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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,235

RHODA SMITH,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MONIQUE T. BEFELER
Florida Bar No. 0504157
Assistant Attorney General
Department of Legal Affairs
401 N.W. Second Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
QUESTION PRESENTED	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
POPE V. STATE SHOULD NOT BE APPLIED RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO APRIL 26, 1990.	
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

CITATIONS	PAGE
<u>Pope v. State,</u> 561 So.2d 554 (Fla. 1990)	6
<u>Ree v. State,</u> -- So.2d --, 15 F.L.W. 395 (Fla. July 19, 1990)	6

INTRODUCTION

In this Brief, the Petitioner RHODA SMITH will be referred to as the Defendant or the Petitioner. The Respondent THE STATE OF FLORIDA will be referred to as the State or the Respondent.

The symbol "R" will refer to the record on appeal. The symbol "A" will refer to the appendix filed with the Petitioner's Brief.

STATEMENT OF THE CASE AND FACTS

On April 14, 1986, the Defendant was charged by information with the first degree felony charge of aggravated child abuse with reference to the knocking out of two teeth from her four year-old son's mouth and injury to his brain, to wit, a subdural hematoma (R.1-1A). Four months later, her son died as a result of the injuries, and she was subsequently indicted on the additional charge of first degree murder (R.2-3A, 4-5A).

On June 22, 1987, the Defendant entered a plea of nolo contendere to a reduced charge of manslaughter and aggravated child abuse (R.23). She was sentenced to seven years as to each of the two counts, each to run concurrently, followed by five years probation (R.25-26). One of the conditions of probation was that she live and remain at liberty without violating any law (R.22).

On November 13, 1989, while on probation, the Defendant was charged by information on the third degree felony charge of child abuse (R.44-46). These charges resulted from the Defendant's October 23, 1989 arrest for leaving her four-month old son unattended in her apartment from 1:00 a.m. to 8:30 a.m. (R.48).

On December 1, 1989, the Defendant entered a plea of guilty to the child abuse charge and the violation of probation, and was

thereafter adjudicated guilty (R.50-51). The Court accepted the guilty plea, adjudicated the Defendant guilty, and sentenced the Defendant to the remaining four years left on her probation from her prior conviction (R.52). As a special condition of her sentence, the Defendant was to enter and complete the Spectrum program (R.53). The Defendant was sworn in and testified that she understood the terms of her plea (R.37).

The State objected to the sentence (R.38) inasmuch as the Defendant scored a "155" on the sentencing guideline scoresheet, indicating a guideline sentence of three and one-half years (3 1/2) to four and one-half (4 1/2) years imprisonment on the child abuse charge (R.54-54A). The Court failed to give written reasons for the departure sentence.

The State appealed the departure sentence imposed (R.57). The Third District Court of Appeals reversed the imposition of the departure sentence and remanded the case for sentencing within the guidelines, citing *Pope v. State*, 561 So.2d 554 (Fla. 1990) (A.1-2). Inasmuch as the sentencing hearing in the instant case occurred on December 1, 1989 and *Pope v. State* was decided on April 26, 1990, the Third District Court of Appeals certified the following question to Florida Supreme Court as one of great public importance:

SHOULD POPE V. STATE BE APPLIED RETROACTIVELY
TO SENTENCES IMPOSED PRIOR TO APRIL 26, 1990?

(A.2). This Petition for Discretionary Review ensued.

QUESTION PRESENTED

WHETHER POPE V. STATE SHOULD BE APPLIED
RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO
APRIL 26, 1990?

SUMMARY OF ARGUMENT

Pope should not be applied retroactively to sentences imposed prior to April 26, 1990.

ARGUMENT

POPE V. STATE SHOULD NOT BE APPLIED
RETROACTIVELY TO SENTENCES IMPOSED PRIOR TO
APRIL 26, 1990.

It is the State's position that there is no discernible difference between Ree v. State, -- So.2d --, 15 F.L.W. 395 (Fla. July 19, 1990) and Pope v. State, 561 So.2d 554 (Fla. 1990). Therefore, the certified question should be answered in the negative and Pope v. State should be applied prospectively only.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited herein, the Respondent THE STATE OF FLORIDA respectfully requests that this Court respond to the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

Monique T. Befeler
MONIQUE T. BEFELER
Florida Bar No. 0504157
Assistant Attorney General
Department of Legal Affairs
401 N.W. Second Avenue, Suite N921
Miami, Florida 33128
(305)377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by United States mail to Bennett Brummer, Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125 on this 14th day of September, 1990.

Monique T. Befeler
MONIQUE T. BEFELER
Assistant Attorney General