O/a 5-26-88

IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT BLACKSHEAR,

Petitioner,

v. CASE NO. 71,440

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #197890
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal will be referred to as "R", followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T".

Attached hereto as appendix A is the opinion of the lower tribunal, in petitioner's first appeal, which has been reported as Blackshear v. State, 480 So.2d 207 (Fla. 1st DCA 1985).

Attached hereto as appendix B is the opinion of the lower tribunal, the subject of the instant proceeding, which has been reported as Blackshear v. State, 513 So.2d 174 (Fla. 1st DCA 1987).

STATEMENT OF THE CASE AND FACTS

By amended information filed February 7, 1984, petitioner was charged with sexual battery with use of a deadly weapon and armed kidnapping, the crimes alleged to have occurred on December 3, 1983 (R 6-7). On March 8, 1984, petitioner entered pleas of guilty to both charges. 480 So.2d at 208. Petitioner's counsel then suggested that petitioner was incompetent to be sentenced, relying upon a psychiatric evaluation from 1978, when petitioner was a juvenile. Id. Two psychiatrists were appointed, and on May 3, 1984, petitioner was found to be incompetent to be sentenced and committed to the state hospital. Id.

On August 15, 1984, the forensic administrator at the state hospital certified that petitioner was competent. Id. On November 19, 1984, psychiatrist Ernest C. Miller, M.D., found that petitioner was competent to be sentenced, although he suffered from: "a mild perceptual motor impairment, a behavioral disorder, diffuse brain damage", and mental retardation. Id. The court declared petitioner competent to be sentenced and imposed concurrent terms of 65 years in prison. Id. at 209; R 8-16.

On appeal, the lower tribunal reversed these sentences:

> With regard to the second point presented for review, i.e., the two concurrent 65-year sentences, Blackshear contends and the state agrees that the sentences are improper because they are not within the parameters provided by statute. Blackshear pled guilty to a violation of Section 794.011(3),

> Florida Statutes, and Section 787.01, Florida Statutes. Both crimes are categorized as life felonies, punishable as provided in Section 775.082(3)(a), Florida Statutes, which states in part that a person convicted of a life felony "committed on or after October 1, 1983, [may be punished] by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years," (emphasis supplied). We find, therefore, that the trial court has imposed an illegal sentence, and we reverse and remand the concurrent 65-year sentences for imposition of a sentence that comports with the law.

Blackshear v. State, 480 So.2d at 209-10; footnote omitted.

Petitioner was returned to Duval County for resentencing on January 30, 1986 (R 24-25). On February 11, 1986, the court ordered petitioner examined again to determine if he was competent to be resentenced (R 29-30). Psychiatrist Miller found that he was not (R 31-32). On February 24, 1986, petitioner was again committed to the state hospital (R 33-34). He was medicinally restored to competency again and returned to Jacksonville for resentencing on June 20, 1986 (R 37-41).

This time Dr. Miller found petitioner competent, although still suffering from organic brain damage (R 42-46). The court judicially restored his competency at a hearing on July 8, 1986 (R 47; T 3-6).

The prosecutor argued for a departure sentence of either 40 years or life (T 6). Petitioner's counsel argued in mitigation and asked for a guidelines sentence of 12-17 years, on the basis of petitioner's long-standing mental condition, and presented the testimony of petitioner's mother and grandmother (T 7-15). Counsel noted that petitioner became involved in the

system at age 14 and was 19 when sentenced for the instant offenses (T 17). The court imposed concurrent life sentences, as a departure from the 12-17 year range (R 48-54; T 18), and adopted its original reasons for departure again:

> The Defendant has a history of violence in his home. His sister and grandmother testified that he has been violent and fought members of his family most of his life.
>
> The Defendant turned 18 years old in August 1982. From that time and before December 6, 1983 when he was arrested for the instant offenses, the Defendant had been arrested more than eight times. While these arrests were for misdemeanor offenses, the arrests revealed a violent nature in the community. Many of the arrests were for battery and for making threats. There were also arrests for disorderly intoxication and trespassing after warning.
>
> The violent nature of the Defendant as revealed in his home life and in his short adult life was further evidenced in the manner in which he committed the offense of Sexual Battery and Armed Kidnapping. The Defendant was not content to force himself upon the victim sexually or to kidnap her by threatening to use a box cutter. He violently and viciously beat the victim about the face and head. He verbally degraded her in the manner of his insistance that she serve him sexually. He created in the victim a terror that has in effect incarcerated her for the remainder of her life in a prison of fear. She is no longer able to work alone, and she has expressed a sense of uncontrollable fear when she is in the presence of men. The victim indicated that she was psychologically traumatized to the extent that she would have had a nervous breakdown were it not for the support of loving and caring family and friends. The Defendant's violent nature would make him a constant threat to the community wherein he may be at large. There is no evidence that the Defendant will ever be anything but violent. Although the Defendant has organic brain damage and is

> borderline retarded, there is nothing to indicate he should not be sentenced.

