IN THE FLORIDA SUPREME COURT

KENNETH WHITEHEAD,

Petitioner,

v.

CASE NO. 67,053

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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I PRELIMINARY STATEMENT

Petitioner will designate references to the consecutively numbered transcript of the record on appeal and of the various proceedings by use of the symbol "R" followed by the page number appearing in the lower right hand corner.

Attached hereto as Appendix A is the lower tribunal's opinion. Appendix B is Petitioner's motion for rehearing, and Appendix C is the order denying rehearing.

II STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information filed in the Circuit Court of Alachua County with attempted murder in the first degree (R 9,10). The state filed a notice of intention to seek an enhanced penalty under Section 775.084, Fla. Stat., should Petitioner be convicted (R 36).

Petitioner was tried by jury and found guilty of the lesser offense of aggravated battery (R 38). After the verdict was returned the state filed another notice seeking to have Petitioner sentenced as an habitual offender (R 57).

A presentence investigation report was ordered and a sentencing hearing held (R 529; 657-724).

At the sentencing hearing the Petitioner stipulated that the contents of the presentence investigation report were accurate (R 659, 660). The report established that Petitioner was convicted on June 19, 1978 of burglary. He was sentenced to the Department of Corrections and subsequently paroled in December of 1979. Parole was revoked and Petitioner was sent back to prison where he remained until November 1, 1982. Petitioner had not been pardoned for that offense (R 61, 661).

Lynn Brown, a probation officer with the Department of Corrections, testified that he had prepared the presentence investigation report. That document showed that Petitioner had been arrested in Maryland on August 8, 1980 and charged with assault with intent to commit murder. Brown spoke to the officer who arrested Petitioner on that charge and he told Brown the facts leading to the arrest. Petitioner had been among a group of migrant workers traveling as a group when an

argument developed and the Petitioner stabbed one of the other occupants of the vehicle. The case had not been prosecuted, however, because the witnesses disappeared (R 666, 667).

Based upon 11 years experience in probation and parole supervision Brown testified that there was a very good likelihood Petitioner was likely to engage in future criminal conduct (R 668).

Detective Tom Terry of the Gainesville Police Department testified that Petitioner had been charged with armed robbery in 1977 but there was no trial or conviction because the victim was retarded (R 672). Terry said Petitioner had a "very bad reputation" for committing crimes (R 18).

Detective Charles Henderson testified he arrested Petitioner in 1977 for the armed robbery of Julian Barnes and had interviewed a co-defendant who implicated Petitioner in that offense (R 675, 676). The charge had been dismissed because the victim was not competent (R 677). In Detective Henderson's opinion Petitioner was a threat to the community (R 679).

Kimberly Faye Johnson was a friend of the Petitioner. She said he had a reputation in the community for "stealing things" (R 684). She said she had been with Petitioner five or six times when stole lunch meat from a convenience store in Gainesville (R 684, 685). Petitioner had never been caught committing any of those thefts (R 685).

Police Sergeant A.C. Smith said Petitioner had a reputation for being a "thief . . . in narcotic circles, burglary, robbery, ag. battery, just known as a crook." (R 690).

John Lassiter with the Alachua County Department of Corrections said Petitioner had been in the jail since May 4, 1983

(the hearing was held January 13, 1984). During that time Lassiter said Petitioner's behavior had been "aggressive and abusive toward staff and other residents, disruptive and very disrespectful." (R 696). Lassiter also said there had been an incident at the jail when Petitioner had grabbed a female inmate (R 696, 697). Petitioner also had threatened to kill Officer D. Wright (R 697).

Officer Wright testified that Petitioner had threatened to do him bodily harm on three occasions (R 699, 700).

Corrections Officer K.W. Phillips said that Petitioner had hit another inmate who had his back turned after Petitioner and the inmate had been arguing (R 702, 703).

Petitioner testified that he was the youngest of seven brothers, most of whom had been in and out of jail (R 704, 705). He had used alcohol and other drugs since he was 11 or 12 (R 704, 705). He said he had never stolen food from a convenience store (R 706).

