IN THE SUPREME COURT OF FLORIDA

JOHNNIE LEE JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 74,004

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner.

TABLE OF CONTENTS

	PAGE
Table of Contents	i
Authorities Cited	ii
Statement of the Case and Facts	1-3
Summary of Argument	4
Argument --	
POINT I	5-15
THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S THIRD DEPARTURE SENTENCE IN VIOLATION OF PRECEDENT FROM THIS COURT.	
POINT II	16-21
THE MANDATE IN JONES II WAS BEYOND RECALL OR CORRECTION BY THE DISTRICT COURT SO THE COURT ERRED IN REFUSING TO ENFORCE ITS MANDATE AND IN REFUSING TO RESPECT THE PRINCIPLE OF LAW OF THE CASE.	
Conclusion	22
Certificate of Service	22

AUTHORITIES CITED

CASES PAGE

Blackhawk Heating and Plumbing, Inc. v. Data Lease Financial Corp., 327 So.2d 825 (Fla. 1975) 18

Brady v. State, 457 So.2d 544 (Fla. 2d DCA 1984) 5

Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988) 10

Brumley v. State, 520 So.2d 275 (Fla. 1988) 7,14,15

Dade County Classroom Teacher's Association v. Rubin, 238 So.2d 284 (Fla. 1970) 19

Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984) 6

Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988) 10

F.P.L. v. Flitchbeil, 513 So.2d 1078 (Fla. 5th DCA 1987) 18

Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984) 6

Harris v. State, 520 So.2d 688 (Fla. 3d DCA 1988) 9

Harrison v. State, 523 So.2d 726 (Fla. 3d DCA 1988) 10,11

Hinnant v. Spotswood, 481 So.2d 80 (Fla. 1st DCA 1986) 19

Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) 21

Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985) 5

Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987) (Jones I) passim

Jones v. State, 526 So.2d 176 (Fla. 4th DCA 1988) (Jones II) — passim

Jones v. State, 14 F.L.W. 798 (Fla. 4th DCA March 29, 1989) (Jones 111) — passim

Larramore v. State, 111 Fla. 755, 150 So.2d 732 (1932) — 16

Maffea v. Moe, 483 So.2d 829 (Fla. 4th DCA 1986) — 16

Matire v. State, 520 So.2d 292 (Fla. 4th DCA 1989) — 20

McCuiston v. State, 462 So.2d 830 (Fla. 2d DCA 1984) — 5

Morganti v. State, 524 So.2d 641 (Fla. 1988) — 7,8,14,15

Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987) — 8

O.P. Corp v. Village of North Palm Beach, 302 So.2d 130 (Fla. 1974) — 18

Patten v. State, 531 So.2d 203 (Fla. 2d DCA 1988) — 18

Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988) — 10

Rogers v. State, 483 So.2d 99 (Fla. 5th DCA 1986) — 18

Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988) — 16

Sanders v. State, 537 So.2d 1118 (Fla. 2d DCA 1989) — 20

Shull v. Dugger, 515 So.2d 748 (Fla. 1987) — passim

Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986) — 13

Simpson v. State, 505 So.2d 1378 (Fla. 1st DCA 1987) — 16

Smith v. State, 536 So.2d 1021 (Fla. 1988) 11

State ex rel. Mortgage Investment Foundation, Inc. v. Knott, 97 o.2d 276 (Fla. 1957) 19

State v. Rollins, 386 So.2d 619 (Fla. 3d DCA 1980) 18

State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988) 10

State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981) 16

Tyson v. State, 504 So.2d 791 (Fla. 4th DCA 1987) 12

Tyson v. State, 527 So.2d 925 (Fla. 4th DCA 1988) 12

Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988) 2,8,9,10,12,19

Walker v. Atlantic C.R. Company, 121 So.2d 713 (Fla. 1st DCA 1960) 19

Whitehead v. State, 498 So.2d 868 (Fla. 1986) 1,4,5,6,7,12,14,20

Whitehead v. State, 467 So.2d 779 (Fla. 1st BCA 1985) 6,14

OTHER AUTHORITIES

Florida Statutes

S35.10 (1987) 16
§921.0091(4)(a) 13

STATEMENT OF THE CASE AND FACTS

In 1985 Jones was sentenced to 50 years imprisonment for third degree murder, grand theft and leaving the scene of an accident. This sentence constituted a departure from the guidelines based upon the habitual offender statute. The Fourth District reversed petitioner's sentence pursuant to Whitehead v. State, 498 So.2d 868 (Fla. 1986). In Jones v. State, 502 So.2d 1375,1378 (Fla. 4th DCA 1987) (Jones I) the district court said:

> With regard to sentencing, the trial court found that appellant was a habitual offender and deviated from the guidelines on this basis. The supreme court has since determined that a finding that defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. State v. Whitehead, 498 So.2d 863 (Fla. 1986).

