IN THE FLORIDA SUPREME COURT

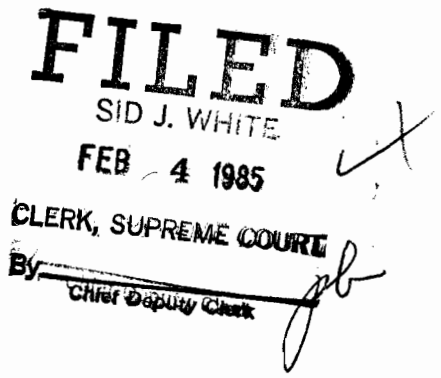
DANNY LEE COCHRAN,

Petitioner,

v. CASE NO. 66,388

STATE OF FLORIDA,

Respondent.



ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the First District Court of Appeal. The State of Florida was the prosecution and appellee in the courts below. References to the parties will be as they appear before this Court.

A one volume record on appeal and one volume transcript of proceedings below, consecutively numbered, will be referred to as "R" followed by the appropriate page number in parenthesis. Attached hereto as an appendix is the opinion of the district court, Cochran v. State, 9 FLW 2602 (Fla. 1st DCA December 13, 1984).

II STATEMENT OF THE CASE AND FACTS

By information filed July 8, 1977, petitioner was charged with one count of making or uttering a false prescription (R 1). Petitioner pled guilty as charged (R 3), and on September 16, 1977, he was adjudicated guilty and placed on probation for five years (R 6-7).

On February 22, 1979, an affidavit of violation of probation was filed, alleging that petitioner violated five conditions of his probation (R 10). Subsequently, on January 20, 1984, an "amended" affidavit of violation of probation was filed, alleging eight new counts of violating condition (4) of the order of probation, that petitioner live and remain at liberty without violating any law (R 12-13). A revocation of probation hearing was held on February 6, 1984, before Circuit Judge N. Russell Bower. At the hearing, petitioner admitted the allegations contained in the amended affidavit of violation of probation (R 44), and his probation was revoked (R 25,45). The trial court informed petitioner that he intended to depart from the sentencing guidelines, stating:

> You're welcome to get a score sheet and put it in the record for the purpose of preserving, but I am of the opinion and take the position that once they violate conditions of probation, that that is sufficient aggravating circumstance for me to impose the maximum penalty allowable by law and I do not feel bound by the sentencing guidelines and I will announce to you now that I will not follow sentencing guidelines.

(R 45).

At sentencing on February 7, 1984, petitioner's counsel announced that "Mr. Cochran elects to be sentenced under the sentencing guidelines" (R 52). This election was made in reliance on the guidelines scoresheet total of 59 points (R 52), which translated to a recommended sentence of any non-state prison sanction (R 19). The trial court departed from the guidelines and sentenced petitioner to a term of five years (R 20-23, 53), with 439 days credit for time served (R 26). The trial court stated:

> The Court has gone outside the sentencing guidelines inasmuch as the Court deems it to be sufficient aggravating circumstances when one violates conditions of probation and can't live within the law.
>
> Therefore, the sentencing guidelines have not been adhered to by the Court over objection of the defendant.

(R 24,53-54).

On appeal to the First District, petitioner argued that his election was not knowingly and intelligently made, since he was not fully informed of the consequences of his election, i.e., waiver of his right to parole, and the purported waiver therefore violated due process. The district court disagreed, citing its prior decision in Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984), but certified the following question as one of great public importance:

> When a defendant who committed a crime before 1 October 1983 affirmatively selects sentencing pursuant to the sentencing guidelines, must the record show the defendant knowingly and intelligently waived the right to parole eligibility?

(App. at A-1).

On January 11, 1985, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

The District Court of Appeal, First District, certified as a question of great public importance whether an election to be sentenced pursuant to the sentencing guidelines must be knowing and intelligent. Petitioner contends that because a defendant who elects to be sentenced under the guidelines necessarily waives a valuable right - - the right to parole, the election must be made with the knowledge and understanding that the defendant is giving up his right to parole eligibility. The district court's certified question should be answered in the affirmative.

