IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v.

KEITH BERNARD BROWN,

Respondent.

CASE NO. 83,759

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Keith Bernard Brown, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

References to the opinion of the First District Court of Appeal, found in Appendix 4 of this brief, will be noted by its Florida Law Weekly citation.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's sentencing proceedings; the symbol will be followed by the appropriate page number in parentheses.

All emphasis is supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The State seeks review of the decision of the First District Court of Appeal, Brown v. State, 19 Fla. L. Weekly D645 (Fla. 1st DCA March 24, 1994)(BrownIV, attached as Appendix 4), that reversed the trial court's denial of a motion for post-conviction relief.

This case originated with the Respondent's indictment for the August 16, 1988, First Degree Murder of Michael Louis Cole. (R 41) A jury convicted Respondent of Second Degree Murder and Armed Robbery. (R 1, 32, 55) The State served on Respondent by hand its Notice of Intent to Seek Departure from Sentencing Guidelines and Supporting Memorandum. (R 49-54) The State's Notice relied upon and discussed four reasons in support of its request for an upward departure, such as Escalating Pattern of Criminality, referencing eleven prior delinquency adjudications. The adjudications included four Grand Theft Autos, two Burglary to Autos, and two Aggravated Batteries. (R 50-52)

The trial judge sentenced Respondent to life in prison for Second Degree Murder and twenty-seven years for Armed Robbery. (R 1, 55-59) The sentencing occurred on Friday, August 18, 1989. (R 55, 59)

On Wednesday, August 23, 1989, the trial court signed its written order, entitled Statement of Reasons for Upward Departure from Sentencing Guidelines. (R 60, 64) The Statement was filed with the clerk on August 24, 1989. (R 60) In the written Statement an "Escalating Pattern on Criminality" was among the reasons for upwardly departing. The trial court cited to Respondent's previous convictions for Grand Theft Auto, Burglary to Auto,

Trespass, Grand Theft Auto, Grand Theft Auto, Burglary to Auto, Petit Theft, Making Threats, Aggravated Battery, Aggravated Battery, and Grand Theft Auto. (R 60-61)

Respondent filed a direct appeal in the First District Court of Appeal. He raised three issues. One of them was whether "the trial court erred in departing from the sentencing guidelines without providing a contemporaneous written statement of the reasons at the time the sentence was imposed." Brown v. State, 565 So. 2d 369, 370 (Fla. 1st DCA 1990)(BrownI, attached as Appendix 1).

On April 26, 1990, Pope v. State, 561 So. 2d 554 (Fla. 1990), was decided. On July 19, 1990, Ree v. State, 565 So. 2d 1329 (Fla. 1990), was decided. It stated that it "shall only be applied prospectively." Id. at 1331.

On August 6, 1990, the First DCA decided BrownI; rehearing was denied on September 6, 1990. Id. at 369. BrownI held that the trial court did not commit error where a few days after the sentencing, he reduced to writing his reasons for upwardly departing from the sentencing guidelines. The First District Court of Appeal's mandate issued on September 24, 1990.[1] Respondent sought review in the Florida Supreme Court, and on January 2, 1991, this Court denied review in Brown v. State, 576 So. 2d 285 (Fla. 1991)(BrownII; attached as Appendix 2).

On April 2, 1992, Smith v. State, 598 So. 2d 1063 (Fla. 1992), was decided, with rehearing denied on June 16, 1992. Id. at 1063.

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[1] This fact is obtained from Brown v. State, 617 So. 2d 1105, 1105 (Fla. 1st DCA 1993), which is attached as Appendix 3 and designated as BrownIII. This brief will discuss BrownIII infra.

Respondent, on November 17, 1992, filed the Motion for Post-Conviction Relief Pursuant to Rule 3.850, Fla. R. Cr. Pr. (1988). (R 1) One of the grounds in the motion alleged: "The trial court erred in departing from the sentencing guidelines without providing contemporaneous written statement of reasons at the time sentence was imposed." (R 2) The memorandum accompanying the Motion argued that Smith v. State, 598 So. 2d 1063 (Fla. 1992), "must mark a development of fundamental significance." (R 10) It also argued that BrownI did not become final "until January 2, 1991, the date the [Florida] Supreme Court denied review." (R 10)

On December 22, 1992, the trial court denied the motion. (R 32-34) The Trial court's denial is the subject of this petition. The portion of the trial court's order pertinent to this petition reasoned:

> ... Defendant claims that the court erred in not giving written reasons for departing from the sentencing guidelines until after it had imposed sentence on Defendant. This ground has been raised and rejected on direct appeal. The First District Court held that the Florida Supreme Court's decision in Ree v. State, 565 So. 2d 1329 (Fla. 1990), requiring written reasons for departure to be given at the sentencing hearing, was not to be retroactively applied to Defendant's case. Brown, 565 So. 2d at 370.
>
> However, Defendant claims that he is entitled to relief based on Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992), in which the Florida Supreme Court receded in part from Ree to the extent that it made the Ree holding retroactive. Defendant's argument is unavailing as it is inconsistent with the supreme court's overall holding in Smith that changes in the law should be applied retrospectively only in cases **pending on direct review or not yet final**. Id. at 1066. In fact, there ... [is] language in the decision to the effect that this court should not retrospectively apply Ree in the case at bar since judgment and sentence have become final and Defendant collaterally raises the instant claim in a motion for post-conviction relief. [Footnote here] Id. at 1066, n. 5. [Footnote: The court cannot conceive of any possible prejudice to Defendant by the court following the law as it existed at the time and drafting its order giving formal written reasons for imposing a departure sentence after the sentencing hearing. To the contrary, Defendant

> would have a better argument if this court had come with its order already prepared beforehand and treated the sentencing hearing and the arguments presented therein as mere formalities. The new holding in Smith, rendered nearly three years after Defendant's conviction and a year-and-a-half after the Florida Supreme Court denied review, does not apply in a case such as this so as to provide Defendant an undeserved windfall.]

(R 32-33; bold in original)

Respondent appealed to the First District Court of Appeal the trial court's denial of his Motion for Post-Conviction Relief. Respondent's appeal raised only one issue, the contemporaneous writing requirement for guidelines departures. The State moved for the District Court of Appeal to take judicial notice of the issuance of its September 24, 1990, mandate in BrownI and moved to dismiss the appeal because the Motion for Post-Conviction Relief was untimely. The State argued that, when measured from the date of the DCA's mandate in BrownI, Respondent's Motion for Post-Conviction Relief was outside the two-year limit of Rule 3.850(b), Fla. R. Cr. P. By published order in Brown v. State, 617 So. 2d 1105 (Fla. 1993)(BrownIII, attached as Appendix 3), the DCA granted the State's motion to take judicial notice but denied the motion to dismiss the appeal. The DCA said the essence of the State's motion-to-dismiss argument was that "the trial court reached the correct result for the wrong reason" and that this argument would be properly included in the State's answer brief. "In the interest of judicial economy," the DCA resolved the question presented in the State's motion to dismiss and declared that Respondent's Motion for Post-Conviction Relief was timely because it was filed within two years of the date that the Florida Supreme Court, in BrownII, denied review of BrownI.

In Brown v. State, 19 Fla. L. Weekly D645 (Fla. 1st DCA March 24, 1994)(BrownIV attached as Appendix 4), the First District Court of Appeal decided the merits of the trial

court's denial of Respondent's Motion for Post-Conviction Relief. BrownIV is the subject of this petition. BrownIV noted the language in footnote five of Smith that the State argued distinguished Smith's applicability from collateral review, but BrownIV held that Smith, required reversal and remand "for re-sentencing within the guidelines." 19 Fla. L. Weekly at D646.

BrownIV stayed the DCA's mandate and certified as having "great public importance" the question presented in this brief as the Issue. Therefore, the case presented by this petition may be called BrownV.

## SUMMARY OF ARGUMENT

ISSUE.

The contemporaneous writing requirement for sentencing guidelines departures that Ree enunciated does not apply to Respondent. Therefore, the certified question should be answered negatively.

Respondent is attempting to use Smith to apply the contemporaneous writing requirement through a motion for post-conviction relief. Smith explicitly distinguished its direct-appeal situation from collateral review. Therefore, to the degree that Respondent relies upon Smith, his own case indicates that he is not entitled to the benefit of the contemporaneous writing rule. Moreover, Smith did not even exist at the time that the Respondent's direct appeal was finalized. Smith came **fifteen** months later.

