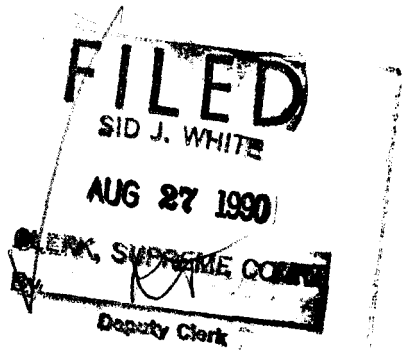
IN THE SUPREME COURT OF FLORIDA



VASTEN E. BLAIR,

Petitioner,

v.

CASE NO. 75,937

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990).

Petitioner was the appellant in the District Court and the defendant in the circuit court, and will be referred to in this brief as petitioner or by name. Respondent was the appellee in the District Court and the prosecutor in the circuit court, and will be referred to as respondent or the state.

Petitioner will designate references to the four volume record by R for the original record on appeal and by S for the supplemental record on appeal followed by the appropriate page number.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was charged in a two count indictment with first degree murder and robbery with a firearm (R 369-370).

The case proceeded to trial on January 25, 1989 and a verdict of guilty as charged was rendered on January 30, 1989 (R 381). After presentation of testimony at the penalty phase, the jury recommended the court impose a life sentence against appellant for the first degree murder conviction (R 382).

On March 23, 1989 petitioner was sentenced for the first degree murder conviction to life imprisonment with no possibility of parole for twenty-five years (R 366; R 389-391).

On the same date, the trial judge heard argument from counsel concerning the state's motion that the trial judge depart from the recommended guideline sentence of twelve to seventeen years. The trial judge imposed a departure sentence of life imprisonment on the robbery conviction, stating:

> I disagree with your attorney with regard to the escalation of your criminal record. That's just the way he characterizes it. And the way I view it, your criminal record has been one that has escalated ever since 1980, when you began with grand theft auto, runaway, and ungovernable, which was subsequently dropped, and then in '81, the grand theft auto and the theft. As a juvenile delinquent, you were adjudicated delinquent and committed twice, and our juvenile system was just inadequate to rescue you and to help you become rehabilitated....
> ...You have a history of an escalating pattern of criminal activity which convinces me that there's not hope for rehabilitation. And I think the only thing we can do is lock you up so that you can't hurt anybody else (R 364-366).

The trial judge did not contemporaneously issue written reasons for departure. This is apparent from the following colloquy which took place immediately after the court pronounced sentence on March 23, 1989.

> State: Your Honor, the Court will prepare and submit the findings?
>
> Court: I will.
>
> State: I think the Court's allowed, as I understand the law, for the Court to do that, subsequent to sentencing, within a day or two period.
>
> Court: I will have it prepared (R 367).

The typed, written order containing the reasons for departure was dated March 23, 1989 but file stamped by the clerk's office with the date March 28, 1989 (R 388).

The First District Court of Appeal affirmed petitioner's conviction but reversed the sentence and remanded for resentencing. Blair v. State, 559 So.2d 349 (Fla. 1st DCA 1990).

The Court ruled that the evidence established the two offenses arose from a single continuous criminal episode and therefore the imposition of consecutive minimum mandatory sentences was error.

The Court further ruled that the trial court's finding that a departure from the guidelines, based on an escalating pattern of criminality, was a proper reason for departure and supported by the record.

The Court then held:

> Additionally, the supreme court has recently held in Ree v. State, __So.2d__ (Fla. 1989), opinion filed November 16, 1989 [14 F.L.W. 565], that written reasons for departure must be issued at the time sentence is pronounced. Since written reasons in the instant case were not entered until after the March 23, 1989 sentencing hearing, reversal for resentencing according to Ree is required.
>
> Accordingly, we affirm the judgment of guilt on both counts, affirm the sentence in part, and reverse and remand for resentencing. The trial court is instructed that any mandatory minimum sentences must be imposed concurrently, and is directed to follow the mandate of Ree v. State, supra, with regard to the entry of written reasons for departure from the sentencing guidelines.

Blair v. State, 559 So.2d at 350.

Petitioner's notice to invoke discretionary jurisdiction was filed with this Court on April 27, 1990.

On July 25, 1990 this Court issued an order accepting jurisdiction.

III. SUMMARY OF ARGUMENT

The First District Court of Appeal reversed petitioner's sentence for armed robbery based on the trial judge's failure to issue contemporaneous written reasons for departure from the guidelines. The court, however, went on to find the reason for departure valid, and authorized resentencing outside the guidelines.

As petitioner's case was pending on appeal at the time of this Court's decision in Ree v. State, 15 F.L.W. 395 (Fla. July 19, 1990) petitioner is entitled to the benefit of that holding.

However, the District Court of Appeal's ruling that petitioner can be resentenced outside the guidelines is erroneous as it conflicts with this Court's recent decision in Pope v. State, 561 So.2d 554 (Fla. 1990) and earlier decision in Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

Petitioner submits that this Court should reverse petitioner's sentence on the robbery conviction and remand for resentencing within the guidelines.

In Issue two, Petitioner contends the life sentence for robbery imposed on petitioner violates equal protection and due process of law, in contravention of Article I, Sections 2 and 9 of the Florida Constitution and Amendments V and XIV of the United States Constitution. This contention is based on the fact that in Florida, a life sentence imposed for robbery is more severe than a life sentence imposed for first degree murder. Under this issue, petitioner submits his sentence for

robbery should be reversed and the case remanded for re-sentencing to a term of years.

In Issue III, petitioner contends that an examination of the colloquy at sentencing shows that the trial judge's reasons for departure were that petitioner was unamenable to rehabilitation and a danger to society. The trial judge based these conclusions on the trial judge's finding that petitioner had a history of an escalating pattery of criminal activity. Petitioner submits in this brief that unamenability to rehabilitation and being a danger to society are invalid reasons for departure and further, that the trial judge's finding that petitioner had an escalating pattern of criminal activity does not have sufficient support in the record. Under this Issue, petitioner submits his sentence for robbery should be reversed and remanded for re-sentencing within the guidelines.

IV. ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO ISSUE CONTEMPORANEOUS WRITTEN REASONS FOR DEPARTURE AT THE TIME OF SENTENCING; APPELLANT'S SENTENCE SHOULD BE REVERSED WITH DIRECTIONS THAT THE TRIAL COURT ENTER A GUIDELINE SENTENCE

The District Court of Appeal reversed petitioner's life sentence for armed robbery because the trial judge did not issue contemporaneous written reasons for departing from the recommended guideline range of twelve to seventeen years. This was in reliance on this Court's opinion in Ree v. State, 14 F.L.W. S565 (Fla. November 16, 1989) since heard on rehearing, Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990).

Petitioner contends the district court of appeal erred in authorizing in its remand that petitioner's sentence once again be outside the guidelines. See Pope v. State, 561 So.2d 554 (Fla. 1990); Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

Pope is directly apposite to the case at bar.

Pope was sentenced to a departure sentence. This Court considered the departure sentence and the lower appellate court's decision which held the departure sentence invalid but authorized a departure sentence on remand. This court noted:

> At the sentencing hearing, the trial court orally gave reasons for the departure sentence, but did not provide reasons in writing pursuant to the requirements of Florida Rule of Criminal Procedure 3.701(d)(11). That rule provides: "Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure."

> The district court correctly vacated the sentence due to the trial court's failure to provide written reasons. State v. Jackson, 478 So.2d 1054, 1055 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987); Fla.R.Crim.P. 3.701(d)(11). The district court remanded, giving the trial court the opportunity to provide written reasons justifying the departure when it resentences Pope. Pope contends that Jackson and Shull v. Dugger, 515 So.2d 748 (Fla. 1987), compelled the district court to remand only for the imposition of a sentence within the guidelines, thereby prohibiting a departure in resentencing. We agree.

(Emphasis supplied). Id. at 555.

In holding Pope could only be resentenced within the guidelines, this Court noted its reliance on existing case law, stating:

> Effectively, Jackson and Shull both determined that at the point of remand no valid reasons for departure existed under the rule. Jackson said oral reasons were invalid and required resentencing. Shull said invalid reasons, even if written, must be remanded only for a guidelines sentence.
>
> Applying the principles of Jackson and Shull, and for the same policy reasons, we hold that when an appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines.

Id. at 556.

Ree v. State, 15 F.L.W. S395 (Fla. July 19, 1990), on rehearing from 15 F.L.W. S565, held invalid a departure sentence where the written reasons were issued in writing five days after sentencing. Citing existing case law, State v. Jackson, 478 So.2d 1054 (Fla. 1985) and State v. Oden, 478

So.2d 51 (Fla. 1985), this Court held Ree's sentence was invalid because written reasons for departure must be issued at the time of sentencing.

Similarly, in petitioner's case, under the authority of Ree v. State, supra, the departure sentence for armed robbery was invalid because no written reasons for departure were issued at the time of sentencing.

As in Pope and Shull, no valid reasons for departure exist under the rule for petitioner's departure sentence. Shull and Pope require where there are no valid reasons for departure, the case can be remanded for imposition of a guideline sentence only.

This relief is not precluded by the language in Ree which states its holding shall be applied prospectively. Generally, the law in effect at the time of an appeal is the law that should be applied. Reed v. State, 15 F.L.W. D1867 (5th DCA July 19, 1990) (Applying Pope v. State, supra, to case pending on appeal); State v. Jones, 485 So.2d 1283 (Fla. 1986); State v. Castillo, 486 So.2d 565 (Fla. 1986); Dougan v. State, 470 So.2d 697, 701 f2. (Fla. 1985) cert. denied 475 U.S. 1098 (1986); Lowe v. Price, 437 So.2d 142 (Fla. 1983); Wheeler v. State, 344 So.2d 244 (Fla. 1977); Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986); McIntyre v. State, 381 So.2d 1154 (Fla. 5th DCA 1980); But See Williams v. State, Case No. 89-1251 (Fla. 1st DCA August 9, 1990); Williams v. State, Case No. 89-962 (Fla. 1st DCA August 8, 1990); Brown v. State, 15 F.L.W. D2015 (Fla. 1st DCA August 6, 1990).

In Jones, this Court considered the applicability of the holding in State v. Neil, 457 So.2d 481 (Fla. 1984) (dealing with peremptory challenges alleged to have been made for racial reasons). Neil was decided while Jones was pending on appeal. In Neil the Court had held its holding would not have retroactive application. In ruling Neil applied to Jones the court stated, "...we generally apply the law as it exists at the time of the appeal. (citations omitted). Our statement in Neil that it was to have no retroactive application was intended to apply to completed cases."

Similarly, petitioner's case is pending appeal at the time of the decision in Ree and is existing law which petitioner submits should be applied to petitioner's case.

Petitioner respectfully submits that this Court should reverse the portion of the District Court of Appeal's opinion in Blair v. State, supra, which authorizes imposition of a departure sentence on remand.

ISSUE II

THE LIFE SENTENCE FOR ROBBERY BEING MORE SEVERE THAN A LIFE SENTENCE FOR FIRST DEGREE MURDER VIOLATES EQUAL PROTECTION AND DUE PROCESS IN CONTRAVENTION OF THE STATE AND FEDERAL CONSTITUTIONS

The trial judge sentenced petitioner pursuant to the guidelines on his robbery conviction. In sentencing petitioner, the court rejected petitioner's guideline sentence of twelve to seventeen years and sentenced petitioner to life.

Because petitioner received a life sentence pursuant to the guideline sentencing scheme, petitioner will spend the remainder of his life in prison with no possibility of release. See Section 921.001(10), Florida Statutes (1989); See Rule 3.701 and Rule 3.988, Florida Rules of Criminal Procedure.

Petitioner was sentenced less severely on his conviction for first degree murder. While petitioner was also sentenced to life on that conviction, he is eligible for parole in twenty-five years.

In Stewart v. State, 549 So.2d 171 (Fla. 1989) cert. denied 110 S.Ct. 3294 (1990), this Court ruled that an individual is eligible for parole in twenty-five years on a life sentence for first degree murder. This court rejected Stewart's argument that the jury should have been instructed first degree murder carries a possible life penalty with no possibility of parole, because the law provides otherwise. The court noted that when the legislature amended chapter 921 in 1983 to exclude capital felonies from guideline sentencing it left unchanged Section 775.082, Florida Statutes, the provision

providing the penalties for a first degree murder conviction and including the language "shall be required to serve no less than twenty-five years before becoming eligible for parole". The court then concluded "section 921.001(8) prohibits parole eligibility only for those offenders sentenced pursuant to the guidelines" Id. at 176. 1

Because the laws of Florida provide that a life sentence for first degree murder is less onerous than a life sentence for robbery, the legislature has created an arbitrary classification which violates the constitutional guarantee of equal protection and due process of law as guaranteed by Article 1, Sections 2 and 9 of the Florida Constitution and Amendments V and XIV of the United States Constitution. But See Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987); Brown v. State, 15 F.L.W. D2015 (Fla. 1st DCA August 6, 1990).

While a rational legislative purpose is apparent for denying parole to individuals convicted of murder or robbery, there is no rational legislative purpose served by a sentencing scheme which comprehends granting parole to convicted murderers but denying it to those convicted of robbery. The classification can only be viewed as arbitrary.

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1 Section 921.001(8) (1983), Florida Statutes, now amended and codified as Sections 921.001(10) and (11), Florida Statutes (1989); again amended in ch. 89-526, effective September 1, 1990.

The equal protection and due process clauses prohibit arbitrary classifications in legislation.

In Logan v. Zimmerman, 455 U.S. 422 (1982) the United States Supreme Court considered the constitutionality of a statute dealing with discrimination laws which granted hearings to some and denied hearings to others. The Court held the statute violated due process. In a concurring opinion, four justices discussed the equal protection problems with the law, stating:

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the equal protection clause guarantees. As the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweider v. Wilson, 450 U.S. 1074 (1981). This is not a difficult standard for the State to meet, when it is attempting to act sensibly and in good faith. But the "rational basis standard is 'not a toothless one,'" (citations omitted); the classificatory scheme must "rationally advance a reasonable and identifiable governmental objective."
>
> ...
>
> This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary. Rinaldi v. Yeager, 384 U.S. 308, 16 L.Ed2d 577, 86 S.Ct. 1497 ("The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes"). Cf. U.S. Railroad Retirement Bd. v. Fritz, 449 US, at 178, 66 L.Ed.2d 368, 101 S.Ct. 453.