(R 55-56).

In his second appeal to the lower tribunal, petitioner argued that his two life sentences constituted a violations of due process, since he had been sentenced to only 65 years initially. The lower tribunal found no due process violation and affirmed on this point. 513 So.2d at 177-78.

Petitioner also argued that the reasons for departure were invalid. The lower tribunal treated the departure order as stating two separate reasons: "(1) the violent nature of the defendant; and (2) the psychological trauma inflicted upon the victim by the defendant." Id. at 176. The lower tribunal found reason 1 to be valid, reason 2 to be invalid, and remanded for resentencing. Id. at 176-77.

This timely discretionary review follows.

SUMMARY OF THE ARGUMENT

Petitioner will make three arguments in this brief, each attacking his life sentences. In the first, he will argue that he was illegally penalized for exercising his right to appeal by receiving life sentences after his original 65 year sentences were reversed on appeal. The lower tribunal failed to recognize that the judge could have imposed a term of years to equal 65 years, and was not required to impose life sentences.

Petitioner will also argue that his life sentences, which constitute a departure from the recommended guidelines range, are not supported by clear and convincing reasons. The reasons given relate to either petitioner's criminal history, already scored on the scoresheet, his past arrest record, for which no convictions were entered, and a prediction by the sentencing judge that petitioner will commit more crimes. All of these reasons are invalid.

Petitioner will also attack the length of his departure sentences, because they are excessive for the crimes for which he was sentenced.

The proper remedy is to vacate the sentences and remand for resentencing, either to 65 years, or the guidelines range, or somewhere in between.

ARGUMENT

ISSUE I

THE LOWER TRIBUNAL ERRED IN FINDING THAT PETITIONER'S LIFE SENTENCES DID NOT VIOLATE DUE PROCESS WHERE HE ORIGINALLY RECEIVED 65 YEAR SENTENCES.

Petitioner originally received two concurrent 65 year sentences, which were vacated because they did not conform to the statute establishing the punishment for life felonies as a term of years not exceeding 40 or life in prison. Section 775.082(3)(a), Florida Statutes. Blackshear v. State, 480 So.2d at 209. When petitioner received two life sentences upon resentencing, he argued that his constitutional right to due process had been violated because he had been penalized for exercising his right to appeal, on authority of North Carolina v. Pearce, 395 U.S. 711 (1969). The lower tribunal disagreed:

> At first blush, it would appear that the appellant's point is well taken since it would seem that there was no conduct or event that occurred subsequent to the original sentencing proceeding which would justify a sentence greater than that which was originally imposed.
> * * *
> But that is, of course, not possible in the instant case because the trial court in the original sentencing had imposed a sentence of a term of years which exceeded by 25 years the 40-year statutory maximum. On reversal and remand after the first appeal, obviously the trial judge could not, as he could in the typical Pearce situation, impose the same sentence as before.
> * * *
> Why is it not logical to assume based on the facts before us that the trial judge -- being precluded from imposing a term of years sufficient to meet what he had earlier determined to be the ends of justice in this case -- imposed the only

> other sentence available under the statute, life imprisonment?

513 So.2d at 177-78; footnotes omitted; emphasis added. Petitioner disputes this conclusion.

First, neither petitioner's counsel nor the prosecutor, as implied in footnote 5 of the lower court's opinion,[1] "assumed that the trial court was free to impose a life term":

> MRS. STARRETT: Judge, it could be anything up to 40 years.
> MRS. ALLEN-TUNSIL: And I think it was a sentence up to 40 years but not beyond.

(T 17-18).

Second, the lower tribunal's initial assumption -- that a life sentence was the only sentence available -- was incorrect, because it failed to consider that the resentencing judge could fashion a sentence not to exceed his original decision that a 65 year sentence for both of these crimes was appropriate. There would be nothing to prevent the judge from giving petitioner a 40 year sentence for one life felony, and a consecutive 25 year sentence for the other, or 32 1/2 years on each, to run consecutively, or any number of combinations, the total of which is 65 years.

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[1] In fact, it is apparent from the transcript of the resentencing hearing that the defense attorney also assumed that the trial court was free to impose a life term.
513 So.2d at 177.

Third, because the lower tribunal's initial assumption was incorrect, it followed that no presumption of judicial vindictiveness occurred. Petitioner disagrees.