Concerning the charges that originated in Maryland the Petitioner said he was defending himself from a man who had attacked him while they were riding a bus (R 707, 708).

At the conclusion of the evidence the state contended that the question before the court was "whether or not the public needs to be protected from further criminal activity of this defendant." (R 712). The prosecutor relied upon the pre-sentence investigation report furnished to this Court as a supplemental record to contend that Petitioner's prior record, including juvenile offenses more than three years old, arrests for which no convictions were obtained, and disciplinary reports filed while Petitioner was an inmate in the Department

of Corrections, justified finding Petitioner an habitual offender (R 712-715). The prosecutor also contended that Petitioner had lied when testifying at the trial (R 716-717).

Petitioner's counsel admitted that technically he met the standard of being a habitual offender but that:

> Whether he's a danger to the community, I think that's based on a lot of discussion by police officers who are faced with his reputation, the reputation of his family and by those who are facing - -in an enviroment where they are not treating his problem. He's not gotten any alcohol or drug rehabilitation while he's in the county jail. He's been confined out there in a situation where's it's Kenny Whitehead against society, and he's reacting as an alcoholic being pulled off would react.
>
> I think that we do need, when his sentence is considered, to look and make sure that he does get some sort of treatment for drug and alcohol, that that is recognized as one of the major factors causing his behavior problems, and that the system also deal with him on that grounds and the grounds that his intelligence is borderline. Kenny puts up a good show, Kenny can talk a good show. But you hear him on the stand. You heard what Mr. Groland said about him. I don't think Kenny lies, Kenny just doesn't know any different.
>
> (R 721, 722).

Following the arguments of counsel the trial judge took the issue of whether Petitioner should be sentenced as a habitual offender under advisement (R 724).

At the subsequent sentencing, Petitioner's counsel announced that Petitioner was electing to be sentenced under the sentencing guidelines. The trial judge found that Petitioner met the criteria set by Section 775.084 and found Petitioner to be an habitual offender. Petitioner was sentenced to 30 years in the Department of Corrections (R 729-731).

In response to the prosecutor's question to the trial judge of whether a separate order was being entered "for departing from the guidelines recommended sentence?", the trial judge said that he found Petitioner met "all the criteria under Florida Statute 775.084 as an habitual offender." (R 732, 733).

Two days later another proceeding was held at which the Petitioner was informed of his right to appeal the judgment and sentence. Petitioner's counsel asked him if they had discussed the sentencing scoresheet, which indicated a sentence of no more than three and a half years would be imposed assuming that the guidelines were followed. Counsel also asked Petitioner is he had not explained to him that the court could go outside the guidelines "upon written report" (R 738). Petitioner acknowledged that he had discussed the guidelines sentence with counsel; and a written election of sentencing procedure was executed and filed at that time (R 737-739, R 58).

The guidelines scoresheet approved by the trial judge had a recommended sentence of 30 months to three and a half years. The court's 30 year sentence was justified by the habitual offender order which was attached (R 66). That order states in part as follows:

> 2. That it is necessary for the protection of the public to sentence the Defendant to an extended term of five years as provided in Section 775.084(4) and this finding is based upon the following: (a) The testimony of witnesses at the trial in this cause as to the circumstances surrounding the entire stabbing incident which leads this Court to conclude that the stabbing of Arthur Lee Johnson in the back by this Defendant, Kenneth Whitehead, was cruel, unprovoked and cowardly. (b) The testimony of the Defendant, Kenneth Whitehead, at trial which this