(Appendix - 7).

At the second resentencing the trial court stated new reasons for departure and again imposed an upward departure from the sentencing guidelines recommended range. This second departure sentence of 25 years was reversed pursuant to Shull v. Dugger, 515 So.2d 748 (Fla. 1987), with specific directions to resentence Jones within the guidelines recommended range of three to seven years. Jones v. State, 526 So.2d 176 (Fla. 4th DCA 1988) (Jones 11). The district court said:

> Because the sole reason initially given for departure from the guidelines, habitual offender status, was found invalid on appeal, the trial court cannot, upon resentencing, exceed the recommended sentence by ascribing new reasons for departure. See Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

> Shull holds that a trial court may not enunciate new reasons for departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court. This is precisely the situation involved in the instant case except that the trial court called its re-departure an "aggravation" of the presumptive sentence. Whether called "departure" or "aggravation," the result is the same and, under Shull, is unacceptable.

(Appendix - 3).

The state's rehearing motion was denied and the mandate issued on July 8, 1988 (Appendix - 24). At his third sentencing on August 11, 1988, petitioner again received an upward departure sentence, this time for 50 years imprisonment. Petitioner immediately filed a Motion to Enforce the Mandate on August 12, which was granted September 14, 1988 (Appendix - 25). The state then filed a corrected Motion for Rehearing and Motion to Vacate and on December 2, 1988, the district court vacated its order enforcing the mandate, consolidated Jones II with petitioner's newly filed notice of appeal from the third departure sentence and allowed new briefs. The third departure sentence was affirmed by the District Court of Appeal in Jones v. State, 14 F.L.W. 798 (Fla. 4th DCA March 29, 1989) (Jones 111). (Appendix - 1).

This third departure was affirmed on the basis that the initial sentence of 1985 was not intended by the trial judge nor considered by the parties as a departure sentence at the time it was imposed. The district court held that in these circumstances the trial court must be given an opportunity to depart after a remand for resentencing under a recent case, Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988).

After this decision, Mr. Jones immediately filed his notice of discretionary review asserting that the decision directly and expressly conflicted with this Court's decision in Shull v. Dugger, as well as expressly and directly conflicting with the decisions of other district courts of appeal on the same question of law. This Court accepted jurisdiction in an order dated June 13, 1989, and called for briefs on the merits. This brief follows.

SUMMARY OF ARGUMENT

The decision in petitioner's case allowing the trial court a second opportunity to impose a departure sentence after the first basis for departure, the habitual offender status, was invalidated under an appellate reversal pursuant to Whitehead v. State, attempts to overrule Supreme Court precedent in Shull v. Dugger. Once the appellate court entered a reversal finding the habitual offender status was the basis for departure and remanded to the trial court, no further opportunities to impose a departure sentence may be allowed. This is so even though the trial court did not know at the time of the initial sentence that the habitual offender status was not a viable alternative to guideline sentencing.

The district court's decision on the merits is erroneous under Shull v. Dugger and procedurally incorrect also. The decision ignored the well-established appellate principle of law of the case. Further, the district court should not have permitted or allowed the state to assume a new contradictory position. Judge Kaplan had no authority to deviate from the mandate in Jones 11. The district court had no jurisdiction to recall the mandate issued July 8, 1988 in Jones II because a new term of court commenced July 12, 1988. The district court's order vacating its enforcement of the mandate in Jones II was beyond the district court's jurisdiction since the court may only recall a mandate issued in the same term of court.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S THIRD DEPARTURE SENTENCE IN VIOLATION OF PRECEDENT FROM THIS COURT.

At petitioner's initial sentencing in 1985 the trial court did not sentence him within the recommended guideline range because, instead, the trial court sentenced him as a habitual offender. On the initial appeal in 1985 the state in its answer brief argued that the trial court had provided a proper written reason for sentencing appellant outside the guidelines because the habitual offender status was a proper basis for departure. (See Excerpts of appellee's answer brief in Jones I, Appendix -10-11).