At the time of Respondent's direct appeal, Ree indicated that the contemporaneous writing rule would apply only to cases in which the sentencing transpired after the date of the Ree decision. Since the rule Ree announced was to be applied only prospectively, it was not applied in Ree, rendering the rule dicta in Ree. Ree announced this Court's intentions for future cases. Therefore, when Respondent's case was decided on direct appeal, there was no precedent that changed the law regarding written departure reasons, and Ree's dicta announced that the contemporaneous writing rule did not apply to situations like Respondent's, where the sentencing occurred pre-Ree.

Consequently, Respondent's claim was correctly decided on direct appeal, and he should not be allowed to, in effect, obtain an undeserved windfall through a second appeal of the

same issue. Accordingly, the issue is controlled by Witt and its progeny and the doctrine of law of the case.

The decision of the First District Court of Appeal that produced the certified question here is understandable, given some confusing language in Smith. The Court is urged to clarify Smith by limiting it to its facts.

## ARGUMENT

### ISSUE

IN VIEW OF *SMITH V. STATE*, 598 So.2d 1063 (Fla. 1992), DOES THE DECISION IN *REE V. STATE*, 565 So.2d 1329 (Fla. 1990), REQUIRE REVERSAL AND REMAND FOR IMPOSITION OF A GUIDELINES SENTENCE IN A CASE THAT WAS PENDING ON DIRECT APPEAL WHEN *REE* WAS DECIDED, WAS FINALLY DISPOSED OF IN ACCORDANCE WITH *REE*, AND IN WHICH THE ISSUE WAS RAISED AGAIN BY MOTION FOR POST-CONVICTION RELIEF AFTER ISSUANCE OF *SMITH*?

The question certified by the First District Court of Appeal is stated as the issue above. This case, BrownV, arose due to the trial court's denial of Respondent's motion for post-conviction relief. Therefore, this case concerns whether Respondent can obtain the benefit of Smith's discussion through a motion for post-conviction relief even though his direct appeal was finalized fifteen months prior to Smith.

More specifically, Brown v. State, 19 Fla. L. Weekly D645 (Fla. 1st DCA March 24, 1994)(BrownIV), is the case for which the State seeks this review in this petition. BrownIV and Respondent have used Smith v. State, 598 So. 2d 1063 (Fla. 1992), to dispose of the issue of whether the contemporaneous writing requirement applies to the upward departure in sentencing Respondent. Smith was decided **fifteen months** after the contested sentence became final in BrownII, when this Court denied review on January 2, 1991.[2] His attempted

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[2] As discussed supra, BrownIII (Appendix 3) decided that the date of this Court's denial of review of BrownI determined when the judgment and sentence became final.

use of Ree and Smith, as well as the status of this case as BrownV, are evidence of (A) a misunderstanding of the fundamental nature of precedent, the wisdom of (B) Witt v. State, 387 So. 2d 922 (Fla. 1980), and (C) the doctrine of law of the case. Therefore, the District Court of Appeal erred in BrownIV when it reversed the trial court's denial of Respondent's motion for post-conviction relief on the ground that the trial court failed to provide contemporaneous written reasons for its sentencing departure.

Before proceeding with the details of the first argument, however, it may be helpful to summarize some key events and their dates:

- 8-18-89 Judgment and sentence (R 55-59);
- 8-23-89 Trial court's written reasons for departure from guidelines (filed 8-24-89)(R 60-64);
- 4-26-90 Pope decided;
- 7-19-90 Ree decided;
- 8-6-90 BrownI (Appendix 1) decided; DCA affirmed the judgment and sentence based upon language in Ree that it was prospective only;
- 1-2-91 BrownII (Appendix 2) decided; in BrownII this Court denied review of BrownI;
- 4-2-92 Smith decided;
- 11-17-92 Motion for post-conviction relief (R 1-7) filed;
- 12-22-92 Order (Appendix 6) and its attachments (R 32-64) denying motion for post-conviction relief;
- 3-24-94 BrownIV (Appendix 4) decided; DCA reversed denial of motion for post-conviction relief due to Smith; no other ground was raised in the appeal.

The State will elaborate on its arguments pertaining to the fundamental nature of precedent and its application to Ree and Pope, the wisdom of Witt v. State, 387 So. 2d 922 (Fla. 1980), and the law of the case. The State will conclude with an argument that Smith should be limited to its facts.

