

IN THE SUPREME COURT OF FLORIDA

**FILED**  
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GRW CORPORATION,  
Defendant/Appellant

v.

Case No. 82,268  
Lower Case No. 93-628-CAB

FLORIDA DEPARTMENT OF  
CORRECTIONS,

Plaintiff/Appellee

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**ANSWER BRIEF OF APPELLEE, DEPARTMENT OF CORRECTIONS**

(On Review From the Circuit Court,  
in and for Gadsden County, Florida)

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**PRELIMINARY STATEMENT**

Appellant, GRW Corporation, will be referred to as "GRW" or "Appellant." Appellee, Department of Corrections, will be referred to as the "Department" or "Appellee." U.S. Corrections Corporation will be referred to as "USCC." The Gadsden County Board of County Commissioners will be referred to as "Gadsden County." Specific Appropriation 1934C, Chapter 91-193, Laws of Florida, shall be referred to as the "Proviso." The Request for Proposals issued by Gadsden County pursuant to the Proviso shall be referred to as the "RFP."

References to the Appendix to this Answer Brief shall be indicated by the abbreviation "App." followed by the appropriate appendix number, and where useful the page and paragraph of the referenced document.

**STATEMENT OF THE CASE**

The Department disagrees with Appellant's discussion of the lease-purchase agreement contained in its Statement of the Case. The lease-purchase agreement was complete for purposes of the validation proceeding.

**STATEMENT OF THE FACTS**

The Department disagrees with certain facts included in Appellant's statement of the facts. The protest of Appellant was not filed in accordance with Chapter 120, Florida Statutes, or the rules of the Department. As noted by the trial judge, Appellant did not have a right to a proceeding under that chapter but had to file its protest in circuit court once Gadsden County denied its protest. (App. 1, paragraphs 17-18, 24-25) In addition, contrary to Appellant's assertion, further action was taken by Gadsden County after the August 18, 1992 meeting. This will be addressed below.

Appellant's remaining statement of facts, while generally accurate, do not paint a complete picture of the proceedings before the trial court. Therefore, the Department submits the following statement of facts to supplement Appellant's statement.

Specific Appropriation 1934C, Chapter 91-193, Laws of Florida (the "Proviso") authorized the Department to contract with a private vendor to construct and operate a 600-896 bed private prison. (App. 5, page 1) The Request for Proposals ("RFP") issued by Gadsden County pursuant to the Proviso specifically set the maximum capacity of the private prison at 768 beds. (App. 3, pages 30, 38) Therefore, all vendors had to submit bids to build and operate a prison with a system maximum capacity of 768 beds. Id.

The RFP required vendors to submit bids with price proposals to reflect the cost on a per inmate per day basis (i.e., per diem



basis). (App. 3, pages 189-190) Vendors were required to submit bids with a per diem cost for operation that was at least 10% less than the Department's per diem for operations. (App. 3, pages 26, 144; App. 5, page 1). Vendors were required to submit bids with a per diem cost for prison construction that was at least 3% less than the Department's per diem for prison construction. (App. 3, Addendum No. 1, Items No. 2 and 6, pages 1-2)

Only USCC and GRW submitted bids. (App. 6, unnumbered first page) The Department's per diem for operations was \$46.96 and for construction was \$7.55. (App. 6, Exhibit Two, first page) Therefore, vendors had to submit bids with operation costs of \$42.26 or less (\$46.96 less 10%), and construction costs of \$7.32 or less (\$7.55 less 3%). Id. USCC submitted a bid with per diem prices of \$41.51 for operations and \$7.17 for construction. GRW submitted a bid with per diem prices of \$41.30 for operations and \$8.18 for construction. (Id.; App. 7 and 8)

Therefore, GRW's bid was deemed non-responsive since its per diem for construction exceeded the Department's per diem. The team that reviewed and evaluated the proposals stated:

it is the unanimous opinion of the Team that GRW submitted a facility cost that exceeded the cost prepared by the Department of Corrections and consequently is in violation of the proviso language for cost of construction and is thereby disqualified. (App. 6, Final Recommendation, page 1)

In addition, the USCC proposal received the overall highest score in the evaluation process. (App 6, Report to Gadsden County, Exhibit Two)

On April 21, 1992 the team reviewing and evaluating the bids made a unanimous recommendation that USCC be awarded the contracts pursuant to the Proviso and RFP. (App. 1, paragraph 13; App. 6, Final Recommendation). This recommendation was approved by Gadsden County on April 21, 1992. (App. 1, paragraph 14)

A written notice of protest was filed with Gadsden County by GRW on April 24, 1992, and its bid protest was filed with Gadsden County on May 4, 1992. (App. 1, paragraph 15) On May 5, 1992, the bid protest was discussed by Gadsden County at a regularly scheduled meeting of the Board which was open to the public; the protest was determined to be without merit; and the county attorney was directed by the Board to proceed with defense of the protest. (Id. at paragraph 16) By letter dated June 16, 1992, the county attorney notified GRW of the denial of the protest and noted that any appeal was to the circuit court in Gadsden County within 30 days of the denial. (Id. at paragraph 17)

The trial court found that GRW was required to file an action in Second Circuit Court in and for Gadsden County, Florida no later than July 16, 1992, as required by Section 59.081, Florida Statutes and Rule 9.100(c), Fl. R. App Pr., in order to preserve its protest of the award of the bid to USCC. (Id. at paragraph 18)

On August 4, 1992, Gadsden County voted to take up confirmation of its position on the protest and voted to notify GRW by letter that the denial of the protest would again be considered on August 18, 1992. (Id. at paragraph 19) By letter dated August 5, 1992, the county attorney advised GRW, by certified mail,

receipt returned, of the forthcoming August 18, 1992, meeting to confirm its previously denial of the GRW protest and repeating the notice that any GRW appeal was to the circuit court. (Id. at 20)

On August 18, 1992, GRW filed an amended protest and on that same date Gadsden County, unaware of the amended protest, voted unanimously to deny the protest of GRW and to reaffirm the award of the contract to USCC. (Id. at paragraph 21) Of course, the time for filing a protest in circuit court had passed by the time the amended protest was filed. Therefore, it was an invalid and untimely protest.

GRW, although on notice of the meeting, did not attend. (Id.) On August 20, 1992, the county attorney wrote GRW again and advised of the unanimous vote to deny the protest and that "the county shall take no further action regarding the GRW protest or proposal". (Id.)