The district court reversed Jones' original departure sentence pursuant to Whitehead v. State as follows:

> With regard to sentencing, the trial court found that appellant was a habitual offender and deviated from the guidelines on this basis. The supreme court has since determined that a finding that defendant is a habitual offender is not a permissible basis for departing from the sentencing guidelines. State v. Whitehead, 498 So.2d 863 (Fla. 1986).

(Appendix - 7).

At the time petitioner was sentenced in 1985 several district courts had recognized the habitual offender status as a valid reason for departure under the guidelines. McCuiston v. State, 462 So.2d 830 (Fla. 2d DCA 1984), Holt v. State, 472 So.2d 551 (Fla. 1st DCA 1985), Brady v. State, 457 So.2d 544 (Fla. 2d

DCA 1984). See also Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984). In Gann v. State, 459 So.2d 1175 (Fla. 5th DCA 1984), the court held that a finding in accordance with the habitual offender statute was sufficient to take the sentence out of the guidelines. Later, in Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985), the district court held that it was sufficient for purposes of departing from the guidelines that the court gave written reasons to sentence the defendant as a habitual offender, that further written reasons were not necessary to satisfy the guidelines requirement that clear and convincing reasons for departure be given. It was precisely this holding of the First District Court of Appeal in Whitehead which this Court invalidated in Whitehead v. State, 498 So.2d 863 (Fla. 1986).

The only reason the trial court did not sentence petitioner within the guidelines recommended range in 1985 is because the trial court sentenced him instead as a habitual offender. By the time the sentence reached appeal in the District Court of Appeal, Whitehead v. State had been decided by this Court. Therefore, what was a lawful basis for departure at the time of sentencing was no longer a lawful basis for departure at the time of appeal. Since it is the law in effect at the time of the appeal which governs, the district court did what it had to do and reversed pursuant to Whitehead v. State (Jones I).

What sentencing remedy was proper after reversal pursuant to Whitehead v. State was emphatically decided by this Court in Shull v. Dugger, 515 So.2d 748 (Fla. 1987). After Whitehead, some of the district courts had distinguished the situation

where, at the time the sentence was initially imposed, the only reason given for departure was valid under appellate decisions from the general rule that if all reasons stated by the trial court in support of departure were found invalid on appeal, no new departure on resentencing was allowed. In Shull v. Dugger this Court held there was no reason for making an exception to the general rule requiring resentencing within the guidelines merely because the illegal departure was based upon only one invalid reason rather than several. The crux of Shull v. Dugger is the basis for the initial appellate reversal. If the reversal was based upon the invalidity of the reason that a guideline sentence was not imposed, then no new reasons for departure may be stated on resentencing. Shull v. Dugger, supra.

This Court made it plain that the trial court is required to articulate all of the reasons for departure in the original sentencing order:

> Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

Shull v. Dusser, at 750.

This Court reiterated the holding of Shull v. Duqger in Brumley v. State, 520 So.2d 275 (Fla. 1988), and Morganti v. State, 524 So.2d 641 (Fla. 1988). The decision of the district court in petitioner's case is similar to the Fourth District's decision in Morganti; since the trial judge did not foresee the Supreme Court's decisions in Whitehead and Shull v. Dugger and since the trial judge thought that habitual offender was a valid

reason not to impose a guideline sentence, or an alternative to guideline sentencing at the time the sentence was initially imposed, then the trial court should also have another chance to impose a departure sentence on resentencing. Although this argument succeeded with the Fourth District in Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1987), that decision was reversed by this Court in Morganti v. State, 524 So.2d 641 (Fla. 1988).

This case is a paradigm of the repeated, unwarranted efforts to justify the original sentence that Shull v. Dugger was designed to prevent. The state's Waldron argument, that the initial sentence was not intended as a departure with reference to the guidelines, was tne 4th reason advanced by the state to justify the departure and inconsistent with positions taken by the state in prior appeals on the same point of law. Here is a summary of the state's inconsistent positions:

State on Jones I:

> The trial court provided written reasons for departure. Habitual offender status is a valid reason for departure under Whitehead v. State, 467 So.2d 779 (Fla. 1st DCA 1985) (Appendix 8-11, Excerpts from Appellee's Answer Brief on Jones I).

