

**FILED**

SID J. WHITE

MAR 28 1989

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

**IN THE SUPREME COURT OF FLORIDA**

**WILLIAM FELTS,**

Petitioner,

v.

CASE NUMBER: 71,915

**STATE OF FLORIDA,**

Respondent.

\_\_\_\_\_ /

**BRIEF OF RESPONDENT ON THE MERITS**

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ATTORNEY GENERAL

GYPSY BAILEY  
CERTIFIED LEGAL INTERN

RICHARD E. DORAN  
ACTING DIRECTOR  
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SUMMARY OF THE ARGUMENT

The issues presented in this case have been disposed of by McGriff and the First District's decision in the case below on rehearing. Based upon those two decisions, this appeal should be dismissed as having been granted improvidently.

ARGUMENT

ISSUE PRESENTED

THIS APPEAL WAS GRANTED IMPROVIDENTLY BASED UPON THIS COURT'S RULING IN STATE V. MCGRIFF, 14 F.L.W. 32 (FLA. 1989) AND THE FIRST DISTRICT'S RULING IN FELTS V. STATE, 14 F.L.W. 237 (FLA. 1ST DCA 1989) (ON REHEARING EN BANC).

On January 14, 1988, the First District rendered its opinion in this case, holding that the amended section 921.001(5), Florida Statutes (1987) applied to petitioner instead of the dictates of Albritton v. State, 476 So.2d 158 (Fla. 1985). Thus, the First District affirmed appellant's departure sentence based upon one valid departure reason. In so doing, the First District certified the following question to this Court: "Whether that portion of chapter 87-110, Laws of Florida, which amends section 921.001(5), Florida Statutes, is applicable to appellate review of sentences imposed for offenses which were committed prior to July 1, 1987."

On January 12, 1988, petitioner filed a notice to invoke this court's discretionary jurisdiction. On March 10, 1988, the First District entered an "Administrative Order with Respect to Rehearing En Banc and Suggestion for Relinquishment of Jurisdiction," staying its rehearing en banc decision until directed otherwise by this Court. Also on March 10, 1988, this

Court temporarily relinquished its jurisdiction for the First District to rehear this case en banc.

On January 20, 1989, the First District rendered its rehearing en banc decision, holding that Albritton, not the amended section 921.001(5), applied to petitioner. Because three of the four departure reasons were invalid, the First District found that the State had not met its burden under Albritton and reversed and remanded for resentencing, adhering to the previously certified question. Petitioner moved for rehearing on January 24, 1989, which the First District denied on March 1, 1989.

On March 8, 1989, this Court ordered petitioner and respondent to file briefs on the merits. Petitioner filed his brief on March 8, 1988, and respondent's brief is due March 28, 1989.

However, on January 19, 1989, this Court rendered its opinion in McGriff, answering in the negative the certified question: "Whether that portion of chapter 87-110, Laws of Florida, which amends section 921.001(5), Florida Statutes, is applicable to appellate review of sentences imposed for offenses which were committed prior to July 1, 1987." This question is identical to the question certified in the present case, and this Court's answer of the question in McGriff controls the answer to

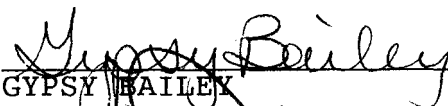

the question in this 'case. Additionally, the First District's rehearing en banc decision is in conformity with the Court's decision in McGriff.

CONCLUSION

For the reasons stated above, the state requests this Court to dismiss the appeal in the present case as having been granted improvidently.

Respectfully submitted,

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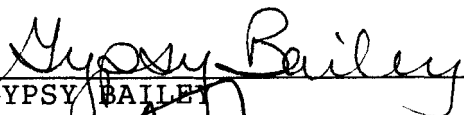
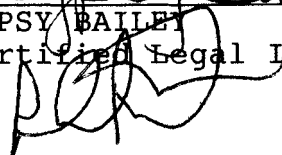
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COUNSEL FOR APPELLEE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Douglas P. Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 28th day of March, 1989.

  
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