047

IN THE SUPREME COURT OF OF FLORIDA

CASE NO. 78,290

ORLANDO HERRERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Respondent, the State of Florida, was the appellee and the prosecution, respectively, in the lower courts.

In this brief, the parties will be referred to as they appear before this Honorable Court of appeal, except that Respondent may also be referred to as the State or the prosecution.

The following symbols will be used:

"R" Record on Appeal

Unless otherwise indicated, all emphasis has been supplied by Appellee.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts appearing on pages 2 through 9 of his Initial Brief to the extent that it is accurate and nonargumentative, but sets forth the additional fact for purposes of clarification:

Contrary to what is stated on page 8 of Petitioner's brief, there was no defense objection interposed to the State's peremptory strike of prospective juror Jewell Thomas. (R 393).

SUMMARY OF ARGUMENT

POINT I

Since this issue was properly decided in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), rev. denied, ___ So.2d ___, (Fla. Case No. 77,459 June 27, 1991), relied upon by the District Court in the instant case, this Court should decline to exercise its discretionary jurisdiction to answer the certified question. Should the Court, however, decide to accept jurisdiction of the case, the State submits that the certified question must be answered in the negative for the following reasons.

Florida Standard Jury Instruction 3.04(c)(2), in allocating the burden of proving entrapment to the defendant, does not violate a defendant's constitutional rights since it does not relieve the State of its burden of proving beyond every reasonable doubt all the elements of the offenses charged. In proving an affirmative defense in a criminal case, such as entrapment, the burden of persuasion rests with the defendant, and the State is not obligated to prove the defendant's explanation untrue. Proof of the nonexistence of all affirmative defenses has never been constitutionally required.

POINT II

Since Petitioner failed to contest the factual existence of the reasons for the peremptory challenges of black jurors by

the State and by a co-defendant, the Neil/Slappy issue was not properly preserved for appellate review. Thus, the district court correctly decided this issue.

ARGUMENT

POINT I

INSTRUCTION 3.04(c)(2), FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, AND SECTION 777.201(2), FLORIDA STATUTES (1989), BOTH APPLICABLE TO OFFENSES AFTER 1987, DO NOT UNCONSTITUTIONALLY SHIFT THE BURDEN TO THE DEFENSE TO PROVE ENTRAPMENT.

As he did below, Petitioner argues that the standard jury instruction on entrapment, Fla Std. Jury Instr. (Crim.) 3.04(c)(2), and §777.201, Fla. Stat. (1987), the statute on which the instruction is based, violate the Due Process Clause of the state and federal constitutions by placing on Petitioner the burden of proving entrapment by a preponderance of the evidence. The State disagrees, and points out that this precise issue was recently decided by the Third District in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), rev. denied ___ So.2d ___ (Fla. No. 77,459 June 27, 1991), relied upon by the Fourth District in the instant case, and of which this Court declined to accept discretionary review. See also Krajewski v. State, 16 FLW D692 (Fla. 4th DCA March 13, 1991), review granted, Case No. 77,685 (Fla. 1991), wherein the Fourth District "aligned" itself with the view expressed by the Third District in Gonzalez. Id., 16 FLW D693.

In Gonzalez, supra, contrary to the argument advanced by Petitioner herein, the Third District Court of Appeal specifically held that the standard jury instruction tracking

the language of the entrapment statute does not unconstitutionally relieve the State of the burden of proving beyond reasonable doubt all elements of offenses charged. Citing Patterson v. New York, 432 U.S. 197, 211, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977), the Court pointed out that proof of the nonexistence of all affirmative defenses has never been constitutionally required. Further, the Gonzalez court reiterated this Court's observation in Cruz v. State, 465 So.2d 516, 518 (Fla. 1985) that the defense of entrapment is not of constitutional dimension. Consequently, the Gonzalez court opined that it saw "no reason not to treat entrapment like any other affirmative defense in Florida by placing the burden of proving that defense on the defendant." This reasoning is in accord with State v. Cohen, 568 So.2d 49 (Fla. 1990), wherein this Court held that "[a]n 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. **An affirmative defense does not concern itself with the elements of the offense [which must always be proven by the State] but it concedes them.**" The State submits that the District Court below was correct in following the thoughtful, well-reasoned and legally sound opinion of the Third District in Gonzalez, rev. denied, ___ So.2d ___ (Fla. No. 77,459 June 27, 1991) and, as such, the District Court's decision herein adopting the reasoning in Gonzalez should be approved by this Court.

