IN THE FLORIDA SUPREME COURT

AURELIO MARQUEZ,

Petitioner,

v.

CASE NO. 66,827

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CONT'D)

TABLE OF CITATIONS
(CONT'D)

IN THE FLORIDA SUPREME COURT

AURELIO MARQUEZ,	:	
Petitioner,	:	
v.	:	CASE NO. 66,827
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF 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.

Petitioner will designate references to the record on appeal by the symbol "R" and references to the supplemental record by the symbol "RS". Attached hereto as an appendix is the opinion of the district court, Marquez v. State, 10 FLW 557 (Fla. 1st DCA March 5, 1985)(on rehearing).

II STATEMENT OF THE CASE AND FACTS

By information filed in the circuit court of Okaloosa County, petitioner was charged with robbery with a firearm (R 6). He was found guilty as charged after a nonjury trial (R 11-12, 22).

At the sentencing hearing on February 23, 1984, petitioner was accompanied by an interpreter (R 22). Petitioner's counsel elected guidelines sentencing on behalf of Mr. Marquez, stating:

> I have discussed the presentencing guidelines with Mr. Marquez through an interpreter, and it will be our desire to be sentenced under the guidelines.

(R 23). A guidelines scoresheet for the offense of robbery with a firearm was prepared and petitioner's counsel agreed that the total of 94 points was correct (R 15, 24). The recommended sentence was 3 1/2 to 4 1/2 years. The trial judge departed from the recommended sentence and imposed instead a sentence of 20 years, stating the following written reasons for its departure:

> The sentencing guidelines recommend a sentence of 3- 1/2 to 4- 1/2 years. The court finds clear, convincing and compelling reasons to deviate from said guidelines. The Defendant has been in the United States only since 1980 when he arrived from Cuba via the Mariel Boat Lift. He was released to a sponsor in February, 1981. Since arriving here he has been convicted of one previous misdemeanor, one previous felony, and has served approximately one year and four months in county jails and state prisons. He was released from prison on August 2, 1983, and approximately 30 days later committed the instant offense, and armed robbery, during which he twice threatened the life of the victim. He has been untruthful and uncooperative with court personnel conducting the PSI. During his incarceration in the county jail since his arrest for this offense, he has displayed violent behavior and has required separation from other inmates. Mr. Marquez is obviously an extremely dangerous individual from whom society deserves protection. The court here-

> by adjudicates the defendant of robbery with a firearm and imposes the sentence of 20 years in the Department of Corrections. (R 13-16, 25-26).

On appeal to the First District Court of Appeal, petitioner argued that his election was not knowingly and intelligently made, since he was not fully informed of the consequence of his election, i.e., waiver of his right to parole. Petitioner further argued that the trial court's reasons for departure were not clear and convincing and his sentence was excessive. The district court affirmed without an opinion, citing its prior decision in Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984). (A 1). On January 28, 1985, petitioner filed a motion for rehearing or in the alternative a motion to certify the question to this Court as one of great public importance (B1-3). On rehearing, the district court of appeal denied the motion for rehearing 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?

(C 1-2).

On April 3, 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 or not 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 the 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'scertified question should be answered in the affirmative.

Petitioner further contends that the trial court's reasons for departure include aggravations which are or should be prohibited as elements of the primary offense or factors already included in the guidelines scoring. Since the reasons for the trial court's departure from the presumptive guidelines sentence are not clear and convincing, petitioner's sentence should be reversed and a sentence within the guidelines range ordered.

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.

Petitioner's offense was committed on September 3, 1983. Persons whose crimes were committed before October 1, 1983, but whose sentences were imposed after that date could affirmatively select to be sentenced under the guidelines. In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). Persons sentenced under the guidelines are not eligible for parole. Section 921.001(8), Florida Statutes (1983).