Petitioner also challenges the validity of the trial court's order revoking his probation and imposition of a five year prison sentence on the ground that the affidavit of violation of probation was untimely filed and, therefore, the trial court lacked jurisdiction to revoke petitioner's probation based upon this affidavit. The trial court lacking jurisdiction, petitioner's sentence is illegal and he is entitled to discharge.

IV ARGUMENT

ISSUE I

WHEN A DEFENDANT WHO COMMITTED A CRIME BEFORE 1 OCTOBER 1983 AFFIRMATIVELY SELECTS SENTENCING PURSUANT TO THE SENTENCING GUIDELINES, THE RECORD MUST SHOW THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED THE RIGHT TO PAROLE ELIGIBILITY.

When the new sentencing guidelines took effect on October 1, 1983, the Legislature and the Supreme Court realized that there would be a number of defendants who would be caught in the middle of the transition, i.e., persons who committed felonies prior to October 1, 1983, but who were sentenced after that date. Thus, Section 921.001(4)(a), Florida Statutes (1983), allowed such persons an option in sentencing: they could either opt for conventional sentencing, with the right to parole, or opt, by means of an affirmative selection, for guidelines sentencing, and thereby waive parole eligibility. See also: In re Rules of Criminal Procedure, 439 So.2d 848, 849 (Fla. 1983)(guidelines applicable to all offenses committed after 12:01 a.m., October 1, 1983, and, "if affirmatively selected by the defendant, to sentences imposed after that date for applicable crimes occurring prior thereto."). Section 921.001 (8) makes it clear that parole does not exist for persons sentenced under the guidelines. The issue involved here is whether a defendant who opts for guidelines sentencing must do so with the knowledge and understanding that he is giving up his right to parole.

In a series of cases, including the instant one, the First District Court of Appeal has held that an election to be sentenced under the sentencing guidelines need only be "affirmative" as opposed to the more strict standard of knowing, intelligent and voluntary. Moore v. State, 455 So. 2d 535 (Fla. 1st DCA 1984); Kiser v. State, 454 So.2d 1071 (Fla. 1st DCA 1984); Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Coates v. State, 9 FLW 2421(Fla. 1st DCA November 16, 1984); Jones v. State, 9 FLW 2478 (Fla. 1st DCA November 28, 1984); Millett v. State, 9 FLW 2559 (Fla. 1st DCA December 10, 1984); and Gage v. State, 9 FLW 2608 (Fla. 1st DCA December 14, 1984), discretionary review pending, Case No. 66,389. In all of these cases, the district court relied on Moore, its initial decision on this question, as authority for the proposition that an election need only be affirmative.

In Moore, the court found that neither this Court nor the Legislature had intended that an election be anything more that "affirmative", since that term is used in both Section 921.001(4)(a) and in this Court's opinion in In re Rules of Criminal Procedure (Sentencing Guidelines), supra. The court apparently believed that because the words, "knowing" and "voluntary" do not appear in either source, and the term "affirmative" does, then a waiver need not be knowing and voluntary. The problem with the district court's opinion in Moore is that it ignores the fact that a defendant who elects to be sentenced under the guidelines necessarily waives a valuable right - - the right to parole. Moore

also ignores the rule of law that when parole is denied to someone who is otherwise eligible for it, an ex post facto violation occurs.

Legislative restriction of the statutory right to be considered for parole violates the ex post facto clauses of both the state and federal constitutions. Art. I, § 9, 10 United States Constitution and Art. I, §10 Florida Constitution, if applied to persons whose offenses occurred prior to the effective date of the act imposing the restrictions. For example, in State v. Williams, 397 So.2d 663 (Fla. 1981), this Court held that Section 947.16(3), Florida Statutes, authorizing retention of jurisdiction by the trial judge to vacate a parole order, had disadvantageous consequences and therefore when applied to persons whose crimes occurred before the act became effective was a prohibited ex post facto law.

