IN THE FLORIDA SUPREME COURT

PETER N. FRASER	:	
PETITIONER	:	
v.	:	Case No. 78,333
STATE OF FLORIDA	:	
RESPONDENT	:	
	:	

PETITIONER'S REPLY BRIEF ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Complex
5100 144th Avenue North
Clearwater, FL 34620
(813) 530-6594

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

PETER N. FRASER

Petitioner

v. **Case No. 78,333**

STATE OF FLORIDA

Respondent.

_____/

REPLY TO RESPONDENT'S ANSWER BRIEF

Petitioner would briefly respond to two points raised in respondent's answer brief in response to Issue I. Respondent contends that this court has already decided the issue presented herein [1] in Cheshire v. State, 568 So.2d 908 (Fla. 1990). Cheshire is totally distinguishable from the instant case. In Cheshire the trial court made a computational/clerical error in calculating the defendant's guideline sentence and as a result imposed a sentence under the guideline recommended range. The defendant argued that double jeopardy prevented the court from resentencing him. This court held that double jeopardy does not apply where there have been computational/clerical errors and defendant could be resentenced. This court also held that under Pope, the defendant had to be resentenced within the guidelines with no departures.

In the instant case petitioner has made no double jeopardy

[1] Should the holding in Pope v. State, 561 So.2d 554 (Fla. 1990) apply retroactively to sentencings occurring prior to April 4, 1990?

claims. His position has been that Pope should not be applied retroactively to downward departures. Also there were no showing that the defendant in Cheshire was prejudiced by the court's error as petitioner was in his case. To the contrary, the defendant in Cheshire reaped an undeserved windfall as a result of the trial court's error. Petitioner on the other hand, suffered a detriment as a result of the trial court's failure to reduce to writing, reasons for a downward departure which were otherwise sufficient.

Respondent has also alleged that petitioner has no basis for litigating the instant issue. Respondent cites Love v. State, 198 So.2d 559 (Fla. 1990) to support his proposition. As there is no such citation, and a case decided in 1990 could not possibly be in volume 198 nor could volume 198 contain a 1990 case, petitioner will assume that the case respondent meant to cite was Porter v. State, 559 So.2d 198 (Fla. 1990). Porter is also distinguishable from the instant case. Porter deals with a petition for writ of habeas corpus filed after a direct appeal to the Florida Supreme Court subsequent to his murder conviction, a second appeal to this court after a remand for resentencing and a subsequent motion for post conviction relief. This court held that habeas corpus could not be used to relitigate issues that had been determined in the prior appeals. Petitioner would point out the obvious and state this is not a petition for writ of habeas corpus. Furthermore this court did state in Porter, "It is only in the case of error that prejudicially denies

fundamental constitutional rights that this court will revisit a matter previously settled by the affirmance of a conviction or sentence." Here petitioner is arguing his fundamental constitutional right to due process/ freedom from application of ex post facto laws has been violated. Petitioner would also note that at the conclusion of the state's first appeal to the District Court of Appeal, Second District, neither a certified question nor a conflicting decision from another district existed so as to give petitioner a jurisdictional basis for taking a petition for certiorari to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **DAVID R. GEMMER**, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, Florida 33607, and to Peter Fraser, Petitioner, this 23rd day of September, 1991.

RESPECTFULLY SUBMITTED,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: Allyn Giambalvo
ALLYN GIAMBALVO
Assistant Public Defender
Criminal Court Building
5100-144th Avenue North
Clearwater, Florida 34620
Florida Bar No: 239399