). Bozeman similarly identified Petitioner when Petitioner walked up to Bozeman's vehicle's door. (R 112-113).

In the instant case, the evidence against Petitioner was so overwhelming as to render any prejudice to the Petitioner insignificant. See, Ferguson v. State, 417 So.2d 639 (Fla. 1982). Petitioner would have been convicted without the improper statements having been made. Palmer v. State, 397 So.2d 648 (Fla. 1981).

Thus, the trial court did not reversibly err in overruling Petitioner's objection and denying his motion for mistrial.

POINT II

SECTION 27.3455, FLORIDA STATUTES (1985) IS CONSTITUTIONAL

Petitioner contends that the instant statute is unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, as it applies to him.[1] Because this is not a challenge to the facial validity of the statute it cannot be raised for the first time on appeal. See, Manning v. State, 461 So.2d 1025 (Fla. 4th DCA 1985) (only challenges which allege facial unconstitutionality of a statute raise a question as to the subject matter jurisdiction and are therefore arguable, as fundamental for the first time on appeal). However, Respondent maintains Petitioner's argument is clearly without merit. Sale and possession of cocaine is a very serious crime. Costs involve payment to the agencies that soceity has had to employ to defend against the acts for which a defendant has been convicted. State v. Young, 238 So.2d 589, 590 (Fla. 1970). Costs are not punitive in nature. Ivory v. Wainwright, 393 So.2d 542, 544 (Fla. 1980), appeal dismissed 454 U.S. 8061 (1981). Thus, Petitioner's Eighth Amendment argument must fail.

Petitioner's next two arguments involve a challenge to the facial constitutionality of the statute, and are thus cognizant on appeal. The first of the two arguments, is the assertion that the imposition of $200.00 is unrelated to any

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[1] The cost is not so excessive as to be cruel and unusual punishment. See State v. Champe, 373 So.2d 874, 879 (Fla. 1979).

real assessment of actual costs in a defendant's case, and is thus a direct tax. Furthermore, Petitioner asserts that the equal protection clause is violated where the same costs are imposed regardless of whether a defendant pleads guilty before trial or is found guilty after a lengthy trial.

Respondent submits that these arguments have already been rejected by the courts. The statute provides that the costs are to be deposited in the Local Government Criminal Justice Fund to be distributed among various agencies which are involved in the criminal justice system, i.e., state attorneys, public defenders, medical examiners, Bureau of Crimes Compensation. Section 27.3455(2), Florida Statutes (1985). The Legislature may impose costs and use that revenue in a manner designated to further legitimate public purposes, State v. Champe, 373 So.2d 874, 878 (Fla. 1979), and it is not unreasonable to make one who stands convicted of an offense share in the improvement of the agencies that society has had to employ in the defense against those acts. State v. Young, supra. There is clearly a legitimate purpose in funding those agencies which are connected to the criminal justice system, and such funding can reasonably be related to the assessment of costs in criminal cases. Thus, the statute does not amount to an unlaw tax.[2]

Furthermore, the statute does not violate the equal

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[2] The Respondent further submits that $200 as costs is not unreasonable when one considers all the time and personnel that become involved when a criminal offense is prosecuted.

protection clause. In State v. Champe, supra, which challenged on equal protection grounds, §960.20, Florida Statutes imposition costs on anyone who pled guilty, nolo contendere, or was convicted of a crime, the Florida Supreme Court held that "it is not irrational for the legislatures similarly to combine all lawbreakers for the purpose of remedying the consequences of violent crime. There is, then, no infirmity in the legislature's use of this broad-brush approach to make both of these penalty provisions applicable to all criminal offenders." 373 So.2d at 879. Where the cost pursuant ot §27.3455(1), are the same type as those pursuant to §960.20, the statute does not violate the equal protection clause.

Petitioner's final argument is that §27.3455(1) is unconstitutional on its face because it violates the prohibition against imprisonment for debts. Respondent submits that Petitioner's contentions are without merit. First, the statute does not deny gain time to indigents who cannot pay the costs. Rather if a person is indigent, the statute provides in the alternative that he should provide community service at the termination of his incarceration. The statute makes no provision for re-imprisonment if for some reason the community service is not fulfilled.

In Tate v. Short, 401 U.S. 395 (1971), the United States Supreme Court held that a state cannot impose a fine as a sentence and then automatically convert it to a jail term solely because a defendant is indigent and cannot pay the fine. The Court however, did hold that there is no constitutional infirmity in

imprisonment of a defendant with the means to pay a fine or neglects to do so. 401 U.S. at 400. See also, Brooks v. State, 366 So.2d 647 n. 1 (Fla. 1st DCA 1976). Thus, §27.3455(1) is constitutional where it provides for loss of gain time for a defendnat who is not indigent or has the ability to pay the costs but does not do so.