In Weaver v. Graham, 450 U.S. 24 (1981) the United States Supreme Court held that a statute decreasing gain time credits was retroactive in application and therefore violated the ex post facto clause of the constitution, saying:

> We need not determine whether the prospect of the gain time was in some tactical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed. [Citations omitted]. See also Rodriquez v. United States Parole Commission, 594 F.2d 170 (Ca. 7 1979) (elimination of parole eligibility held an ex post facto violation). We have previously recognized a prisoner's eligibility for reduced imprisonment is a significant factor entering into both

> the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

450 U.S. at 31-32.

A fundamental principle of law is that a waiver of constitutional rights cannot be presumed from a silent record. Carnley v. Cochran, 369 U.S. 508 (1962); Boykin v. Alabama, 395 U.S. 238 (1969). The record fails to show that petitioner knew or understood that in exchange for selecting guidelines sentencing he was giving up the right to parole consideration at any time during the sentencing hearing.

The Legislature and this Court have both stated that a defendant could elect sentencing under the guidelines. No procedure, however, was suggested or adopted for making that election as a matter of record. Because the election inherently involves waiver of a constitutional right, the record of that election must show a knowing and voluntary and intelligent waiver, in the same manner as the record of a guilty plea must show the waiver of certain constitutional rights given at that time. Florida Rule of Criminal Procedure 3.172(c)(iii). Moreover, the court is required by that rule to inform the defendant of any minimum sentences or portions of sentences during which there is no parole eligibility. Florida Rule of Criminal Procedure 3.172(c)(i); Peak v. State, 399 So.2d 1043 (Fla. 5th DCA 1981). A plea which is defective in non-compliance with this rule is vulnerable to attack. Williams v. State, 316 So.2d 267 (Fla. 1975).

In State v. Green, 421 So.2d 508 (Fla. 1982), the issue was whether it was error to deny a motion to vacate a sentence after a guilty plea in which the trial jugde had failed to inform the defendant of the possibility of retaining jurisdiction to vacate parole during one-third of his sentence. This Court held that the lack of a proper advisement of the consequences of the plea was reversible error.

The issue here is similar but not the same as that in Green. Petitioner is not asking to withdraw his plea, but he is asking to have the opportunity to withdraw his sentencing election. The error was in not stating the consequences of electing to be sentenced under the guidelines. The record should have shown that petitioner knew that a sentence within the guidelines deprived him of parole; that for the graver possibility of an aggravated sentence beyond the guidelines range, there was no parole even for that portion which deviated from the presumptive sentence; and that by choosing the guidelines the protection against ex post facto laws was being relinquished.

The Sentencing Guidelines Commission apparently anticipated that some waiver would be placed upon the record. The former Executive Director of the Commission, Robert Wesley, wrote the following:

> The record should reflect that the defendant understands the impact of the selection, with emphasis on the fact that s/he will be ineligible for parole release.

The Florida Bar, Sentencing Guidelines and Sentencing Advocacy Seminar at 1.6.

Moore is not controlling here because the point is not whether a particular word was used in a rule of procedure or in a statute in determining whether a trial judge can ascertain if a defendant understands he is waiving the right to parole; the issue here is whether the constitutional right against ex post facto laws was waived. Since the waiver of federal constitutional rights is governed by federal standards the absence of particular words in a rule of procedure or statute is immaterial. Even without a procedural rule enacted by this Court, federal waiver standards would control. Moore's simplistic view does not address the serious waiver of the constitutional right and therefore should not control this issue.

Particularly compelling is the total silence of the record as to petitioner's knowledge of the ex post facto right or his ability to understand the selection made by counsel. The constitutional right against ex post facto application of the law is personal to the defendant and therefore must be exercised personally by the defendant. Brookhart v. Janis, 384 U.S. 1 (1966)(counsel cannot waive his client's right not to plead guilty and to have a trial; defendant neither personally waived his rights nor acquiesced in his lawyer's attempted waiver). Again, the record here is totally silent on petitioner's personal waiver of his federal consitutional right, and his waiver cannot be presumed from a silent record. Carnley v. Cochran, supra; Boykin v. Alabama, supra.