Consequently, the protest of GRW was denied twice by Gadsden County (May 5, 1992 and August 18, 1992 meetings). GRW was notified three times of the denial of protest and need to file an action in circuit court in order to maintain its protest (June 16, 1992; August 5, 1992; and August 20, 1992). Moreover, in an August 25, 1992 letter GRW stated that it understood its protest was denied and that it would pursue its civil remedies. (App. 9)

Nevertheless, GRW never initiated any action in the circuit court in Gadsden County regarding its protest. (App. 1, paragraph 22; App. 10) The trial judge found that GRW was given more than ample notice of its right to challenge the award to USCC in circuit

court, and that the time for filing a petition in circuit court has long expired. (App. 1, paragraph 25)

## SUMMARY OF ARGUMENT

Chapter 75 controls the scope and function of validation proceedings. One of the major purposes of a validation proceeding is to determine if the governmental body is authorized to incur the obligation or indebtedness in question.

Both Chapter 75 and the long standing case law in Florida authorized the resolution of the issues raised by the Department in its Complaint for Validation. These were issues necessary to resolve the authority of the Department to incur the indebtedness evidenced by the lease-purchase agreement.

The trial judge carefully considered the evidence introduced at the validation hearing and properly found that the Department had the authority to incur the indebtedness in question. The trial judge considered those issues necessary to make this determination. Therefore, the Final Judgement of Validation should be confirmed.

The indebtedness is created by the lease-purchase agreement. This agreement was awarded pursuant to a competitive bid. If the award of the bid is not proper then the authority to incur the indebtedness is in question. Therefore, GRW's right to challenge the award is a proper issue for the validation proceeding.

Moreover, as the trial judge found, GRW voluntarily raised the issue of its right to protest the award in the validation proceeding. Therefore, they cannot now argue it is a collateral issue.

Furthermore, GRW's bid was non-responsive. Therefore, even if they had a right to protest the bid award, they could not achieve

any success. USCC was the sole responsive bidder and had to be awarded the lease-purchase agreement.

The fact that a sole purpose subsidiary of USCC will actually execute the lease-purchase agreement for USCC does not invalidate the agreement or the Department's authority to incur the obligation. A wholly owned subsidiary of USCC is one and the same as USCC for purposes of the Proviso. It is controlled by USCC.

In addition, the subsidiary is used as part of the financing arrangement in order to meet the concerns of investors. Therefore, it satisfies the intent of the Proviso under the generally accepted rules of statutory construction.

Finally, the lease-purchase agreement complies with the Proviso. Many of the conditions in the Proviso do not apply to the lease-purchase agreement which is merely a financing vehicle to construct the prison. The important conditions need to be put in the management agreement which controls how the private vendor will operate the prison and care for the inmates. Therefore, Appellant's claim that the lease-purchase agreement lacks many important provision is erroneous. Moreover, many of these issues were not raised at the validation hearing and cannot be raised for the first time on appeal.

The lease-purchase agreement is complete and sufficient for purposes of the validation proceeding. The agreement provides the information needed by the trial court to determine if the Department is authorized to incur the obligation evidenced by the agreement.

## ARGUMENT I

### THE JUDGEMENT COMPLIED WITH THE REQUIREMENTS OF FLORIDA LAW

The Final Judgement of Validation (the "Judgement") issued by the circuit court did not exceed the scope of review for a proceeding under Chapter 75. Moreover, the Judgement properly ruled on the matters at issue in a validation proceeding. Therefore, the Judgement should be affirmed.

Section 75.01, Florida Statutes, which pertains to jurisdiction for a validation proceeding under Chapter 75, specifically states:

Circuit courts have jurisdiction to determine the validation of bonds and certificates of indebtedness and all matters connected therewith. (emphasis supplied)

Section 75.02, Florida Statutes, permits state agencies to file a complaint in circuit court in order to:

determine its authority to incur bonded debt or issue certificates of debt and the legality of all proceedings in connection therewith, including assessment of taxes levied or to be levied, the lien thereof and proceedings or other remedies for their collection. (emphasis supplied)

Section 75.07, Florida Statutes, states:

At the hearing the court shall determine all questions of law and fact and make such orders as will enable it to properly try and determine the action and render a final judgement with the least possible delay. (emphasis supplied)

The plain meaning of these provisions demonstrate the authority of the circuit court to determine the issues it deems necessary "to properly try and determine the action and render a final judgement with the least possible delay." Fla. Stat.,

Section 75.07. This is exactly what the circuit court did in this case.

Moreover, Chapter 75 must be viewed with its intended purpose in mind. Government financing of prisons, roads, buildings and other capital projects are essential in order for our state to provide the necessary services required by an orderly and civilized society. However, government financing is contingent upon acceptance by the financial marketplace of each separate and distinct capital project. Without investors, our government would not be able to finance its capital infrastructure.

As noted by Justice Adkins in his dissent in McCoy Restaurants, Inc. v. City of Orlando:

The main purpose of a validation proceeding is to create in the mind of the bond buyer a sense of security, in that there could be no further attack upon the validity of the bond issue. 392 So. 2d 252, 254 (Fla. 1980) See also, State v. Citrus County, 157 So. 4, 5 (Fla. 1934); Fahs v. Kilgore, 187 So. 170, 172 (Fla. 1939).

In State v. Citrus County, the Florida Supreme Court specifically held, as far back as 1934, that the purpose of a validation proceeding was to:

judicially determine the legal sufficiency of the proceedings constituting the initiatory steps for the issuance and sale of the particular obligations sought therein to be validated. The questions of law and fact to be decided in such statutory bond validation proceedings extend to whether or not the proposed warrants, certificates or bonds, and the obligations and contractual relationship attempted to be created thereby, directly or indirectly, principally or collaterally, are within the authority of law, so that whatever is decided by the court with reference thereto shall never again be subject to be called in question in any court in this state. 157 So. 4, 5 (Fla. 1934) (citations omitted)



Furthermore, the Florida Supreme Court has held on many occasions that the purpose of validation proceedings are to judicially determine:

whether the public body had authority to incur the obligation, whether the purpose of the obligation is legal, and whether the proceedings authorizing the obligation were proper. State v. City of Daytona Beach, 431 So. 2d 981, 983 (Fla. 1983); State v. City of Sunrise, 354 So. 2d 1206, 1209-1210 (Fla. 1978); State v. City of Tampa, 95 So. 2d 409, 410 (Fla. 1957).