Petitioner enjoyed the right to consideration for parole at the time his offense was committed. By being sentenced under the guidelines petitioner lost that right. The guidelines sentence, therefore, operated as an ex post facto law against petitioner by depriving him of a right which existed at the time of the offense. This deprivation of parole could not be applied to petitioner retroactively without violating the state and federal constitutional guarantees against ex post facto application of the law. Article I, Sections §§9,10, United States Constitution; Article I Section 10, Florida Constitution. See State v. Williams, 397 So.2d 663 (Fla. 1981)(Section 947.16(3), Florida Statutes (1981) authorizing retention of jurisdiction by trial judge to vacate a parole order during the first third of a sentence, had disadvantageous consequences and therefore was a prohibited ex post

facto law when applied to persons whose crimes occurred before the effective date of the act).

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, saying:

> [W]e need not determine whether the prospect of the gain time was in some technical 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 his determinant is changed. [Citations omitted]. See also Rodriquez v. United States Parole Commission, 494 F.2d 170 (See Ca. 7 1979)(elimination of parole eligibility held an ex post facto violation). We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.

450 U.S. at 31-32.

The issue here is whether the selection of a guidelines sentence announced by petitioner's counsel constituted a voluntary and intelligent waiver of petitioner's right not to be subjected to an ex post facto application of the law. Because a federal constitutional right is involved, the waiver of that right must be governed by federal standards. Boykin v. Alabama, 395 U.S. 238 (1969). The waiver of petitioner's state ex post facto law protection may, of course, be governed by state standards. The record here is insufficient to show a waiver of the rights under either constitution.

Petitioner did not understand English. The record is somewhat ambigious about petitioner's fluency in English, but the record on a whole shows that there was a substantial language

barrier. The trial court's Record of First Appearance contains the handwritten notation that the proceedings were "continued to a later date for interpreter" (R 5). An interpreter was present at the sentencing, but there is no indication that the following statement made by petitioner's counsel was translated for him:

> I have discussed the presentencing guidelines with Mr. Marquez through an interpreter, and it will be our desire to be sentenced under the guidelines.

Any assumption that the entire proceedings were interpreted for petitioner is undermined by the notation on page 24 of the record that a specific question from the judge to petitioner was spoken to him in Spanish. Apparently, therefore, this was the only statement made during the proceedings which petitioner was able to understand.

Even if the entire proceedings were translated, the statement of counsel that he had discussed the sentencing guidelines with petitioner and a guidelines sentence was desired was ineffective to waive petitioner's constitutional ex post facto rights. Merely stating that a guidelines sentence is selected is not the equivalent of stating that the statutory right to parole is being waived. Even if, by implication, the selection of a guidelines sentence is equivalent to a waiver of parole, it is not sufficient to expressly waive the constitutional right against ex post facto laws.

In a series of cases, including the instant one, the first district court of appeal has held 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); Gage v. State, 9 FLW 2608 (Fla. 1st DCA December 14, 1984), discretionary review pending, Case No. 66,389; Cochran v. State, 9 FLW 2602 (Fla. 1st DCA December 13, 1984), discretionary pending, Case number 66,388. 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 than "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. Moore is not necessarily controlling here because the point is not whether a rule of procedure must exist before a trial judge can be required to ascertain if a defendant understands he is waiving the right to parole; rather the issue is whether the constitutional right against ex post facto laws was waived. Since the waiver of federal constitutional rights are governed by federal standards the absence of a rule of procedure is immaterial. Even without a procedural rule enacted by the state supreme court, federal waiver standards would control. Moore does not address the waiver of the constitutional right and therefore does not cover this issue.

Particularly compelling here is the total silence of the

record as to petitioner's knowledge of the ex post facto rights or his ability to understand the selection made by counsel during the sentencing proceeding. The constitutional right against ex post facto application of the law is personal and therefore must be exercised personally by a 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). The record here is totally silent on a waiver of petitioner's federal constitutional right. Presuming waiver from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506 (1962); Boykin v. Alabama, supra.

Moreover, this Court 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. This requirement was imposed without any rule of procedure. See also, Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982), in which the court held that a defendant's request that the jury be instructed on lesser included offenses for which the statute of limitations had run was not equivalent to a waiver of the statute of limitations. The court said:

> The right not to be convicted of an offense for which prosecution is barred by limiting statute is substantive and fundamental. Waiver of that right must meet the same strict standards which courts have applied in determining whether there has been an effective waiver as to other fundamental rights. Waiver of any fundamental right must be express and certain, not implied or equivocal. With respect to waiver of the statute of limitations there should be a waiver in writing made part of the record or at least

> an express oral waiver of the statute preventing prosecution and conviction made in open court on the record by the defendant personally or by his counsel in his presence. [Citations omitted].
>
> We believe that a mere request for an instruction on the lesser-included offense is not an express waiver of the right not to be prosecuted and convicted for an offense for which the statute of limitations has run. (Footnote omitted).

