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IN THE SUPREME COURT OF FLORIDA

GERALD WAYNE BUNNEY,

Petitioner,

vs. Case Number 78,141

STATE OF FLORIDA,

Respondent.

ON PETITION TO REVIEW THE DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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Contents

Authorities ii

Argument 1

I. MR. BUNNEY WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE EXCLUSION OF RELEVANT EVIDENCE THAT WAS VITAL TO HIS DEFENSE AGAINST BOTH CHARGES . . . 1

II. THE ACCUSED WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER SPECULATION THAT THE ACCUSED INTENDED TO SEXUALLY MOLEST THE VICTIM 7

III. THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY INSERTING THE ALTERNATE JURORS INTO THE JURY'S DELIBERATIVE PROCESS 11

IV. SINCE THE SENTENCING SCORESHEET FOR MR. BUNNEY'S KIDNAPPING OFFENSE INCLUDED POINTS FOR THE VICTIM'S DEATH, IT WAS IMPROPER TO IMPOSE A DEPARTURE SENTENCE BASED ON THE UNSCORED CAPITAL FELONY 13

Conclusion 15

Certificate of Service 15

Authorities

Cases

Albritton v. State,
476 So.2d 158 (Fla. 1985) 17

Beathea v. United States,
365 A.2d 64, 88 (D.C.1976) 5

Chestnut v. State,
538 So.2d 820 (Fla. 1989) 1, 3-5

Fischer v. State,
429 So.2d 1309 (Fla. 1st DCA 1983) 13

Garganus v. State,
451 So.2d 817 (Fla. 1984) 4, 5

Gould v. State,
577 So.2d 1302 (Fla. 1991) 7

Hansbrough v. State,
509 So.2d 1081 (Fla. 1987) 14, 15

Jennings v. State,
512 So.2d 169 (Fla. 1987) 13

Livingston v. State,
565 So.2d 1288 (Fla. 1988) 14

Wise v. State,
580 So.2d 329 (Fla. 1st DCA 1991) 6

Rules

Florida Rule of Criminal Procedure 3.988 15

Florida Rule of Criminal Procedure Rule 3.701 16

Argument

I. MR. BUNNEY WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE EXCLUSION OF RELEVANT EVIDENCE THAT WAS VITAL TO HIS DEFENSE AGAINST BOTH CHARGES.

The State has incorporated by reference its argument to the district court that Mr. Bunney's attorney waived this issue because it was not preserved by his attorneys' arguments at trial. The district court obviously rejected the waiver argument, and decided the issue on its merits. Nevertheless, Mr. Bunney will oblige the State and respond as it did in the district court:

In his initial brief Mr. Bunney pointed out a critical distinction between a defense based on the accused's generally diminished capacity, as in Chestnut v. State, 538 So.2d 820 (Fla. 1989), and one premised on evidence that ***at the time of the offense*** the accused suffered from an impairment that prevented him from forming a specific intent to commit the crime. The analogy used was the difference between alcoholism and intoxication.

To be sure, as the State pointed out to the district court, Mr. Bunney's trial attorneys desired to present evidence of his mental deficiencies, generally. But, in addition, the purpose of much of the evidence was to corroborate and explain Mr. Bunney's claim that during the abduction and homicide he experienced "numbness" and "static" in his brain--evidence that at the time of the offense he was suffering an epileptic episode during which he did not have the specific intent to harm or terrorize the child. The State's contention notwithstanding, Mr. Bunney's attorneys made that purpose clear to the trial judge, as demonstrated in the passages set forth in the appendix to this brief.

Moreover, the judge understood the distinction:

> THE COURT: Mr. Benito, what says the State with reference to this isolated point as to whether or not they have the right to put a witness on the stand, specifically, Dr. Maher, to testify that, assume hypothetically that Mr. Bunney had a static sensation and that that is consistent with organic brain damage?

