IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,475

HERBERT WHIPPLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125
Telephone: (305) 545-3003

HARVEY J. SEPLER
Assistant Public Defender
Florida Bar No. 473431

Counsel for Petitioner

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INTRODUCTION

This is an initial brief on the merits brought by the petitioner HERBERT WHIPPLE on discretionary review of the following certified question from the Third District Court of Appeal:

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

References to the record are abbreviated as follows:

(R) = Clerk's Record on Appeal

(T) = Transcript of Trial Court Proceedings

(A) = Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

On July 21, 1989, the petitioner/defendant HERBERT WHIPPLE was charged by Information with trafficking in cocaine within 1,000 feet of a school (Fla. Stat. 893.13). (R. 1). Accepting the defendant's nolo contendere plea, the trial court, on October 11, 1989, adjudicated Mr. Whipple guilty and sentenced him to two (2) days imprisonment (i.e., credit-for-time-served). (R. 67-69). This was a downward departure from the recommended guidelines range. (R. 71).

At the sentencing hearing, the following discussion took place:

> "THE COURT: Are you presently under the influence of any alcohol, medications, or drugs?
>
> THE DEFENDANT: I used drugs, but I am not under it now.
>
> THE COURT: You're a user, are you not?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you have a drug problem?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: How long have you had this problem?
>
> THE DEFENDANT: About a year and a half.[1]
>
> THE COURT: And the drug problem that you have a problem with is cocaine?
>
> THE DEFENDANT: Yes."

(T. 31-32).

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[1] The criminal offense is said to have occurred on June 30, 1989. (R. 1).

"THE COURT: Based on your plea of no contest in case number 89-25113, the court will adjudicate you guilty, make a finding of guilt, credit for time served.

How many days were you in, sir?

THE DEFENDANT: I think it was two days.

THE COURT: Court costs 225 dollars, give you two months to pay it.

. . .

MS. GROSS (state): For the record, State would object.

THE COURT: The fact that he has a drug problem with cocaine and admitted so on the record reference that particular problem, and the Court also would note that his prior record dates back to 1982 at which time he was placed on subsequent parole and is now presently on parole.

Court understands that 1982 to 1989 is a significant amount of years, and the fact that he has a drug problem the last couple of years caused him to be in the situation that he is in now.

The Court would make note that the sting that was set up by the Police Officers in this case was set up at a schoolyard deliberately in order to enhance the penalty which would normally make it a third degree felony to a first degree felony by the fact that they placed this sting within a thousand feet of the school.

Because of this, the Court is under the impression this individual has demonstrated from his behavior that after he was placed on parole and was responsible enough to seek employment and to work to become a constructive person within our community and in society.

Afterward within the last few years, he became a victim to this terrible drug called cocaine and placed in the situation that he is in now. That's why the disposition is the way it is.

The Court feels that the deviation from

> the guideline sentence is based on the aforementioned reasons."

(T. 7-8).

No contemporaneous written reasons for the departure sentence were entered.

The state appealed the sentence to the Third District Court of Appeal and, on July 24, 1990, the disyrict court reversed the sentence based on the trial court's failure to supply written departure reasons. The district court cited as the only authority Pope v. State, 561 So.2d 554 (Fla. 1990). Uncertain as to the retroactivity of the Pope decision to sentences imposed prior to April 26, 1990 (date of Pope opinion), as here, the district court certified the retroactivity question to this Court.

SUMMARY OF ARGUMENT

The defendant submits the decision of the Florida Supreme Court in Pope v. State, 561 So.2d 554 (Fla. 1990), should be given **prospective** application only and should not be applied to a sentence, as the defendant's sentence here, that was imposed prior to April 26, 1990, the date of Pope. Consequently, the defendant submits the sentence in this case should be remanded to the trial court with directions to either sentence him within the guidelines or to place reasons for the downward departure in writing.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT HOLDING THAT POPE v. STATE, 561 So.2d 554 (Fla. 1990), SHOULD BE GIVEN RETROACTIVE APPLICATION SHOULD BE QUASHED WHERE SUCH RETROACTIVE APPLICATION VIOLATES THE RIGHT AGAINST EX POST FACTO LAW AND THE RIGHT TO EQUAL PROTECTION OF THE LAW, PARTICULARLY WHERE THE PETITIONER HAS RELIED ON LONG-STANDING LAW AUTHORIZING SUCH CASES TO BE REMANDED FOR THE ENTRY OF WRITTEN REASONS TO MATCH CONTEMPORANEOUS ORAL PRONOUNCEMENTS OF DEPARTURE GROUNDS.