417 So.2d at 1013 (emphasis added).

In the same way 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 protections against ex post facto laws. Nor was the selection announced by petitioner's counsel tantamount to a knowing and voluntary waiver on the part of petitioner personally as required in Harris and Tucker.

The infirmity of the waiver here is analogous to the purported waiver of jury trial held ineffective in Williams v. State, 440 So.2d 1290 (Fla. 4th DCA 1983). The only record evidence of a waiver of jury trial was a waiver signed by the defendant's counsel at the time of arraignment. The trial transcript reflects no discussion on the point. The court relied upon Fla.R.Crim.P. 3.260, which provides that a defendant may in writing waive a jury trial with the consent of the state and said that it was incumbent upon "the trial court and all counsel involved" to see that the record reflected compliance with the rule. Under Williams, therefore, the waiver executed by counsel and not by the defendant was insufficient to waive personally defendant's right to a jury trial. 440 So.2d at 1292.

ISSUE II

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE IN EXCESS OF THAT RECOMMENDED BY THE SENTENCING GUIDELINES SINCE CLEAR AND CONVINCING REASONS FOR DEPARTURE DID NOT EXIST.

The reasons for the trial court's departure are a conglomerate which include aggravations which are or should be prohibited. One reason is that petitioner had "one previous misdemeanor, one previous felony, and has served approximately one year and four months in county jails and state prisons." In addition the court found that during the robbery, petitioner "twice threatened the life of the victim." These reasons do not warrant deviation since they include essential elements of the offense and prior record, which have already been accounted for by the guidelines themselves.

Numerous cases have condemned departures based upon factors already considered within the guidelines recommended range. Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984), discretionary review pending, Case No. 66,163 (factors that "the robbery was premeditated and calculated for pecuniary gain" and "[that] there was no provocation [for the robbery]" are inherent components of robbery and hence already embodied in the guidelines recommended sentencing range; factors thus impermissible basis for departure); Burch v. State, 462 So.2d 548 (Fla. 1st DCA 1985), discretionary review pending, Case No. 66,471 (fact that defendant on parole not proper basis for departure since "legal status" at time of offense already scored); Napoles v. State, 10 FLW 337 (Fla. 1st DCA February 7, 1985)(fact that defendant on probation improper basis for departure since that fact already taken into consideration in computing recommended

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 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); Patterson v. State, 9 FLW 2648 (Fla. 1st DCA December 18, 1984). It is contradictory that the courts will 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.

Here, petitioner's valuable constitutional right against ex post facto application of the law was not clearly waived. Not even a reasonable implication of waiver can arise from this record where it is not clear that petitioner understood what his counsel said in court and counsel's statements do not amount to a waiver of ex post facto rights on behalf of petitioner. A waiver of constitutional rights cannot be presumed or upheld on a record like this and the court should vacate the sentence and remand for petitioner to make a voluntary and intelligent choice with the record showing a full advisement of his rights before any waiver is made.

sentence); Sarvis v. State, 10 FLW 667 (Fla. 1st DCA March 13, 1985)(improper to deviate based upon facts which have already been included within the determination of the guidelines sentence); Callaghan v. State, 10 FLW 8 (Fla. 4th DCA December 19, 1984) (court not at liberty to aggravate a sentence by using elements which go to make up the crime for which the defendant is being sentenced; use of firearm improper reason for deviation since crime of shooting in a dwelling necessarily involves use of a firearm); Bowdoin v. State, 10 FLW 472 (Fla. 4th DCA February 20, 1985)(defendant's use of a firearm during commission of robbery with a deadly weapon improper ground for departure since use of firearm already factored into the presumptive sentence); Knowlton v. State, 10 FLW 457 (Fla. 4th DCA February 20, 1985)(following Carney v. State, supra; fact that robbery planned in advance improper ground for deviation since inherent in robbery). The rationale for these decisions is quite simple and basic:

> We find a lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity.

