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W/APP

IN THE SUPREME COURT OF FLORIDA

JOEY LUIS ROJAS,

Petitioner,

versus

CASE NO. 73,622

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Orange County, Florida, for first-degree murder, and was charged by an information with two counts of kidnapping. (R 753, 7, 9-10) He was tried by a jury on April 20 through 23, 1987, and found guilty of second-degree murder with a deadly weapon and two counts of false imprisonment. (R 655, 793, 794) He appealed his judgment and concurrent prison terms totalling twenty-two years to the Fifth District Court of Appeal and on December 22, 1988, his convictions and sentences were affirmed. Rojas v. State, 535 So.2d 674 (Fla. 5th DCA 1988).

Petitioner's notice to invoke this Honorable Court's jurisdiction was given on January 20, 1989, and jurisdiction was accepted by this Honorable Court on April 14, 1989.

STATEMENT OF THE FACTS

In the late evening of October 28-29, 1986, Tammy Howard and Maria Steverson met Petitioner's nephew, Ricky Delgado, at a club on Orange Blossom Trail in Orlando, Florida, and rode with them to a store or white building in Eatonville in Orange County, where the women said that several black men approached the car. (R 178, 179, 180, 181, 182, 195, 211, 212, 213, 214, 232) They said they did not hear any conversation except someone's saying, "Don't rip me off like in New York." (R 183, 216, 217, 236) Petitioner drove away suddenly, they said, with a black man hanging half in and half out of the vehicle. (R 184, 217, 218, 256) The car stopped about two blocks down the road, where they said Petitioner and the man fought outside the car in the street. (R 185-186, 202, 208, 219, 223, 246) They said after Petitioner hit the man a couple of times, he got back in the car, (R 186, 187, 200, 203, 221)

A sixteen-year-old cocaine "runner" testified that he was present at the Rainbow Club when James Lorenzo Richardson sold Petitioner a twenty-dollar piece of crack cocaine, and when Petitioner did not pay him, Mr. Richardson leaped into the car and grabbed Petitioner's steering wheel. (R 252, 253, 254, 255, 290,. 291, 292; 454, 455, 456, 457, 458, 472)

James Richardson died from two stab wounds to his heart via one chest wound. (R 356) No one saw Petitioner stab Mr. Richardson, and no one saw, or ever found, a knife. (R 187, 200, 224, 240, 261, 286, 324, 358, 390, 400, 461)

SUMMARY OF ARGUMENT

POINT I: It is reversible and fundamental error for the trial court to fail to fully instruct a jury on all the essential elements of manslaughter, a lesser offense included within the crime of first-degree murder for which Petitioner was on trial. The definition of manslaughter necessarily includes the definition of excusable and justifiable homicide, which must be read contemporaneously with the instruction on manslaughter. Although an objection has been held not to be required to preserve this fundamental error, Petitioner's request for a full instruction on excusable and justifiable homicide has otherwise preserved the error for appeal.

POINT 11: Petitioner was entitled to an instruction on his defense of self-defense where the State's witnesses' testimony showed that Petitioner was fighting with the deceased and may have been attacked by the deceased.

POINT 111: The State in this case was guilty of misconduct where a State witness sought by the defense for deposition was found three days before trial but that fact was not disclosed to the defense until the third day of the trial, after the prosecutor had found time to interview the witness and determine whether he would be called. A recess for the taking of a deposition was inadequate to allow the defense to make meaningful use of the newly available witness, particularly where other key State witnesses had already testified and been cross-examined.

ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO RENDER A COMPLETE AND CONTEMPORANEOUS DEFINITION OF JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF ITS INSTRUCTION ON MANSLAUGHTER WAS FUNDAMENTAL, REVERSIBLE ERROR.