In Pearce, the Supreme Court held that a defendant may not be resentenced to a greater term of years following a successful defense appeal, and that a rebuttable presumption of vindictiveness is raised by a greater sentence, which may be overcome if the judge sets forth reasons for the increased sentence. Fifteen years later, the Court in Wasman v. United States, 468 U.S. 559 (1984), held that the increased sentence may be justified by events occurring subsequent to the original sentence.

If the lower tribunal had not been operating upon a faulty beginning premise, its logic would have resulted in finding a Pearce conclusive presumption, since the second sentence is, on its face, more severe than the first, and since the judge said nothing to justify it. The only intervening event to rebut the presumption is the opinion in Petitioner's first appeal, which remanded only; "for imposition of a sentence that conforms with the law." 480 So.2d at 210.

Even if Pearce is not applicable to the instant situation, petitioner's sentences are still impermissible under decisions from this Court which discuss how to correct an illegal sentence after the defendant successfully challenges it.

After this Court decided in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) that a split sentence of more than one year incarceration as a condition of

probation was illegal, many inmates filed motions to vacate their sentences. When they succeeded, some, much to their dismay, received prison sentences equal to their original probation period, and claimed a Pearce violation. This Court ultimately held that no Pearce violation occurs when the new sentence is: "no longer than the original combined term of incarceration and prison." Beech v. State, 436 So.2d 82, 84 (Fla. 1983). Accord: Forbert v. State, 437 So.2d 1079 (Fla. 1983).

The application of Beech to petitioner's dilemma is obvious. Petitioner's total sentence after resentencing should not exceed the 65 years he originally received.

Likewise, in Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1966), the defendant successfully attacked sentences which were illegal because they exceeded the statutory maximum. His original aggregate sentence was a net 10 years, but upon resentencing, received more. The court found that he could be resentenced to no more than a total of 10 years without running afoul of Pearce. However, if he received more than a net sentence of 10 years, the judge would have to justify it. See also Smith v. State, 365 So.2d 1058 (Fla. 2nd DCA 1978).

Thus petitioner's life sentences constitute a Pearce violation. They must be vacated so that the sentencing judge may fashion a combination of terms of years not exceeding 40, but less than a total of 65 years.

ISSUE II

THE LOWER TRIBUNAL ERRED IN APPROVING PETITIONER'S "VIOLENT NATURE" AS A REASON FOR DEPARTURE BECAUSE IT IS BASED UPON PRIOR ARRESTS WITHOUT CONVICTION AND UPON THE INSTANT OFFENSES AND UPON SPECULATION THAT FUTURE CRIMES WILL BE COMMITTED.

A. Prior Arrests

In its opinion, the lower tribunal found one of the two reasons for departure, "the violent nature of the defendant", to be valid, because petitioner's "violent character was not based upon past convictions alone." 513 So.2d at 176.

If it was not based upon petitioner's prior convictions, then what else is there in the record from which the lower tribunal could derive a finding of violence? The answer is found in the language used by the sentencing judge:

> The Defendant has a history of violence in his home. His sister and grandmother testified that he has been violent and fought family members of his family most of his life.
>
> The defendant turned 18 years old in August 1982. From that time and before December 6, 1983 when he was arrested for the instant offenses, the Defendant had been arrested more than eight times. While these arrests were for misdemeanor offenses, the arrests revealed a violent nature in the community. Many of the arrests were for battery and for making threats. There were also arrests for disorderly intoxication and trespassing after warning. (R 55; emphasis added.

Thus, it appears that one source of the finding of violence is the prior arrests mentioned above. The courts of this state have ruled on many occasions that prior arrests, without conviction, are absolutely prohibited as reasons for departure.

See, e.g., Weems v. State, 469 So.2d 128 (Fla. 1985); Sellers v. State, 499 So.2d 43 (Fla. 1st DCA 1986); Aleman v. State, 498 So.2d 967 (Fla. 2nd DCA 1986); Hendsbee v. State, 497 So.2d 718 (Fla. 2nd DCA 1986); Henderson v. State, 496 So.2d 965 (Fla. 1st DCA 1986); Bass v. State, 496 So.2d 880 (Fla. 2nd DCA 1986); Dowling v. State, 495 So.2d 874 (Fla. 5th DCA 1986); Reid v. State, 488 So.2d 913 (Fla. 2nd DCA 1986); Fabelo v. State, 488 So.2d 915 (Fla. 2nd DCA 1986); Middleton v. State, 489 So.2d 201 (Fla. 2nd DCA 1986); and Mack v. State, 489 So.2d 205 (Fla. 2nd DCA 1986).