This Court, moreover, in Harris v. State, 438 So.2d 787 (Fla. 1983), held that the waiver of the defendant's procedural right to have the jury instructed on lesser offenses must be made personally and not just by counsel. The record is required to show that the waiver was knowingly and intelligently made, even though there is no such rule of procedure in effect. More importantly, in Tucker v. State, 459 So.2d 306 (Fla. 1984), this Court held that a defendant must personally waive the protection of the statute of limitations when he seeks to have the jury instructed on lesser offenses which otherwise would be barred by the statute of limitations:

> The statute of limitations defense is an absolute protection against prosecution or conviction. Before allowing a defendant to divest himself of this protection, the court must be satisfied that the defendant himself, personally and not merely through his attorney appreciates the nature of the right he is renouncing and is aware of the protential consequences of his decision. We agree with the state's position that an effective waiver may only be made after a determination on the record that the waiver was knowingly, intelligently and voluntarily made; the waiver was made for the defendant's benefit and after consultation with counsel; and the waiver does not handicap the defense or contravene any of the public policy reasons motivating the enactment of the statute.

Tucker v. State, supra, at 309 (emphasis added).

Just as Tucker held that the request for instructions on lesser offenses was not equivalent to an express waiver of the statute of limitations, the request for guidelines sentencing was not equivalent to a waiver of the constitutional protection against ex post facto laws. Nor did

the selection announced by petitioner's counsel tend to amount to a knowing and voluntary waiver on the part of petitioner, personally, as required by Harris and Tucker.

The First District and Second District Courts of Appeal have correctly held that an election cannot be inferred from a totally silent record, where nothing is said by a defendant or his lawyer regarding the guidelines' applicability to a pre-October 1, 1983, crime, and where a guidelines sentence is imposed. Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); Rodriquez v. State, 458 So.2d 899 (Fla. 2d DCA 1984); and Patterson v. State, 9 FLW 2648 (Fla. 1st DCA December 18, 1984). It is contradictory that the courts would require something regarding an affirmative election to appear on the record, but would require nothing regarding the waiver of parole eligibility to appear on the record.

One judge of the First District has agreed with petitioner's position that a knowing and voluntary waiver of parole eligibility is required where a defendant, at least during a plea colloquy, elects to be sentenced under the guidelines for a pre-October 1, 1983, crime. In Jones v. State, supra, Chief Judge Ervin, dissenting, stated:

> In my judgment, because the record fails to reveal the existence of an express waiver of the defendant's right[1] to a proper consideration of parole, the statute and the rule, in their application, not facially, must be said to violate constitutional prohibitions against ex post facto laws. A violation of the ex post facto constitutional provision occurs when a law has retrospective effect, i.e., it applies to events occurring before its enactment, and it disadvantages the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed. 2d 17, 23 (1981).

> Weaver indicates that if a defendant is deprived of the right to qualify for parole, the deprivation may amount to an ex post facto violation, if applied retroactively. 450 U.S. at 34. In the case on review, appellant, by selecting guideline sentencing, unknowingly waived a valuable constitutional right: the right to be sentenced under the law existing at the time the offense was committed.[2]
>
> Thus there should be no question that retroactive application of Section 921.001, Florida Statutes, or of Florida Rule of Criminal Procedure 3.701, could amount to an ex post facto violation if a defendant does not knowingly and intelligently waive his or her right to a proper consideration of parole.
>
> A situation similar to that before us occurs when, as part of a plea bargain, the defendant is not informed by the court that it may retain jurisdiction over a portion of his sentence. See State v. Green, 421 So.2d 508, 509 (Fla. 1982), holding that the imposition of retention is a significant consideration in the plea bargain arrangement which should be fully explained to a defendant before his plea is accepted, otherwise he would not be completely informed of the consequences of his plea. See also Shofner v. State, 433 So.2d 657 (Fla. 1st DCA 1983); Ward v. State, 433 So.2d 1221 (Fla. 3d DCA 1983); Brown v. State, 434 So.2d 21 (Fla. 2d DCA 1983).
>
> Nor should there be any question that the defendant was disadvantaged by the sentence imposed. Admittedly the trial judge could have sentenced appellant outside the guidelines to a five-year term of imprisonment. See Sections 812.014(2)(c); 775.082(3)(d), Florida Statutes. Nevertheless, pursuant to the Objective Parole Guidelines Act, appellant would have been eligible for a parole interview within eight months of her sentence, to have a presumptive parole release date set within 90 days of that interview, and to have the release date reconsidered periodically. See Sections 947.16(1)(a), 947.172(2), and 947.174, Florida Statutes.