Thus, the issues decided by the circuit court in the Judgement are properly within the scope of review under Chapter 75. In fact, the specific ruling of the circuit court in the Judgement follows the language of the Florida Supreme Court in City of Daytona Beach:

ORDERED AND ADJUDGED that the Department does have the authority to enter into the lease-purchase agreement attached to the Complaint as Exhibit "D"; the purpose of the lease-purchase agreement is a legal purpose; the proceedings authorizing the Department to enter into the lease purchase agreement are proper; and the vendor selection proceedings were valid. (Appendix 1, page 8)

As held by this Court in City of Tampa, the purpose of a validation proceeding "is to determine the authority of the municipality or other entity to issue the bonds or incur the proposed debt..." 95 So. 2d at 410.

The circuit court in this case did nothing more than inquire into the Department's ability to incur the indebtedness evidenced by the lease-purchase agreement. All the matters ruled in the Judgement relate to that matter. This ruling is necessary to provide the investors with the necessary security that there will be no further attacks on the validity of the Department's indebtedness.

It is also important to note that no other party to the validation proceeding, and no citizen of Gadsden County, questioned the Department's authority to incur the indebtedness evidenced by the lease-purchase agreement. (App. 1, pages 1-2; App. 4) The state attorney, who was made a defendant in this action and appeared at the validation proceeding, had no objection to the circuit court's ruling in this case. (App. 4, pages 12 and 91) Moreover, the state attorney, by statute, appeared at the validation proceeding in order to represent the taxpayers of Gadsden County and the state of Florida. Florida Statutes, Section 75.05. The only party who objected to the proceeding and the circuit court's ruling is GRW, the losing bidder in the award of the prison contracts.

## **ARGUMENT II**

### **THE JUDGEMENT DID NOT RULE ON MATTERS COLLATERAL TO THE VALIDATION PROCEEDING**

In its endeavor to find some argument that might prevent the Department from contracting with USCC, GRW contends that the issue of its right to protest the award of the prison bid to USCC is collateral to the validation proceeding. Therefore, it should not have been ruled on by the circuit court.

However, the issue of GRW's right to protest goes directly to whether the Department has the authority to execute the lease-purchase agreement; whether the purpose of the lease-purchase agreement is legal; and whether the proceedings (i.e., bid process) authorizing the obligation were proper. This issue goes

directly to whether the Department may incur the indebtedness which is evidenced by the lease-purchase agreement.

If GRW has a right to challenge the award to USCC then it questions the Department's ability to enter into the lease-purchase agreement. The Proviso states that the Department will contract with the successful vendor. Therefore, if USCC or its wholly owned subsidiary is not entitled to be the lessor under the lease-purchase agreement, then the Department is not authorized to incur the obligation evidenced by the agreement.

On the other hand, if GRW (the only other bidder on the prison) has waived its right to challenge the award to USCC then the circuit court can clearly rule that the obligation is legal and the Department is authorized to incur it.

As noted previously, the purpose of the validation proceeding is to resolve all issues relating to the validity of the obligation, so they cannot be raised at a later date. See, State v. Citrus County, supra, at 5; McCoy Restaurants, supra, at 254. In addition, in State v. City of Miami, this Court stated:

we think there can be no escape from the conclusion that the purpose of a decree validating and confirming bonds thereunder is to put in repose any question of law or fact that may be subsequently raised affecting the validity of such bonds. 103 So. 2d 185, 189 (Fla. 1958) (citations omitted)

Consequently, the issue of GRW's right to protest the award to USCC is not collateral. It was proper and appropriate for the trial court to rule on this matter so it could not be raised at a later date and affect the validity of the Department's indebtedness.

A similar and recent case on this same issue is People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373 (Fla. 1991). In People Against, the appellants ("PATRM") challenged a bond validation proceeding in circuit court by alleging, among other matters, that the bond referendum authorizing the sales tax to finance the bonds was flawed. The Supreme Court of Florida held that a Chapter 75 proceeding was the proper vehicle to resolve the validity of the bond referendum. 583 So. 2d at 1377.

In People Against, this Court found that Section 75.02, Florida Statutes, specifically permitted such review in a validation proceeding. The Court relied on the following language in Section 75.02: "and the legality of all proceedings in connection therewith, including assessment of taxes levied or to be levied." (emphasis in original) Id.

The Court found that a bond referendum was "inseparable from the validity of the tax assessment itself." Id. The Court held as such even though there was a separate procedure to challenge the referendum under Section 100.321, Florida Statutes. Id.

The rationale of Peoples Against is equally applicable to the instant case. If the referendum is invalid then the bonds cannot be validated. Therefore, the legality of the referendum falls within the "legality of all proceedings in connection therewith" language of Section 75.02, Florida Statutes.

In the instant case, if GRW is entitled to the award then the obligation between USCC and the Department is invalid and

unauthorized. Therefore, the legality of the bid protest proceedings by GRW are directly an issue in this case.

Moreover, in Peoples Against, PATRM filed actions against various parties in circuit court which were ultimately dismissed by the court or withdrawn by PATRM. 583 So. 2d at 1374. Leon County then filed a bond validation action and named PATRM as a defendant. Id. The Florida Supreme Court not only affirmed the right of Leon County to name PATRM as a defendant, but added:

we see nothing improper with the decision to join PATRM as a defendant. Chapter 75, Florida Statutes, clearly contemplates that a bond validation proceeding is a proper vehicle for quieting all legal and factual issues that may cast doubt on the legal validity of a bond issue.... Nothing in the statutes forbids the county from joining as a defendant any corporation such as PATRM that publicly announces its belief that a bond referendum was unlawfully conducted. 583 So. 2d 1374-1375, f.n. 2. (emphasis in original)

In the instant case the Department joined GRW as a defendant. (App. 2) As in Peoples Against, GRW was publicly announcing its opposition to the contracts with USCC and the award to USCC. Furthermore, GRW was attempting to frighten off any investors who might finance the prison construction. In an August 26, 1992 facsimile message to bond counsel on the prison financing, the President of GRW wrote:

Enclosed is documents relating to the Gadsden County Correctional Institution Protest. Please disclose these documents to all potential Bond Investors and other financial participants. Thank you. (App. 13)

In Peoples Against at least PATRM filed some actions trying to invalidate the referendum. In this case, GRW continued to refuse to file a protest in circuit court even after it was notified three

times by Gadsden County that its protest had been rejected and circuit court was its only remedy. (App. 1, paragraphs 17, 20 and 21) In fact, GRW admitted in an August 25, 1992 letter that their remedy was in circuit court but still refused to file any circuit court action. (Id. at paragraph 22; App. 9 and 10)

Considering GRW's constant complaining of the bid award, and its attempts to intimidate investors, it was appropriate for the Department to join GRW as a defendant to resolve the very issues GRW was raising. This is exactly what Leon County did in Peoples Against and it is specifically authorized by Chapter 75 and the Florida case law cited above.

