

6-16

IN THE SUPREME COURT OF FLORIDA

DANIEL JOSEPH POPE,  
Petitioner,

vs .

STATE OF FLORIDA,  
Respondent.

CASE NO. 74,163

**FILED**  
SID J. WHITE  
MAY 24 1989  
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By \_\_\_\_\_  
Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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the departure, the trial judge, on remand, would be given the opportunity to now provide written reasons and impose the same departure sentence. Pope v. State, supra.

In making this ruling, the court recognized that there has been much confusion and conflict in the district courts over the issue of whether the trial court must resentence the defendant to the presumptive guideline sentence or whether it will be given the chance to now provide the written reasons which it failed to provide in the first place. The district court, however, rejected those cases which remanded for imposition of the guideline sentence.

The petitioner filed a timely notice to invoke discretionary review because of the conflicting cases. This brief follows.

SUMMARY OF ARGUMENT

The decision of the district court directly and expressly conflicts with decisions of other district courts and of this Court. Where a trial court has failed to provide written reasons for the departure, case law from other districts and this Court require that the sentence must be vacated and remanded to the trial court for resentencing within the recommended guidelines range, notwithstanding the existence of oral reasons for the departure.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN POPE V. STATE, 14 FLW 1010 (Fla. 5th DCA April 20, 1989), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF RANGEL V. STATE, 532 So.2d 84 (Fla. 3d DCA 1988); FLORENCE V. STATE, 532 So.2d 1345 (Fla. 4th DCA 1988); NICHOLS V. STATE, 521 So.2d 372 (Fla. 2d DCA 1988); CRIGLER V. STATE, 526 So.2d 176 (Fla. 2d DCA 1988); MARTINEZ V. STATE, 526 So.2d 1080 (Fla. 2d DCA 1988); JENKINS v. STATE, 528 So.2d 527 (Fla. 2d DCA 1988); AND SHULL V. DUGGER, 515 So.2d 748 (Fla. 1987).

The opinion of the Fifth District in the instant case, if allowed to stand, would permit judges to ignore with impunity the guidelines requirement that reasons for departure be in writing. Written reasons are required to be filed at the time the departure sentence is imposed so that meaningful and expeditious appellate review of the departure sentence can occur. The opinion of the district court here, which would allow for multiple, costly, and time-consuming appeals from a single sentence, expressly and directly conflicts with cases holding that, in a resentencing following the failure to provide written reasons, the trial court is limited to the presumptive guidelines range.

In State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), ruled that written reasons must be provided when a

judge imposes a departure sentence. Adopting the rationale of then Judge Barkett in Boynton v. State, 473 So.2d 703, 706-707 (Fla. 4th DCA 1985), the Court opined that the requirement of written reasons over oral reasons would allow for more precision in the sentencing process and for more expeditious, meaningful appellate review. State v. Jackson, supra at 1055-1056.

Shull v. Dugger, 515 So.2d 748 (Fla. 1987), requires that where a guidelines sentence is reversed for a deficiency in the written reasons, the trial court cannot have another "bite of the apple" but must sentence the defendant to the presumptive guidelines sentence. Under Shull v. Dusser, a trial judge who fails to comply with all the rules concerning imposition of a departure sentence (i.e. clear and convincing reasons provided in a written order contemporaneously with the pronouncement of the sentence), is not permitted a second chance to make its sentence "legal." To hold otherwise, the Court held, would needlessly subject the defendant to unwarranted multiple appeals and resentencings. Shull v. Dugger, supra at 750.

Numerous district court decisions have applied the holding of Shull v. Dugger, supra, to the identical situation here to require that, where a trial court provides only oral reasons for departure, but not written reasons, the sentence must be vacated and the court, on remand for resentencing, is not permitted to depart, but must resentence the defendant within the presumptive guidelines range. Ransel v. State, 532 So.2d 84 (Fla. 3d DCA 1988); Florence v. State, 532 So.2d 1345 (Fla. 4th DCA



1988); Nichols v. State, 521 So.2d 372 (Fla. 2d DCA 1988); Crigler v. State, 526 So.2d 176 (Fla. 2d DCA 1988); Martinez v. State, 526 So.2d 1080 (Fla. 2d DCA 1988); Jenkins v. State, 528 So.2d 527 (Fla. 2d DCA 1988). The rationale for these rulings is precisely that announced in State v. Jackson, and Shull v. Duaser, *supra*. The trial court, which is imposing a departure sentence (and which recognizes that it is imposing a -departure sentence)' should be given only one opportunity to correctly and lawfully impose such sentence, rather than allowing for multiple "bites of the apple," and requiring the defendant to undergo multiple resentencings and multiple appeals in a single case. The fifth district court, in the instant case, however, chose to disregard this logic and issued a ruling contrary to these opinions (although recognizing the conflict on the face of the opinion).

In conclusion, the decision of the district of appeal in the instant case is in direct conflict with decisions of this Court and other district courts of appeal. This Court should exercise its discretionary jurisdiction, vacate the decision of

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<sup>1</sup>This situation is entirely different from the situation where the trial court, at the initial sentencing, does not believe that it is sentencing the defendant to a departure sentence. See, e.g., Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988).

the fifth district court of appeal, and remand the case for resentencing within the guidelines. In so doing, this Court will provide teeth for the requirement of written reasons for guidelines departures.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court accept jurisdiction of this cause, vacate the decision of the District Court of Appeal, Fifth District, vacate the petitioner's sentence, and remand the case to the trial court for the imposition of a sentence within the presumptive guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, and to Mr. Daniel J. Pope, Inmate # 627426, P.O. Box 699, Sneads, FL 32460, this 22nd day of May, 1989.



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**JAMES R. WULCHAK**