R.248

The State's claim to the district court (and again in its description of the case here) that defense counsel conceded that Chestnut controlled is not accurate. Rather, counsel agreed that the case was binding authority ***to the extent it applied.***

> THE COURT: Does counsel for Mr. Bunney agree that this Court is bound by Chestnut vs. State, albeit a four-three decision?
>
> MR. CHALU: Your Honor, I must agree, as an officer of the court, though, obviously, my own thoughts and heart lie elsewhere, that the Court is bound by that decision. The rehearing was pending for some period of time, but it's been finalized and the case has now been finalized and reported. So, I cannot represent to you any other way than, as an officer of the court, that the decision is binding. ***To the extent that it applies to this case, it is binding.***

R.45 (emphasis added.)

On the merits, in the district court the State characterized Chestnut as holding that a defendant is "required to either assert an insanity defense . . . or recede from any specific intent reducing defense." (*State's DCA brief, p.8*) That is simply not true. Rather, the Chestnut Court ruled that evidence that the defendant suffers mental aberrations which cause diminished capacity shy of insanity is not relevant to his culpability *vel non*.

As we have previously pointed out here, at the same time the Chestnut Court reaffirmed its holding in Gurganus v. State, 451 So.2d 817 (Fla. 1984), which "reaffirmed the long-standing rule in

Florida that evidence of voluntary intoxication is admissible in cases involving specific intent." Chestnut, 538 So.2d at 822.

In Gurganus, a murder case, the Supreme Court held that expert psychological testimony was (1) inadmissible with respect to the defendant's insanity defense, because the experts could not opine whether the defendant appreciated the wrongful nature of his acts; and (2) inadmissible with respect to whether the defendant's acts were more consistent with a depraved mind than with premeditation, because that determination was exclusively for the jury. Gurganus, 451 So.2d at 820-821.

But on a third basis, the Court found error in the exclusion of the psychologists' testimony.

> As discussed earlier, Gurganus intended to use the testimony ***as evidence of his intoxication and resulting inability to entertain a specific intent at the time of the offense.*** To set up the proper foundation for the expert testimony the defense question the psychologists on the basis of a hypothetical set of facts, the most important of which was the hypothetical fact of Gurganus' consumption of Fiorinal capsules combined with alcohol. The record certainly contained sufficient facts from which the jury could have properly inferred Gurganus' consumption of the drugs and alcohol and, therefore, questions and opinions regarding his state of mind at the time of the offense based on such hypothetical facts were proper. [citations omitted]
>
> * * * * * *
>
> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. [citations omitted] As such it is proper for an expert to testify "as to the effect of a given quantity of intoxicants" on the accused's mind when there is sufficient evidence in the record to show or support an inference of consumption of intoxicants. *Cirack*[*v. State*], 201 So.2d at 709.

Gurganus, 451 So.2d at 822-823 (Emphasis added).

In the case *sub judice* there was sufficient evidence, either in the record or proffered, to show or support an inference that at the time of the crimes charged against Mr. Bunney he was suffering an epileptic episode. Under Gurganus, it was proper for the defense to submit this evidence, and it was proper for an expert to testify as to the effect of the epileptic activity on Mr. Bunney's ability to form a specific intent.

As we have also pointed out, Chestnut did not change this. Though the Court disavowed Gurganus's *dicta* that evidence of ***any*** condition affecting the accused's ability to form a specific intent was relevant, nowhere in Chestnut did the Court hold that ***only*** evidence of voluntary intoxication was permissible. To the contrary, the Court recognized a number of conditions which could properly lead a jury to conclude that the accused was unable to form the specific intent required for a conviction.

> [T]here are significant evidentiary distinctions between psychiatric abnormality and the recognized incapacitating circumstances. Unlike the notion of partial or relative insanity, conditions such as intoxication, medication, ***epilepsy***, infancy, or senility are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding.

Chestnut, 538 So.2d at 823, quoting Beathea v. United States, 365 A.2d 64, 88 (D.C.1976)(Emphasis added).

This passage was noted in Wise v. State, 580 So.2d 329, 330 (Fla. 1st DCA 1991), when that court distinguished attempts to prove diminished capacity, as in Chestnut, from proof of epilepsy.