At Petitioner's trial for murder, the trial court instructed the jury by reading the standard jury instruction on manslaughter:

> THE COURT: . . . .
>
> In connection with the accusation of murder in the first degree, murder in the first degree includes the lesser crimes of murder in the second degree, murder in the third degree, and manslaughter, all of which are unlawful.
>
> A killing that is excusable or was committed by the lawful use--excuse me, by the use of justifiable deadly force is lawful.
>
> If you find James Lorenzo Richardson was killed by Joey Luis Rojas, you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree or was murder in the second degree, or whether the killing was excusable or resulted from justifiable use of deadly force.
>
> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant may have been at

the time of the killing.

> The killing of a human being is excusable and, therefore, lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident or misfortune in the heat of passion upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used, and not done in a cruel or unusual manner.

(R *629-630, 797)*

After defining first-degree murder and second-degree murder, the trial court read:

> THE COURT: Before you can find the defendant guilty of manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> One, that James Lorenzo Richardson is dead.
>
> Secondly, that his death was caused by the act, procurement or culpable negligence of Joey Luis Rojas.
>
> I will define culpable negligence for you. Under the law each of us has a duty to act reasonably towards others. If there is a violation of that duty without any conscious intention to harm that violation is referred to as negligence.
>
> Culpable negligence is more than a failure to perform that duty or more than a failure to use ordinary care for others. For negligence to be called culpable negligence it must be gross and flagrant.

> The negligence must be committed with utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was likely to cause death or great bodily injury.

(R 632-633, 800)

It has been held that failure to include full definitions of justifiable and excusable homicide and culpable negligence as part of the instruction on manslaughter is fundamental error. In Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986), the District Court reiterated that an instruction defining justifiable and excusable homicide is necessary to provide a complete instruction on the crime of manslaughter, and that the court's failure in that case to give a complete instruction was reversible error, notwithstanding defense counsel's failure to make a timely objection. Alejo was convicted of second-degree murder. The First District Court of Appeal, in Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), made it clear that the complete definition of excusable or justifiable homicide must be given "as part" of the instruction on manslaughter:

> Florida courts have consistently held, starting with Hedges v. State, 172 So.2d 824 (Fla. 1965), that when a trial court gives an instruction on manslaughter it is reversible error for the court to fail to give an instruction on justifiable and excusable homicide. [Citations omitted.] Therefore, we are called upon to determine whether the trial court's summary definitions on excusable and

> justifiable homicide given at the beginning of the jury instructions, and not in connection with the instruction on manslaughter, satisfied this fundamental obligation. We find it did not.

Id., 500 So.2d at 1370. In Ortagus, the jury received the same definition of manslaughter as did Petitioner's jury, plus "a brief and general definition of excusable and justifiable homicide." Id., 500 So.2d at 1369. The Ortagus Court found that the incomplete manslaughter instruction

> . . . failed to cover material elements of the offense, making the instruction necessarily misleading and prejudicial to the accused. [Citations omitted.][Emphasis supplied.]

Id., 500 So.2d at 1370.

In Walker v. State, 520 So.2d 606 (Fla. 1st DCA 1987), the defendant was convicted of second-degree murder. A different panel of District Judges relied upon the holding in Ortagus that:

> . . . even though the jury was given an abbreviated instruction on justifiable and excusable homicide at the beginning of the homicide instructions, it was reversible error not to read the justifiable and excusable homicide defenses in their entirety contemporaneously with the manslaughter instruction given later. Ortagus at 1370. This is because manslaughter is a residual offense, defined by what it is not. See Kelsey v. State, 410 So.2d 988 (Fla. 1st DCA 1982). Consequently, the failure to fully instruct on the applicable defenses results in omitting material elements of the offense, which is necessarily misleading and prejudicial to the accused.

> [Citations omitted.] [Emphasis supplied.]

Id.