Therefore, the issue of whether GRW was time-barred to protest the award to USCC is not collateral. Furthermore, even if it were deemed to be collateral, GRW voluntarily made it an issue in the validation proceeding when it filed its Motion to Abate with the circuit court. In the Motion to Abate, GRW clearly alleges that the validation proceeding is untimely because it has not exhausted its right to challenge the award of the bid to USCC. (App. 11) Therefore, its has affirmatively made its right to protest an issue in this case. (App. 1 at paragraph 29)

In addition, even if GRW were entitled to a bid protest hearing, such hearing would be with the circuit court of Gadsden County. The award of the contracts to USCC were made by Gadsden County. Thus, GRW's remedy to contest the award was to file a petition in the circuit court in the county where the decision was made within thirty days of the adverse decision. See Rule

9.100(c), Florida Rules of Appellate Procedure; City of Fort Pierce v. Dickerson, 588 So. 2d 1080 (Fla. 4th DCA 1991); Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982); Baxter's Asphalt & Concrete, Inc. v. Liberty County, 406 So. 2d 461 (Fla. 1st DCA 1981); Robinson Electrical Co., Inc., v. Dade County, 417 So. 2d 1032 (Fla. 3d DCA 1982). (App. 1, paragraph 24)

Consequently, GRW's petition had to be filed in circuit court by July 16, 1992 in order to preserve its protest of the award to USCC. (App. 1, paragraph 18) As noted previously, no petition had been filed by GRW almost one year after the July 16, 1992 date. (App. 1 at paragraph 22; App. 10)

Furthermore, since the validation proceeding in this case was brought before the circuit court in Gadsden County, the issue of GRW's right to protest was raised before the proper forum. In other words, even if the Florida Supreme Court ruled that GRW was entitled to a ruling on its right to file a bid protest outside the validation hearing, the circuit court in Gadsden County has already ruled on its timeliness. In addition, since GRW raised the issue of its protest rights in its Motion to Abate it cannot not argue that it was unprepared to address that issue at the validation hearing.

The trial judge found that:

GRW was duly given ample written notice of its right to file a petition in Circuit Court as noted above but failed to do so and the time for filing any petition in Circuit Court has long expired. See Kowch v. Board of County Commissioners of Seminole County, 467 So.2d 340 (Fla. 5th DCA 1985). The thirty day time frame is jurisdictional. City of Melbourne v. Hess Realty

Company, 575 So.2d 774 (Fla. 5th DCA 1991). (App. 1, paragraph 25)

GRW is now barred from renewing any protest or challenge of the award at this late date. Rule 9.100(c), Florida Rules of Appellate Procedure; City of Fort Pierce v. Dickerson, 588 So. 2d 1080 (Fla. 4th DCA 1991). (App. 1, paragraph 23)

Having failed to pursue its legal remedy, GRW has no standing to challenge the vendor selection procedure of Gadsden County. Even if GRW had standing it would be estopped, having failed to pursue its remedy in Circuit Court. (App. 1, paragraph 26)

Further GRW is now estopped to further complain of that process because of multiple notices afforded it by Gadsden County a year ago. (App. 1, paragraph 2)

The issue of GRW's lack of standing to challenge the vendor selection process is not collateral to this proceeding. The scope of inquiry in this validation proceeding includes the authority of the Department to enter into and execute the lease-purchase agreement as well as the propriety of the procedure that has been followed. (citing City of Daytona Beach, supra) (App. 1, paragraph 27)

If USCC is not entitled to be the successful vendor pursuant to the selection process then this would directly impact on the Department's authority to enter into this lease-purchase agreement. In addition, the vendor selection process deals directly with "whether the proceedings authorizing the obligation were proper." Therefore, GRW's standing to challenge the selection process is not a collateral issue in this proceeding. (App. 1, paragraph 28)

Moreover, even if the issue of GRW's standing to challenge the selection process were collateral, GRW has waived the same in filing its motion to abate herein asserting that the agency lacked authority to enter into the lease-purchase agreement due to GRW's claims relating to the selection process. (App. 1, paragraph 29)

Additionally, even if this Court ruled that GRW still had a right to a bid protest hearing, and was not time barred, GRW could never win that hearing since its bid was non-responsive. In fact, this determination was made by the evaluation team reviewing the



bids and recommending an award to Gadsden County. (App. 6, Final Recommendation)

The Request for Proposals ("RFP") clearly stated that each vendor must submit bids with construction costs at least 3% below the Department's per diem for construction costs. Addendum No. 1 to Request for Proposals (dated October 20, 1991), Item No. 2 states:

and price proposals for facility and construction expenses with a per diem rate at least three percent less than the Department of Corrections' rate for per diem construction and facility expenses. (App. 3, Addendum No. 1, page 1)

This warning is reiterated in Addendum No. 1, Item No. 6 (Id. at page 2).

GRW's bid price of construction was \$8.18 (App. 7) and the Department's per diem for construction was \$7.55 (App. 6, Report to Gadsden County, Exhibit Two, first page). Not only did GRW's construction per diem exceed the 3% requirement of the RFP, but it actually exceeded the Department's per diem for construction.