> The instant case, unlike *Chestnut*, involves a physical defect or condition which has as a potential result, loss of consciousness. This is a situation wholly distinguishable from one involving a diminished capacity defense. A diminished capacity

> defense concerns the defendant's ability to understand the wrongfulness of his acts. The instant case presents a question of the defendant's consciousness of his acts themselves, not of his understanding of their wrongful nature.

Wise, 580 So.2d at 330.

The State here asserts another waiver, contending that Mr. Bunney's counsel did not argue the Wise theory to the trial judge. But a review of the statements of Mr. Bunney's trial counsel quoted in the appendix demonstrates that he did just that, *e.g.*,

> Your Honor, I have argued earlier for the record that we are not seeking to establish any diminished capacity defense. What we are attempting to do by this testimony is give credence to the defendant's statements to the deputies and to the detectives that his mind was filled with static, that it was numb, that the numbness that he referred to has a medical and psychiatric basis, that this is something he's not fabricating merely to try to beat the charge that he's here today on.

R.246

Nevertheless, the State argues that "[t]he question of whether epilepsy is actually a physical defect was never broached in the trial court."

> In the instant case, Petitioner argued in the trial court that his "present mental makeup" rendered his conduct intentless and that there was a "medical and psychiatric basis" for the static in his head. [footnote omitted] Consequently, inasmuch as Petitioner viewed his own theory(s) of defense as a mental one, he should now be held to it and be required to have asserted the insanity defense at trial.

State's brief, pp.4-5.

But note that Dr. Maher's testimony in the penalty-phase proceedings clearly established a physical basis for epileptic seizure activity, *i.e.*, wildly erratic electrical impulses coursing through the subject's brain. *E.g., R.486-487, 507* When the Chestnut issue arose during the trial on innocence or guilt, Mr. Bunney's counsel

asked the judge to permit him to proffer Dr. Maher's evidence by his live testimony. Counsel feared that as a layman he would be unable to accurately relate the substance of Dr. Maher's testimony. The trial judge refused. *R.114-116, 119-121, 237, 247*

Therefore, if Mr. Bunney's right to present the subject evidence turns on the adequacy of his counsel's description of Dr. Maher's testimony during the proffer, he was clearly prejudiced by the trial judge's ruling, and should be granted a new trial for that reason.

Finally, the State urges that the Court should not consider this issue because it was not encompassed within the district court's certified question. But in support of this proposition the State merely cites Gould v. State, 577 So.2d 1302, n.2 (Fla. 1991). In that case the Court simply exercised its discretion not to consider issues other than those embraced in the certified question. The Court's authority to do otherwise is well-established.[1]

Here there is very good reason to decide the instant issue even though the district court did not certify it: on this question there is now clear decisional conflict. The court below expressly held that evidence regarding epilepsy is inadmissible under Chestnut. The First District in Wise expressly held that evidence regarding epilepsy is ***not*** inadmissible under Chestnut. Of course,

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[1]Indeed, constitutionally, this Court's jurisdiction is not limited to review of the certified *question*. Rather, the Court has jurisdiction to review the "decision" of the district court of appeal. Art. 5, §3(b)(4), Florida Constitution; Hillsborough Association for Retarded Citizens v. City of Temple Terrace, 332 So.2d 610, 612, n.1 (Fla. 1976).

that conflict itself furnishes a constitutional basis for reviewing the decision in the absence of ***any*** certification by the district court.

II. THE ACCUSED WAS DEPRIVED OF A FAIR TRIAL BY THE PROSECUTOR'S IMPROPER SPECULATION THAT THE ACCUSED INTENDED TO SEXUALLY MOLEST THE VICTIM.

Again, the State has merely incorporated by reference the argument it made to the district court on this point. Mr. Bunney will respond accordingly.

In the district court the State conceded that it was improper for the prosecutor to suggest to the jury that Mr. Bunney intended to sexually molest Tonya McGrew, but asserted that a new trial is unwarranted. In this regard, the State took two related tacks.

One was to attempt to minimize the prosecutor's conduct.