**A. The significance of Ree and Pope.**

Ree interprets a pertinent statute and related Rules of Criminal Procedure. Section 921.001(6), Fla. Stat., provided that departures from the sentencing guidelines "must be explained in writing by the trial court judge." This Court implemented the statutory provision with two Rules, 3.701(b)(6), Fla. R. Cr. P., providing that departures "shall be articulated in writing," and 3.701(d)(11), Fla. R. Cr. P., providing that departures "must be accompanied by a written statement delineating the reasons for the departure." See Ree, supra at 1331. In other words, Ree interpreted Rules of Criminal Procedure, which in turn interpreted a statute. Therefore, Ree, Smith,[3] and related cases basically are cases interpreting a Florida statute. The Florida legislature recently highlighted this point by its amendment of the pertinent statute to allow the trial court fifteen days to render a written departure order if its reasons were orally expressed at sentencing. See §921.016(1)(c), Fla. Stat. (1993).

However, prior to the legislature's action providing the fifteen-day window, this Court grappled with implementing the legislative writing requirement through a long line of cases.

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[3] Under the United States Constitution, state courts are generally vested with the discretion of whether to make its case law prospective or retrospective. See Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179, 94 S.Ct. 190 (1973); Rumble v. Smith, 905 F.2d 176 (8th Cir. 1990).

For example, Stewart v. State, 549 So. 2d 171 (Fla. 1989), remanded for the trial court to correct its error of not providing written departure reasons. Stewart cited State v. Jackson, 478 So. 2d 1054 (Fla. 1985), as authority. Jackson had also remanded with directions to comply with the written departure requirement.

Pope emphasized that written reasons enhance "meaningful and expeditious appellate review," Id. at 555, and implicitly receded from Stewart and Jackson by holding "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. Accordingly, Pope quashed the decision of the Fifth District Court of Appeal, which would have given "the trial court the opportunity to provide written reasons justifying the departure" upon resentencing Pope. Id. at 555.

Ree is an interesting and much misunderstood case. Whereas Pope's facts concerned the remedy for a total failure to provide written departure reasons prior to appeal, Ree, on direct appeal, interpreted the pertinent rules and statute to require that the written reasons be contemporaneous with the sentencing. The trial judge had waited five days to produce written departure reasons. By answering the certified question in the affirmative, Ree concluded that a trial court must "produce written reasons for departure from the sentencing guidelines at the sentencing hearing." However, Ree explicitly stated that "[t]his holding ... shall only be applied prospectively." 565 So. 2d at 1331. The real question is, as a matter of binding precedent, what does Ree actually represent? The key to understanding Ree's relationship to the law is its language, "only be applied prospectively." To understand the impact of this

language, one must refer to fundamental principles regarding the nature of precedent, the nature of case law.

The concept of precedent is at the heart of how cases create law. Black's Law Dictionary (1979) defines precedent:

> An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.

Id. at 1059. The underlined text above stresses the pivotal role of the facts of the particular case. Re's Brief Writing and Oral Argument (1965) elaborates:

> ... the proposition of law contended must actually have arisen in the prior case and *must have been necessary for the determination of that case.* Unless the proposition was stated in order to decide the case, the utterance of the judge is said to be *judicial dictum* or *obiter dictum* * * * an authority only in a 'like case'; hence, if the advocate can demonstrate to the court a distinguishing feature, a different factual pattern, the prior decision is not binding authority although the facts, generally, may come from within the same genre of cases.

Id. at 74-75 (italics in original). It is clear that dicta can be very persuasive, Id. at 74, for example, as an indication "how the court is likely to rule if confronted with a similar situation in the future." Dernbach & Singleton, A Practical Guide to Legal Writing and Legal Method 22 (1981). Thus, the formation of precedent requires the interplay of the judicial opinion, the facts of the particular case, and the outcome of the case. Determining the nature of a specific precedent becomes a three step process:

1. Determine all of the facts as seen by the court and as included in the court's opinion;

2. Discover which of these facts are material to the outcome of the case by looking at and analyzing the opinion; and,

3. State the nature of the binding precedent:[4] If a court bases the outcome of the case on facts A and B, in the future, a case with facts A and B must have the same outcome.

See Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930).

Judge Edmondson provided a succinct and clear treatment of this subject:

> ... no matter how often or how plainly a judicial panel may put in its opinion that 'we hold X,' 'X' is not law and is not binding on later panels unless 'X' was squarely presented by the facts of the case and was a proposition that absolutely must have been decided to decide the concrete case then before the court.