The issue before this Court is whether this Court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990) is to be given retroactive application to sentences, as here, which were imposed prior to April 26,1990 -- the date of the Pope decision.[2]

Pope involved an upward departure sentence in which the trial court gave oral reasons for the departure at the sentencing hearing, but never provided a written order outlining the reasons in writing. The Fifth District vacated the sentence because of the trial court's failure to provide written reasons, pursuant to State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and remanded the case to the trial court for the opportunity to provide written reasons justifying the departure.

Upon conflict review of the district court's decision, this Court quashed the opinion of the district court and remanded the case for resentencing within the guidelines with no possibility of departure. This Court reasoned that since Jackson said "oral reasons were invalid and required resentencing," and Shull v.

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2 The petitioner was sentenced on October 11, 1989. (R. 69).

Dugger, 515 So.2d 748 (Fla. 1987), said "invalid reasons, even if written, must be remanded only for a guidelines sentence," then at the point of remand, "no valid reasons for departure existed under the guidelines." Pope v. State, 561 So.2d at 555. This Court then held 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." 561 So.2d at 556.

In the instant case, the petitioner was sentenced below the recommended guidelines range. As in Pope, the trial court gave oral (departure) reasons at the sentencing hearing, but failed to enter a written order enumerating those same departure grounds. Without commenting on the validity of the underlying departure grounds, the Third District reversed the sentence and remanded the case for resentencing within the guidelines, in accordance with Pope. The court did, however, recognize the frailty of retroactive application of Pope and, as it had done in at least one other case,[3] certified the retroactivity question to this Court.

The petitioner submits that Pope should be given **prospective** application only and that the defendant's case should be remanded for the entry of written reasons. There should be no basis for distinguishing the **prospective** scope in this Court's recently revised opinion in Ree v. State, ___ So.2d ___ (Fla. 1990) (Case

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[3] The same issue and certified question is presented in State v. Smith, ___ So.2d ___ (Fla. 3d DCA 1990), on review in this Court, Case No. 76,235.

No. 71,424, opinion filed July 19, 1990) [15 FLW 395] from the reach of the Pope decision. Both Ree and Pope concern the trial court's failure to enter contemporaneous written departure reasons.

In Ree, this Court held that when a trial court departs from the guidelines, the written reasons for departure must be issued contemporaneously with the entry of the departure sentence. This Court agreed with the Fourth District that a written order citing the reasons for departure that was filed five days after the sentencing hearing was not contemporaneous with the pronouncement of sentence and required reversal of the case for resentencing. This Court specifically stated that this holding "shall only be applied prospectively."

Under Ree, it does not matter whether the written reasons were filed a day late, five days late, twenty-five days late, or weeks or months after the pronouncement of sentence. See Lyles v. State, 559 So.2d 370 (Fla. 1st DCA 1990), review pending (Fla.S.Ct. Case No. 75,878) (written reasons filed three days after pronouncement of sentence); Holmes v. State, 556 So.2d 1224 (Fla. 4th DCA 1990) (written reasons filed seventeen days after sentence); Owens v. State, 563 So.2d 180 (Fla. 1st DCA 1990) (written reasons filed a month after pronouncement of sentence); Hayes v. State, __ So.2d __, 15 FLW 1678 (Fla. 2d DCA, June 20, 1990) (written reasons filed two months after sentence). The result is the same: the written reasons are not filed contemporaneously with the pronouncement of sentence and the sentence must be reversed for resentencing. Also, presumably

under Ree, it is no longer permissible for an appellate court to relinquish jurisdiction in a case to the trial court for the entry of an order listing the written reasons because, again, the written reasons would not be issued contemporaneously with the pronouncement of sentence. See Elkins v. State, 489 So.2d 1222, 1224, n.2 (Fla. 5th DCA 1986). The critical point outlined in Ree is the entry of written reasons contemporaneous with the pronouncement of sentence.

The logical extension of this, of course, is that even if written reasons are never filed at all, the holding in Ree would be the same -- that is, whether the written reasons are late filed (two days, two months) or whether they are never filed, they are not contemporaneously issued and resentencing within the guidelines is required under Ree. This conclusion is perfectly consistent with the holding in State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), and with the express holding in Pope. one of the foundations for the Ree decision.[4] Moreover, since this Court has specifically and unequivocally held that the resentencing required for late written reasons in Ree is prospective only, the resentencing required for no written reasons under Pope must also be found to be prospective only.