> Thus, in light of an accurate rendition of the record, the <u>most</u> the prosecutor can be accused of is, arguendo, improper hand gesturing. * * * * * * Herein, the prosecutor merely mimicked strangulation with his hands. That his hands may have naturally fallen, as many arms and hands to, near the pelvic area, does not rise to the level of reversible error.

State's DCA brief, p.10

Premised on this rather benign description of the prosecutor's action, the State posited that the real harm was caused by defense counsel's objection.

> [I]t was defense counsel who, upon vociferous objection, literally made a spectacle of where the prosecutor had placed his hands during the argument. It was defense counsel who introduced the word "pubic" into the objection and complained just how "vital" it was for the record to show where the prosecutor's hands were. (R.288) Without necessarily accusing Appellant of invited error, it readily appears that a simple: "Your Honor, may we approach the bench?" would have sufficed rather than the verbally explicit volley that attended the objection and motion for mistrial.

State's DCA brief, pp.9-10

Notwithstanding the State's disingenuous description of what happened, it is clear from the record that the prosecutor's misconduct was not limited to the hand gestures, ***nor was it accidental.***

With respect to the latter, recall that just prior to closing arguments defense counsel renewed his motion in limine to preclude the prosecutor from speculating that Mr. Bunney had intended to sexually molest the child. *R.257-260* The court denied the motion without even requiring the State to respond *R.260*, but the prosecutor nevertheless proclaimed his intention to argue just that: "I think the State should be allowed to draw all reasonable inferences from the evidence ***and the one that Mr. Alldredge has spoken to, I will be drawing that reasonable inference.***" *R.262* (emphasis added)

Then, during his argument the prosecutor, *inter alia*, argued as follows:

> Now, he says, he's got static. He's had a few drinks. Couldn't that be a little buzz? Feeling good when he leaves the bar, maybe? Wants to go by and see Lois. He wants to go by and see Lois at 2:00 a.m.
>
> ***How is Lois going to be dressed, possibly, at 2:00 a.m.? Ready to go out? Good chance, she's in her night clothes.***
>
> Where's Lois going to be at 2:00 in the morning? In bed? Possibly. Why does he want to go see Lois at 2:00 in the morning, a girl, who he has asked out about three or four times, a girl who, it's obvious, ***he's sexually attracted to***?
>
> MR. ALLDREDGE: Objection, Your Honor, move for a mistrial.
>
> THE COURT: Objection, overruled. Motion for mistrial is denied.
>
> MR. BENITO: Why does he want to see Lois at 2:00 in the morning? ***What are his plans for Lois when he gets over there***? Why is he sneaking in at 2:00 in the morning to see Lois? He gets

in there, though, see, and Lois isn't there. ***So, his original plans for Lois, whatever they might be, he cannot carry out. So, he takes Tonya instead.***

Remember what he said in his taped statement? She was sleeping curled up on the front seat. All right. If he wanted to kill her, why didn't he just strangle her immediately out there in the front? Why drive her five miles away, to Grand Central Station, as Mr. Alldredge would have you believe? Why drive her to this desolate area five miles away?

She's lying on the front seat, curled up, half asleep. Why couldn't he just, if he wanted to kill her, why couldn't he just reach over and grab her at that time and choke her?

Recall what he said on the taped statement. He turned her over on her back. He's in his driver's seat. She's in the passenger's seat. He turns her over on her back. Her head's against the door. ***The lower portion of her body, clad in her little nightgown and underwear, is right here. (indicating).***

R.286-287 (emphases added) The record reflects, as a result of defense counsel's objection, that the "indicating" reference meant the prosecutor was holding his hands at his crotch. And as he did so he said:

What are his plans at that time? What are the plans of this man who, about half an hour earlier, had went over to see Lois Zeigler, who went over to see Lois Zeigler who he had asked out four times? What are his plans for that little girl? And before he can carry out any plans to terrorize her, is it reasonable to infer that she screamed and he grabbed her and he choked her, and, he killed her?

R.287-288 Whereupon, defense counsel objected:

MR. ALLDREDGE: Excuse me. Your Honor, I would object at this point. I would move for a mistrial. ***I would ask the opportunity to supplement the record for appeal, Your Honor. It's urgent that I do so.***

THE COURT: Motion denied. What the lawyers say is not evidence.