New York Largo, Inc. v. Monroe Co., 985 F.2d 1488, 1500 n. 7 (11th Cir. 1993)(concurring). Consistent with Goodhart's analytical process, Judge Edmondson explained that judges have a duty to look beyond what an opinion says it does and analyze what it actually does by means of precedent. Thus, an opinion may contain general rules, tests, standards, or guidelines that are not actually binding as precedent. See Id.

This Court has recognized the process by which precedent is determined many times. For example, it is through this process that conflict jurisdiction is decided. To determine conflict jurisdiction, this Court analyzes the case law, the precedents, of district courts of appeal rather than merely accepting on their face the words of their opinions. See Jenkins v. State, 385 So. 2d 1356, 1358-59 (Fla. 1980); Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958)("such that one decision would overrule the other if both were rendered by the same court; in other

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[4] This summary has simplified Goodhart. His article, Determining the Ratio Decidendi of a Case, 40 Yale L.J. 161 (1930), actually interjects another step of stating the "principle" of the case. Id. at 179.

words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions"). It is also through this process that dicta, in contrast to precedent, is identified. See Coastal Petroleum Co. v. American Cyanamid, Co., 492 So. 2d 339, 344 (Fla. 1986)(dicta as arguments addressed but not necessary for resolving the case). Accordingly, dicta can be persuasive, but it does not have the force of law; that is, it does not function as precedent. Continental Assurance Co. v. Carroll, 485 So. 2d 406 (Fla. 1986); Aldret v. State, 592 So. 2d 264, 266 (Fla. 1st DCA 1991)(collecting several case cites).

We now return to the question that prompted this discussion of precedent. What does Ree represent? Although, as discussed infra, BrownIV should be reversed regardless of one's view of Ree on this matter, it is reasonable to construe Ree's treatment of the contemporaneous writing requirement as dicta. It was not necessary for the resolution of that case. To determine whether Ree was precedent we must look to its facts and what it did or did not do in terms of an outcome affecting the parties in that case. Its facts regarding the writing requirement were similar to the ones in this case, **but** Ree said that it was prospective only. To determine what Ree did by looking at its four corners, one must determine the meaning of "prospective." According to Webster, prospective is the adjective form of "prospect," which means basically something to come in the future. See The New Merriam-Webster Dictionary 584 (paperback ed. 1989). By making the contemporaneous writing rule prospective only, Ree did not apply the rule to its facts. Instead, the Ree Court said that we will apply the rule in a future set of cases. Ree, then, was not precedent, and it is limited by what the Court said in that case. It was a vehicle by which the Court indicated what it would do in the future.

Therefore, as of the moment that Ree was issued, its language regarding the contemporaneous writing requirement was very persuasive for the district courts of appeal to follow, but it was not binding on them as precedent. This Court, in essence, by stating that Ree was prospective only, was telegraphing to all of the courts of the State of Florida what this Court would do if presented with facts meeting the conditions set out in the dicta. The question then becomes what types of cases in the future did the Ree Court indicate that it would apply its prospective rule? State v. Williams, 576 So. 2d 281 (Fla. 1991), provided an answer to the question.

Williams was sentenced to an upward departure from the guidelines without contemporaneous written reasons. The trial judge filed them later. Because he was sentenced prior to Ree's decision date, then-Justice Grimes, writing for a unanimous Court, decided that Ree's pronouncement did not apply to Williams and, because the trial judge did eventually provide written reasons, Pope did not apply. Because Williams presented facts to the Court for resolving the issue of whether the contemporaneous writing requirement applied to a sentencing prior to July 19, 1990 (Ree's decision date), Williams was precedent, that is, binding case law.

The Williams unanimous Court reasoned: In Ree we

> declined to recede from the view that written reasons for departure must be provided at sentencing. However, we announced that this rule would be applied prospectively. In the absence of such a pronouncement, all cases involving the same issue that were pending on appeal at the time *Ree* became final would be subject to reversal under the 'pipeline' theory. [citation omitted] This change was made in recognition of the fact that many trial judges were under the impression prior to *Ree* that it was permissible to give reasons for departure orally at sentencing and to provide a written statement containing the same reasons shortly thereafter.

576 So. 2d at 283 (italics in original). Accord, State v. Lyles, 576 So. 2d 706, 707 (Fla. 1991).[5]

Therefore, Judge Wolf's opinion in BrownI, although decided prior to Williams or Lyles, was insightful when it correctly interpreted Ree's prospective-only language by denying Respondent the benefit of the contemporaneous-writing rule. BrownI denied Respondent the benefit of a rule that the very case his post-conviction motion relied upon, Ree, (R 9-10) expressly stated would not apply to him.