Tate v. Short, supra, also held that a state can resort to alternatives to imprisonment as a means of enforcing payment of fines, and that the state is not powerless to enforce judgments against those financially unable to pay. 401 U.S. at 399. The Court did not preclude imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means. Id. at 401. See also, Rollins v. State, 299 So.2d 586, 589 (Fla. 1974).

Respondent submits that §27.3455(1) does not incarcerate or deny gain time to indigents for the failure to pay costs. Rather, under Tate, supra, it provides an alternative of community service as an enforcement method. Because the statute does not provide for further incarceration if community service is not performed, it presents no issue of imprisonment for failure to pay a debt.[3]

In determining the unconstitutionality of legislation,

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[3] However, even under Tate, the refusal to perform the community service, could be grounds for imprisonment or denial of gain time.

the courts must give the statute a construction which will uphold it rather than invalidate it, if there is any reasonable basis for doing so. State v. Champe, supra, 373 So.2d at 880. Thus, based on all the foregoing reasons, this Court must reject Petitioner's arguments, and hold §27.3455(1) to be constitutional.

POINT III

THE EX POST FACTO APPLICATION OF SECTION 27.3455 MAY NOT BE RAISED ON APPEAL FOR THE FIRST TIME ABSENT A CONTEMPORANEOUS OBJECTION. (Restated)

Respondent acknowledges that State v. Yost, 507 So.2d 1099 (Fla. 1987) precludes the ex post facto application of Section 27.3455, Florida Statutes (1985) to offenses committed prior to its effective date. As Petitioner has correctly pointed out, the issue presented sub judice is whether the ex post facto application of this statute can be raised on appeal for the first time in absence of a contemporaneous objection at trial. Respondent maintains that the imposition of these costs does not constitute fundamental error.

In the instant case, the Fourth District affirmed the imposition of costs against Petitioner pursuant to section 27.3455 finding that Petitioner waived the right to raise this issue on appeal where he did not raise the issue in the trial court and where the issue does not involve the facial unconstitutionality of the statute. Harriel v. State, 508 So.2d at 510. In Davis v. State, 495 So.2d 928, 930 (Fla. 4th DCA 1986), the Fourth District had earlier concluded that the failure to raise the ex post facto application of the costs statute in the trial court constituted a waiver of this constitutional issue on appeal.

The First District Court of Appeal has reached this same conclusion in Slaughter v. State, 493 So.2d 1109 (Fla. 1st DCA 1986). Petitioner suggests that the First District has

receded from Slaughter, supra, in its decision in Brown v. State, 508 So.2d 776 (Fla. 1st DCA 1987). However, in Brown, supra, the court merely held that the trial court erred in imposing an excessive term of community service and that this error could be raised for the first time on appeal. Thus, the sentence was illegal because too much community service was imposed. Cases which present the imposition of costs issue under section 27.3455 continue to require a contemporaneous objection at the trial level. Thus, in Dominguez v. State, 508 So.2d 1316 (Fla. 1st DCA 1987), decided by the First District on the same day as Brown, supra, the court reaffirmed that the ex post facto application of the costs statute cannot be addressed on appeal in absence of a contemporaneous objection.

However, both the Fifth District and the Second District have reached the opposite conclusion.[4] See, Webber v. State, 497 So.2d 997 (Fla. 5th DCA 1986) and Ghianuly v. State, 12 F.L.W. 2506 (Fla. 2d DCA October 30, 1987) (en banc).

Petitioner points out that the Second District had generally required an objection to be interposed at the time of the ex post facto imposition of costs to preserve the issue on appeal, Johnson v. State, supra; but that even that court

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[4] The Second District had heretofore concluded that a contemporaneous objection was required to preserve this issue for appeal. Henriquez v. State, 12 F.L.W. 2224 (Fla. 2d DCA Sept. 11, 1987); Treadway v. State, 500 So.2d 308 (Fla. 2d DCA 1986); Maldonado v. State, 498 So.2d 1057 (Fla. 2d DCA 1986); Johnson v. State, 495 So.2d 188 (Fla. 2d DCA 1986).

recognized that where the defendant had no notice that costs would be imposed under section 27.3455, the objection requirement would be waived. Maldonado v. State, supra. Petitioner has apparently overlooked the recent decision of the Fourth District in Doyle v. State, 12 F.L.W. 2175 (Fla. 4th DCA Sept. 9, 1987) which recognized that the instant decision in Harriel v. State, supra, and Davis v. State, supra, "impliedly contemplate the trial court's oral pronouncement of intention to impose community service, which pronouncement would occasion the opportunity to raise the challenge before the trial court." As there was no such oral pronouncement made by the trial court in Doyle, supra, the Fourth District found that the defendant did not waive his right to raise this issue on appeal. Thus, where a defendant has no reason to object to these costs on ex post facto grounds, he will not be held to have waived the issue on appeal. See, e.g., Fazio v. State, 509 So.2d 979 (Fla. 2d DCA 1987); Bull v. State, 507 So.2d 744 (Fla. 2d DCA 1987) and Sescon v. State, 506 So.2d 45 (Fla. 2d DCA 1987).