State on Jones 11:

> Shull v Dugger is absurd. The more reasoned approach is Morganti v. State, 510 So.2d 1182 (Fla. 4th DCA 1984), pending rev. S.Ct. 71,126. If the sole reason for departure had been held valid by appellate courts at the time of the initial sentencing but was subsequently held invalid by the Supreme Court in Whitehead, then on remand the trial court should have an opportunity to depart again if the reasons

existed at the time of the original sentencing and are valid reasons for departure. (Appendix 12-19, Excerpts from Appellee's Answer Brief on Jones 11).

State on Rehearing on Jones 11:

> The reasons for departure are not new. They were referred to by the trial judge in the initial habitual offender order. Therefore, the trial court should be able to reiterate reasons contained in the initial sentencing order. (Appendix 20-23, State's Rehearing Motion on Jones 11).

State on Jones 111:

> The trial court did not intend or consider the initial sentence to be a departure with reference to the guidelines. Shull v. Dugger limited by Waldron.

Each of the state's three prior positions, on Jones I, Jones II, on rehearing of Jones II were rejected by the district court. The state's argument on rehearing on Jones II was rejected on the merits in Harris v. State, 520 So.2d 688 (Fla. 3d DCA 1988). There the defendant's original sentence in excess of the guidelines for the sole reason that he was adjudicated a habitual offender was reversed pursuant to Whitehead, so the subsequent departure sentence could not stand because of the rule of law established in Shull v. Dugger. The state's suggestion that reasons referred to in the original habitual offender order could be reiterated and restated as reasons for departure without violating Shull v. Dugger, was rejected by the Third District in Harris.

Now, the state advances a new reason to justify the departure, a Waldron argument, which is plainly inconsistent with the

state's prior positions that there were valid reasons for departure. The basis for the third departure rests on the trial court not knowing in 1985 that this was a departure sentence and that the trial judge had no basis, written or oral, for departing in 1985. At the outset it must be noted that Waldron does not justify imposition of a new departure sentence on resentencing when the original deviation from the guidelines on the basis of the habitual offender statute has been overturned on appeal. In Waldron, the trial court erred by imposing a sentence of prison and community control when the guidelines directed those penalties to be utilized in the alternative. Since the trial court did not know this sentence was a departure, the Second District reversed but allowed an opportunity for reimposition of a departure sentence with written reasons on resentencing. Waldron has been followed and applied in other cases involving imposition of a departure sentence without written reasons due to scoring errors, Brown v. State, 535 So.2d 332 (Fla. 1st DCA 1988), Roberts v. State, 534 So.2d 1225 (Fla. 1st DCA 1988), and an improper utilization of a youthful offender sentencing alternative Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988). In State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988), the court reversed a downward departure without written reasons but allowed the trial court an opportunity to state reasons on resentencing since none were furnished at the original sentencing.

Waldron may well be wrongly decided. A case decided prior to Waldron and one which rejects similar reasoning as inconsistent with Shull v. Dugger is Harrison v. State, 523 So.2d 726

(Fla. 3d DCA 1988). There the defendant was sentenced to 22 years in state prison in accord with an elevated violation of probation scoresheet. The scoresheet was incorrect because points were assessed in the primary offense and victim injury sections for an offense for which the defendant was not on probation. The corrected scoresheet resulted in a lower recommended range, and so the state argued that the judge should be able to impose the same sentence as a departure. The district court disagreed:

> The thrust, if not the precise holding of Shull [supra] precludes what would be an initial attempt to enter a departure sentence after a prior sentence has, as we do here, been deemed inappropriate on appeal.

Id. at 727.

The reasoning of Harrison is the more consistent with Shull, especially in light of this Court's recent decision in Smith v. State, 536 So.2d 1021 (Fla. 1988). There the defendant had been sentenced to six years as a departure from the scoresheet's range of 34 to 44 years. While he successfully attacked all of the reasons for departure on appeal, he was convicted of five more robberies. When he appeared for resentencing on the original charge, his scoresheet factored in the five additional robberies and called for life in prison, which the judge imposed. This Court held:

> Equity compels us to vacate Smith's life sentence and remand the case for sentencing within the original range of three and one-half to four and one-half years. If Smith had been properly sentenced in the initial proceeding, he would not be facing life imprisonment. To sustain the life sentence would be to punish Smith for the trial court's mistakes. The more

> equitable result is to place him in the position he would have been in absent the court's error. This is consistent with the rule espoused in Shull [supra].

Id. The same consistency with the rule of Shull is required in petitioner's case.

Assuming arguendo that Waldron creates a valid exception to the holding of Shull v. Dugger, it plainly applies only to inadvertent guideline departures where, due to a scoring error or an error in interpreting sentencing options required by a particular grid or range, the trial court did not know the sentence was a departure.

As applied to Judge Kaplan's initial sentence of petitioner, this Waldron argument must proceed on the fiction that Judge Kaplan had no idea why he sentenced the petitioner as a habitual offender in 1985. The fiction presumes that if Judge Kaplan did not orally or in writing mention the guidelines, that the sentence imposed was therefore not a departure.[1]

Whitehead v. State answers the question of whether the sentence imposed in 1985 was a guideline departure. In

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[1] Nearly contemporaneous to petitioner's 1985 sentence, Judge Kaplan deviated from the guidelines by sentencing one Ira Tyson as a habitual offender without written reasons. That sentence was reversed because the habitual offender statute may not be used as a basis for departure from the guidelines on authority of Whitehead. Tyson v. State, 504 So.2d 791 (Fla. 4th DCA 1987). After remand, Judge Kaplan's articulation of new written reasons and reimposition of a departure sentence was reversed on Shull v. Dugger. The Fourth District held there that after reasons for the original departure are reversed, whether oral or written, no new reasons may be given for departure on resentencing. Tyson v. State, 527 So.2d 925 (Fla. 4th DCA 1988).

Whitehead this Court held that the guideline statute, Section 921.001(4)(a), explicitly and unambiguously required the guidelines to apply to all sentencing and then, the Court said, that the "statute does not exempt defendants sentenced under the habitual offender statute." Therefore, a defendant sentenced under the habitual offender statute, even though the reasons were not given in writing, in lieu of guideline sentencing, was entitled to be resentenced within the guidelines recommended range after an appellate reversal.

Mr. Shull's trial judge also had not given any written reasons for the departure sentence under the habitual offender statute in lieu of the guidelines, Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986). However, after the appellate reversal finding that the basis for sentencing Mr. Shull outside the guidelines was invalid, this Court noted that:

> [Mr. Shull's] sentence constituted a departure from the recommended guideline sentence based upon the habitual offender statute. Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

In Jones 111, the district court allowed the third departure sentence on petitioner in violation of Shull v. Dugger based on a perception of what the trial court thought when he imposed the sentence in 1985. It is plain from the state's prior positions on prior appeals in this case and the prior decision of the district court in petitioner's case, Jones I, that the 1985 sentence occurred because Judge Kaplan's erroneous belief that the habitual offender sentence was an alternative to the guidelines (and therefore he did not think that it was a guidelines

departure); although that premise was not wrong at the time of sentencing, Whitehead v. State, supra, First DCA, it was shown to be wrong by the law in effect at the time of the appeal.

The truth of the matter is that in 1985, Judge Kaplan wanted to sock the petitioner with the harshest possible penalty and he achieved that result, in utter disregard of the guidelines, by use of the habitual offender statute. This deviation of the guidelines recommended range based on the habitual offender statute was a guideline departure. The "reason" for departure did not have to be articulated orally or in writing for the sentence to be a departure. It matters not what Judge Kaplan thought, knew or said about the state of the law in 1985. The reason for the appellate reversal on Jones I is law of the case and controls whether a new departure should be allowed on remand.

Pursuant to this Court's decision in Shull v. Dugger, it is not what the trial court knew, did or said at the time he imposed a guideline departure sentence that determines whether a new departure sentence may be reimposed but it is the reason for the appellate reversal. There is no question here but that the Jones I appellate reversal was based on Whitehead v. State, and that deviation from the guidelines was impermissibly based on petitioner's status as a habitual offender. After this appellate reversal, regardless of the fact that the trial judge may have thought that his initial sentence was a valid guideline sentence, as was the case in Morganti v. State and Brumley v. State, on resentencing only a sentence within the guidelines recommended range could be imposed.

The district court's failure to follow this Court's explicit authority in Shull v. Dugger, Brumley v. State and Morganti v. State, requires reversal and remand with instructions that petitioner be resentenced within the guidelines recommended range and no other.