Court finds to be unworthy of belief. (c) The uncontested testimony of Detective Tom Terry of the Gainesville Police Department that the Defendant Kenneth Whitehead has a reputation within the Gainesville Police Department for committing crimes within the community. (d) The uncontested testimony of Detective Charles Paul Henderson of the Gainesville Police Department concerning his arrest of the Defendant Kenneth Whitehead in June, 1977, for an armed robbery charge and his testimony likewise uncontested that the victim in this case, a retarded person, who knew the Defendant in the past, positively identified the Defendant, Kenneth Whitehead, as the person who robbed him at knifepoint and took $24.00 in U.S. Currency from him. (e) The uncontested testimony from Sgt. A.W. Smith of the Gainesville Department who said he knows the Defendant for a number of years and the Defendant has a reputation in the community as being a "crook". (f) The Defendant's own testimony in court, at this hearing and at trial that he has continuooously over the years imbibed in illegal drugs. (g) The testimony of Kim Fay Johnson who said that she has observed the Defendant on at least five or six occasions in January or February of 1983 shoplifting food from a local 7-11 food store. (h) The testimony of Sgt. John Lasseter of the Alachua County Adult Detention Center that in October, 1983 he heard the Defendant Kenneth Whitehead threaten to kill Corrections Officer Dee Wright and that the Defendant has been aggresive, disruptive and a constant source of problems during his incarceration at the Alachua County Adult Detention Center since May, 1983. (i) The testimony of Corrections Officer Dee Wright who stated that the Defendant, Kenneth Whitehead, had twice in the past threatened to kill him (and on one occasion kill his family) and Officer Wright's testimony that the Defendant Kenneth Whitehead struck him in the face in October, 1983 while said Defendant was incarcerated in the Alachua County Detention Center. (j) The testimony of Corrections Officer Charles Phillips that he observed the Defendant Kenneth Whitehead

in an argument at the Alachua County Detention Center with another inmate in 1983 and when the other person in that argument turned his back and walked away from the Defendant, said Defendant struck that person with his fist in the head. (k) The uncontested testimony of Probation Officer Lynn Brown as to how he obtained and compiled all of the information in the P.S.I. report (which the Defendant through his attorney has stipulated is true and accurate) and further the testimony of Lynn Brown that in his opinion, which was not objected to, based upon eleven (11) years of experience as a Probation Officer in Michigan and Florida, it is likely that the Defendant Kenneth Whitehead will continue to engage in criminal activities. (l) The actual contents, hearsay and otherwise, of the P.S.I. report itself which was stipulated to by the Defendant and his attorney as being true and accurate. (m) The criminal records section of the P.S.I. report which states that as a juvenile and an adult the Defendant, although 23 years old, has been arrested approximately 29 times and has already been convicted as a juvenile and an adult, of burglary, breaking and entering, attempted robbery, simple assault, trespass after warning, and most recently, aggravated battery. (n) The Defendant's testimony at hearing concerning an incident in Maryland in August, 1980 where he stabbed another and was arrested and jailed for several months on the charge of assault with intent to commit murder and further the uncontested testimony of Probation Office Lynn Brown that said charge was dismissed because the witnesses were migrant workers who could not be located after the Defendant's arrest. (o) The portion of the P.S.I. report which indicates that the Defendant was paroled on December 18, 1979 and then on June 3, 1981 had his parole revoked for failing to remain at liberty without violating the law and being an absconder from supervision.

(R 67-70).

Petitioner filed a notice of appeal pro se on January 30, 1984 (R 81). On the same day his counsel filed a motion

to vacate and correct sentence (R 82-100). No order was entered on counsel's motion. Counsel filed a notice of appeal Feburary 16, 1984 (R 101).

On appeal, Petitioner argued that his election to be sentenced pursuant to the guidelines was not knowing and voluntary, because he did not expressly give up his right to parole. The First District Court of Appeal applied prior decisions and found that his election satisfied the "affirmative" standard, but certified the question (Appendix A at 2). Petitioner also argued that the habitual offender finding could not act as a reason for departure from the recommended guidelines sentence. The First District Court of Appeal disagreed and held that the finding of a habitual felony offender "alone is a clear and convincing reason for departure from the guidelines." Appendix A at 3). Petitioner challenged this latter holding by motion for rehearing (Appendix B) which was denied without comment (Appendix C).

On May 21, 1985, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

In the first issue, Petitioner will argue that an election to be sentenced pursuant to the guidelines must be knowing and voluntary, and made by the defendant himself, with full knowledge that he has given up his right to parole.

In the second issue, Petitioner will argue that a habitual offender finding cannot, in and of itself, act as a justification for an upward departure from the recommended sentence.

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.

