IN THE SUPREME COURT OF FLORIDA

KENNETH WHITEHEAD,

Petitioner,

-v-

CASE NO. 67,053

STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

JIM SMITH
Attorney General

ROYALL P. TERRY, JR.
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol
Tallahassee, Florida 32301-8048
(904) 488-0290

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND OF THE FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
ISSUE I	
PETITIONER IS NOT ENTITLED TO WITHDRAW OR HAVE VACATED HIS ELECTION TO BE SENTENCED UNDER THE SENTENCING GUIDELINES. (Restated.)	4
ISSUE II	
THE TRIAL JUDGE'S IMPOSITION OF A SENTENCE IN EXCESS OF THE RECOMMENDED RANGE IN THE APPLICABLE SENTENCING GUIDELINES PREDICATED UPON A FINDING THAT APPELLANT IS A PROPER SUBJECT FOR SENTENCING AS AN HABITUAL OFFENDER WAS NOT ERROR. (Restated.)	12
CONCLUSION	18
CERTIFICATE OF SERVICE	19

TABLE OF CITATIONS

Cases	Page(s)
Adams v. State, 376 So.2d 47 (1st DCA 1979)	14
Bould v. Touchette, 349 So.2d 1181 (Fla. 1977)	13
Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1079, 23 L.Ed.2d 274 (1969)	8
Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984)	15
Cuthbert v. State, 459 So.2d 1098 (Fla.1st DCA 1984)	15
Daniels v. Parole and Probation Commission, 401 So.2d 1351 (Fla.1st DCA 1981)	7
Dominguez v. State, 461 So.2d 277 (5th DCA 1985)	14
Eutsey v. State, 383 So.2d 219 (Fla. 1980)	14
Ex parte Alvarez, 39 So. 481 (1905)	8
Gann v. State, 459 So.2d 1175 (Fla.5th DCA 1984)	15
Gay v. Whitehurst, 44 So.2d 430 (Fla. 1950)	8
Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945)	8
Greenholtz v. Inmates at the Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed.2d 668 (1979)	7
Hendrix v. State, 455 So.2d 449 (5th DCA 1984)	16

Johnson v. State, 462 So.2d 49 (Fla.1st DCA 1984), review granted, 10 F.L.W. 24 — 6

Jones v. State, 459 So.2d 1151 (Fla.1st DCA 1984) — 7

Marsh v. Greenwood, 65 So.2d 15 (Fla. 1953) — 8

McPhee v. State, 254 So.2d 406 (Fla.1st DCA 1971) — 9

Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), cert.denied, 41 L.Ed.2d 239 — 7

Moore v. State, 455 So.2d 535 (Fla.1st DCA 1984) — 6

Ray v. State, 403 So.2d 956 (Fla. 1981) — 9

Silver v. State, 188 So.2d 300 (Fla. 1966) — 13

Small v. State, 428 So.2d 337 (Fla.2d DCA 1983) — 14

Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982), cert.denied, 72 L.Ed.2d 166 — 7

Trushin v. State, 425 So.2d 1162 (Fla. 1982)

Wainwright v. Sykes, 433 U.S. 72 (1962) — 9

Weems v. State, Case No. 65,593, ___So.2d___ (3rd DCA, May 9, 1984), 10 F.L.W. 268 — 17

Whitehead v. State, Case #AX-350, 1st DCA, April 15, 1985 — 15

Williams v. State, 454 So.2d 751 (Fla.1st DCA 1984) — 7

Florida Statute

§ 775.084, F.S. 14, 16

§ 775.084(1)(a), F.S. (1983) 16

§ 775.084(1)(a)2, F.S. 14, 16

§ 921.001, F.S. (1983) 9

§ 921.001(4)(1), F.S. 4

§ 921.001(4)(a), F.S. 6

Other

3.701, Florida Rules of Criminal Procedure 4, 6, 9

3.701(d)(5)(b), Florida Rules of Criminal Procedure 14, 16

3.701(d)(10), Florida Rules of Criminal Procedure 15

3.701(d)(11), Florida Rules of Criminal Procedure 13, 15, 16

Art.I, § 10, United States Constitution 3

67 C.J.S. Pardons § 21, p. 609 8

The Florida Bar: Amendment to Rules of Criminal Procedure, No. 66,801 (Fla. April 11, 1985) 13

IN THE SUPREME COURT OF FLORIDA

KENNETH WHITEHEAD,

Petitioner,

-v- CASE NO. 67,053

STATE OF FLORIDA,

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the appellant/defendant below and respondent was the appellee/plaintiff.

