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IN THE SUPREME COURT OF THE STATE OF FLORIDA

EUGENE N. BUCHANAN,
Petitioner,

v.

CASE NO. 78,153

STATE OF FLORIDA,
Respondent.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT:

A TRIAL COURT IS REQUIRED TO GIVE
CONTEMPORANEOUS WRITTEN REASONS FOR
DEPARTING DOWNWARD FROM THE
SENTENCING GUIDELINES.
.....2

CONCLUSION.....10

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

CASES:

PAGES:

<u>Branam v. State,</u> 554 So.2d 512 (Fla. 1990).....	2,4
<u>Cheshire v. State,</u> 568 So.2d 908 (Fla. 1990).....	2,4
<u>Pope v. State,</u> 561 So.2d 554 (Fla. 1990).....	3,4,7,9
<u>State v. Allen,</u> 553 So.2d 176 (Fla. 4th DCA 1989).....	5,7,8,9
<u>State v. Buchanan,</u> 16 FLW 1607 (Fla. 5th DCA June 13, 1991).....	2

OTHER AUTHORITIES:

Fla. R. Crim. P. 3.800.....	6,8
Fla.R.Crim.P. 3.800(b).....	2,4,5,8

SUMMARY OF ARGUMENT

The requirements for downward departure sentences are the same as for upwards departures; a trial court must always give contemporaneous written reasons for departing downward from the sentencing guidelines. Since the trial court imposed a downward departure sentence upon Buchanan, the instant case must be remanded to the trial court with the requirement that Buchanan be resentenced within the guidelines. Furthermore, the trial court is prohibited from subsequently departing from the guidelines if Buchanan subsequently files a motion to reduce sentence.

ARGUMENT

A TRIAL COURT IS REQUIRED TO GIVE
CONTEMPORANEOUS WRITTEN REASONS FOR
DEPARTING DOWNWARD FROM THE
SENTENCING GUIDELINES.

In the district court of appeal decision in the instant case, *State v. Buchanan*, 16 FLW 1607 (Fla. 5th DCA June 13, 1991), the court certified the following question:

Is a trial court required to give contemporaneous written reasons in departing downward from the guidelines, since Florida Rule of Criminal Procedure 3.800(b) allows a court in some criminal cases upon receipt of a timely motion to reduce or modify a sentence without expressly requiring the court to give contemporaneous written reasons?

The simple answer to the question certified by the district court is yes; a trial court must always give contemporaneous written reasons for departing downward from the sentencing guidelines. *Branam v. State*, 554 So.2d 512 (Fla. 1990); *Cheshire v. State*, 568 So.2d 908 (Fla. 1990).

Although the holdings in *Branam* and *Cheshire* are sufficient to answer the certified question affirmatively, the question raises three issues which require more detailed discussion. The first issue is whether a trial court must give contemporaneous written reasons for departing downward from the sentencing guidelines. The second issue is whether Rule 3.800(b), Fla.R.Crim.P., provides a loophole for a trial court to impose a downward departure sentence without providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence. The third issue is whether Rule 3.800(b) may be

interpreted to circumvent the requirements of *Pope v. State*, 561 So.2d 554 (Fla. 1990), in a downward departure case. The questions are discussed one by one below.

A. Written reasons required for downward departure.

The first issue is whether a trial court must give contemporaneous written reasons for departing downward from the sentencing guidelines. As explained above, this Court held in *Branam* and *Cheshire* that a trial court must always give contemporaneous written reasons for departing downward from the sentencing guidelines.

In *Branam*, *supra* at 513, the court explained that requiring that trial courts give contemporaneous written reasons for departing downward from the sentencing guidelines fulfills the purpose of the sentencing guidelines, which is to provide uniformity in sentencing. This Court's statement in *Branam* was as follows:

In adopting the sentencing guidelines, we stated:

Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-and offender-related criteria and in defining their relative importance in the sentencing decision..

In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). Unless upward or downward departures are justified by valid written reasons, a trial judge may not depart from the guidelines recommendation. *Williams v. State*, 492 So.2d 1308 (Fla. 1986). Since uniformity in the sentencing process is the goal, all sentences should reflect, or attempt to reflect, the guidelines as closely as possible unless valid reasons for departure are found. (Emphasis added.)

In *Cheshire*, the state filed a cross appeal alleging that the trial court erroneously departed downwards from the sentencing guidelines without written reasons when it imposed a seven year sentence upon the defendant for burglary. The sentencing guidelines range for the defendant was nine to twelve years incarceration. This Court held that pursuant to *Pope v. State*, 561 So.2d 554 (Fla. 1990), the trial court was required to resentence the defendant within the guidelines and that no further downwards departure would be permitted.

Both *Branam* and *Cheshire* demonstrate that the trial court must follow the same procedure for downward departures from the sentencing guidelines as they follow for upward departures from the guidelines. Thus, in the instant case, the trial court erred by imposing a downward departure sentence without giving contemporaneous written departure reasons. Furthermore, *Cheshire* requires that the instant case be remanded to the trial court with the requirement that Buchanan be resentenced within the guidelines.

B. Rule 3.800(b) is not a loophole through sentencing guidelines.

The second issue is whether Rule 3.800(b) provides a loophole for the trial court to impose a downward departure sentence without providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence. Although Buchanan has not filed a motion to reduce sentence in the instant case, he argues on appeal that the trial court should not be required to provide contemporaneous written departure

reasons when imposing a downward departure sentence because the trial court could later impose a downward departure sentence pursuant to Rule 3.800(b).