Therefore, GRW's proposal violated one of the major requirements of the Proviso. The Proviso stated:

In order to demonstrate "substantial savings" to the state, as defined in s. 944.105(1)(a) and s. 944.714, bidders must submit price proposals for operational expenses with a per diem rate at least ten percent less than the Department of Corrections' rate for per diem operations...."Substantial savings" to the state on construction costs shall be defined as described in s. 944.105(1)(a) and s. 944.714. (App. 5, pages 1-2)

As noted in the Proviso, Florida Statutes, Sections 944.105(1)(a) and 944.714 also require a private vendor to propose construction costs that provide a substantial savings to the Department. These

provisions are part of the statutes controlling the Department's privatization of prisons and its contractual relationship with prison vendors.

Since GRW's construction costs exceeded the Department's per diem for construction there is no possible argument that can be offered to show that GRW provides substantial savings to the state for construction costs as required by the Proviso and Florida Statutes. Moreover, the Proviso makes clear that the winning bidder is to be awarded the contracts for construction and operation of the prison:

The Department of Corrections shall enter into a lease purchase agreement and a separate management agreement, as provided herein, with the private vendor selected by the procurement and agreed to by the Department of Corrections. (App. 5, page 1)

Therefore, GRW's exceeding the Department's per diem for construction renders its bid non-responsive. In fact, this was the determination of the team evaluating the bids. (App. 6, Final Recommendation, page 1) Consequently, there is no possible way that GRW could ever be awarded the contracts under the Proviso and USCC must be the successful bidder.

The only success that GRW can hope to achieve with all its litigation is to delay execution of the lease-purchase agreement. If GRW can delay execution of the lease-purchase agreement long enough then interest rates charged to finance the prison construction will eventually rise. If the interest rates rise high enough USCC will not be able to build the prison at the per diem

rate included in its proposal. This would effectively kill any hope of achieving the results of the Proviso.

GRW cites cases in its brief which it believes demonstrates that the issue of its right to protest is collateral. McCoy Restaurants, supra; State v. Sunrise Lakes Phase II Special Recreation District, 383 So. 2d 631 (Fla. 1980); City of Miami, supra; Warner Cable Communications, Inc. v. City of Niceville, 520 So. 2d 245 (Fla. 1988); Zedeck v. Indian Trace Community Development District, 428 So. 2d 647 (Fla. 1983); Haines City v. Certain Lands, etc., 178 So. 143 (Fla. 1937); Atlantic Coast Line R. Co. v. City of Lakeland, 177 So. 206 (Fla. 1937).

However, these cases deal with validation of bonds. In the instant case the validation involves a lease-purchase agreement. The lease-purchase agreement is a financing arrangement which includes the indebtedness in its terms. This is much different from a bond validation proceeding, where the indebtedness in question is evidenced by the bonds.

In a lease-purchase arrangement it is crucial that the lease agreement be in accord with its authorizing act or resolution. In this case the Proviso is the authorizing instrument. The Proviso states that the lease-purchase agreement will be with the successful bidder. Therefore, GRW's protest claims go directly to whether the lease-purchase agreement is authorized since the agreement is not with GRW. Bond validation cases, on the other hand, do not generally involve issues of who the contractor should be.

The instant case is much different from cases like McCoy or Sunrise Lakes Phase II, where the leases in question were not the instruments creating the obligations being validated. Therefore, the leases in these cases were deemed to be collateral. In these cases, and all other cases cited by Appellant, the bonds or other securities were the instruments creating the obligations and being validated.

As noted in McCoy, supra, collateral issues are those "issues not going directly to the power to issue the securities..." 392 So. 2d at 254. See also, City of Miami, supra, at 188. If GRW is the successful bidder then the Department cannot execute the lease-purchase agreement in question. Therefore, the protest issue goes directly to the Department's power to execute the agreement and incur the indebtedness therein. This cannot be a collateral issue even under the cases cited by Appellant.

A case more directly on point with the instant case is Peoples Against, supra, which has been discussed above. Moreover, it is interesting to note that in all but one of the cases cited by Appellant, the bonds were validated by the trial court and affirmed by the Florida Supreme Court.

Finally, even if the issue of GRW's right to protest is deemed collateral this only means it does not affect the Department's ability to incur the indebtedness. McCoy, supra, at 254; City of Miami, supra, at 188. This Court should still be able to affirm the Department's authority to incur the obligation in question. See, McCoy, supra; Sunrise Lakes Phase II, supra; Zedeck, supra.

(collateral issues did not prohibit validation in these cases)  
Therefore, at the very least, this Court should confirm the  
Judgement absent its rulings on the protest issue.

### ARGUMENT III

#### THE LESSOR IN THE LEASE-PURCHASE AGREEMENT MET THE TERMS OF THE AUTHORIZING PROVISIO

Appellant also argues that the lease-purchase agreement is  
invalid because the lessor thereunder is not USCC but a wholly  
owned subsidiary of USCC. This argument was raised by GRW at the  
validation hearing and properly rejected by the circuit court.

The trial judge had the opportunity to review all the evidence  
in the case, including the testimony of the President of USCC, and  
found that:

The Department may enter into said lease-purchase  
agreement with U.S. Corrections Leasing Company, Inc., a  
yet to be formed wholly owned subsidiary of USCC. Upon  
execution of the lease-purchase agreement, such agreement  
will be a binding and valid obligation of the Department,  
enforceable in accordance with its terms. (App.1 at  
paragraph 4)

As a wholly owned subsidiary of USCC, the lessor will be  
controlled by USCC. Therefore, as the trial judge found, USCC and  
the lessor are one and the same for purposes of the Proviso.

The Proviso must be construed in order to achieve its stated  
purpose. Weiss v. Leonardy, 36 So. 2d 184 (Fla. 1948); Van Pelt v.  
Hilliard, 78 So. 693 (Fla. 1918). The clear intent and purpose of  
the Proviso is to utilize the lease-purchase agreement as the  
financing mechanism for constructing the prison. This is further  
indicated by the Proviso's statement that the Department shall

include "financing" costs in determining the "cost of construction." The Proviso also states:

Construction financing costs shall include interest, which shall be equal to the rate that the state would pay for all tax-exempt full faith and credit bonds issued on the date of issuance of the Request for Proposals.

Therefore, the Proviso clearly demonstrates the legislative intent and understanding that the tax-exempt market would be utilized, through the lease-purchase agreement, to finance the prison construction. As such, the Proviso must also be construed to allow the use of a wholly owned sole purpose corporation in order to attract investors to the financing arrangement.

Furthermore, the Proviso should not be construed to reach an unreasonable, absurd or ridiculous consequence. Williams v. State, 492 So. 2d 1051, 1054 (Fla. 1986); McLellan v. State Farm Mutual Automobile Insurance Company, 366 So. 2d 811, 812 (Fla. 4th DCA 1979). As this Court noted in Foley v. State:

If the language of a particular part of a statute imports an intent which leads only to absurdity or to an evil result the strict letter of the law might be required to yield to the obvious intent of the legislature as determined by use of the foregoing formula of statutory construction. 50 So. 2d 179, 184 (Fla. 1951).

The Proviso understood that certain actions would have to be taken to complete the financing arrangement. A sole purpose lessor is utilized by the financial marketplace in order to protect the financed property from legal actions against USCC. In other words, the investors want the lessor to have one specific purpose, and that is to operate as lessor under the lease-purchase agreement. Thus, the sole purpose of the lessor is to enforce the rights of

the investors to receive the payments due under the lease-purchase agreement. These payments are then used to repay investors the principal outstanding and accrued interest. Since the lessor has no other purpose it cannot be sued by other creditors who might try to attach the lease payments for any other obligations. This would be the risk if USCC were the lessor. A creditor in another state might try to attach the lease payments to satisfy a judgement unrelated to the activities of the lease-purchase agreement. Instead, a wholly owned subsidiary is established which is still controlled by USCC, but shielded from its liabilities.

The Florida Supreme Court has previously addressed lease-purchase agreements in State v. Brevard County, 539 So. 2d 461 (Fla. 1989), and State v. School Board of Sarasota County, 561 So. 2d 549 (Fla. 1990). These cases clearly indicate the purpose and use of lease-purchase agreements, and how they are created as financing arrangements. *Id.* In fact, in Brevard, the Court specifically discussed the use of a sole purpose corporation to limit liability. 539 So. 2d at 463.

Therefore, use of a wholly owned subsidiary of USCC to act as lessor under the lease-purchase agreement does not violate the Proviso. To accept Appellant's arguments would be contrary to the long-standing rules of statutory construction cited above.

Moreover, the lease-purchase agreement is subject to annual appropriations by the legislature. (App. 12, pages 2, 9 and 12) Thus, if there really is a question about whether USCC has to be the lessor under the lease-purchase agreement that is best left to

the legislature to decide. If they disapprove of anything the Department has done in the lease-purchase agreement they can non-appropriate funds under the agreement without any further liability to the state. The ability of the governmental entity to terminate the lease-purchase agreement in any year by non-appropriation is discussed at length in Brevard, supra, and School Board of Sarasota County, supra.

Finally, since the lessor will be created as a wholly owned subsidiary of USCC it is not essential that it be created at this time. In fact, it is common in these types of financing arrangements that the sole purpose lessor be established just before the lease-purchase agreement is executed.

Appellant's reliance on State v. Manatee County Port Authority, 171 So. 2d 109 (Fla. 1965) is in error. This case has nothing to do with substituting a wholly owned subsidiary as lessor in a lease-purchase agreement.

Manatee County merely holds that the facilities to be constructed with bond funds must not deviate from the facilities described in the authorizing instrument. Appellant introduced no evidence questioning whether the facility to be constructed by USCC would be the 768 bed prison as authorized by the Proviso and the RFP. A review of the USCC proposal in the record shows ample plans and drawings to demonstrate that the funds raised by the lease-purchase agreement will be for the prison authorized in the Proviso. Moreover, this was one of the findings of the trial court which had the opportunity to review all the evidence in the record.



(App. 1, paragraph 6, and ruling of trial court on page 8; App. 4, pages 25, 92)

#### ARGUMENT IV

##### THE TERMS OF THE LEASE-PURCHASE AGREEMENT ARE IN COMPLIANCE WITH THE PROVISIO

As noted above the Proviso must be interpreted with the intent of the legislature in mind and in a manner that will give it a reasonable construction. Appellant's attempt to interpret the Proviso in a manner that will invalidate the lease-purchase agreement conflicts with the generally accepted rules of statutory construction. Moreover, Appellant's contention of what terms are required to be included in the lease-purchase agreement conflicts with the plain language of the Proviso itself.

As noted in School Board of Sarasota County, these lease-purchase arrangements involve a number of contracts in addition to the lease-purchase agreement. 561 So. 2d at 550-551. The Proviso was not meant to require all of its terms to be in the lease-purchase agreement. Such an interpretation would be patently unreasonable. In fact, the Proviso specifically stated that there would be a separate management agreement. Therefore, terms which belong in the management agreement need not be in the lease-purchase agreement.

Additionally, all of the arguments raised by Appellant in "Point II on Appeal," other than the issue of liability insurance contained in paragraph 8 of the Initial Brief, were not raised by Appellant at the trial level. These are new issues which cannot be

raised on appeal for the first time. Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970); Fleischer v. Fleischer, 586 So. 2d 1253 (Fla. 4th DCA 1991); Graves v. State, 548 So. 2d 801 (Fla. 1st DCA 1989).

Nevertheless, the Department will address these matters in its Answer Brief.

1. Identification of type of facility. As the RFP indicates vendors were required to submit bids to provide the facility authorized by the proviso. The proposal of USCC in response to the RFP legally bound the vendor to provide the facility in the manner required by the Proviso and the RFP. (App. 3, pages 30-47) The facility is further defined in the proposal of USCC. As noted from the court record the proposal of USCC is three large volumes in length. (Appendix 4, pages 44, 61, 63) (Since the proposal of USCC is so voluminous it has not been included in the Appendix. However, it is in the record and amply discusses the proposed facility with detailed drawings.) Moreover, the Department will be executing a Design Build Agreement with USCC whereby it will agree to provide the facility authorized by the Proviso in the manner required by the RFP and as proposed by USCC in its bid. The identification in Section 1.1 of the lease-purchase agreement and in Exhibit A are a mere formality which is usually added right before contract execution.

2. No identification of occupants of the facility. The type and class of inmates that will be housed in the prison are addressed in the RFP. (App. 3, pages 49-50) No identification is required in the lease-purchase agreement. The provision of the RFP

dealing with type and classification of inmates will be a part of the management agreement. The Proviso specifically authorized a management agreement which will control the operation of the prison by USCC. It would be unreasonable to put these provisions in the lease-purchase agreement or interpret the Proviso to require this.