The First District has in a number cases, in addition to the instant one, held that an election to be sentenced under the sentencing guidelines need only be "affirmative" as opposed to the more strict "knowing and voluntary" standard. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Coates v. State, 458 So.2d 1219 (Fla. 1st DCA 1984); Jones v. State, 459 So.2d 1151 (Fla. 1st DCA 1984); Cochran v. State, 460 So.2d 542 (Fla. 1st DCA 1984), disc. rev. pend. No. 64,388; Millett v. State, 460 So.2d 202 (Fla. 1st DCA 1984); and Gage v. State, 461 So.2d 202 (Fla. 1st DCA 1984), disc. rev. pend. No. 66,389. In all of these cases, the First District has cited Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984) 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 both in Section 921.001(4)(a), Florida Statutes, and in this Court's opinion promulgated the original guidelines in 1983, In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). 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 First District's

simplistic view of the statute and rule is that it ignores the fact that any defendant who elects the guidelines is necessarily giving up a valuable right - - the right to parole.

Without question, if a defendant elects to be sentenced under the guidelines, he is not eligible for parole on any part of his sentence, and he can only be released from prison through one of three other specified methods:

> A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:
> (a) Upon expiration of his sentence;
> (b) Upon expiration of his sentence as reduced by accumulated gain-time; or
> (c) As directed by an executive order granting clemancy.
>
> The provisions of chapter 947 shall not be applied to such person.

Section 921.001(8), Florida Statutes.

The First District's simplistic view 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, §9 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 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.

The Third District Court of Appeal has already told us how it will rule when faced with this issue, in Gonzalez v. State, 465 So.2d 613, 614 (Fla. 3d DCA 1985):

> Because we remand for sentencing, we need not decide the further point posed by the appellant - namely, whether he, as a person whose crime occurred before October 1, 1983, and who is therefore given the right to elect to be sentenced under the guidelines, must on the record affirmatively waive his right to parole eligibility before his election of guideline sentencing will be deemed free and voluntary. While there is authority that such an affirmative waiver is unnecessary, see, e.g., Harris v. State, 465 So.2d 545 (Fla. 1st DCA 1985); Gage v. State, 461 So.2d 202 (Fla. 1st DCA 1984); Cochran v. State, 460 So.2d 542 (Fla. 1st DCA 1984); Kiser v. State, 455 So.2d 1071 (Fla. 1st DCA 1984); Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984), nonetheless, the question has been certified to the Florida Supreme Court as one of great public importance, and until the question is finally resolved, the trial

> court would be well advised to obtain the defendant's waiver of his right to parole eligibility preceding any resentencing under the guidelines.

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 hearings.

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 3.712(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 Procudure 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 judge 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 similiar but not the same as that in Green. Petitioner is asking to have the opportunity to withdraw his sentencing election. The error 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 not 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 consti-

tutional 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 rights 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 constitutional right. Again, presumed waiver from a silent record is impossible. 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. There is nc such rule of procedure currently 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 potential 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, at 309; emphasis added.

In the same way as Tucker held that the request for instructions on lesser offenses was not equivalent to an expressed 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 selection announced by petitioner's counsel tend to amount to knowing and voluntary waiver on the part of petitioner, personally, as required by Harris and Tucker. It is important to note that there is no rule of procedure governing waiver of the statute of limitations.

The First District and Second District have correctly held that an election cannot be inferred from a totally solent record, where nothing is said by a defendant or his lawyer regarding the guidelines' applicability ot 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, 462 So.2d 33 (Fla. 1st DCA 1984). It is contradictory that the courts would require something regarding an affirmative election to appear on the record, but would not require anything 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 when 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 to a proper consideration of parole[1], the statute and the rule, in their application, not facially, must be said to violate constitutional prohibitions against ex post facto law. 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 to 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 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

> 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, supra, 459 So.2d at 1153; footnotes omitted.

Petitioner never expressely gave up the right to parole when his attorney elected the guidelines (R 728-29). The same same is true with respect to the written election form, which does not say anything about the right to parole being waived (R 58; 738-39). Why would a defendant knowingly give up the right to parole when he knows the state is pressing for a 30 year sentence as a habitual offender?