Certainly, this is the only logical and fair result. As

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Indeed, relying on Jackson, this Court in Pope expressly stated that when no written reasons at all are given for a departure sentence, the case must be remanded for resentencing within the guidelines.

this Court recognized in Pope, many district courts of appeal routinely remanded cases for the entry of a written order when the trial court provided oral reasons for departure but failed to place those reasons in writing. See, e.g., State v. Simmons, 539 So.2d 40 (Fla. 3d DCA 1989); State v. Richardson, 536 So.2d 1193 (Fla. 4th DCA 1989); State v. Wayda, 533 So.2d 939 (Fla. 3d DCA 1988); State v. Adams, 528 So.2d 548 (Fla. 3d DCA 1988); State v. Wilson, 523 So.2d 178 (Fla. 3d DCA 1988); Daughtry v. State, 521 So.2d 208 (Fla. 2d DCA 1988); State v. Chaney, 514 So.2d 436 (Fla. 4th DCA 1987); Boynton v. State, 473 So.2d 703, 707 (Fla. 4th DCA 1985). In State v. Smith, __ So.2d __, 15 FLW 1520 (Fla. 3d DCA, case no. 89-3012, June 5, 1990), the Third District acknowledged it routinely remanded such cases for the trial court to reduce its oral reasons to a written order. Indeed, in Barbera v. State, 505 So.2d 413 (Fla. 1987), discussed in Pope, this Court remanded for resentencing to permit the trial court to place the drug dependency and rehabilitation reasons for departure into a written order. See also State v. Oden, 478 So.2d 51 (Fla. 1985) (approving Oden v. State, 463 So.2d 313 (Fla. 1st DCA 1984), in which the district court remanded for resentencing to permit trial court to place reasons for departure, if any, in writing). Thus, there was a long-standing practice in the district courts of appeal, sanctioned by this Court, to remand cases to the trial courts to place valid oral reasons for departure into a written order. The petitioner here has, as have many defendants state-wide, relied upon this long-standing practice and should not now be forced to suffer the most

severe sanction possible - sentencing within the guidelines - for his reliance on these appellate decisions.

In addition, permitting Pope to be applied retroactively operates to the petitioner's disadvantage in the same way that retroactive application of a substantive law would subject an accused to ex post facto punishment. Here, again, we note, as this Court did in Pope, its holding represents a substantial change in the law as interpreted on both the supreme court and district court levels. By overruling the previously condoned remand-for-written reason practice, as in Barbera, Pope constitutes a new judicial interpretation of law which, because it works to his disadvantage, may not be applied retroactively.[5]

Moreover, by applying Pope retroactively, this Court would be denying the petitioner his state and federal constitutional right to equal protection of the law. Article IV, Section 1, United States Constitution; Article I, Sections 2 and 9, Florida Constitution. Other defendants in the same position as the petitioner receive the benefit of this Court's (prospective-only) decision in Ree, and the benefit of other decisions from this Court and from the district courts of appeal permitting them to have their cases remanded for the placement of oral reasons into

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See Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), in which the United States Supreme Court held that an unforeseeable judicial change in a criminal statute, applied retroactively, operates precisely like an ex post facto law that the Constitution forbids. See also United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), where the Court declared that a rule of criminal procedure that was "a clear break with the past" was almost invariably found to be nonretroactive.

a written order. Treating the petitioner differently denies him the right to equal protection under the law. See Mitchell v. State, 157 Fla. 121, 25 So. 73 (1946) (prosecution by method which denies defendant benefit of the statute of limitations while others guilty of same offense receive benefit of limitations period denied equal protection); cf., Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) (subjecting a court order to First Amendment scrutiny and affirming Rhinehart v. Seattle Times Co., 654 P.2d 673 (Wash. 1982), which affirmed the court order on the ground that the discovery sought would infringe on constitutionally protected rights of privacy, religion, and association); South Florida Blood Service v. Rasmussen, 467 So.2d 798, 803 (Fla. 3d DCA 1985) (court orders may constitute state action subject to constitutional limitation), approved, 500 So.2d 533 (Fla. 1987).

Consequently, Pope should not be applied retroactively to defendants who were sentenced prior to April 26, 1990 (date of Pope decision). Since the petitioner here was sentenced long before Pope was issued, the decision of the Third District should be quashed.[6] See Stewart v. State, 549 So.2d 171, 176 (Fla.

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[6] The decision of the Third District does not address the merits of the departure grounds; however, a review of the record shows the departure sentence was reasonably justified by the reasons given at the sentencing hearing and that the departure sentence should be affirmed.

The record demonstrates, for example, that the petitioner had a long-standing drug problem which formed the basis for his criminal activity. Moreover, despite his efforts to benefit from treatment, he had been unable to do so. Certainly, chronic drug addiction is a valid ground for downwardly departing from the presumptive guidelines range. See Barbera v. State, 505 So.2d 413 (Fla. 1987) (drug dependency may be valid reason for (Cont'd)

1989) (where defendant was sentenced prior to issuance of decision holding that failure to provide contemporaneous written reasons for imposing death penalty required reversal of death penalty and resentence to life imprisonment, defendant's case would be remanded to trial court for entry of written reasons).