References to the consecutively numbered transcript of the record on appeal and of the various proceedings will be made by use of the symbol "R" followed by the page number(s) appearing in the lower right hand corner.

References to petitioner's Appendix (opinion below) will be made by use of the symbol "A." Any other references will be specifically designated.

STATEMENT OF THE CASE AND OF THE FACTS

Appellee accepts appellant's statement of the case and of the facts for purposes of this appeal.

SUMMARY OF ARGUMENT

As To Issue I

Parole eligibility is not a constitutional right. It is solely a creature of the legislature. Applicable law requires only that an affirmative election to be sentenced under the guidelines be made in the record. No ritualistic procedure indicating knowing and intelligent waiver of parole eligibility is required in order to remove such results from the proscriptions of Art.I, § 10 (ex post facto), Constitution of the United States. Even if a knowing and intelligent waiver were constitutionally mandated there was such a waiver in the instant case as the record clearly shows.

As To Issue II

Unlike the question raised under petitioner's Issue I, Issue II was not certified by the lower court as a question of great public importance and the Supreme Court need not address it except as a matter of absolute discretion. In any case, a finding, supported by the evidence that a defendant may be sentenced as an habitual offender is clear and convincing reason and justification for departure from the sentencing guidelines because of the stricter recidivist standard. When such a finding has been reduced to writing, a second writing vis-a-vis reason for departure from the sentencing guidelines is superfluous and not required by law.

ARGUMENT

ISSUE I

PETITIONER IS NOT ENTITLED TO WITHDRAW OR HAVE VACATED HIS ELECTION TO BE SENTENCED UNDER THE SENTENCING GUIDELINES.

In the case sub judice the First District Court of Appeal has certified the following question to the Supreme Court as one of great public importance:

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

Petitioner is asking that he be permitted to withdraw his affirmative election to be sentenced under the sentencing guidelines on grounds that the record allegedly does not show that his election was done "knowingly and intelligently." Petitioner argues that if the courts observe the language of § 921.001(4)(1), F.S., and 3.701 (see committee notes), Florida Rules of Criminal Procedure, and the weight of the authority construing what constitutes "affirmative selection" on the part of a defendant (who elects to be sentenced under the sentencing guidelines for crimes committed before October 1, 1983, for which sentence might be imposed after that date) such person is deprived of federally guaranteed constitutional rights.

The respondent disagrees and argues that the meanings and language of the applicable statute and rule are clear and that the weight of the construing authority and the ruling of the district court below were and are correct and in no way dilute any constitutional rights to which petitioner is entitled.

Petitioner seems to be saying that even if the record and documents filed with the court indicate clearly that counsel has fully explained to the defendant his available options under the provisions of the statutes and sentencing under the law that prevailed at the time the crime was committed, that the record should reflect some ritualistic panoply of questions and answers akin to the entry of a negotiated plea of guilty. The weight of judicial authority construing these provisions of the law shows clearly both that the courts have never adopted the position that the legislature ever intended anything beyond an affirmative selection of record and that, moreover, such an election has never been given the dignity of a waiver of federally guaranteed constitutional rights. It is a novel construction which the petitioner now urges upon this court.

The respondent disagrees that there is any question of ex post facto limitation of constitutional rights as parole itself is not a constitutional right nor is eligibility for parole as the latter must be earned. To crown the questions of parole or eligibility for parole with a constitutional diadem is to invite

speculation as to what might or might not transpire respecting some imagined standing of the petitioner before a parole board at some future indeterminate time.