In this case, the District Court acknowledged that the First and Second District Courts of Appeal have held that the failure to fully instruct a jury on justifiable and excusable homicide, as part of and contemporaneous with an instruction on manslaughter, is fundamental and reversible error where the defendant is convicted of second-degree murder. Walker, supra; Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988); Ortagus, supra. The District Court, however, relied on the Third District Court of Appeal's decision in Garcia v. State, 535 So.2d 290 (Fla. 3d DCA 1988), that the failure to give a complete manslaughter instruction was harmless error and not fundamental error. In the instant case, the District Court said:

> We realize this opinion is in conflict with Walker, supra; Spaziano, supra (as modified by Tobey [v. State, 533 So.2d 1198 (Fla. 2d DCA 1988)]).

Id., 535 So.2d at 676.

In Banda v. State, 536 So.2d 221 (Fla. 1988), upon rehearing, this Honorable Court affirmed a first-degree murder conviction even though a complete instruction on excusable and justifiable homicide was not given, because "there was no evidence which would have supported either defense," and cited Squires v. State, 450 So.2d 208 (Fla.), cert. denied, 469 U.S. 892 (1984). In both this case and in Garcia v. State, supra, the District Courts reached the same conclusion of affirmance where

the defendants were convicted of second-degree murder upon incomplete manslaughter instructions. Both Courts relied on a reasoning that the jury's verdict of second-degree murder necessarily precluded a finding of guilt as to manslaughter. The Fifth District Court of Appeal in this case, moreover, stated that there was

> . . . no evidence which could have supported a self-defense instruction. As in Garcia, the jury's conviction of Rojas of second degree murder required it to find the killing was by an act "imminently dangerous to another" and "evinced a depraved mind regardless of human life". These findings reject any possibility the killing was justifiable or excusable. . . .

Id., 535 So.2d 674, 676. (Emphasis in original.) (Footnote omitted.) As argued in Point 11, infra, Petitioner contends that evidence did exist to support an instruction on self-defense. Apart from that issue, however, Petitioner respectfully submits that the District Court's ruling herein is erroneous for other reasons.

In the original opinion in Banda, 13 F.L.W. 451 (Fla. July 14, 1988), this Honorable Court wrote:

> . . . The record before us discloses that, without objection from the defense, the trial court instructed the jury on the crimes of first-degree murder, second-degree murder and manslaughter, but did not so instruct on excusable and justifiable homicide. Because manslaughter is a residual offense, an instruction on that crime must include a definition of excusable

> and justifiable homicide. Hedges v. State, 172 So.2d 824 (Fla. 1965). However, the present case essentially is indistinguishable from Squires v. State, 450 So.2d 208 (Fla.), cert. denied. 469 U.S. 892 (1984). There, we held that where the defendant is found guilty of first-degree murder, an error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error. Even if an objection had been made, appellant would not prevail because he was convicted of an offense greater than the least of the offenses correctly instructed. State v. Abreau, 363 So.2d 1063 (Fla. 1978). . . .

In Tobey v. State, supra, the defendant's conviction for first-degree murder was affirmed, on the basis of the Banda decision as it appeared in November 1988, and in light of Banda, the Second District Court of Appeal sought to correct Spaziano v. State, supra. The District Court clarified that a thorough instruction on excusable and justifiable homicide was essential in Spaziano's case because it allowed the jury to pass upon Spaziano's only defense. In Tobey's case, the jury was fully instructed on excusable and justifiable homicide elsewhere in the jury instructions than during the manslaughter definition.

In Smith v. State, 14 F.L.W. 541 (Fla. 2d DCA February 24, 1989), the situations in Spaziano and Tobey were later explained to be "context (a)" cases, where the question is whether a full jury instruction on a defendant's presented defense has been given. Both Spaziano and Tobey, however, were cases wherein the defendant was convicted of a crime two steps removed from the

inadequately defined crime of manslaughter and did not involve a "context (b)" situation where the defendant was convicted of second-degree murder.