MR. ALLDREDGE: Your Honor--

THE COURT: You have the right to draw reasonable inferences and make your own argument, and you have rebuttal.

MR. ALLDREDGE: Your Honor, the record on appeal is going to remain silent as to the position of Mr. Benito's hands. I would like the record supplemented to show that Mr. Benito's hands were at essentially his pubic level. Your Honor, I think it's vital for the record to show that.

R.287-288

The foregoing makes clear that the prosecutor's misconduct was not limited to a hand gesture, and the hand gesture itself was no accident. Rather, the prosecutor made a calculated and intentional suggestion to the jury that Mr. Bunney had gone to the trailer to have sex with Lois Zeigler, and that when he discovered she was not home he decided to have sex with Tonya instead. There was not a single shred of evidence to support that inflammatory speculation, even as an inference.

Moreover, the prosecutor's pernicious suggestion was made, and established the overtly sexual connotation of the action, ***before*** he put his hands at his crotch. It was not defense counsel's objection which alerted the jury to it, as the State contends.

But even if that had been the case, it is also clear that the trial judge forced defense counsel to state the nature of his complaint in the jury's presence. When defense counsel first objected he asked for an opportunity to supplement the record, ***but the judge cut him off***:

THE COURT: Motion denied. What the lawyers say is not evidence.

MR. ALLDREDGE: Your Honor--

THE COURT: You have the right to draw reasonable inferences and make your own argument, and you have rebuttal.

R.288 It was only then that defense counsel, with no other choice,

described the nature of his objection in front of the jury.

III. THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY INSERTING THE ALTERNATE JURORS INTO THE JURY'S DELIBERATIVE PROCESS.

Here, too, the State has simply incorporated by reference its argument to the district court. The State there suffered from three basic misconceptions. First, it asserted that the alternates did not join the jurors' deliberation; rather, they were seated in the courtroom.

But the fact is, whether in or out of the courtroom, the jurors were not ***receiving*** evidence; they were ***reviewing it as part of their deliberations***. Obviously, there was some purpose to their request to review the videotape. Given the emphasis both attorneys placed on it during their closing arguments, it is likely the jurors were examining the tape for the purpose of assessing Mr. Bunney's demeanor and sincerity.

By placing the alternates in the same position, the trial judge increased the likelihood that an ***alternate's*** assessment of the videotape would affect the decision of one or more of the jurors. *Compare* Fischer v. State, 429 So.2d 1309, 1311 (Fla. 1st DCA 1983) ("[t]he attitude of the alternate juror could have been conveyed to the jurors by facial expressions, gestures or the like, and may have had some effect upon the decision of one or more juror.")

The point of Fischer was that, unless circumstances were such as to fully preclude the possibility that the alternate influenced the deliberations even in a slight way, the court could not presume

that he did not. Thus, it is not the defense's burden, as the State suggested to the district court, to point to hard evidence that the alternates influenced the deliberation in this instance. Rather, it is for the State to demonstrate that they ***could not*** have done so under the circumstances.

An example, cited by the State, was Jennings v. State, 512 So.2d 169 (Fla. 1987), in which the alternates left the courtroom with the jurors. This was discovered almost immediately, and the alternates were called back to the courtroom before they ever reached the jury room. Under those circumstances this Court was satisfied that the alternates had been separated from the jurors before deliberations began.

Here, on the other hand, the judge intentionally inserted the alternates into the jurors' ongoing deliberations, and they remained there for some 40 minutes while the jurors reviewed a critical piece of evidence.[2] Even in an open courtroom, it would have been virtually impossible to successfully monitor fourteen people (twelve jurors and two alternates) to detect indications of nonverbal communication between them.

Under these circumstances, this Court cannot conclude that the judge's error was harmless beyond a reasonable doubt.