Generally, the unconstitutional application of a statute to the facts of a particular case must first have been raised at the trial level. Trushin v. State, 425 So.2d 1126 (Fla. 1983). Constitutional error is not necessarily fundamental error and even constitutional rights can be waived if not timely presented. Ray v. State, 403 So.2d 956 (Fla. 1981). See also, Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984). Significantly, as stated in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. 1986),

sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal. In an analogous area, cases presenting the issue of the ex post facto application of the retention of jurisdiction statute have held that the error was not fundamental and therefore was not preserved for appellate review in absence of a contemporaneous objection. Styles v. State, 465 So.2d 1369, 1371 (Fla. 2d DCA 1985); Springfield v. State, 443 So.2d 484, 485 (Fla. 2d DCA 1984); Fredricks v. State, 440 So.2d 433 (Fla. 1st DCA 1983).

Respondent maintains that this Court's decision in State v. Whitfield, supra, does not control the result of the case at bar. The impact of the error in Whitfield in improperly assessing points for victim injury resulted in a departure from the sentencing guidelines without the trial judge making the mandatory written reasons for departure. In Whitfield, and other cases presenting the situation where the trial court failed to make written findings, the defendant was not precluded from first raising the issue on appeal because the error resulted in an illegal sentence. See, State v. Snow, 462 So.2d 455 (Fla. 1985); Walker v. State, 462 So.2d 452 (Fla. 1985) and State v. Rhoden, 448 So.2d 1013 (Fla. 1984). In Snow, supra; Walker, supra; and Rhoden, supra, the trial court's failure to comply with its statutory duty to specifically state the findings upon which it imposed sentence hampered effective appellate review and

rendered the sentence illegal, because in the absence of these findings, there was no statutory authority for the sentence imposed. Thus, no objection at the trial level was needed to raise these issues on appeal. Moreover, as noted in Rhoden, supra, the reason for not requiring an objection in the situation where the trial court has failed to make written findings is that:

> [I]t is difficult, if not impossible for counsel to contemporaneously object to the absence of a written order at the sentencing hearing 'since counsel at that stage does not know for sure what the written sentence may be, and a written order pursuant to section 39.111 may indeed be subsequently filed.'"

State v. Rhoden, 448 So.2d at 1016, quoting from Glenn v. State, 411 So.2d 1367 (Fla. 5th DCA 1982) (Sharp, J. dissenting).

Petitioner's position, and that of the Second District in Ghianuly v. State, supra; and the Fifth District in Webber v. State, supra, appears to be that all sentencing errors are fundamental. If this were so, this Court would obvioulsy not enforce the contemporaneous objection rule in the capital sentencing context. See, e.g., Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Rose v. State, 461 So.2d 84 (Fla. 1984). The present case does not present the situation where sentence is in excess of the maximum term authorized by statute and consequently, illegal. See, e.g., Noble v. State, 353 So.2d 819 (Fla. 1977). Respondent submits that the ex post facto imposition of costs does not result in an illegal sentence, which is reviewable in absence of a contemporaneous objection.

Respondent further submits that requiring a contemporaneous objection to the ex post facto imposition of costs would promote judicial efficiency. As recognized in Castor v. State, 365 So.2d 701, 703 (Fla. 1978):

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and unnecessary use of the appellate process result in a failure to cure early that which must be cured eventually.

Finally, as to Petitioner's contention that all that is necessary to cure such an error is a simple remand to the trial court, Justice Shaw's concurring opinion in Walker v. State, 462 So.2d at 454-455, cogently observed that the simple remand in Walker:

> [H]ad consumed almost two years, required the attention of two appellate courts, ten appellate judges, an unknown number of appellate lawyers and court personnel, and is now enroute to the original sentencing judge for a review of the record and a resentencing hearing. A contemporaneous objection might well have cured the error, thus resulting in finality of judgment, speedy justice, and efficient use of judicial resources.

Consequenlty, the ex post facto application of the costs statute does not rise to the level of fundamental error, and judicial economy favors the application of the contemporaneous objection rule. This Court should affirm the decision of the

Fourth District Court of Appeal below by holding that a contemporaneous objection is required to preserve this issue for appeal.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been furnished, by courier, to TANJA OSTAPOFF, ESQUIRE, Assistant Public Defender, The Government Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, this 2nd day of December, 1987.

Amy Lynn Diem
Of Counsel