It is the respondent's position that the First District Court of Appeal was correct in Johnson v. State, 462 So.2d 49 (Fla.1st DCA 1984), review granted, 10 F.L.W. 24, that the application of Fla.R.Cr.P. 3.701 requires only that the defendant "affirmatively selects" to be sentenced pursuant to the rule and that such affirmative selection does not require any advisement by the court as to parole eligibility. Colloquy between the trial court and defense counsel clearly evidencing defendant's affirmative selection to be sentenced under the sentencing guidelines complies with the law and there is no indication in either the rules of criminal procedure on sentencing guidelines or in § 921.001(4)(a) that the term "affirmatively" was intended to mean "knowingly and intelligently." Moore v. State, 455 So.2d 535 (Fla.1st DCA 1984).

Returning to petitioner's constitutional argument relating to ex post facto law, petitioner urges that his "right" to parole or parole eligibility must be knowingly and intelligently waived on the record. But this is based on the false premise that a known constitutional right is at stake. Right to trial by jury, to confrontation with accusers, and right to be represented by counsel, etc., are constitutional rights and any waiver of same

should be done knowingly and intelligently. But the speculative consequences of a full-blown parole hearing that may never take place are qualitatively different from the consequences of waiver of fundamental rights. Williams v. State, 454 So.2d 751 (Fla.1st DCA 1984), Jones v. State, 459 So.2d 1151 (Fla.1st DCA 1984). Jones involved a negotiated plea and though it is well established that the voluntariness of a guilty plea is dependent upon an awareness of the consequences thereof, the court held to the view that, even under that standard, an election to be sentenced under the sentencing guidelines requires only an affirmative selection, without any requirement that the court advise a defendant concerning parole ineligibility. There is ample authority for the proposition that in no wise is the matter of parole, right to parole, eligibility for parole of constitutional dimension except where equal protection under the law might be involved and even in such cases the question of protectable entitlement is one that should be resolved on a case-by-case basis. Greenholtz v. Inmates at the Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed.2d 668 (1979), Daniels v. Parole and Probation Commission, 401 So.2d 1351 (Fla.1st DCA 1981), Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982), cert.denied, 72 L.Ed.2d 166, Moore v. Florida Parole and Probation Commission, 289 So.2d 719 (Fla. 1974), cert.denied, 41 L.Ed.2d 239.

Parole is not freedom in the complete sense of the word. It is merely a means of serving out a sentence outside of prison

walls. Marsh v. Greenwood, 65 So.2d 15 (Fla. 1953). Thus, there is no consideration of fourth amendment rights. Except for the setting, a parolee is still very much a prisoner of the state. Even if an inmate were unlawfully denied an opportunity to qualify for parole his proper remedy would be in the filing of habeas corpus petition. He would still not have the inherent right to live where he pleased or come and go as he pleased whenever he pleased. For these reasons, a waiver of parole eligibility is distinguishable from waivers of well-defined constitutional rights, e.g., right against self-incrimination, right to counsel, etc., as were held to be subject to knowing and intelligent waiver in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Even behind bars, waiver of consideration for parole is a unilateral, personal act but it may be waived either expressly, impliedly or by conduct. There is no requirement that there be a formal, ritualized waiver in open court and made part of a court record. AGO 078-29, Feb. 21, 1978, citing Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945), Gay v. Whitehurst, 44 So.2d 430 (Fla. 1950), Ex parte Alvarez, 39 So. 481 (1905). See also 67 C.J.S. Pardons § 21, p. 609.

It is the position of the state that since a defendant may waive even a constitutional right, an option that does not rise to the level of a constitutional right could certainly be waived

by an affirmative election, as announced by counsel in open court. Trial counsel may make and announce strategic decisions of, by and for his client. Wainwright v. Sykes, 433 U.S. 72 (1962). In such cases, defendants are bound by acts of counsel and should not be permitted to challenge judicial acts done at counsel's request. Castor v. State, 365 So.2d 701 (Fla. 1978), McPhee v. State, 254 So.2d 406 (Fla.1st DCA 1971), and Ray v. State, 403 So.2d 956 (Fla. 1981).