Jones v. State, 9 FLW at 2478-2479 (footnotes omitted).

Petitioner therefore urges this Court to adopt Chief Judge Ervin's dissenting opinion in Jones as the law of Florida, i.e., that an election of the sentencing guidelines must be knowingly and voluntarily made, and that the defendant must expressly waive his right to parole in making his election. Petitioner's election below does not meet that standard and therefore his sentence must be reversed and the cause remanded for resentencing.

ISSUE II

THE TRIAL COURT LACKED JURISDICTION TO REVOKE PETITIONER'S PROBATION BASED ON NEW CHARGES ALLEGED IN AN AMENDED AFFIDAVIT WHICH WAS FILED AFTER THE EXPIRATION OF PETITIONER'S PROBATIONARY TERM.[1]

As noted in the statement of the case and facts, petitioner was placed on probation on September 16, 1977, for a period of five years. On February 22, 1979, an affidavit of violation of probation was filed, alleging five violations. Specifically, the affidavit alleged two violations of Condition I, in that petitioner on October 26, 1978, changed his residence without permission and on September 25, 1978, changed his employment without permission; violation of Condition IV, in that petitioner was arrested for possession of controlled substances on September 28, 1978; violation of Condition V, that petitioner used intoxicants to excess, as evidenced by his arrest on October 22, 1978, for drunkeness; and violation of Condition VII, by failing to truthfully answer all inquiries of his probation supervisor (R 10).[2]

The record indicates that petitioner was arrested on the charge of violation of probation on December 23, 1983, and had a first appearance the following day (R 11). Subsequently, on January 20, 1984, an amended affidavit was filed, charging petitioner with eight violations of Con-

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1/ Since this Court has jurisdiction based on the certified question discussed in Issue I, supra, the Court may consider this issue on the authority of Trushin v. State, 425 So.2d 1126 (Fla. 1982) and Bould v. Touchette, 349 So.2d 1181 (Fla. 1977).

2/ It is not clear from the record whether an arrest warrant was issued pursuant to this affidavit, but it is apparent that no further action was taken on the affidavit.

dition (4), that he live and remain at liberty without violating any law, in that he committed and pled guilty to eight separate offenses of burglary, larceny, receiving stolen goods, possession of tools to be employed in a crime, and forgery (R 12-13). Thereafter, petitioner's probation was revoked solely on the basis of the violations alleged in the amended affidavit (R 44-45).

It is well settled that an affidavit alleging a violation of probation must be filed before the expiration of the probationary period. Bouie v. State, 360 So.2d 1142 (Fla. 2d DCA 1978); Wrich v. State, 350 So.2d 114 (Fla. 2d DCA 1977). Upon expiration of the probationary period, the court is divested of all jurisdiction over the probationer unless prior to that time the processes of the court have been set in motion for revocation or modification of probation. Gardner v. State, 412 So.2d 10 (Fla. 2d DCA 1981); White v. State, 410 So.2d 588 (Fla. 2d DCA 1982); Kimble v. State, 396 So.2d 815 (Fla. 4th DCA 1981); State ex rel. Ard v. Shelby, 97 So.2d 631 (Fla. 1st DCA 1957). Here, petitioner's probation expired in September of 1982; no action was ever taken on the affidavit filed in 1979, and petitioner's probation was revoked on the basis of an affidavit filed in January, 1984, almost one and a half years after the probationary period had expired. The trial court lacked jurisdiction to revoke petitioner's probation based upon this affidavit. See Brooker v. State, 207 So.2d 478 (Fla. 3d DCA 1968), wherein the court held that the filing of a separate information during the probationary period did not initiate proceedings for revocation of probation so as to allow trial court to enter-

tain application for revocation instituted after termination of probation. The court reasoned:

> Assuming that such information or the law violation which it alleged could have been the basis for an application or initiation of a proceeding in the present case for the revocation of the probation, it was not so used during the term, but was attempted to be so used only after the probation term had expired.