POINT II

THE MANDATE IN JONES II WAS BEYOND RECALL OR CORRECTION BY THE DISTRICT COURT SO THE COURT ERRED IN REFUSING TO ENFORCE ITS MANDATE AND IN REFUSING TO RESPECT THE PRINCIPLE OF LAW OF THE CASE.

The district court's decision in Jones I became final once the state declined to seek further review in the Supreme Court. Once Jones I was final, there was no lawful basis on which to reinstate the habitual offender sentence. Rowe v. State, 523 So.2d 620 (Fla. 2d DCA 1988), on rehearing. The reversal of the second departure sentence on the grounds of Shull v. Dugger became final when rehearing was denied on June 22, 1988, and the mandate issued on July 8, 1988 (Appendix - 26), which was during the last days of the district court's January 1988 term. Thereafter, a new term of court began in the District Court of Appeal, Fourth District, on the second Tuesday of July 1988, which was July 12, 1988. Section 35.10, Florida Statutes (1987), Rule 1.4, Manual of Internal Procedures of the Fourth District Court of Appeal (Appendix - 27). Once the term in which the mandate was issued expired, the district court had no jurisdiction or power to recall its mandate or to vacate its prior judgment in Jones 11. Simpson v. State, 505 So.2d 1378 (Fla. 1st DCA 1987), Larramore v. State, 111 Fla. 755, 150 So.2d 732 (1932), State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980,982-83 (Fla. 1981), Maffea v. Moe, 483 So.2d 829 (Fla. 4th DCA 1986 .

Initially, the district court granted petitioner's August 12, 1988, Motion to Enforce Mandate on Jones 11. (Appendix -25). However, after the state filed yet another pleading, a Corrected Motion for Rehearing and Motion to Vacate, the court vacated the order enforcing the mandate, consolidated Jones II and Jones III and allowed new briefs (Appendix - 26).

Instead of recalling its mandate, which it could not do, or enforcing its mandate, which it apparently no longer wished to do, the district courts order further proceedings under consolidated case numbers with Jones II; this order was unlawful. First it totally disregarded settled principles regarding law of the case and second, it was entered without any regard to the legal effect of the mandate in Jones II (Order Vacating Enforcement of Mandate and Setting Briefing Schedule on Jones 111, Appendix-26). The only reason a notice of appeal was filed from the third departure sentence is that the district court had not yet ruled on petitioner's motion to enforce the mandate by the time 30 days from imposition of that sentence was about to expire. The third departure sentence was imposed on August 11, 1988. On August 12, 1988, petitioner filed his motion to enforce the mandate in the district court, which was not granted until September 14, 1988. (Appendix - 25). But, petitioner's notice of appeal from his third departure sentence, necessitated by the district court's sluggishness in ordering its mandate enforced, did not confer any jurisdiction on the Fourth District Court of Appeal to undo or

recall the mandate on Jones 11. (Obviously, petitioner would have dismissed his appeal on Jones 111, if the district court had enforced its mandate on Jones II.)

Whatever Judge Kaplan's disagreement with the district court's decision in Jones II ordering resentencing pursuant to Shull v. Dugger, he was duty-bound to follow it. Blackhawk Heating and Plumbing, Inc. v. Data Lease Financial Corp., 327 So.2d 825 (Fla. 1975), O.P. Corp v. Village of North Palm Beach, 302 So.2d 130 (Fla. 1974). When a mandate is issued, a trial court must follow the dictates of the mandate and should not stray from it, F.P.L. v. Flitchbeil, 513 So.2d 1078 (Fla. 5th DCA 1987).

The principle of law of the case prohibits exactly this kind of protracted, needless litigation caused by Judge Kaplan's initial failure to follow the mandate of the district court on Jones 11. The Fourth District apparently was unconcerned that Judge Kaplan ignored its specific directions to resentence within the guidelines and refused to enforce its mandate. Other district courts are not so lackadaisical when trial courts disregard their mandates. Patten v. State, 531 So.2d 203 (Fla. 2d DCA 1988), State v. Rollins, 386 So.2d 619 (Fla. 3d DCA 1980), and Rogers v. State, 483 So.2d 99 (Fla. 5th DCA 1986). The doctrine of law of the case requires adherence to the principle that questions of law decided on a prior appeal to the court must govern the case in both the court and in the trial court throughout all subsequent stages of the proceedings, whether correct on

general principles or not, so long as the facts on which the decision were predicated continue to be the facts in the case. Hinnant v. Spotswood, 481 So.2d 80 (Fla. 1st DCA 1986).