Rule 3.800(b), Fla.R.Crim.P., should not be interpreted to provide a loophole for the trial court to impose a downward departure sentence without providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence. The rationale of the district court in rejecting Buchanan's argument in the instant case was as follows:

We agree with Judge Downey in *State v. Allen*, 553 So.2d 176 (Fla. 4th DCA 1989) that rule 3.800(b) should not be construed as allowing a procedural "end-run" around the written reason requirements of rule 3.701.d.11. Contemporaneous written reasons must be given, whether the departure is effected by the original sentence or by a motion for reduction pursuant to rule 3.800(b). . . This interpretation gives force and application to both rules. It is also consistent with the requirement of rule 3.800 that a trial court may reduce a "legal sentence imposed by it" and the 1980 Amendment to the Committee Note, which specifies further that the modification may encompass "any sentence which could have been imposed initially...."

In *State v. Allen*, 553 So.2d 176 (Fla. 4th DCA 1989), the trial court sentenced the defendant to 3 1/2 years incarceration in conformity with the recommended guidelines range of 3 1/2 to 4 1/2 years incarceration. Immediately following the imposition of sentence, the trial court invited the defendant to move to mitigate the sentence. The trial court granted the defendant's motion and resentenced him to 2 1/2 years incarceration. The state objected to the resentencing and argued that it was an illegal downward departure sentence. The trial court replied,

"I didn't go under, I sentenced him on the guidelines. I mitigated it. Let's see what the 4th District Court says about it."

The appellate court in *Allen* reversed the mitigation of the sentence by the trial court. The court's holding was as follows:

[W]e believe it would constitute a bad precedent to approve the procedural device used to reach what the trial judge no doubt considered to be the appropriate sentence in this case. To place the imprimatur of this Court on the use of Rule of Criminal Procedure 3.800(b) to effect a lesser sentence than that authorized by the sentencing guidelines promulgated pursuant to Florida Rule of Criminal Procedure 3.701 would have a deleterious effect upon the present strictures inherent in the guidelines by allowing an "end run" around the recommended sentence through the exercise of the discretion allowed in 3.800(b). Aside from policy reasons, we acknowledge the committee note under Rule 3.800, which provides that the authorization in 3.800(b) allows the trial court to modify the sentence in question so as to impose any sentence *which could have been imposed initially*. Obviously, the sentence of two and one-half years' incarceration could not have been imposed initially because below the guidelines minimum. (Emphasis in original.)

The rationales of the district courts in the instant case and in *Allen* are sound and should be adopted by this Court as the law for all Florida courts. Rule 3.800(b) does not permit a trial court to impose a downward departure sentence without providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence.

C. Rule 3.800(b) does not circumvent requirements of Pope v. State.

The third issue is whether Rule 3.800(b) may be interpreted to circumvent the requirements of *Pope v. State* in a downward departure case. As explained above, the requirements in *Pope* apply in downward departure cases; a downward departure sentence imposed without written reasons must be remanded to the trial court with the requirement that the defendant be resentenced within the guidelines. However, the following question arises: After the case is remanded and the defendant is resentenced within the guidelines, is the trial court permitted to subsequently reduce the sentence below the guidelines by providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence? The answer to the question should be no, because otherwise the *Pope* requirements will be circumvented.

This third issue was not addressed in *Allen*. As explained above, the court held in *Allen* that Rule 3.800(b) does not permit a trial court to reduce a sentence below the guidelines without providing contemporaneous written departure reasons when the defendant files a motion to reduce sentence. No valid departure reasons were articulated in *Allen*; however, Buchanan argues in the instant case that the trial court orally articulated valid departure reasons.¹ The question arising in the instant case, therefore, is as follows: After Buchanan is resentenced within

¹ The validity of the oral departure reasons are not at issue in this appeal. The state does not concede that the trial court orally articulated valid departure reasons.

the guidelines pursuant to *Pope*, is the trial court permitted to subsequently reduce Buchanan's sentence below the guidelines by providing contemporaneous written departure reasons if Buchanan files a motion to reduce sentence?

The answer in the instant case should be no; Rule 3.800(b) should not be construed to circumvent the application of *Pope* to the instant case. The policy concerns which this Court addressed in *Pope, supra* at 556, were as follows:

To avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure. . .

The same policy concerns are present in the instant case² and it should be remanded for a guidelines sentence with no possibility of departure from the guidelines. The holding in *Pope* was as follows:

[W]e 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. (Emphasis added.)

"No possibility of departure" should be interpreted to preclude a departure after a motion to reduce sentence.

The committee note for Rule 3.800 is also persuasive that the rule should not be construed to circumvent *Pope*. In *Allen*, the court emphasized the provision in the committee note that a

² The scenario in the instant case could be as follows: This appeal is remanded and Buchanan is resentenced within the guidelines; Buchanan subsequently files a motion to reduce sentence; another sentencing hearing is held; Buchanan is resentenced below the guidelines with written reasons; the state appeals the validity of the written reasons. Such scenario is exactly what this Court intended to avoid in *Pope*.

modification of a sentence pursuant to the rule would be "any sentence which could have been imposed initially." Since the initial sentence upon remand would be limited to the guidelines range, the committee note makes it clear any subsequent modification pursuant to the rule should also be within the guidelines range.

D. Conclusion.


There must be uniformity and finality in sentencing, which will only be achieved if the requirements of *Pope* are followed uniformly and without exception. The instant case should be remanded to the trial court with the requirement that Buchanan be resentenced within the guidelines and the trial court should be prohibited from reducing Buchanan's sentence below the guidelines even with written departure reasons and even if Buchanan subsequently files a motion to reduce sentence.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests the court to affirm the district court decision and remand to the trial court with the requirement that Buchanan be resentenced within the guidelines.

Respectfully submitted,

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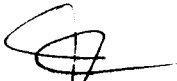


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by delivery to Noel A. Pelella, Assistant Public Defender and counsel for petitioner, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 12th day of August, 1991.



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