> As to context (b), a jury instruction on manslaughter is incomplete if the jury is not also instructed on both excusable homicide and justifiable homicide. The reason is that the offense of manslaughter is a residual offense which may exist when the degrees of homicide do not exist and a killing is not justifiable or excusable. See Hedges v. State, 172 So.2d 824 (Fla. 1965). In this case the trial court followed the standard jury instruction for manslaughter and had previously read the the jury the instruction on justifiable homicide and the short form instruction on excusable homicide. We hold in this context (b) that the failure lto give the long form excusable homicide instruction was fundamental error. Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986). The giving of that instruction promotes the opportunity of the jury to exercise its inherent pardon power. See State v. Abreau, 363 So.2d 1063 (Fla. 1978).

Id., 14 F.L.W. at 542.

In Smith, the District Court found support for this holding in Banda, as published upon rehearing. Although Banda was decided as a "context (a)" case, this Honorable Court cited Squires v. State, supra, in support of its conclusion; and the Second District Court of Appeal noted:

> If may be argued that Squires calls for the result we reach in this case. In Squires the supreme court stated, "Where defendant is convicted of first-degree murder an

error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error." Id., at 211. That statement could be taken to imply, as Alejo held, that where a defendant, as in this case, is convicted of second-degree murder, an error or omission in an instruction on the lesser included offense of manslaughter is fundamental error. Yet in State v. Bryan, 287 So.2d 73 (Fla. 1973), the supreme court found no fundamental error in an incomplete manslaughter instruction (where the omission concerned the definition of culpable negligence, not excusable or justifiable homicide) when the defendant was convicted of second-degree murder. And in City of Orlando v. Birmingham, 14 F.L.W. 33 (Fla. January 19, 1989), the supreme court stated, "[I]n criminal cases where the alleged error is giving or failing to give a particular jury instruction, this court has refused to allow parties to object to the instruction for the first time on appeal." While Birmingham was a civil case, its above statement is dicta, and the supreme court again made no reference to a difference between contexts (a) and (b), it appears to be a category (b) case.

Nonetheless, Castor v. State, 364 So.2d 701, 703-704 (Fla. 1978), implies that there is fundamental error in omitting the definitions of excusable and justifiable homicide from the initial manslaughter instruction, although that case found no fundamental error in such an omission during re-instruction, as opposed to initial instruction, on manslaughter in a case involving a conviction for third-degree murder.

The Smith Court also dismissed Garcia's and this case's

reasoning that the jury's verdict of second-degree murder precluded a conviction for manslaughter because the finding of a depraved mind rejected "any possibility the killing was justifiable or excusable." Rojas v. State, 535 So.2d at 676. The Smith Court disagreed:

> . . . We do not disagree that the fact that the jury found that defendant had acted with a depraved mind means that the jury could not have concluded that he had acted justifiably or excusably. Nonetheless, we do not conclude that that would mean that the jury could not have convicted defendant of manslaughter. Indeed, the conclusion that the jury thereby found no defense to manslaughter means that the jury could have convicted defendant of manslaughter. Thus, it appears to us that the Garcia conclusion is essentially that the fact that the jury convicted defendant of one offense meant that it would not have convicted him of an offense one step lesser if the jury had been correctly instruction on that lesser offense. We would disagree with that conclusion, especially having in mind a jury's inherent pardon power. As is stated in Abreau, 363 So.2d at 1064, "the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible."

Smith, 14 F.L.W. at 544, fn. 2.

The District Court erred in this case by affirming Petitioner's conviction for second-degree murder.

POINT II

THE TRIAL COURT ERRED BY DENYING PETITIONER'S REQUEST THAT THE JURY BE INSTRUCTED ON SELF-DEFENSE.

In summarizing the trial court's and counsel's conference on the jury instructions to be given, the trial court stated:

> THE COURT: . . . Defense counsel also is requesting that I give an instruction on justifiable use of deadly force or self-defense. The State objects. I agree with the State's position. Those issues have not been framed by the evidence presented in the case and, therefore, I believe an instruction on those topics would be inappropriate.