3. No specification of maximum capacity. Capacity requirements are part of the management agreement. The lease-purchase agreement is merely an arrangement used to finance the cost of construction of the prison. The RFP stated that the Department will pay a set amortization rate monthly for twenty years. (App. 3, pages 113-114, paragraphs (B)(1) and (B)(3)(a)) Therefore, capacity does not affect the lease-purchase agreement or the obligations due thereunder.

4. Model rehabilitative facility with innovative programs. This item specifically deals with how the prison will operate and is part of the management agreement. The Proviso clearly anticipated this by requiring a separate management agreement. The RFP clearly indicated that these items would be part of the management agreement. The portions of the RFP pertaining to education and substance abuse are contained in Section V, "Administration and Operation of the Institution." (App. 3, pages 72-77)

5. No separate management agreement validated/no provision for management agreement in lease-purchase agreement. Since the management agreement is not part of the financing arrangement it does not need to be validated. Sunrise Lakes Phase II, supra, at

633. Furthermore, the Proviso required a separate management agreement. Therefore, Appellant's argument that the lease-purchase agreement is invalid because it does not provide for the management agreement is absurd and is erroneous.

6. Compliance with Department rules, procedures, etc. As mentioned previously, the lease-purchase agreement is a financing arrangement. The Proviso's language pertaining to compliance with all Department rules, procedures, etc. pertain to the management agreement. The purpose of this language is to require the vendor not to operate the prison in a manner that will violate any court ordered settlement that the Department is a party to or negatively impact the care and custody of the inmates in a manner that would lead to a class action lawsuit.

7. Indemnification of the Department by USCC will be through the Design Build Agreement. The lease-purchase agreement is written in the manner that is necessary to attract investors.

8. Liability insurance. The reference in the Proviso to liability insurance is specifically applicable to the management agreement. The Proviso itself refers to Section 944.713, Florida Statutes, for a further explanation of the necessary insurance. Section 944.713 deals with insurance for violations of an inmates civil rights and negligence claims by reference to Section 768.28. These are obviously lawsuits that would be brought as a result of services provided under the management agreement. Furthermore, the insurance provision in the Proviso is discussed in Article VII,

Section (B)(7) of the RFP and will be a part of the management agreement. (App. 3, page 110)

9. Lobbying services. The Proviso states that:

The successful bidder shall not use any funds paid to it under the agreements for lobbying services. Appropriate remedies shall be included in the agreements to address a violation of this provision. (emphasis added)

As noted above the Proviso must be read to give it a reasonable interpretation and to effect its clear purpose. No investor would fund a project if their source of repayment (the lease-purchase agreement) contained a provision allowing for a reduction in payments or other remedy in the event the lessor paid for lobbying services with monies under the lease-purchase agreement. Moreover, the payments made by the Department will be used to pay the investors the outstanding principal due and interest accrued. The money paid under the lease-purchase agreement will not go to USCC. Therefore, even if USCC were to violate this portion of the Proviso it is futile to place remedies in the lease-purchase agreement.

It is certainly commendable to prohibit state funds from being used for lobbying services. However, the "appropriate remedy" clause must be construed to allow the Department to determine the remedies and where to place them. Thus, if the Department places appropriate remedies in the management agreement or any other agreement between USCC and the Department the Proviso has been satisfied.

It is clear that the lease-purchase agreement complies with the Proviso. Moreover, even if certain items need to be added

these are technical corrections that could be included and would not affect the validity of the agreement. This Court could rule that the lease-purchase agreement is valid subject to these provisions being added.

In fact, had Appellant raised these issues at the validation hearing the Department would have provided evidence through the testimony of available witnesses that any of these provisions would be added to the lease-purchase agreement if required by the circuit court. Therefore, it would be extremely prejudicial to allow the Appellant to raise these issues now on appeal to the Supreme Court.

Furthermore, as noted by Appellant, the focus of judicial inquiry in a validation hearing is whether the Department has the authority to incur the obligation. Nothing has been raised by Appellant which negatively impacts on the Department's authority to incur the obligations contained in the lease-purchase agreement.

The Proviso is clear on the Department's authority to execute the lease-purchase agreement. The lease-purchase agreement is to finance construction of the prison authorized by the Proviso. Therefore, the Department is authorized to incur the obligation.

In other words, one of the issues to be addressed by the validation proceeding is whether the governmental body has the authority to incur the obligation evidenced by the lease-purchase agreement. Whether or not the agreement evidencing the obligation is final or not is not relevant. It is the government's authority to incur the obligation in question (as evidenced by the agreement) that is at issue. That is the assurance that the financial

marketplace wants. The purpose of the validation proceeding, as noted previously, is to give the marketplace that assurance.

Certain terms of the financing arrangement by their very nature cannot be addressed until immediately before the underlying securities are sold. Therefore, to have an absolute and final agreement is never possible.

The lease-purchase agreement only contains a few blank spaces. Moreover, the items that are blank are usually filled in right before closing. These items are already established in the record. Therefore, the lease-purchase agreement is not incomplete.

For example, the actual amount of bonds or securities to be sold may vary depending on the interest rate at the time of sale or demand by investors. These issues would affect the actual amount of the obligation. As noted by the Florida Supreme Court in Jackson Lumber Co. v. Walton County, interest rates charged on bonds need not be certain at the time of the validation proceeding. 116 So. 771 (Fla. 1928). Therefore, as far back as 1928 this Court understood the need to allow flexibility in financing, and that not every "i" must be dotted nor every "t" must be crossed to validate an obligation. In Jackson Lumber, this Court specifically held:

The circuit court could, therefore, on the original petition, have validated the bonds with a provision in the decree that the bonds as issued should bear a specific rate, to be determined by the county commissioners, not exceeding the maximum rate of 6 per cent per annum, named in both the statute and the original resolution. What possible injury could have been done the taxpayers of the county, including the interveners, by allowing the county commissioners to sell the bonds at a lower rate if they could, so long as the maximum fixed by law and by the resolution was not exceeded?

The lease-purchase agreement complies with the purpose and intent of the Proviso. Moreover, what is important is that the circuit court review the record and determine that the Department has the authority to incur the obligation evidenced by the lease-purchase agreement.