Section 777.201, Florida Statutes (1987), states as follows:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

The above notwithstanding, because a defendant is entitled to have the jury instructed on his theory of defense, the trial court complied with Petitioner's request for instructions on the affirmative defense of entrapment. During the charge conference, defense counsel asked the trial court to read the standard jury instructions as they appeared prior to the most recent amendment. (R 1311-1319, 1579). In response the trial court stated he would read the entrapment instruction as **currently** promulgated by the Florida Supreme Court. (R 1311-1319). The State submits that the trial court was correct in reading the standard instruction on entrapment as recently amended by this Court. It is settled law that a trial judge

should use the standard jury instructions where they are appropriate. Kelley v. State, 486 So.2d 578 (Fla. 1986); State v. Bryan, 290 So.2d 482 (Fla. 1974). And as recently stated in Hurtado v. State, 546 So.2d 1176-1177 (Fla. 2d DCA 1989), unnecessary departures from the standard jury instructions may undermine the unquestionably beneficial effect of those forms on the Florida trial system as a whole. See also, Smith v. Mogelvang, 432 So.2d 119, 125 (Fla. 2d DCA 1983).

In addition to instructing the jury on reasonable doubt, the trial court in the instant case charged the jury on the issue of entrapment following Standard Jury Instruction 3.04(c)(2) as follows:

> Orlando Herrera has raised the defense of entrapment.
>
> This means that Orlando Herrera claims he had no prior intention to commit the offense and that he committed it only because he was persuaded or caused to commit the offense by law enforcement officers.
>
> Orlando Herrera was entrapped if he was, for the purpose of obtaining evidence of the commission of a crime, induced or encouraged to engage in conduct constituting the crime of trafficking in cocaine over four hundred grams and he engaged in such conduct as the direct result of such inducement or encouragement and the person who induced or encouraged him was a law enforcement officer or a person engaged in cooperating with or acting as an agent of a law enforcement officer and the person who induced or encouraged him employed methods of persuasion or inducement which created a substantial risk that the crime would be committed

by a person other than one who was ready to commit it and Orlando Herrera was not a person who was ready to commit the crime.

It is not entrapment if Orlando Herrera had the predisposition to commit the crime of trafficking in cocaine over four hundred grams.

Orlando Herrera had the predisposition if before any law enforcement officer or person acting for the law enforcement officer persuaded, induced or lured Orlando Herrera, he had a readiness or willingness to commit trafficking in cocaine over four hundred grams if the opportunity presented itself.

It is also not entrapment merely because a law enforcement officer, in a good faith attempt to detect crime, provided Orlando Herrera the opportunity, means and facilities to commit the offense which the defendant Orlando Herrera intended to commit and would have committed otherwise or used tricks, decoys or subterfuge to expose the defendant's criminal acts or was present and pretending to aid or assist in the commission of the offense.

On the issue of entrapment, the defendant Orlando Herrera must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of an entrapment.

If you find from the evidence that Orlando Herrera was entrapped or if the evidence raises a reasonable doubt about his guilt, you should find him not guilty.

If you have no reasonable doubt, you should find him guilty. (R 1496-1498).

Petitioner submits that the burden to prove predisposition must remain on the State where entrapment is

raised in defense to a crime which has intent or state of mind as an element. The Petitioner, however, is mixing apples and oranges. The defendant in raising an affirmative defense never has a burden of proof but rather a burden of persuasion.

Petitioner in the instant case chose as an affirmative defense entrapment. Petitioner therefore had the burden of persuasion. "Burden of proof" actually encompasses two separate burdens. One burden is that of going forward with evidence. If the party who has the burden of producing evidence does not meet that burden, the consequence is an adverse ruling on the matter at issue. The other burden is the burden of persuasion, which becomes crucial only if the parties have sustained their respective burdens of producing evidence and only when all the evidence has been introduced. It becomes significant if the trier of fact is in doubt; if he is, then the matter must be resolved against the party with the burden of persuasion. See McCormick, Evidence § 337 (3d Ed. 1984). Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Cf. Walton v. Arizona, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 511 (1990). "It is well within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion." See Patterson v. New York, 432 U.S. 197, 97 S.Ct. 319, 53 L.Ed.2d 287 (1977). Florida's allocation to the defendant of proving by a preponderance of the evidence that his criminal conduct occurred as a result on an entrapment is consistent with due process given

the law in Florida concerning the burden of proving affirmative defenses.

The decisions of federal courts, even those of the United States Supreme Court, are not controlling or even necessarily persuasive in regard to the subject of entrapment in state courts. Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). Entrapment, whether it is recognized as a defense and, if so, how it is pleaded and the burden of proof in regard thereto, has so far remained exclusively within the rule-making and precedent-establishing authority of the particular jurisdiction that recognizes the defense. See Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). The Bauer court, citing Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978), stated as follows:

> The federal view of the burden of proof on entrapment is not binding on the States because it is not based on any constitutional requirement. State v. Brown, 287 A.2d 400 (Del.Super. 1972). Thus, California requires by statute that the defendant prove entrapment by a preponderance of the evidence. See, People v. Moran, 1 Cal.3d 755, 83 Cal. Rptr. 411, 463 P.2d 763 (1970). Many states require the defendant to prove entrapment by a preponderance of the evidence before requiring the state to disprove entrapment beyond a reasonable doubt. State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975); State v. Amundson, 69 Wis.2d 394 (1972). Others adhere to the typical view that a defendant has the burden of proving all affirmative defenses such as self-defense and entrapment by a preponderance of the evidence without placing any burden at all upon the state. Commonwealth v. Wilkes, 414 Pa.246. 199 A.2d 411 (1964), cert. den.,

> 379 U.S. 939, 85 S.Ct. 344, 13 L.Ed.2d 349 (1969); State v. Rogers, 43 Ohio St.2d 28, 330 N.E.2d 674 (1975). The freedom of the states in this regard is illustrated in Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977) where the Court said:
> **"We thus decline to adopt as a constitutional imperative operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.... Proof of the nonexistence of all affirmative defenses has never been constitutionally required...."** 359 So.2d at 560.

528 So.2d at 6.

As the United States Supreme Court stated in Patterson v. New York, supra:

> It is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'and its decision in this regard is not subject to proscription under the Due Process Clause unless' it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

53 L.Ed.2d at 287.

In determining whether Florida's allocation to the defendant of proving by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment is consistent with due process, this court must look to Florida case law with respect to the burden of proving affirmative defenses.

At common law the burden of proving affirmative defenses, indeed "all ... circumstances of justification, excuse

or alleviation," rested on the defendant. 4 W. Blackstone Commentaries, Commentaries 201; M. Foster, Crown Law 255 (1762). Mullaney v. Wilbur, 421 U.S. 684, 693-694, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. Commonwealth v. York, 50 Mass. 93 (1845), as cited in Patterson v. New York, supra, 53 L.Ed.2d at 287.

In Florida, the burden of persuasion in proving an affirmative defense in a criminal case also rests with the defendant. 23 Fla. Jur. 2d Evidence and Witnesses, § 75 Affirmative Defenses; 29 Am.Jur.2d, Evidence § 156; Priestly v. State, 450 So.2d 289 (Fla. 4th DCA 1984); Evenson v. State, 277 So.2d 587 (Fla. 4th DCA 1973); Koptyra v. State, 172 So.2d 628 (Fla. 2d DCA 1965).

As the Court in Koptyra v. State held:

> While the State always has the burden of proving the guilt of the accused beyond a reasonable doubt and the accused never has the burden of proving his innocence, nevertheless, the burden of adducing evidence on the defense of entrapment is on the accused unless the facts relied on otherwise appear in evidence to such an extent as to raise in the minds of the jury a reasonable doubt of guilt.

172 So.2d at 632.

For an interesting analysis, see Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1986), which held that under the Ohio Revised Code, the burden of proving the elements

of a criminal offense is upon the prosecution, but for an affirmative defense, the burden of proof by a preponderance of the evidence is placed on the accused. Self defense is an affirmative defense under Ohio law and therefore must be proved by the defendant.