Burch v. State, supra at 549. This rationale finds support in two separate lines of authority in Florida which suggest that penal sanctions cannot be increased by counting the same element of behavior more than once in aggravation.

A presumptive parole release date set under chapter 947 cannot be increased for the same "factors" used in reaching the "salient factor score and severity of offense behavior category." Section 947.165, Florida Statutes (1983). In Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1162

(Fla. 1st DCA 1982), the court held that the commission's rule did not "permit additional aggravation for factors included in the definition of other convictions already used as aggravating elements."

In capital sentencing, this Court has likewise prohibited counting the same aspect of behavior as more than one aggravating circumstance. In Provence v. State, 337 So.2d 783, 786 (Fla. 1976), this Court reasoned:

> The state argues the existence of two aggravating circumstances, that the murder occurred in the commission of the robbery [(d)] and that the crime was committed for pecuniary gain [(f)]. While we would agree that in some cases, such as where a larceny is committed in the course of a rape - murder (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery - murders, both subsections refer to the same aspect of the defendant's crime. . . .We believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

Decisions of the Minnesota Supreme Court also support the proposition that circumstances used in scoring cannot be used again in aggravation. In State v. Brusven, 327 N.W.2d 591, 593 (Minn. 1982), the court explained:

> Ordinarily, it is inappropriate for the sentencing court to use as a basis for departure the same facts which are relied upon in determining the presumptive sentence.

Likewise, in State v. Mangan, 328 N.W.2d 147, 149 (Minn. 1983), the rule is stated as:

> Generally, the sentencing court cannot rely upon a defendant's criminal history as a ground for departure. The sentencing guidelines takes one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into ac-

> count in determining his criminal history score and there is not justification for concluding that a qualitative analysis of the history justifies using it as a ground for departure.

See also, State v. Gross, 332 N.W.2d 167 (Minn. 1983); State v. Barnes, 313 N.W.2d 1 (Minn. 1981).

These expressions of limitations on applying aggravating circumstances to a presumptive guidelines sentence are in harmony with both the statement of principle in Florida's guidelines, Fla.R.Crim.P. 301(b), and with Florida's decision in both the parole and capital sentencing context. See Callaghan v. State, supra (analogizing rule applicable in determining presumptive parole release dates to the rule applicable in aggravating presumptive sentences).

Petitioner was convicted of an armed robbery under an information which charged that it was committed by force, violence, assault or putting in fear. Threatening the victim was, therefore, a part of the behavior necessary to commit the offense and could not be used again as an aggravation. In Carney v. State, supra, the court held:

> We agree with appellant that the trial court adopted a number of reasons for departure from the guidelines that are inappropriate. For example, the factors "the robbery was premeditated and calculated and for pecuniary gain" are, practically speaking, an inherent component of any robbery, and hence may properly be viewed as already embodied in the guidelines recommended sentencing range.

458 So.2d at 15 (emphasis added). This ruling applied to the aggravation applied here, that petitioner twice threatened the life of the victim. Threats are inherent in robbery and do not justify departure. See also, Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984), wherein the court said that to

justify a departure for the manner of committing the crime, it would have to be done "in a repugnant and odious manner". Without this criterion departures would be authorized in almost every instance, "a result obviously not intended when the guidelines were conceived." Id., at 40.

Petitioner was also penalized for violent behavior in jail. Without a conviction for these alleged occurences, a departure on this basis was unjustified. See Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984)(rejecting as a reason for sentence that the defendant suborned perjured testimony from his witnesses). The guidelines expressly prohibit aggravations for arrest for which no convictions have been obtained, Fla.R.Crim.P. 3.701 (d)(11), and by necessary implication, prohibit departures for any criminal conduct not resulting in conviction, regardless of any arrest. Petitioner's alleged violent behavior in jail is arguably criminal conduct and without a conviction cannot be used as aggravation. The impropriety of this reason taints the entire sentencing order and as in Young v. State, 455 So.2d 551 (Fla. 1st DCa 1984), discretionary review pending, No. 66,257, a remand is necessary for reconsideration of the sentence where possible valid aggravations were "mired in the confusion revealed by [the] record." Id., at 552. Accord, Carney v. State, supra.