In the instant case petitioner is obviously unhappy with the sentence he received after his election to be sentenced under the guidelines. Now that he knows what his sentence is he wants to waive his right to be sentenced under the guidelines and to be sentenced under the general law prevailing at the time he committed his crime. What should this court assume in this case, that defense counsel was either incompetent or deceived the court when he filed with the trial court his client's "election of sentencing procedure"? (R 58). Contemporaneous to the filing of that document petitioner Kenneth Whitehead signed his name and elected "to be sentenced pursuant to § 921.001, F.S. (1983), and Fla.R.Cr.P. 3.701." On the face of that same piece of paper appears a certificate of counsel that reads as follows: "I hereby certify that I have fully explained to the defendant his options under the provisions of the Florida statutes and the defendant has knowingly, voluntarily and intelligently made the above election of sentencing procedure." (Signed) Don Reid, as Counsel for Defendant. (Emphasis added.)

There has been no showing by petitioner that Mr. Reid did not do exactly what he certified that he did. Petitioner should not be allowed to pick, choose and then shop around until he finds a more favorable alternative sentence.

On January 18, 1984 when petitioner appeared before the trial judge for sentencing, defense counsel Don Reid addressed the court as follows:

> Yes, Your Honor, in being handed a transcript of the proceeding the other day, it indicated that what I referred to as a matrix is the sentencing score-sheet under the sentencing laws, and the sentencing scoresheet was given to Mr. Whitehead -- is that correct -- and we went over the sentencing scoresheets which indicated under the guidelines as set by the courts of Florida. Mr. Whitehead, if those guidelines were followed, would receive a sentence of no more three and a half years. But it was also explained to him that he could go outside the guidelines upon written report -- that having been adjudged an habitual offender, that as you announced in court you had gone outside those guidelines -- correct, Mr. Whitehead?
>
> MR. WHITEHEAD: Yeah.
>
> MR. GROLAN: Mr. Reid and I would ask, Your Honor -- I think I provided you earlier with a form provided by the clerk's office entitled Election of Sentencing Procedure, and I would ask you if you are inclined to execute that at this time, to give a copy of that to the clerk so that the record would be complete.

MR. REID: Indicating that you were sentenced and elected to be sentenced under the sentencing guidelines provision; is that correct?

MR. WHITEHEAD: (Nods)

MR. REID: Would you sign that, Mr. Whitehead.

(the defendant signed the above-mentioned document.)

The foregoing and the election document mentioned should convince anyone that defense counsel fully explained the sentencing options to his client and that petitioner's election to be sentenced under the guidelines not only constitutes an affirmative election but under the circumstances that prevailed and the pains that counsel took was, in fact, a knowing and intelligent waiver of any and all options available to the petitioner under the general law.

Even if the court is inclined toward the ritualistic approach to sentencing elections in such cases, petitioner in the instant case, deserves no relief, as the record is ample and adequate to show, that after consultation with his attorney as to his options, he knowingly and intelligently waived any of the options available to him through sentencing under the then existing law. He gambled and he lost and now he seeks to make the best of a bad situation by demanding that he be given the opportunity to be considered for parole, when the sentence resulting from this free election turned out not to be to his liking.

ISSUE II

THE TRIAL JUDGE'S IMPOSITION OF A SENTENCE IN EXCESS OF THE RECOMMENDED RANGE IN THE APPLICABLE SENTENCING GUIDELINES PREDICATED UPON A FINDING THAT APPELLANT IS A PROPER SUBJECT FOR SENTENCING AS AN HABITUAL OFFENDER WAS NOT ERROR. (Restated.)

The certified question of great public importance treated under Issue I is the only matter relevant to the instant cause that is before the Supreme court for review. Appellant has injected a second issue into the proceedings as Issue II in its brief, stated as follows:

> 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 court below ruled in the affirmative. On April 15, 1985, in Case No. AX-350, Judge Mills, writing for the court, said:

> A finding, supported by the record, that a defendant is an habitual felony offender as defined in § 775.084(1)(a), Florida Statutes (1983), is a clear and convincing reason for departure from the sentencing guidelines. Citing Cuthbert v. State, 459 So.2d 1098 (Fla.1st DCA 1984); Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984); Gann v. State, 459 So.2d 1175 (Fla.5th DCA 1984).

This question was not certified by the First District as being one of great public interest nor has there been any

application for certiorari based on any apparent conflict among the district courts of appeal on this point.

It is respondent's position that the Supreme Court ought not to, for the reasons aforesaid, consider appellant's Issue II as a part of this appeal. Respondent asks that the court limit its jurisdiction, in this matter, to the one question certified by the First District. Petitioner is attempting to invoke this court's jurisdiction on a claim not arising out of the First District's certification by improperly attaching it to a certified question. Respondent is aware that once this court's jurisdiction has been invoked it may, as a discretionary matter, consider other aspects of the case in chief if it deems such ancillary matters to be of importance in addressing questions properly before the court. Trushin v. State, 425 So.2d 1126 (Fla. 1982), Bould v. Touchette, 349 So.2d 1181 (Fla. 1977), Silver v. State, 188 So.2d 300 (Fla. 1966).

Petitioner argues that if the sentence imposed departs from the recommended sentence, the provisions of Fla.R.Cr.P. 3.701(d)(11) must apply and cites The Florida Bar: Amendment to Rules of Criminal Procedure, No. 66,801 (Fla. April 11, 1985), slip op. at 7, which reads:

> (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

> § 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. (Emphasis supplied by petitioner.)

This was not the way the rule read in January, 1984 when petitioner was sentenced. The underlined portion (see above) was not added until April 11, 1985. Prior to the above-referenced clarification by this court there was already authority to the effect that the habitual offender statute merely prescribes longer sentences but does not reclassify the offenses enhanced as being new substantive offenses. Dominguez v. State, 461 So.2d 277 (5th DCA 1985), citing Eutsey v. State, 383 So.2d 219 (Fla. 1980), and Small v. State, 428 So.2d 337 (Fla.2d DCA 1983); Adams v. State, 376 So.2d 47 (1st DCA 1979). In any case, if a court found that a defendant is an habitual offender, stated the basis on the record in compliance with § 775.084 and then reduced same to writing there would be no reason for the court to prepare a second set of factual findings to justify departure from the sentencing guidelines.

The habitual offender statute has been with us for a number of years and its application requires a more aggravated degree of recidivism than does departure from the sentencing guidelines. Cf. 775.084(1)(a)2 with Fla.R.Cr.P. 3.701(d)(5)(b). As a result, some courts of this state have held that a finding in accordance

with the habitual offender statute alone is sufficient to take the sentence out of the sentencing guidelines and that when the judge complies with the habitual offender statute by finding that sentencing as an habitual offender is necessary to protect the public, this per se is a clear and convincing reason for departing from the guidelines. Whitehead v. State, Case #AX-350, 1st DCA, April 15, 1985, citing Cuthbert v. State, 459 So.2d 1098 (Fla.1st DCA 1984), Brady v. State, 457 So.2d 544 (Fla.2d DCA 1984), Gann v. State, 459 So.2d 1175 (Fla.5th DCA 1984). In the case sub judice the court recorded in writing its reasons for finding petitioner an habitual offender. Respondent argues that two writings are both unnecessary under the law and would constitute an unwarranted cluttering of the record.

Respondent is aware of no authority holding that a trial judge's written order of sentencing as an habitual offender is an insufficient writing for purposes of Fla.R.Cr.P. 3.701(d)(11).