Moreover, this principle was embodied in the guidelines rule from its inception. Fla. R. Crim. P. 3.701(d)(11). The dangers of inserting arrests without conviction into the sentencing mix were stated in the ABA Standards on Criminal Justice, Sentencing Alternatives and Procedures, Std. 18-5.1(d)(ii)(B) (2d Ed. 1980), at 18.351 (footnotes omitted; emphasis added):

> First, the evidence is abundant that the majority of arrests do not result in convictions for any offense. Second, it is clear that arrests are made for reasons unrelated to any intent to commence a criminal prosecution: to settle family disputes, too create a "cooling-off" period, even to protect the subject of the arrest, and sometimes to punish the subject for a disrespectful attitude toward the police. Third, arrest data stored in centralized data banks tend to be incomplete because little effort appears to be made to determine the subsequent disposition of arrests. In this sense, arrest data are inherently unverified. Fourth, the pattern associated with "suspicion" arrests is particularly troubling, since the number of such arrest involving minority group

> members, unsupported by probable cause, appears to be disproportionate. Fifth, arrest data supply a less distinctive portrait of the offender than may at first be imagined. Indeed, one study predicts that 50 percent of American males will acquire a nontraffic arrest record at some point in their lives, and in the case of the black urban male the probability is as high as 90 percent. Ultimately, whether one acquires an arrest record may depend as much on styles of police record keeping as on individual behavior.

[Footnotes omitted] Id. at 18.351.

The same day as the lower tribunal's opinion, this Court reaffirmed this principle in Vantassell v. State, 512 So.2d 181 (Fla. 1987), where, in reversing the lower tribunal's approval of a reason for departure in Vantassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986), this Court held: "The trial court may not punish him for other offenses for which there were no convictions and no charges. State v. Tyner, 506 So.2d 405 (Fla. 1987)." Vantassell, 512 So.2d at 183.

There are only five prior convictions listed on petitioner's sentencing guidelines scoresheet, one second degree felony and four misdemeanors (R 53). If petitioner was arrested eight times, and only five were scored as convictions, then three arrests did not result in convictions and cannot be used as reasons for departure.

B. The Instant Offenses

A second source of the finding of violent propensities may be in the further language used by the sentencing judge:

> The violent nature of the Defendant as revealed in his home life and in his short adult life was further evidenced by the

> manner in which he committed the offense of Sexual Battery and Armed Kidnapping. (R 55).

If these conclusions were relied upon by the lower tribunal, as shown by the statement that: "the record in this case supports the court's conclusion regarding the defendant's violent propensities", 513 So.2d at 176, then it has made the same error as it did in Vantassell, supra. There the sexual battery defendant suffered a departure sentence because he had used excessive force against the victim, even though his scoresheet, like that of petitioner (R 53), assessed points for only penetration or slight injury. This Court reversed:

> The first reason, that excessive force resulted in the victim sustaining extensive physical injuries, it is invalid because the extent of victim injury was already calculated in the guidelines. Vanover v. State, 498 So.2d 899, 901 (Fla. 1986). Petitioner received forty points on his scoresheet for "penetration or slight injury" and points were not scored for serious injury. Factors already taken into account in calculating the guidelines score cannot support a departure sentence. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Vantassell, 512 So.2d at 183.

Thus, the violence involved in the instant crimes cannot be used to support the judge's finding and the lower tribunal's approval of the "violent nature" as a reason for departure.[2]

C. Predictions

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[2]After petitioner's decision, another panel of the First District "reluctantly concluded" that "an ongoing history of violence" was an invalid reason for departure. Mooney v. State, 516 So.2d 333 (Fla. 1st DCA 1987).

As a final attempt to justify his departure sentence, the judge said:

> The Defendant's violent nature would make him a constant threat to the community wherein he may be at large. There is no evidence that the Defendant will ever be anything but violent. Although the Defendant has organic brain damage and is borderline retarded, there is nothing to indicate he should not be sentenced. (R 56).[3]

There are several problems with these statements. First, the trial judge was without the power to ensure that petitioner would never regain his freedom, even if given a life sentence, because of the operation of the gain time statutes. The lack of judicial control over gain time is not a proper ingredient in the departure mix. Thompson v. State, 478 So.2d 462 (Fla. 1st DCA 1985). Likewise, the trial judge was incorrect in assuming that petitioner would soon be free, since his recommended range was 12-17 years, not probation.