When the district court stated in Jones I that the trial court had deviated from the guidelines on the basis that petitioner was a habitual offender and that such was not a permissible basis for departure, that principle or rule became law of the case and must be adhered to throughout all subsequent stages and proceedings, Walker v. Atlantic C.R. Company, 121 So.2d 713,715 (Fla. 1st DCA 1960). Questions settled on an earlier appeal are no longer open to question on a subsequent appeal. Dade County Classroom Teacher's Association v. Rubin, 238 So.2d 284 (Fla. 1970). See also, State ex rel. Mortgage Investment Foundation, Inc. v. Knott, 97 So.2d 275 (Fla. 1957).

The trial court's reliance on Waldron v. State, a case decided after the mandate was issued in Jones II resulted in a complete re-examination and re-argument of the reasons the first departure was entered so as to undermine the first reversal in Jones I. At that point the district court should not have refused to give legal effect to its mandate; it was final and should have served to protect petitioner from being needlessly subjected to repeated resentencings in violation of Shull v. Dugger.

Over petitioner's specific objections that the mandate had to be enforced, that the mandate was beyond recall because it was issued in a separate term of court, that Judge Kaplan had no authority to alter or evade the mandate and solely based on a

state's pleading entitled Motion for Rehearing; and/or Motion to Vacate; and/or Motion for Certification of Conflict, the district court consolidated the Jones II case number with petitioner's newly filed notice of appeal from the third departure sentence and proceeded to consider new arguments raised by the state to justify a departure sentence. The decision in Jones I establishes as law of the case that the habitual offender status was the basis on which the trial court deviated from the guidelines so that a reversal under Whitehead v. State was required. Jones I (Appendix - 8-11). How then, in defiance of the principle of law of the case, and over petitioner's repeated objections, can the state be permitted to argue a completely inconsistent position that no basis for departure was ever given in the 1985 sentence? Since, when this case was first on appeal, the state conceded that the reason for departure was the defendant's habitual offender status, the district court was bound to reverse when this Court decided Whitehead v. State. See Matire v. State, 520 So.2d 292 (Fla. 4th DCA 1989). This Court should not countenance the lawless procedures in the district court and the state's assertion of inconsistent positions, the one they assumed on the appeal in 1985, that there was no error in imposing a guidelines departure on the basis of the habitual offender statute, and the position taken on this third appeal, that the initial 1985 sentence was not intended to be a guideline departure. Sanders v. State, 537 So.2d 1118 (Fla. 2d DCA 1989).

The litigation in this case will not end until this Court forces the District Court of Appeal, Fourth District, to adhere to established principles of law which apply to this case. Shull v. Dugger governs on the merits and the district court was grossly in error for attempting to fashion a different rule of law contrary to authority from this Court. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The procedure by which the district court reached this remarkable result in Jones III is equally as remarkable and unlawful as their disregard for the case law set forth by this Court. Judge Kaplan was without authority to evade the final mandate of the district court and the district court was without authority to recall, rehear or vacate its decision in Jones 11.

The saga of Johnnie Jones' journey on sentencing and resentencing between the Seventeenth Judicial Circuit and the Fourth District Court of Appeal is one of the absurd results envisioned and condemned by this Court in Shull v. Dugger. These numerous resentencings and attempt to impose a valid departure sentence on petitioner are expressly contrary to the rule of law established in Shull v. Dugger, and beyond the authority and jurisdiction of both the circuit and district courts due to the finality of the mandate in Jones 11.

Petitioner respectfully requests this Court to order forthwith that he be resentenced within the guidelines recommended range of three to seven years and no more.

CONCLUSION

Based on the foregoing reasons and authorities cited petitioner requests this Court to quash the decision of the district court in Jones III and to remand for imposition of a sentence within the guidelines recommended range of three to seven years.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

Margaret Good
MARGARET GOOD
Florida Bar No. 192356
Assistant Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

Counsel for Petitioner

CEKTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 10th day of July, 1989.

Margaret Good
MARGARET GOOD
Assistant Public Defender