Respondent is aware of no legal authority that holds that a trial court's oral finding on the record as to the elements necessary to adjudge a defendant an habitual offender need be set down in a separate writing. The judge's findings may be spoken into the record followed by signing of the usual and customary documents necessary for commitment of the individual. If the latest amendment to Fla.R.Cr.P. 3.701(d)(10) is to be applied in the case sub judice, retroactively then the respondent earnestly

urges this court to adopt the view of the court below that a finding, supported by the record, that a defendant is an habitual felony offender as defined in § 775.084(1)(a), F.S. (1983), is a clear and convincing reason for departure from the sentencing guidelines. Moreover, the trial court, in this case, did reduce its findings that petitioner is an habitual offender to writing. (R 67-70). In any case such a writing, when supported by the record, satisfies the requirements of Fla.R.Cr.P. 3.701(d)(11) in accordance with its latest wording. Because of the stricter recidivist standards encompassed by the habitual offender statute, a person found to be an habitual offender certainly merits an enhanced sentence as much as or more than anyone who might be the subject of a departure from the guidelines but who does not meet the criterial required by Fla.Stat. 775.084, as an habitual felony offender.

A defendant's record of prior convictions may be used as a basis for departing from a presumptive sentence under sentencing guidelines even though the prior record has been used in arriving at a point total for presumptive sentence range. Hendrix v. State, 455 So.2d 449 (5th DCA 1984). The same record may serve to qualify a defendant for treatment under the habitual offender statute but the standard for treatment as a recidivist under that statute is a higher one than the departure guidelines require. Cf. § 775.084(1)(a)2, F.S. (1983), with Fla.R.Cr.P. 3.701(d)(5)(b). As Judge Mills phrased it in the opinion of the court below:

> To be a habitual felony offender, the recidivistic activity must occur within five years of a prior conviction or release from commitment. § 775.084 (1)(a)2, F.S. (1983). In contrast, a prior adult record may be scored on the guidelines scoresheet if the instant offense is within ten years of the "the most recent date of release from confinement, supervision or sanction." Fla.R.Cr.P. 3.701(d)(5)(b) [sic].

A defendant's juvenile record can provide a basis either for departing from the guidelines or for consideration under the habitual offender statute even if the defendant's juvenile conviction had been so remote in time that it could not be used in calculating the applicable sentence range. Weems v. State, Case No. 65,593, ___So.2d___ (3rd DCA, May 9, 1984), 10 F.L.W. 268.

The trial court's written findings and recitation in the record as to its basis for finding petitioner to be an habitual felony offender satisfies the provisions of the applicable rule requiring a clear and convincing statement of the reason(s) for departure from the sentencing guidelines.

CONCLUSION

As to Issue I

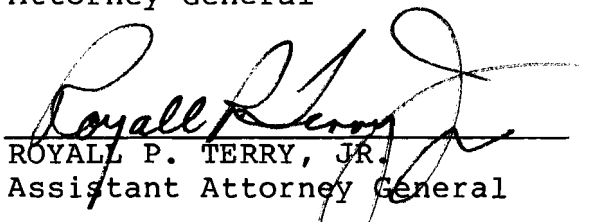
The record in the instant case clearly shows that petitioner consulted with his attorney and was adequately and fully apprised concerning the alternatives respecting election to being sentenced under the guidelines or pursuant to the law in effect at the time he committed the crime sub judice, including ineligibility for parole in the event of his election to be sentenced under the guidelines.

As to Issue II

The trial court, by its written findings that petitioner qualified for sentencing under the habitual felony offender law stated clear and convincing reasons for departure from the guidelines and that such a finding, especially when reduced to a separate writing, constitutes full compliance with all applicable law.

Respectfully submitted,

JIM SMITH
Attorney General



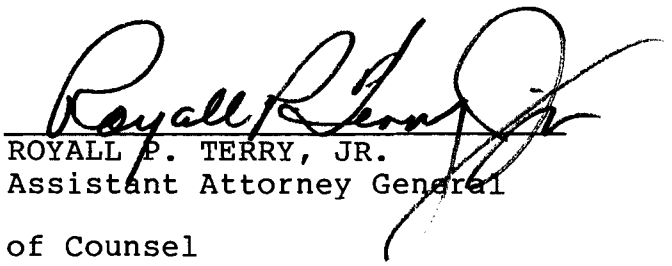
ROYALL P. TERRY, JR.
Assistant Attorney General

COUNSEL FOR APPELLEE

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Respondent on the Merits to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this 3rd day of July, 1985.



ROYALL P. TERRY, JR.
Assistant Attorney General

of Counsel