Id. at 439; 441.

In Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) disparate treatment of similarly situated groups was found to violate equal protection. In Skinner, a law which provided for sterilization of those convicted of three felonious larcenies but did not provide for sterilization of those convicted of three felonious embezzlements, was found to violate the equal protection clause because felonious embezzlement was arbitrarily excluded from the category of those subject to sterilization.

Similarly, in the case at bar, disparate treatment of those convicted of murder and robbery, violates equal protection. There is no rational basis to support the position that murder is less of an intrusion into a victim's personal rights than an assault against the victim's person for the purpose of obtaining property. But the life sentence for first degree murder comprehends possible release of the offender in the offender's lifetime, a life sentence for robbery does not.

Because the classification is arbitrary and without rational basis, petitioner's life sentence for robbery violates the constitutional guarantees of equal protection and due process of law and should be reversed for resentencing to a term of years.

ISSUE III

THE COURT ERRED IN DEPARTING UPWARD FROM THE GUIDELINES AND SENTENCING APPELLANT TO LIFE IMPRISONMENT ON THE ROBBERY CONVICTION

The trial judge departed from the recommended range of twelve to seventeen years in sentencing petitioner to life imprisonment for robbery. In sentencing petitioner, the court cited, "a history of an escalating pattern of criminal activity which convinces me that there's no hope for rehabilitation" (R 366). In it's written order of departure the court noted, "the defendant has demonstrated a history of an escalating pattern of violent criminal activity which convinces this Court there exists no hope for rehabilitation of this young man. It remains only for the State of Florida to protect society from this individual" (R 388).

The Florida Supreme Court has authorized the use of an escalating course of criminal conduct in certain circumstances as a valid reason for departure. Keys v. State, 500 So.2d 134 (Fla. 1986); See State v. Simpson, 554 So.2d 509 (Fla. 1989).

Petitioner submits that the evidence does not support the requisite finding of an escalation from crimes against property to violent crimes against persons. The offenses that the trial judge discussed in the record were juvenile offenses which occurred in 1981 and 1982. Two prior escapes the petitioner was convicted of cannot be said to be crimes against either persons or property, and cannot be factored into the equation of escalation. While petitioner did have an adult record other

than escapes, the totality of that record was insufficient to meet the requirements of Keys, supra.

Moreover, the sentencing transcript and written order entered by the court all evidence that the trial judge's real reason for departing upward is his conclusion that petitioner cannot be rehabilitated and is a danger to society (R 364-367).

That someone is a danger to society or not amenable to rehabilitiation are invalid reasons for departure from the guidelines. Tillman v. State, 525 So.2d 862 (Fla. 1988).

Where the sentence choice is between probation and incarceration, or between a short period of incarceration and a longer period, the amenability of an individual to rehabilitation as evidenced by an escalating pattern of criminal activity might have some meaning in choosing whether or not to depart upward from the guidelines.

However, in the case before this court, the sentence imposed on the first degree murder conviction requires a minimum of twenty-five years incarceration before eligibility for parole. At the point petitioner is eligible for parole, he still would not be released absent a determination by the paroling authority that he was rehabilitated.

In light of this, a consecutive life sentence to begin at the earliest twenty-five years from the date of sentencing based on what amounts to speculation about future rehabilitation potential or an individual's possible dangerousness is not a sufficient ground for upward departure, even where the speculation is based in part on the escalating

nature of petitioner's prior history. See Harris v. State, 489 So.2d 838 (Fla. 1st DCA 1986); See Roache v. State, 547 So.2d 707 (Fla. 1st DCA August 4, 1989).

The trial judge's reason for departure is invalid because not sufficiently supported by the record, and because it is based on petitioner's unamenability to rehabilitation and dangerousness. The departure sentence on the robbery conviction should be reversed and the case remanded for sentencing within the guidelines.

V. CONCLUSION

Petitioner requests this Court reverse the portion of the District Court of Appeal's decision which authorizes a departure from the guideline sentence for petitioner's robbery conviction, and further requests this Court, under Issue II, order that any sentence pronounced on petitioner's robbery conviction not be for life but for a term of years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Vasten E. Blair, #084440, Cross City Correctional Institution, Post Office Box 1500, Cross City, Florida 32628 this 27th day of August, 1990.

Lynn A. Williams

LYNN A. WILLIAMS