Next, the judge's comments also indicate his basic disagreement with the recommended range and the overall guidelines scheme, which, again, is improper. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); and Scott v. State, 508 So.2d 335 (Fla. 1987). The judge has failed to demonstrate how this kidnapping

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[3]The undersigned had construed the latter statement as a third reason for departure -- petitioner's sanity, coupled with his organic brain damage and mental retardation -- and argued that this could not be a valid reason, an argument not addressed in the instant case, but accepted by the lower tribunal in Jaggers v. State, 509 So.2d 1165 (Fla. 1st DCA 1987), rev. pending, case no. 70,918, oral arg. March 1, 1988.

and sexual battery are so far worse than those envisioned by the framers of the guidelines when the scoresheets and recommended ranges were developed.

Next, the judge's prediction that petitioner would likely commit more violent crimes is pure speculation and cannot stand as a reason for departure. Cowan v. State, 505 So.2d 640 (Fla. 1st DCA 1987); Broomhead v. State, 497 So.2d 734 (Fla. 2nd DCA 1986); Dixon v. State, 492 So.2d 410 (Fla. 5th DCA 1986); Cortez v. State, 488 So.2d 163 (Fla. 1st DCA 1986); and Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984), approved, 477 So.2d 565 (Fla. 1985).

Finally, the judge has used petitioner's mental condition against him in aggravation, rather than for him in favor of mitigation. Organic brain damage and mental retardation are treatable but not curable conditions. In death penalty cases, the defendant's mental condition is a recognized mitigating circumstance. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, (1982) (personality disorder short of legal insanity); Meeks v. State, 336 So.2d 1142 (Fla. 1976) (dull-normal intelligence); Jones v. State, 332 So.2d 615 (Fla. 1976) (paranoid psychosis); Burch v. State, 343 So.2d 831 (Fla. 1977) (temporary psychosis); and Amazon v. State, 487 So.2d 8 (Fla. 1986).

In guidelines cases, the judge may not use the defendant's sanity to justify a departure, Davis v. State, 489 So.2d 754 (Fla. 1st DCA 1986). Petitioner's organic brain damage and mental retardation should militate against an upward departure.

State v. Villalovo, 481 So.2d 1303 (Fla. 3rd DCA 1986). This Court must reverse in favor of a guidelines sentence.

ISSUE III

THE EXTENT OF THE DEPARTURE IS EXCESSIVE.

Petitioner's recommended and presumptively correct guidelines sentence was 12-17 years (R 77). The court departed therefrom and imposed life, which constituted a four-cell upward departure.[4] Petitioner submits that the extent of the departure was excessive.

The test for an excessive departure is this:

> [T]he proper standard of review is whether the judge abused his judicial discretion. An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable.

Albritton v. State, 476 So.2d 158, 160 (Fla. 1985).

The instant case may be compared to Campos v. State, 515 So.2d 1358 (Fla. 4th DCA 1987). There the defendant was convicted of two counts of shooting into an occupied vehicle, four counts of armed robbery, and eight counts of aggravated assault. The recommended range was 5 1/2 to 7 years for all of these crimes. He received sentences totalling 40 years.

Campos was involved in a bank robbery, and in fleeing therefrom, a high speed chase occurred in heavy traffic on I-95, at 100 mile per hour speeds, during which shots were

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[4]The scoresheet in effect at the time of the crimes and its accompanying ranges of cells must be used. Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 882 (1987).

fired at the police from a Uzi semiautomatic rifle. The trial judge found two reasons for departure. The appellate court approved one of them, and then examined the extent of the departure. The court applied Albritton and found the six-cell departure to be excessive.

Petitioner is permitted to raise this issue because his crimes occurred in 1983, when the extent of departure was subject to appellate review. Booker v. State, 514 So.2d 1079 (Fla. 1987). In that case the Court had asked the parties to brief the effect of Chapter 86-273, Laws of Florida, on a case in which jurisdiction had been accepted on a certified question. That session law removed the right to have the appellate court review the extent of the departure sentence, which had been judicially created in Albritton v. State, supra. Booker's crimes had been committed prior to the amendment of the statute.

This Court held that the amendment would cause an ex post facto violation if applied to one whose appeal was pending at the time it was enacted:

> Chapter 86-273 clearly operates to the detriment of those whose crimes were committed prior to July 9, 1986. We hold that chapter 86-273 may not constitutionally be applied to those whose crimes were committed prior to its effective date.

Booker v. State, supra, at 1084, footnote omitted.[5] Thus, this Court has the power and the obligation to reverse the departure as being excessive.

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[5]Booker's departure sentence was ultimately approved.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate his life sentences, and remand for resentencing.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
Fla. Bar No. 197890
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 foregoing has been furnished by hand delivery to Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. Randall Scott Blackshear, #077828, Post Office Box 221, Raiford, Florida, 32083, this 1 day of March, 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER