

IN THE SUPREME COURT OF FLORIDA

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CASE NO. 74,908

ROBERT RAY FERGUSON,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

ROBERT RAY FERGUSON,)
)
 Petitioner,)
)
 vs.) CASE NO. 74,908
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 STATE OF FLORIDA,)
)
 Respondent.)

PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Petitioner Ferguson appealed to the District Court of Appeal, Fifth District, following a guidelines departure sentence. On appeal, he contended that the departure sentence was illegal because the trial court failed to provide written reasons to justify the departure. Ferguson v. State, 14 FLW 2231 (Fla. 5th DCA September 21, 1989). The petitioner contended that the appellate court must reverse the sentence and remand for resentencing within the presumptive guidelines range (especially since the trial court provided no justification, even orally).

The district court agreed that the sentence must be vacated due to the failure to provide written reasons for departure, but disagreed with the relief requested. The court, citing Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989), held that the trial judge, on remand, would be given the opportunity

to now provide written reasons and impose the same departure sentence. Fersuson v. State, supra.

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 cites as controlling authority a case which is pending decision in this Court. As such, under *Jollie v. State*, 405 So.2d 418 (Fla. 1981), this Court has conflict jurisdiction.

Furthermore, 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.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN FERGUSON V. STATE, 14 FLW 2231 (Fla. 5th DCA September 21, 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.

The district court's opinion cites as controlling authority Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989), **rev.**

granted, Case No. 74,163. In Pope, supra, as in the instant case, the district court remanded the case for resentencing and the opportunity for the trial judge to provide written reasons for the departure for the first time on the remand. In making this ruling, the Pope 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 would be given the chance to now provide the written reasons which it failed to provide in the first place. **Id.** The district court, however, rejected those cases which remanded for imposition of the guideline sentence.

The case of Pope v. State, supra, has been accepted for review by this Court. In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held:

Common sense dictates that this Court must acknowledge its own public record actions in dispensing with cases before it. We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.

The dictates of Jollie supra, should control here. The instant case was not a mere per curiam opinion, but did go into some minimal discussion of the issue raised. It cited Pope as controlling authority. Since Pope was accepted by this Court as conflicting with other decisions, then so too should the instant

case be accepted for review. The basis for conflict jurisdiction in Pope and the instant case is as follows.

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. Dugger, 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. 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); Criqler 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. Dugger, supra. The trial court, which 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 in its previous ruling in Pope 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. It cites as controlling authority a decision which this Court has accepted for review. This Court should exercise its discretionary jurisdiction, vacate the decision of 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,

JAMES B. GIBSON
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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, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, and to Mr. Robert R. Ferguson, Inmate # A-082906, P.O. Box 333, Raiford, FL 32083, this 30th day of October, 1989.



JAMES R. WULCHAK