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 and personally waive his right to parole in making his election.

ISSUE II

WHETHER AN ORDER FINDING PETITIONER TO BE AN HABITUAL OFFENDER UNDER §775.084 CAN BE USED AS THE SOLE JUSTIFICATION FOR AGGRAVATING A SENTENCE BEYOND THE GUIDELINES.

The sentencing in this case was a mixture of habitual offender and sentencing guidelines proceedings. The trial judge expressed the confusion caused by the intermingling of separate sentencing issues when, responding to the prosecutor's question about a written order explaining deviations from the guidelines, he said that Petitioner met all the criteria under §775.084 for habitual offender (R 372, 733).

The relationship between habitual offender and guidelines was confused from the inception of the guidelines. Fla.R.Cr.P. 3.701, does not say how §775.084 proceedings affect a recommended guidelines sentence. A "comment" to the committee note to Rule 3.701(d)(10), published in the Sentencing Guidelines Commission Guidelines Manual seemed to equate enhancements of the maximum sentence under §775.084 with reclassification of the degree of the offense under §775.087 (use of a weapon or firearm) and §775.084 (wearing a mask). This comment proved to be erroneous because habitual offender enhancements were not reclassifications of the degree of the offense and this Court clarified that language by the following underscored addition to the committee note to Rule 3.701(d)(10):

> (d)(10) If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence

> imposed departs from the recommended sentence, the provisions of paragraph (d)(11) shall apply.

The Florida Bar: Amendment to Rules of Criminal Procedure, No. 66,801 (Fla. April 11, 1985)(slip opinion at 7). Thus, it is now clearly this Court's intent to require clear and convincing reasons for departure in addition to a habitual offender finding. That finding provides a greater maximum sentence, but does not constitute an automatic reason for departure.

Still to be answered then is what effect should be given an enhancement order when considering a guidelines sentence. The practice used in this case, of merely annexing the enhancement order to the guidelines scoresheet, automatically makes the habitual offender finding a basis for deviation. No rule or statute allows that kind of automatic aggravation of a guideline sentence and it should not be allowed. The issues are not the same.

In Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980) the Court said:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism.

The guidelines have as their purpose:

> to establish a uniform set of standards to guide the judge in the sentence decision-making process. [They] are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-and offender-related criteria and in defining their relative importance in the sentencing decision. (Emphasis added) Fla.R.Cr.P. 3.701(b).

Among the principles embodied in the guidelines is that:

> The severity of the sanction should increase with the length and nature of the offender's criminal history.

Fla.R.Crim.P. 3.701(b)4.

The objective of the guidelines, therefore, is uniformity in sentencing offenders who commit similar crimes and whose criminal histories are similar. By incorporating increasingly severe sanctions as the number and the seriousness of the offenses increases, the guidelines structure takes recidivism into account. Being essentially redundant, the habitual offender statute should not be used to allow a second enhancement for past offenses already counted in guidelines scoring.

The habitual offender sentence, moreover, was enacted when parole was available. Now persons who are sentenced under the guidelines are not eligible for release on parole. §921.001 (8), Fla. Stat. (1983). The length of a guidelines sentence is intended to reflect the time to be served, shortened only by gain time. Fla.R.Cr.P. 3.701(b)5. By applying the enhanced penalties available under the habitual offender statute to sentences without parole, habitual offenders will be given sentences which are disproportionately harsh when compared with other offenders who have committed similar crimes and who have similar criminal histories, but were not subjected to §774.084 proceedings. In addition, if an order finding a defendant to be a habitual offender is automatically a clear and convincing reason for departure, the avowed purpose of sentencing uniformity will be thwarted. Habitual offenders, sentenced without either the restraint of the guidelines or the leveling effects of parole, will be a separate class of offenders sentenced without regard to guidelines criteria.

The trial judge here improperly merged what are two distinct proceedings. Under the habitual offender statute the question is whether the maximum statutory penalty could be enlarged. Deviation from the guidelines is a different inquiry,

being whether there are clear and convincing reasons for departure from a sentence within the guidelines range, in which criminal history has already been taken into consideration. The habitual offender proceeding was superfluous in this case because the maximum sentence for the second degree felony of aggravated battery was 15 years, and the maximum guidelines sentence was three and a half years. The gap between the maximum guidelines sentence and the statutory maximum was 11 1/2 years. Instaed of considering a departure to close some or all of that 11 1/2 year span, the trial judge extended the statutory maximum to 30 years and, without additional explanation, imposed a sentence 10 times greater than the three year recommended guidelines sentence. This process did not advance the avowed guidelines goal of uniformity, but instead produced a sentence out of proportion to the guidelines.

Because of the different issues and criteria the enhancement order cannot stand ipso facto as a reason for departure from the guidelines. Nor can the single order here, despite its lengthy findings, suffice for both enhancement and departure.

The guidelines rule prohibits consideration as aggravation of arrests for which there have been no convictions. Fla.R.Cr.P. 3.701(d)11. The enhancement order relies in part upon Petitioner's prior arrests for robbery and for assault, even though no convictions were obtained. Similarly, the trial judge recited Petitioner's alleged theft of groceries and alleged untruthful testimony during his trial (perjury) as factors substantiating enhancement, but those acts, criminal in nature, were not even the basis for arrests. This conduct could not be validly used in aggravation because Petitioner had not been convicted (or even charged) with those putative offenses. The enhancement order's

additional recital of Petitoner's 29 prior arrests is likewise violative of guidelines Rule 3.701(d)11, prohibiting use of prior arrests when no conviction ensued as Petitioner was not convicted of all the offenses for which he had been arrested.

The order does not apportion the weight given those arrests which did not result in convictions from those that did, thus violating Crosby v. State, 429 So.2d 421 (Fla. 1st DCA 1983) which held that while prior arrests may be considered in sentencing, they may not be recognized as convictions. The enhancement order further states that Petitioner had been adjudicated delinquent as a juvenile. All of those adjudications occurred more than three years from the sentencing date in this case and therefore were excluded from being counted under prior record category. Fla.R.Cr.P. 3.701(d)(5)(c). As is true with consideration of alleged criminal acts for which there was neither an arrest nor a conviction, a stale juvenile record which cannot be considered in scoring should not be used as an aggravation. To allow aggravations for factors which are prohibited from being otherwise used would allow a trial judge to do indirectly what the rules prohibit from being done directly.

Committee Note (d)(5) says that each separate juvenile adjudication is "discharged from consideration" after three years. Any aggravation based on a juvenile record older than three years would conflict with the plainly stated intent to prevent consideration of that old record in scoring.

Because the reasons for enhancement are the same as those given for departure, and because at least some of those reasons could not have been used for departure, the entire sentencing is invalid. It is impossible to assess on appeal whether the trial judge would have departed, or to the same extent, had he known

that some of the reasons he relied on were not valid aggravations. Cf., Elledge v. State, 346 So.2d 998 (Fla. 1977) (result of reweighing aggravating versus mitigating circumstances by trial judge could not be known by appellate court reviewing death sentence after it struck some, but not all, of aggravations originally found by trial judge). Thus this Court should at least remand for proper sentencing under the guidelines, and direct that if any valid clear and convincing reasons for departure are found, they be stated in an order separate from the habitual offender findings. Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), disc. rev. pend.

The failure of the trial judge to enter a proper order stating clear and convincing reasons for departing from the guideline sentence is reversible error. The sentence should be vacated and remanded.

IV CONCLUSION

The record does not establish, as it should, that Petitioner voluntarily and intelligently waived the protection against ex post facto laws when electing to be sentenced under the guidelines. The sentence should be vacated and remanded so that the consequences of that election, including the waiver of the constitutional rights, are voluntarily and intelligently waived on the record as a condition precedent to any guideline sentence without parole eligibility.

In the alternative, the sentence should be vacated and remanded for resentencing because the order finding Petitioner an habitual offender is not a valid basis for departure from the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on the Merits has been furnished by hand delivery to Assistant Attorney General Thomas Bateman, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to Petitioner, Kenneth Whitehead, #065590, Post Office Box 747, Starke, Florida 32091 on this 13 day of June, 1985.

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