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departure downwards); State v. Wilson, 523 So.2d 178 (Fla. 3d DCA 1988) (same); State v. Whitten, 524 So.2d 1114 (Fla. 3d DCA 1988) (same); State v. Fink, 557 So.2d 129 (Fla. 3d DCA 1990) (defendant's drug addiction and amenability to rehabilitation proper bases for downward departure); State v. Bledsoe, 538 So.2d 94 (Fla. 3d DCA 1989) (same); State v. Forbes, 536 So.2d 356 (Fla. 3d DCA 1988) (same); State v. Salony, 528 So.2d 404 (Fla. 3d DCA 1988) (defendant's chronic drug abuse problem which caused him to commit instant crime and prior offenses valid reason for downward departure); State v. Daughtry, 505 So.2d 537 (Fla. 4th DCA 1987) (drug addiction and use of drugs during commission of crime valid reason for downward departure); see also Rule 3.701(b)(2), Fla.R.Crim.P. (although primary purpose of sentencing is to punish, rehabilitation continues to be a goal of the criminal justice system); Rule 3.701(b)(7), Fla.R.Crim.P. (because the capacities of state and local correctional facilities are finite, the "sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence"); §948.01(3), Fla.Stat. (1989) (allows court in its discretion to place defendant on probation); §921.187(a), Fla.Stat. (1989) (provides that a court may place defendant on probation as an alternative to sentencing in a manner which will "provide the opportunity for rehabilitation"); §§397.12, Fla.Stat. (1989) (the court may in its discretion require the person charged or convicted of drug crimes to participate in a licensed drug treatment program "to provide a meaningful alternative to criminal punishment for individuals capable of rehabilitation as useful citizens through techniques and programs not generally available in state or federal prison systems").

CONCLUSION

For the foregoing reasons, the petitioner requests this Court to quash the decision of the Third District Court of Appeal and to hold that this Court's decision in Pope is not to be applied retroactively to persons who were sentenced prior to the issuance of Pope.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 NW 12 Street
Miami, Florida 33125

By: _____
HARVEY J. SEPLER
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, 401 NW 2nd Avenue, Miami, Florida 33128, this 5th day of September, 1990.

By: _____
HARVEY J. SEPLER
Assistant Public Defender

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1990

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 89-2606
HERBERT WHIPPLE,	**	
Appellee.	**	

Opinion filed July 24, 1990.

An Appeal from the Circuit Court of Dade County, Phillip S. Davis, Judge.

Robert A. Butterworth, Attorney General, and Anita J. Gay, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, for appellee.

Before HUBBART, FERGUSON and LEVY, JJ.

PER CURIAM.

Herbert Whipple, the defendant, was convicted of purchasing cocaine within 1000 feet of an elementary school. The recommended sentencing guideline range was seven to nine years in prison, with a permitted range of five and one-half to twelve

years. The defendant entered a plea of "no contest." However, it is unclear from the record whether the defendant's plea was entered pursuant to any plea agreement with the trial court.

The trial judge sentenced the defendant to two days in the Dade County Jail and gave him credit for time served. As support for the departure, the trial judge orally stated that the defendant has a drug problem which caused him to be in the situation in which he found himself. The trial judge also expressed the view that the police set up the reverse sting operation in which defendant was ensnared in order to make a third degree felony into a first degree felony. However, the trial judge did not contemporaneously set forth written reasons for the deviation from the guideline sentence.

Because the trial court failed to provide contemporaneous written reasons for the downward departure from the sentencing guidelines, this cause is remanded for imposition of a sentence within the guidelines with no possibility of departure from the guidelines. See Pope v. State of Florida, ___ So.2d ___ (Fla. 3d DCA Case No. 74,163, opinion filed, April 26, 1990)[15 F.W S243]. Upon remand, the trial court is instructed to determine whether the defendant entered his plea of "no contest" in reliance upon a plea agreement that the defendant would receive a sentence of only two days in the county jail. If this is the case, the defendant must be afforded an opportunity to withdraw his plea and proceed to trial.

We recognize that in the instant case, as in the case of State v. Smith, No. 89-3012 (Fla. 3d DCA June 5, 1990), the trial

judge sentenced the defendant prior to the issuance of the Pope decision, which raises the issue of Pope's retroactive application. In accord with this court's decision in Smith, we apply Pope retroactively and certify the following question to the Florida Supreme Court as a question of great public importance:

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

We vacate the current sentence and remand for proceedings consistent herewith.