The lease-purchase agreement in the record is sufficient for purposes of the validation proceeding. Any items left out are clear from the record or are not essential at this time. For example, the maximum amount of the obligation is stated in the Complaint for Validation. (App. 2, page 3, paragraph 8). This is the amount included in the bid of USCC for construction and lease-purchase of the prison. (App. 8) In addition, the lease term is for twenty years. This is clear from the RFP and USCC's proposal. (App. 3, page 113; App. 8)

Furthermore, the Trustee need not be identified at this time and there is no need to attach the Trust Indenture or the Supplemental Trust Indenture. The use of a Trustee is not addressed in the Proviso. The Trust Indenture does not create the obligation that is being validated. Therefore, these documents need not be part of the validation proceeding. In fact, these documents would be deemed collateral under the definition used in McCoy, supra; and City of Miami, supra.

Including the amount of lease payments in the lease-purchase agreement at this time is a mere formality. As noted in Jackson Lumber, if the Department can get the rent payments reduced even further there should be no requirement that it be inserted into the



lease-purchase agreement at this time. What is important is only that the Department not exceed the amount of obligation stated in the Complaint for Validation.

Prior to closing, the actual dates of contract execution will be known. At that time the dates presently left blank in the lease-purchase agreement will be filled in acknowledging the twenty year term. Interest rates will also be final at that time and all other items left blank will be filled in.

The lease-purchase agreement and the record are more than sufficient to determine the issues raised by the validation proceeding:

whether the public body had authority to incur the obligation, whether the purpose of the obligation is legal, and whether the proceedings authorizing the obligation were proper. State v. City of Daytona Beach, 431 So. 2d 981 (Fla. 1983).

To apply Appellant's argument would mean that the Department could not agree with USCC to share cost savings in the prison construction since it would change the amount of payments under the lease-purchase agreement. Moreover, the Department could not agree to any changes that would reduce the amount of the obligation. Clearly this argument conflicts with the reasoned holding in Jackson Lumber.

In addition, the date of contract execution, interest rates, etc. would have to be established many months in advance under Appellant's argument. Unfortunately, the financial marketplace does not work this way.

The Department is not requesting any blank check be issued. The Proviso, the RFP and USCC's proposal contain the essential terms of all the agreements that the Department will enter into. All the Department asked for was a judicial inquiry into its authority to incur the obligation evidenced by the lease-purchase agreement; whether the purpose of the obligation (to finance a prison construction) is legal; and whether the proceedings authorizing the obligation were proper. The record is sufficient to affirmatively rule on these matters as the trial court did. This Court should affirm these rulings.

Appellant relies on the cases of State v. Suwannee County Development Authority of Suwannee County, 122 So. 2d 190 (Fla. 1960); State v. State Board of Education, 67 So. 2d 627 (Fla. 1953); State v. City of Clearwater, 169 So. 602 (Fla. 1936); Barron v. State, 598 So. 2d 181 (Fla. 2d DCA 1992).

Suwannee County does not stand for the proposition that a lease-purchase agreement must be absolutely final in order to be part of a validation proceeding. All Suwannee County discusses is the need for a complaint for validation to set forth "a description of the purpose for which the proceeds are to be used." 122 So. 2d at 193. The description is needed so a member of the public can "determine whether the issuing agency can lawfully expend public monies therefor." Id. The complaint in Suwannee was found to have no description of the program to be financed by the securities being validated. Id.

In the instant case the Complaint for Validation describes in detail the purpose for which the lease-purchase agreement is being executed. (App. 2, paragraphs 4-10) Therefore, the instant case complies with Suwannee.

Moreover, the language in Suwannee discussed herein is acknowledged by the Court in that case to be dicta. Id. at 192. The Court specifically ruled on the validation in question based on the intended private use of the facilities to be constructed. Id. at 191-192.

Appellant's reliance on State Board and City of Clearwater is also improper. As noted above, the Complaint for Validation and USCC's proposal specified the maximum obligation the Department would incur. This is all that is required under these cases. Therefore, contrary to Appellant's assertion, the Department's financial obligation is "specified," "ascertainable" and "capped." The lease-purchase agreement is not open-ended as asserted by Appellant.

In fact, State Board like Jackson Lumber, supra, holds that only the maximum obligation need be included in the complaint. The Court recognized that interest rates may change, and the issuer should not be bound to a rate in a validation proceeding that may exceed the prevailing rate at closing.

In addition, in City of Clearwater the Court validated obligations issued by the city even though they were uncertain as to the dates of maturity. Furthermore, the exact amount of the

obligations to be issued were not fixed by the authorizing resolution but were to be determined by a formula. 169 So. at 608.

The lease-purchase agreement is for a fixed term (twenty years) and for a maximum amount (\$2,010,628.30). This is more certainty than provided in City of Clearwater.

Finally, the case of Barron is totally irrelevant to the instant appeal. Barron involved the issue of whether the Department of Corrections could determine the amount of restitution to be paid by a probationer, subject to review by the circuit court. Barron ruled that the circuit court had to determine the amount of restitution.

There is no relationship between the issues in Barron and the issues in this appeal. Determining the amount a probationer will have to pay has no legal relevancy to the lease-purchase agreement. As noted many times before, the maximum obligation was established pursuant to the competitive bidding process. The Department has not been delegated any judicial responsibilities in the lease-purchase agreement.

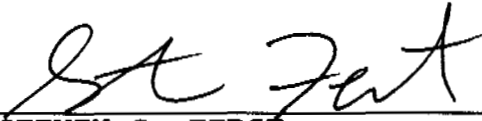
#### CONCLUSION

The lease-purchase agreement is a financing arrangement to raise the funds necessary to construct a prison. The prison is authorized by the Proviso. The use of the lease-purchase agreement to finance the prison construction is also authorized by the Proviso.

Therefore, the Department has the authority to incur the obligation evidenced by the lease-purchase agreement; the purpose of the obligation is a legal purpose; and the proceedings authorizing the obligation were proper. As such, the Judgement of the trial court should be affirmed.

In addition, the prison in question is desperately needed by the state of Florida. Thus, the Department respectfully requests this Court expedite its ruling on the issues raised by this appeal.

Respectfully submitted this 7<sup>th</sup> day of October, 1993.

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to James E. Moore, Moore, Kessler & Moore, P.O. Box 746, Niceville, Florida 32588-0746, this 7<sup>th</sup> day of October, 1993.

  
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STEVEN S. FERST