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[2]The length of the tape can be discerned from the court reporter's notations when it was first played during the State's evidentiary presentation. *R.195, 234*

IV. SINCE THE SENTENCING SCORESHEET FOR MR. BUNNEY'S KIDNAPPING OFFENSE INCLUDED POINTS FOR THE VICTIM'S DEATH, IT WAS IMPROPER TO IMPOSE A DEPARTURE SENTENCE BASED ON THE UNSCORED CAPITAL FELONY.

The State's argument here is based on four significant misconceptions. First, the State apparently believes there is some policy encouraging departure from the sentencing guidelines on the basis of a unscored capital felony conviction. Second, the State posits that this policy stems from the heinous nature of a capital felony, citing for this proposition Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), and Livingston v. State, 565 So.2d 1288 (Fla. 1988).

As for the first proposition, there certainly is no such policy expressed in the guidelines or anywhere else. Nothing in the law requires a sentencing departure on this basis, or even encourages it.

The State's second proposition is also misguided. Neither Hansbrough nor Livingston purported to permit sentencing departures in pursuit of some policy in this regard, or because of the "heinous" nature of a capital felony. Rather, in Hansbrough the Court merely held that a departure on that basis was not invalid because it was not prohibited by the guidelines, it was not already taken into account by the guidelines, and it was not an inherent component of the crime for which the defendant was being sentenced. Hansbrough, 509 So.2d at 1087. Livingston merely cited Hansbrough. Livingston, 565 So.2d at 1292.

Nowhere did either opinion suggest that a sentencing judge

should as a matter of policy depart from a guideline sentence because of an unscored capital felony conviction.

The State also argues that it is "unreasonable to think that the 24 points for victim injury scored by the kidnapping conviction constitutes sufficient punishment so as not to warrant a departure sentence based upon the contemporaneous capital felony." What the State overlooks is that each guideline scoresheet is a separate construct, in which the factors considered are weighted independently of the weights given to them on other scoresheets. Indeed, the victim injury points assessed for "death or severe injury" range from a high of 85, on the Category 2 scoresheet, to a low of only 6, on the Category 6 scoresheet. Fla.R.Crim.P. 3.988(a-i). It is meaningless to urge that "24 points is not enough".

Moreover, the State ignores that victim injury points must always be assessed, whereas a trial judge is free in his or her discretion to ***decline*** to depart from the guideline sentence ***regardless*** of the presence of factors that might have justified a departure.

The latter observation undermines the State's final proposition. The State suggests that even if Mr. Bunney's position is well taken, it could have been sidestepped by the expedient of failing to assess victim injury points.

To the contrary, the judge has no discretion to omit victim injury points. Rule 3.701(d)(7) mandates that "[v]ictim injury ***shall be scored*** for each victim physically injured during a criminal episode or transaction." (emphasis added)

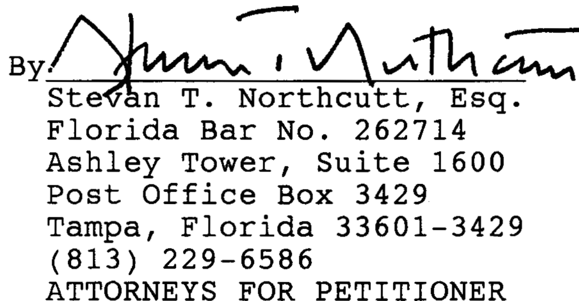
If the State's reasoning were to prevail, a sentencing judge would be free in ***any*** case to simply fail to score some factor (say, an "additional offense at conviction"), then list that factor as a reason for departing from the presumptive sentence. Surely this Court could not approve such a procedure, for to do so would render the sentencing guidelines wholly meaningless.

Conclusion

For the reasons described here and in Mr. Bunney's initial brief, he asks the Court to reverse his convictions and sentences and remand for a new trial. At the least, he urges the Court to answer the certified question in the negative, set aside his sentence for kidnapping, and remand with directions that he be re-sentenced for that offense within the guideline range.

Respectfully submitted,

LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.



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I certify that a true copy of the foregoing was furnished by U.S. Mail to the office of the Attorney General, ATTN: Stephen A. Baker, Assistant Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607 on September 16, 1991.