In State v. Wheeler, 468 So.2d 978 (Fla. 1985), the State argued that when this Court adopted instruction 3.04(c) (former instruction - not the instruction involved in the instant cause), the Court altered the substantive law regarding entrapment. In rewriting the earlier jury instruction, 2.11(e), this Court deleted a statement of the burden of proof: "The State must prove beyond a reasonable doubt that the defendant was not the victim of entrapment by law enforcement officers, and unless it has done so, you should find the defendant not guilty."[1] The State argued that the deletion altered the burden of proof, so that the defendant bore the burden of establishing entrapment as with other affirmative defenses. The Court in Wheeler held this was not the case, as when it adopted the current standard jury instructions in In Re Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases and the Standard Jury Instructions in Misdemeanor Cases, 431 So.2d 594, 595-99 (Fla. 1981). The Court discussed those areas where substantive changes were made. No mention, according to this Court, was made of the entrapment instruction, indicating that it

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[1] The full text of both versions of the instruction can be found in Rotenberry v. State, 468 So.2d 971 (Fla. 1985).

did not intend to alter the status quo. This, however, is not the situation now. In Florida Statute §777.201 (1987), and the new Standard Jury Instruction 3.04(c), the intent was very much to change the status quo and to place the burden of establishing entrapment on the defendant as with any other affirmative defense. The case law cited prior to the enactment of the new statute clearly is inapplicable.

For the first time, Petitioner complains in part B. of his brief that the standard jury instruction on entrapment is infirm for allegedly failing to require that the jury look at all the evidence in its determination of whether the state proved its case beyond a reasonable doubt. However, similar to the situation in Krajewski, supra, 16 FLW at 694, no such objection was made to the trial court below and Petitioner's proffered instruction neither expressly nor by implication suggested this alleged inadequacy. (R 1311-1319, 1579). Consequently, as in Krajewski, the State asserts that any supposed defect in this regard was waived. See also Fla. R. Crim. P. 3.390(d). Notwithstanding, even if it had not been waived, the jury instructions given by the trial court were "adequate as a whole to convey the requirement that the jury must consider all the evidence in determining whether the state met its burden of proof." Krajewski, supra, 16 FLW at 694.

Indeed, the applicable statute and jury instruction on entrapment adequately and correctly charged the jury on the substantive law in Florida on this issue. The present entrapment

statute and standard jury instruction clearly are not unconstitutional beyond a reasonable doubt. See State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981). Proof of the nonexistence of all affirmative defenses has never been constitutionally required. As no constitutional violation occurred in giving Florida Standard Jury Instruction 3.04(c)(2) to the jury in the instant case, the certified question of the District Court below must be answered in the negative.

POINT II

SINCE PETITIONER FAILED TO CONTEST THE FACTUAL EXISTENCE OF THE REASONS FOR THE PEREMPTORY CHALLENGES OF BLACK JURORS BY THE STATE AND BY A CO-DEFENDANT, THE NEIL/SLAPPY ISSUE WAS NOT PROPERLY PRESERVED FOR REVIEW. (Restated).

A party claiming racial discrimination in the exercise of a peremptory challenge must first object to the challenge, show that the challenged person is a member of a distinct racial group, and make a strong showing that the challenge was motivated by race. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So.2d 565 (Fla. 1986). If the trial court determines the objection not to be frivolous, the burden shifts to the challenging party to present a "clear and reasonably specific racially neutral explanation" for the challenge. Slappy, 522 So.2d at 22. If the challenging party satisfies this requirement by presenting reasons for the challenge which rebut the accusation of racial prejudice, the inquiry ends and jury selection continues. Neil, 457 So.2d at 487. Further, the trial judge necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended. Reed v. State, 560 So.2d 203 (Fla.), cert. denied, ___ U.S. ___, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990). As this Court opined in Reed:

> Only one who is present at trial can discern the nuances of the spoken word and the demeanor of those involved.
>
> * * *
>
> In trying to achieve the delicate balance between eliminating racial prejudice and the right to exercise peremptory challenges, we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a "feel" for what is going on in the jury selection process.

Id. at 206.