(R *548)*

Although there were several inconsistencies and contradictions among the State witnesses' accounts of what happened in this case, it was fairly clear that the deceased had jumped into the driver's window of Petitioner's car and that Petitioner and the deceased were fighting as Petitioner drove away. (R *184, 217, 218, 256, 292, 458, 472)* One of the occupants of Petitioner's car testified that Petitioner and the deceased fought in the street outside the car; another said that when Petitioner stopped his car, Ricky Delgado helped get the deceased "off" of Petitioner. (R *184, 185-186, 202, 208, 219, 220)* Although Petitioner did not take the stand at trial, the testimony of other witnesses provided ample evidence to suggest that, if he was the person who stabbed the deceased, his actions could have been in self-defense. This Honorable Court has

repeatedly held that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is *any* evidence to support such instruction. Smith v. State, *424* So.2d *726, 732* (Fla. *1983);* Bryant v. State, *412* So.2d *347, 350* (Fla. *1982);* Palmes v. State, *397* So.2d *648, 652* (Fla. *1981);* Motley v. State, *155* Fla. *545, 20* So.2d *798 (1945).* Without the requested instruction, the jury found that the State's evidence did not establish that Petitioner had killed the deceased with premeditation, and acquitted him of first-degree murder. (R *655)* It cannot be asserted that advising the jury that killing in self-defense is a lawful act would not have further affected its verdict. Compounded with the trial court's failure to fully define manslaughter, the next lesser included offense of murder, this error is especially harmful. It was Petitioner's right to have his jury instructed on self-defense because there was evidence to support his theory of defense. He is entitled to a new trial.

POINT III

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE INQUIRY INTO THE STATE'S FAILURE TO INFORM THE DEFENSE UNTIL DURING TRIAL THAT A PREVIOUSLY UNAVAILABLE STATE WITNESS HAD BEEN LOCATED,

Prior to Petitioner's trial for first-degree murder, his lawyer attempted to subpoena a State-listed witness, Edward Shaw, for deposition, but was unable to locate and serve him. (R 408) Petitioner's trial began on April 20, 1987. On the third day of trial, April 22nd, the State announced that it was calling Mr. Shaw to the stand. Defense counsel objected and the prosecutor responded that Mr. Shaw had not been available as a witness until "yesterday," about seven o'clock in the evening, when everyone had already left the courthouse for the day. (R 410-412) The trial court chided the prosecutor for not notifying defense counsel of the witness' sudden availability, and said:

> THE COURT: I assumed you talked to the witnesses you intended to talked [sic] to also. What this brings us to is I either have to exclude his testimony, we have to have a Richardson hearing, or we break. Those are the only choices I'm left with.
>
> Rather than excluding his testimony I'm going to take a break. We are in a break right now. Since these options are well foreseen in advance, or we know these possibilities occur, I would appreciate it if a witness is out-of-pocket but suddenly becomes available, and both sides are looking for the person, that they notify each other.

(R 409-410) (Emphasis supplied.)

Defense counsel was permitted, moments before Edward Shaw testified, to take his deposition. (R 413-442) During the deposition, Mr. Shaw testified that he had received his subpoena for trial on the preceding Friday, April 17th. (R 431) After the deposition, the prosecutor continued to maintain that she had had no opportunity to talk to Mr. Shaw until the night before he was to testify, because "Friday was a holiday," and she learned from her investigator Sunday night, April 19th, that he had been served. (R 442, 444) There followed an exchange between counsel, following which the trial court stated that it would not exclude Mr. Shaw's testimony. (R 444-445)