The invalidity of one of several reasons for departure should prompt a remand, just as when a probation revocation has been based in part on a reason found invalid on appeal. This would allow the trial judge to consider both whether any departure is required and if so the extent of that departure. See Watts v. State, 410 So.2d 600 (Fla. 1st DCA 1982)(appellate court could not determine whether the trial judge would have revoked probation and imposed same

sentence without reliance on violation of probation condition which on appeal was held not to have been violated); Aaron v. State, 400 So.2d 1033, 1035 (Fla. 3d DCA 1981)("[S]ince we do not know whether the trial court would have revoked his probation under the remaining grounds or whether the trial court would have imposed the remaining portion of the term of imprisonment, we reverse the judgment and sentence and remand the cause to the trial court, as we did in Jess v. State. 384 So.2d 328 (Fla. 3d DCA 1980), to make such findings and determinations and then to resentence the defendant as it is so advised."); Peterson v. State, 384 So.2d 965 (Fla. 1st DCA 1980)(court unsure as to whether the trial court would have revoked appellant's probation and imposed the same sentence for sole reason that appellant failed to be gainfully employed); Page v. State, 363 So.2d 621 (Fla. 1st DCA 1978)(appellate court could not determine whether trial court would revoke probation and impose the sentence for sole reason that appellant failed to file timely monthly reports). Cf., Elledge v. State, 346 So.2d 998 (Fla. 1977)(appellate court could not know what trial court would have decided sentence when some but not all of the aggravating circumstances relied upon where held improper on appeal).

In Young v. State, the district court struck all but one of the reasons given by the trial court as either impermissibly considered or not clear and convincing, or both. The court remanded to the trial court for resentencing because it was impossible to determine whether the trial court would come to the same conclusion on the one valid reason alone. Similarily, in Davis v. State, 458 So.2d 43 (Fla. 4th DCA 1984), the court noted that

if there are some acceptable clear and convincing reasons for aggravation, unacceptable ones are surplusage, but went on to hold:

> Nonetheless, we must speculate that the profusion of unacceptable reasons in this case may have affected the extent of the departure. Here we have both acceptable and unacceptable reasons for departure. To us, it appears more equitable to reverse and remand for resentencing, especially since the trial judge erroneously contemplated parole by retaining jurisdiction over a third of the sentence. Cynics may observe that a trial judge upon remand will simply decree enhanced punishment for the acceptable reasons. Maybe so, and maybe he should. However, he may well not and if the last be possible, simple justice requires that the defendant have his day in court.

Id. at 45 (emphasis in original).

The reasoning of Young and Davis applies here. One of the aggravations found by the trial judge is invalid because it is "an inherent component of any robbery." Other reasons are based on petitioner's prior record and conduct for which petitioner was not convicted. It is impossible to separate these invalid reasons from others which arguably support departure. Nor can the court ascertain what the extent of departure, if any, would have been without the improper factors.

The recommended guidelines sentence was 3 1/2 to 4 1/2 years and the trial judge imposed a total of 20 years. The length of petitioner's sentence is almost five times the guidelines maximum and is not supported by sufficient clear and convincing reasons. It is simply not fair to find even though some reasons relied on were invalid, the entire extent of the departure should be upheld because some reasons are valid. This reasoning fails to take into account that the trial judge may

have taken all the aggravations, good and bad, into consideration when determining the length of the sentence. A remand should be ordered whenever any substantial reason is stricken on appeal. Clearly, the harmless error doctrine cannot be applied in these circumstances and reversal is therefore appropriate.

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 vacate and remand the sentence since the trial court failed to articulate clear and convincing reasons for departing from the presumptive guidelines sentence and the improper reasons could have affected the length of the departure.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Petitioner's Brief on the Merits has been furnished by hand delivery to Assistant Attorney General Lawrence Kaden, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Aurelio Marquez, #084685, Post Office Box 1100, Avon Park, Florida 33825 on this 29th day of April, 1985.

Paula S. Saunders
PAULA S. SAUNDERS