In the instant case, Petitioner claims that the trial court improperly permitted both the prosecutor and counsel for co-defendant Dempster to peremptorily strike three black prospective jurors from the jury panel. First of all, Petitioner did not meet his initial burden of demonstrating on the record that there was a strong likelihood that the jurors had been challenged solely because of their race. See Reed, supra, 560 So.2d at 205; Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986). Moreover, the State submits that although the prosecutor below proffered facially race-neutral reasons for the strikes, Petitioner did not contest the "factual existence" of any of these reasons at trial as specifically required by this Court in Floyd v. State, 569 So.2d 1225, 1229 (Fla. 1990). Consequently, Petitioner's present claim on appeal in this regard was not properly preserved for review.

In Floyd, supra, this Court further clarified the parameters of a trial court's responsibility under Neil and

Slappy to determine whether the state has satisfied its initial burden of proffering a race-neutral reason for peremptory challenges. In no uncertain terms, the Court stated that:

> It is the state's obligation to advance a facially race-neutral reason that is supported in the record. If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason advanced. However, when the state asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged. **Once the state has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason.**
>
> * * *
>
> Because defense counsel failed to object to the prosecutor's explanation, the Neil issue was not properly preserved for review. Id. at 1229-1230.

In the instant case, as to prospective juror Lolita Hawkins, the State sought to peremptorily strike her and proffered as its reasons the fact that she was young, single and apparently annoyed with the jury selection process. (R 382-383). Although challenging the sufficiency of the State's proffered reasons, Petitioner's counsel clearly did not contest the factual existence of these reasons. (R 383). Notwithstanding, although her age was admittedly not established, there exists record support that Ms. Hawkins was a young college student and single.

(R 97-99, 244). Further, although the cold record would obviously not show Ms. Hawkins' body language, more importantly it is clear that Petitioner's counsel never contested or denied the fact that Ms. Hawkins appeared annoyed. Nor did Petitioner's trial counsel ever factually contest the assertion that Ms. Hawkins was young and single.

Moreover, even though this Court need not reach this issue due to Petitioner's unpreserved claim, the State submits that one's youth and marital status are valid race-neutral reasons for peremptorily challenging a juror in a drug case. Certainly, young, single persons are generally much more inclined to harbor liberal views concerning the possession and use of drugs. As a result, it is not unreasonable that a prosecutor would wish to peremptorily strike such persons as prospective jurors in a drug trafficking case. As the Fourth District significantly reiterated in Taylor, supra at 1151-52, citing Neil, supra at 487, "reasons given for exclusion need not be equivalent to those for a challenge for cause; the prosecutor need only show that the 'challenges were based on the particular case on trial, the parties or witnesses, **or characteristics of the challenged persons other than race.**'" See also, Thomas v. State, 502 So.2d 994 (Fla. 4th DCA 1987).

Likewise, as to prospective juror Anthony Canady, initially the State, and later co-defendant Dempster's counsel, sought to peremptorily strike him on the basis of his youth and Riviera Beach residence, where the prosecutor asserted there

existed "bad relationships" between the citizenry and the police. (R 388, 396-397). Although Petitioner's counsel joined in a general objection with co-defendant Castillo's counsel (R 396), Petitioner's counsel nonetheless did not, nor could he, contest the factual existence of Canady's youth or residence, both of which had record support. (R 103-104, 247, 386). Indeed, interestingly enough, Petitioner's counsel himself made it a point to insure that the record reflected that Canady was young. (R 386). And, as previously asserted, youth is a valid, facially race-neutral reason for exercising a peremptory challenge.

Finally, as to prospective juror Jewell Thomas, the State advanced the facially race-neutral reasons of Thomas's Reviera Beach residence and occupation, both of which had record support (R 135), as justification for peremptorily striking Thomas as a juror. (R 393). However, Petitioner did not even object to this peremptory challenge by the State, let alone contest the factual existence of the reasons therefor. (R 393). Consequently, as with the other two black prospective jurors, the Neil/Slappy issue was simply not properly preserved for appellate review.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that this Honorable Court **AFFIRM** the decision of the district court in all respects and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by Courier to: ALLEN J. DeWEESE, Assistant Public Defender, Counsel for Petitioner, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, on this 4 day of September, 1991.

Of Counsel