The recess and opportunity to depose Edward Shaw that was afforded to the defense was inadequate to substitute for a proper inquiry into the discovery violation that occurred in this case. In Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1980), the State failed to disclose to the defense, until the eve of trial, information bearing critically on his defense which had not been included in the medical examiner's autopsy report. In that case, the prosecutor had learned of the information five or six days before it was disclosed, but the District Court found that the trial court's holding that the discovery was not willful or unreasonable did not constitute an adequate determination of the matter. Richardson v. State, 246 So.2d 771 (Fla. 1971), requires a trial court to inquire into whether a violation was inadvertent or willful; trivial or substantial; and whether the discovery

violation prejudiced the defendant in his ability to prepare for trial. In State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984), the District Court observed that prejudice is completely removed when the defendant is provided with the discovery information and material and is afforded an adequate opportunity to make use of the information and material in the preparation of his defense. Here it cannot be said that the announcement on the third day of trial that a previously unavailable witness would be taking the stand in a first-degree murder trial constituted "adequate opportunity" to make use of or prepare a response to his testimony. The Del Gaudio Court also stated:

> If the discovery material and information comes too late to permit the trial to proceed as scheduled, the prejudice is extinguished when the trial is continued.

Id., 445 So.2d at 610. In this case, however, Petitioner's trial had already begun when the violation was revealed. In any event, as the Del Gaudio Court observed, a means of removing the prejudice caused by the discovery violation is prohibiting the State from introducing the material or calling the witness. Rule 3.220(j)(1), Fla.R.Crim.P.

The circumstances in this case are quite similar to those in Brown v. State, 515 So.2d 211 (Fla. 1987), also a first-degree murder case, wherein the existence of a taped statement by a State witness whom the defense could not depose was not revealed until either the day of the trial or the preceding Friday. Without conducting a Richardson inquiry, the trial court in

Brown, as in this trial, postponed the testimony until the defense had an opportunity to hear the surprise evidence. In Brown, the trial court's failure to also conduct an adequate Richardson inquiry was found to constitute reversible error in a capital case. Such failure is per se reversible error. Smith v. State, 500 So.2d 125 (Fla. 1986). The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive prejudice. Wilcox v. State, 367 So.2d 1020, at 1023 (Fla. 1979). The trial court needs to determine whether the defendant is prejudiced by the State's discovery violation and whether such conduct is willful. Watson v. State, 509 So.2d 396 (Fla. 4th DCA 1987). In this case, despite the prosecutor's protestations that Mr. Shaw was not "available" to her until late in the evening of the second day of the trial, the deposition revealed that the State had in fact discovered Mr. Shaw's whereabouts five days earlier; the prosecutor had learned of his being served two days later; and his having been located was kept from the defense until after the prosecutor had had the opportunity to question him thoroughly and determine whether the State did indeed wish to call him as a witness. (R 410, 411, 442, *445)* If the violation was not willful, then it was grossly negligent.

In his motion for a new trial, defense counsel outlined the chronology of his attempts to locate Edward Shaw and the State's withholding of the information that he had been found. (R 813-817) Defense counsel also demonstrated how the absence of such prosecutorial misconduct would have affected his preparation for

trial. (R 788-789)

The trial court's action upon learning of the State's discovery violation did not constitute a sufficient Richardson inquiry. Despite the failure to conduct a proper hearing, however, the record amply demonstrates that the violation resulted in prejudice to the defense and was the result of prosecutorial misconduct or negligence which mandated the exclusion of the witness' testimony.

CONCLUSION

For the reasons expressed in Points I and II herein, Petitioner respectfully requests that this Honorable Court reverse his conviction for second-degree murder and remand this cause to the trial court for a new trial. In addition, and for the reasons expressed in Point III herein, Petitioner respectfully requests that this Honorable Court reverse his convictions for second-degree murder and false imprisonment and remand this cause to the trial court for a new trial.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery to his basket at the Fifth District Court of Appeal, 300 S. Beach Street, Daytona Beach, Florida 32014; and by mail to Mr. Joey Luis Rojas, P. O. Box 500, Olustee, Florida 32072, this 9th day of May, 1989.

ATTORNEY