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

# REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

## I PRELIMINARY STATEMENT

This brief is submitted in reply to respondent's brief on the merits. Respondent's brief will be referred to herein as "RB". All other references will be as designed initially.

## II 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.

Respondent contends that this issue is not preserved for appellate review and that it is nonetheless meritless. These contentions miss completely the arguments originally asserted by petitioner.

The protection against ex post facto application of the law is founded upon guarantees of the Florida and federal constitutions. These rights are personal to petitioner and a waiver of them cannot be presumed when the record is silent. See, e.g., Harris v. State, 438 So.2d 787 (Fla. 1983); Brookhart v. Janis, 384 U.S. 1 (1966). Respondent attempts to manufacture a waiver by presuming that "Petitioner's counsel acted in a professional manner by apprising him of the consequence of electing to be sentenced under the guidelines" (RB 7). Such a presumption cannot amount to a knowing and intelligent waiver by petitioner of ex post facto protections.

When considering the constitutional rights waived by a plea of guilty, the United States Supreme Court has firmly declared that a silent record will not suffice. Boykin v. Alabama, 395 U.S. 238 (1969). Represented by counsel, Boykin was asked no questions by the judge and did not address the court. After listing the federal

constitutional rights waived by a guilty plea the Court said:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. [emphasis supplied]

395 U.S. at 243, 244. Thus it was error, plain on the face of the record, for the court to have accepted the guilty plea "without an affirmative showing that it was intelligent and voluntary". Id. at 242.

In Barker v. Wingo, 407 U.S. 514 (1972) the Court discussed the doctrine of waiver in connection with the Sixth Amendment right to a speedy trial. Rejecting the argument that without a demand the accused should be presumed to have waived the right to a speedy trial the Court said:

> Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined a waiver as "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver," Aetna Insurance Company v. Kennedy, 301 U.S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights". Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292, 207 (1937).

407 U.S. at 525, 526.

Petitioner maintains that the error here is fundamental and can be raised for the first time on appeal. See Castor v. State, 365 So.2d 701 (Fla. 1978). Fred-

ricks v. State, 440 So.2d 438 (Fla. 1st DCA 1983), and similar cases cited by respondent for the proposition that an ex post facto challenge cannot be made for the first time on direct appeal overlook the fundamental nature of the error, which is equivalent to a violation of due process.

The test established by Castor for defining fundamental error is whether there has been a violation of due process. 365 So.2d at 704, n.7. Ex post facto application of a penal law is equivalent to a violation of due process. As the United States Supreme Court said in Bouie v. Columbia, 378 U.S. 347, 353, 354 (1964):

> An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed". Calder v. Bull, 3 Dall 386, 390, 1 L ed 648, 650. If a state legislation is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. [emphasis supplied]

The failure to object to the sentence is not fatal to the issue on appeal as Sections 921.001(5) and 924.06(1)(e), Florida Statutes (1983), expressly provide for appellate review of sentences imposed outside the range recommended by the sentencing guidelines. Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984). As stated by this Court in Rhoden v. State, 448 So.2d 1013, 1016

(Fla. 1984):

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings . . . . The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

Accord, Weston v. State, 452 So.2d 95 (Fla. 1st DCA 1984). Just as the statutes involved in both Rhoden v. State and Weston v. State provided for appellate review, so does Section 924.06(1)(e) in the instant case.

As a part of the appeal the court can consider whether the record demonstrates an affirmative waiver by the petitioner, personally, of the protection against ex post facto laws which was a part of the process under which he selected to be sentenced under the guidelines. Without that showing in the record the sentence is tainted.

In summation, petitioner maintains that it is improper to presume waiver of a constitutional right where the record does not show a knowing and intelligent election by the person whose rights have been relinquished. By venturing into the area of speculation, presumption and assumption, as suggested by the respondent, the state is inviting this Court to make the same kind of constitutional error that was present in Boykin v. Alabama, supra. A more correct result would be to remand for an evidentiary hearing on this point rather than to accept the state's guess.

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.

Case law firmly establishes that upon the expiration of the probationary period, the trial 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 of probation. Contrary to respondent's assertions, objections to jurisdiction can never be waived. Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981). State v. King, 426 So.2d 12, 14 (Fla. 1983), recognizes this well-established principle:

> This Court has long recognized a distinction between judgments that are void and those that are voidable. Objections to a void judgment can be raised at any time, whereas objections to a voidable judgment must be timely made . . . . If a court has jurisdiction of the subject matter and of the parties, the proceeding is not a nullity and the judgment is not void.

[Emphasis supplied]. See also, Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 (1982), where the United States Supreme Court noted:

> [N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, . . . principles of estoppel do not apply, . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Petitioner maintains that because proceedings were not instituted to revoke his probation during the probationary period the trial court lacked jurisdiction to revoke the probation and impose sentence. Petitioner is therefore entitled to discharge.

## III CONCLUSION

For the reasons expressed herein, as well as those stated in petitioner's brief on the merits, petitioner requests, in Issue I, that the certified question be answered in the affirmative and that this Court vacate the sentence and remand for a new selection after a full explanation of the consequences of an election on the record. As to Issue II, petitioner requests this Court address the issue on the merits, reverse the order revoking probation and direct that petitioner be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing 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 Lee Cochran, #881402, 3950 Tiger Bay Road, E-106-D, Daytona Beach, Florida 32014 on this 21st day of March, 1985.

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