207 So.2d at 480.

While an amended affidavit of violation of probation filed after the probation has expired may be tacked on to an affidavit which is filed during the probationary period, see, e.g., Williams v. State, 406 So.2d 86 (Fla. 1st DCA 1981), the "amended" affidavit here does not purport to relate back to the initial affidavit since it does not refer to the initial affidavit or violations alleged therein. In fact, the amended affidavit alleges altogether different substantive violations. Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981); Carpenter v. State, 355 So.2d 492 (Fla. 3d DCA 1978). In Clark v. State, supra, the appellant was placed on probation for one year on October 4, 1978. On August 24, 1979, an affidavit of violation of probation was filed charging Clark with three offenses committed on August 22, 1979. On October 5, 1979, two days after the expiration of the one-year probationary period, an amended affidavit was filed. The amended affidavit realleged Counts I, II and III of the original affidavit and alleged two additional counts, offenses also occurring during the probationary period. Clark's probation was revoked based upon two of the original counts and the two counts alleged in the amended affidavit. On appeal,

the court rejected the state's argument that the amended affidavit was part of the process set in motion by the original affidavit and related back to the earlier affidavit because of the similarity between the original and added charges, and held:

> The Supreme Court in Carroll v. Cochran, 140 So.2d 300 (Fla. 1982), upheld a revocation of probation even though an arrest warrant was not served until after the termination of probation. The court grounded its decision on the fact that 'the processes of the trial court had been timely set in motion . . . because the warrant . . . was issued within the period of probation.' Id., at 301. We apply a restrictive interpretation to the holding in Carroll and conclude that while it permits a revocation process, timely begun, to continue past the probationary term, it does not allow the filing of new, substantive charges after the date of termination of probation. Consequently, since Counts IV and V constituted new and untimely filed charges, we hold that the court was divested of jurisdiction to consider them.

402 So.2d at 44-45 (emphasis added).

The instant case is indistinguishable from and controlled by Clark v. State. The court took no action on the original affidavit filed in 1979, and the amended affidavit, filed long after the expiration of petitioner's five-year probation, alleged new, substantive charges. The trial court therefore lacked jurisdiction to entertain the amended affidavit.

The instant case is analogous to the filing of an amended complaint in a civil context. The courts recognize that an amended complaint, stating a new cause of action, can not be filed so as to defeat the bar of the statute of limitations. See School Board of Broward County v. Surette, 394 So.2d 147

(Fla. 4th DCA 1981). See also, Owens v. Florida Patient's Compensation Fund, 428 So.2d 708 (Fla. 1st DCA 1983)(complaint amended to name new party does not relate back to original complaint and cause of action for statute of limitations purposes does not commence until amended complaint is filed). Likewise, here, the revocation process was not commenced until the amended affidavit, charging new violations of probation, was filed and thus proceedings were untimely.

As noted by the court in Clark v. State, supra at 44:

> Although appellant failed to voice an objection below to the trial court's lack of jurisdiction to consider counts Iv and V due to their untimely filing, we hold that the issue may be raised for the first time on appeal since it is fundamental and jurisdictional. [Citation ommitted].

Petitioner has not waived the jurisdictional defect below, see Carpenter v. State, supra, and White v. State, 404 So.2d 804 (Fla. 2d DCA 1981), and submits that this Court should reach the merits of this issue and reverse the order revoking petitioner's probation and his sentence.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, in Issue I, petitioner submits that this Court should answer the certified question in the affirmative and hold that an election to be sentenced under the guidelines must be knowingly and intelligently made. Because his election was merely affirmative and the record does not show that petitioner knowingly and intelligently waived his right to parole, petitioner respectfully requests this Court vacate his sentence and remand for resentencing. In Issue II, petitioner respectfully requests this Court reverse the order revoking probation and vacate the sentence with directions that petitioner be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on the Merits has been furnished by hand delivery to Assistant Attorney General Henri C. Cawthon, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Danny L. Cochran, #881402, 3950 Tiger Bay Road, E-106-D, Daytona Beach, Florida 32014 on this 4th day of February, 1985.

Paula S. Saunders
PAULA S. SAUNDERS