



TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING A DEPARTURE SENTENCE WITHOUT ENTERING CONTEMPORANEOUS WRITTEN REASONS.	3
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Brown v. State,</u> 565 So.2d 369 (Fla. 1st DCA 1990)	4
<u>Owens v. State,</u> 563 So.2d 180 (Fla. 1st DCA 1990)	3,4
<u>Pope v. State,</u> 561 So.2d 554 (Fla. 1990)	3
<u>Ree v. State,</u> 565 So.2d 1329 (Fla. 1990)	3,4
<u>State v. Smith,</u> 15 F.L.W. D1520 (Fla. 3d DCA 1990), <u>pending Case No. 76,235</u>	3

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No.: 77,122

BOBBY CHARLES OLIVER,

Respondent.

\_\_\_\_\_ /

PETITIONER'S REPLY BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent, BOBBY CHARLES OLIVER, the defendant in the trial court and appellant below, will be referred to in this brief as respondent. References to the record on appeal will be noted by the symbol "R," and will be followed by the appropriate page numbers in parentheses.

Based on respondent's concession on the first issue, the state submits its reply brief on the merits for the sole purpose of addressing a second issue raised by respondent in his brief on the merits, i.e., whether the trial court erred in imposing a departure sentence without entering contemporaneous written reasons.

SUMMARY OF THE ARGUMENT

As to Issue II:

Respondent inaccurately frames this issue as involving a Pope violation. Because the trial court entered written reasons 12 days after imposition of respondent's sentence, the issue, if one exists, instead concerns a Ree violation. However, because this Court specifically limited Ree's application to prospective cases and respondent was sentenced before the original Ree opinion issued, Ree does not apply.

ARGUMENT

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION  
IN IMPOSING A DEPARTURE SENTENCE WITHOUT  
ENTERING CONTEMPORANEOUS WRITTEN REASONS.

Respondent again mischaracterizes this issue as involving a Pope v. State, 561 So.2d 554 (Fla. 1990), violation. In Pope, this Court specifically 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." Id. at 556 (emphasis added). In the present case, it is clear that Pope is inapplicable,<sup>1</sup> because the trial court entered written reasons 12 days after it orally pronounced its departure reasons at respondent's October 11, 1989, sentencing hearing (R 30-31). See Owens v. State, 563 So.2d 180 (Fla. 1st DCA 1990).

Instead, respondent's claim for relief under this issue, if he has one, concerns Ree v. State, 565 So.2d 1329 (Fla. 1990), where this Court held that trial courts must provide written departure reasons contemporaneously with imposition of sentence.

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<sup>1</sup> Even if this issue actually concerned a Pope violation, it is questionable whether Pope would even apply to this case, because the trial court sentenced appellant in October 1989, and this Court issued Pope about six months later, on April 26, 1990. See State v. Smith, 15 F.L.W. D1520 (Fla. 3d DCA 1990), pending Case No. 76,235 (where the Third District certified a question of great public importance to this Court: Whether Pope should be applied retroactively to sentences imposed prior to April 26, 1990).

While the facts of the present case would support an argument that the trial court did not enter its written departure reasons contemporaneously with imposition of sentence, this Court unequivocally retired such an argument in its Ree rehearing opinion: "This holding . . . shall only be applied prospectively." 565 SO.2d at 1331. Because appellant was sentenced on October 11, 1989, and Ree issued on November 16, 1989, a Ree argument is unavailable to respondent. See Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990).

If this Court determines otherwise and finds that this case must be remanded for resentencing, the state points out that, under Owens, the trial court should not be restricted to sentencing respondent within the guidelines. After all,

[t]he only problem here is the trial court's failure to have timely issued . . . written reasons for departure at the sentencing hearing. Allowing the trial court on remand to reimpose the departure sentence based on these same rereasasoonss will not, as in Shull [v. Dugger], 515 So.2d 748 (Fla. 1987)], subject [respondent] to "unwarranted efforts to justify the original sentence" and will not result in multiple appeals and resentencings.

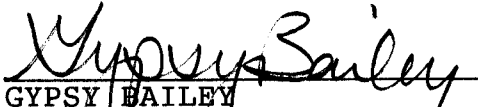
563 So.2d at 181.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to reverse the decision of the First District Court of Appeal and dispositively disapprove of Wheeler as to the first issue, and affirm the decision of the First District Court of Appeal as to the second issue.

Respectfully submitted,

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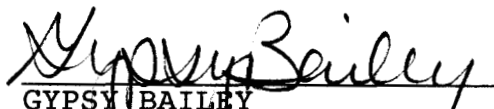
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Deputy Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of May, 1991.

  
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