

IN THE SUPREME COURT OF FLORIDA

DANIEL JOSEPH POPE,

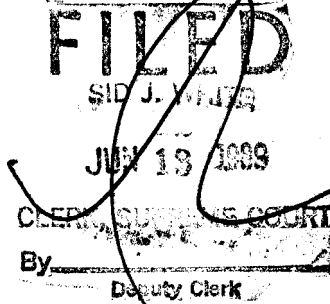
Petitioner,

vs .

CASE NO. 74,163

STATE OF FLORIDA,

Respondent.



RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 618550
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32114
(904) 252-2005

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

The discretionary jurisdiction of this court may be sought to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another court of appeal or of this court on the same question of law. The cases cited by petitioner involve directions to the trial court upon remand following reversal for the trial court's failure to enter a written departure order. Respondent submits that directions to a trial court following reversal on a separate issue is not a decision on a question of law so as to create conflict jurisdiction.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT
CONFLICT BETWEEN THE INSTANT
DECISION OF THE FIFTH DISTRICT
COURT OF APPEAL AND A PRIOR
DECISION OF THIS COURT OR A
DECISION OF ANOTHER DISTRICT COURT
OF APPEAL.

The discretionary jurisdiction of this court may be sought to review a decision of a district court of appeal that expressly and directly conflicts with a decision of this court on the same question of law. Fla. R. App. P. 9.030(a)(2)(A). Petitioner contends that the instant decision conflicts with this court's prior decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987), as well as the decisions of the district courts of appeal in Rangel v. State, 532 So.2d 84 (Fla. 3rd DCA 1988), Florence v. State, 532 So.2d 1345 (Fla. 4th DCA 1988), Nichols v. State, 521 So.2d 372 (Fla. 2d DCA 1988), Criqler v. State, 526 So.2d 176 (Fla. 2d DCA 1988), Martinez v. State, 526 So.2d 1080 (Fla. 2d DCA 1988), and Jenkins v. State, 528 So.2d 527 (Fla. 2d DCA 1988). Respondent submits there is no conflict, so this court should decline jurisdiction.

In Shull, this court held that a trial court may not enunciate new reasons for a departure sentence after the reasons for the original departure sentence have been reversed by an appellate court. *Id.* at 750. Petitioner's situation was not controlled by Shull because the district court never addressed the merits of the reasons given for the departure due to lack of a sentencing order. Since the district court's reversal was

based on lack of a sentencing order as opposed to invalid reasons, there is no express and direct conflict with Shull.

In Rangel, Florence, Nichols, Crigler, Martinez, and Jenkins, reversal was predicated on the trial court's failure to enter a written departure order. After reversing, the appellate courts remanded the causes to the trial courts for resentencing within the sentencing guidelines. Respondent submits that an appellate court's directions to a trial court following reversal on a separate issue cannot be equated with a decision on a question of law so as to create conflict jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A).

As far as respondent can ascertain, the instant case is the only one in which the issue of whether a trial court is precluded from entering a departure sentence upon remand after reversal for failure to enter a departure order has been raised, squarely addressed and ruled upon. Further, as the district court acknowledged, this court has previously approved a decision of the First District, where it directed the trial court to enter a written order should it decide to depart from the guidelines upon resentencing, where it had failed to do so the first time. State v. Oden, 478 So.2d 51 (Fla. 1985); Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984). Since there is no express and direct conflict on the same question of law, this court should decline to accept jurisdiction in the instant case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 618550
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, FL 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished, by delivery in his basket at the Fifth District Court of Appeal to: James R. Wulchak, Chief, Appellate Division, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114 , counsel for petitioner, this 12th day of June, 1989.



KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL