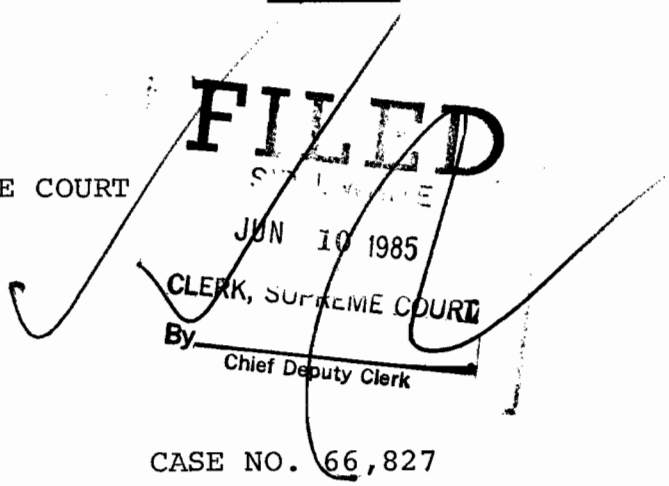
IN THE FLORIDA SUPREME COURT



AURELIO MARQUEZ,

Petitioner,

v.

CASE NO. 66,827

STATE OF FLORIDA,

Respondent.

REPLY BRIEF ON THE MERITS

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IN THE FLORIDA SUPREME COURT

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

REPLY BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent supplemented the statement of the case and facts in petitioner's brief on the merits with an observation about Mr. Marquez's ability to understand English and about comments in the presentence investigation report.

The record is ambiguous about petitioner's fluency with English, but the record on a whole shows that there was a substantial language barrier. As previously noted, the Judge's Record of First Appearance contains the handwritten notation that the proceedings were "continued to later date for interpreter" (R 5), and an interpreter was present for sentencing. Allegations in the PSI that petitioner had lied about his previous arrests and about whether he was married or had used an alias may be indications of this language impediment.

The other facts inserted by respondent relate to comments in the PSI that petitioner denied his guilt and that the state informed the trial judge that petitioner showed no remorse and claimed his innocence despite overwhelming evidence. These factors are irrelevant because they cannot support a departure

from the guidelines. See Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984); Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984). Because these reasons should have played no part in the sentencing decision of the trial judge, they should be disregarded in this appeal.

III 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 claims that the ex post facto issue is not cognizable on direct appeal because it was not preserved for appellate review by a contemporaneous objection and is not fundamental error.

This Court has ruled that contemporaneous objections are not a prerequisite for raising on appeal errors that occur at sentencing. State v. Rhoden, 448 So.2d 1013 (Fla. 1984); cf., Mitchell v. State, 458 So.2d 10 (Fla. 1st DCA 1984)(the failure of the defendant to make a contemporaneous objection upon the imposition of sentence does not vitiate his right to appeal a departure from the guidelines).

The error, moreover, is not just waiver of the statutory right to parole; the error is a violation of the constitutional right to be free from ex post facto application of law. Lack of a contemporaneous objection does not bar an appeal of fundamental error, which includes due process of violations. Castor v. State, 365 So.2d 701, 704, n.7 (Fla. 1978). Ex post facto application of a penal law is equivalent to a violation of due process. Bouie v. Columbia, 378 U.S. 347, 352-54 (1964). Thus the absence of a contemporaneous objection does not prevent a defendant from raising, and the appellate court from considering, an ex post facto violation.

Furthermore, it would neither serve the pruposes of judicial economy nor be fair to a defendant to split the issues of a guidelines appeal into separate determinations of (1) whether there were clear and convincing reasons for deviation and (2) whether the election of a guidelines sentence was made knowingly and intelligently and then allow consideration of only the first issue on direct appeal with the second being reserved for later collateral attack. Once the court has jurisdiction to determine the validity of the deviation form the presumptive sentence on appeal, it should also consider the record to determine whether it supports a finding of knowing and intelligent waiver of ex post facto rights which necessarily were relinquished in the selection process.

ISSUE II

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

Petitioner relies on his initial brief on the merits as to this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Reply 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 peititoner, Aurelio Marquez, #084685, Post Office Box 1100, Avon Park, Florida 33825, on this 10 day of June, 1985.

P. Douglas Brinkmeyer

PAULA S. SAUNDERS