Therefore, at the time of Respondent's sentencing, the trial judge did not have the benefit of Ree. This is precisely the reason that Williams held, in the sense of establishing precedent, that the contemporaneous-writing requirement would not apply in situations like Respondent's. And, this is precisely one of the reasons why the trial court denied Respondent's motion for post-conviction relief: "this court [followed] ... the law as it existed at the time and drafting its order giving formal written reasons for imposing a departure sentence after the sentencing hearing." (R 33 n. 1)

Another compelling reason given by the trial court for denying Respondent's motion for post-conviction relief was that BrownI expressly decided that Respondent was not entitled to benefit from the contemporaneous writing requirement. (R 32-33) The trial court's reasoning

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[5] The text does not discuss Robinson v. State, 571 So. 2d 429 (Fla. 1990), because it does not apply here. Although decided after Pope and Ree, Robinson implemented Pope, but it did not refer to Ree. There, this Court was faced with a situation where the Third District Court of Appeal had remanded the case twice for the trial court to provide written departure reasons. Finally, seven months after the second remand, the trial court recorded written reasons. On direct appeal, this Court remanded with directions that a guidelines sentence must be imposed. It appears that the precedent-value of Robinson was that it extended Pope to cover situations where the written reasons were egregiously belated, there, seven months late. Therefore, Robinson does not apply here.

was impeccable as following not only the precedent of BrownI but also the law of the case.[6] Moreover, the trial court's denial of the motion was absolutely correct when analyzed according to the principles of Witt v. State, 387 So. 2d 922 (Fla. 1980), regardless of one's view of whether Ree's language is non-precedent.

**B. Witt v. State, 387 So. 2d 922 (Fla. 1980), clearly precludes reversal of the trial court's denial of Respondent's motion for post-conviction relief.**

This case, BrownV, is here as a result of Respondent filing a motion for post-conviction relief **twenty-two months** after his sentence became final, BrownIII. His motion relies upon a case, Smith, decided **fifteen months** after his sentence became final. He expects relief from his sentence through collateral review. Witt controls and indicates that he is entitled none.

With very few exceptions, this court has consistently endorsed and applied Witt's principle that a change in the law is not generally applied through collateral review. As Smith itself summarized this area:

> ... any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Art. I, §§ 9, 16, Fla. Const. [Footnote here] [Footnote: This is not inconsistent with *Witt v. State*, ..., where we addressed the retrospective application of changes in criminal law to cases on collateral review. Although we occasionally applied precedent retrospectively on collateral review, ... we have on numerous instances distinguished collateral cases from 'pipeline' cases, i.e., those not yet final at the time the law changed, applying the change in law retrospectively only to the pipeline cases. * * * The distinction between collateral and nonfinal cases with regard to retrospectivity finds added support in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d

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6 The law of the case will be argued infra.

649 (1987), and *United State v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

598 So. 2d at 1066 (italics in original).

Like Respondent, Witt had pursued and lost a direct appeal on a number of issues. Like Respondent, Witt "subsequently sought post-conviction relief in the trial court pursuant to Florida Rule of Criminal Procedure 3.850, which was denied." Witt, supra at 924. Like here, a claim in the 3.850 motion for post-conviction relief concerned an alleged change in the law occurring subsequent to the conclusion of his direct appeal. Id. Like here, the alleged change in the law pertained to sentencing. Id. Like here, appellate review of the denial of the post-conviction motion was sought. Id. Witt rejected post-conviction relief; accordingly, post-conviction relief should be rejected here.

Witt applied several criteria to reject the motion for post-conviction relief as a vehicle to raise changes in the law, even though Witt claimed a number of sentencing-related changes pertaining to his death sentence. A fortiori, here the sentence was not death, and we are concerned with only one alleged change in the law occurring subsequent to the conclusion of Respondent's direct appeal. The alleged change in the law was the Smith decision.

There is no doubt that Smith did change the law. The trial court sentenced Smith on December 1, 1989, downwardly departing from the sentencing guidelines without contemporaneous written reasons. Smith's sentence, therefore, transpired before Ree's July 19, 1990, decision date. Receding from Ree's language and Williams' precedent that the contemporaneous-writing requirement applied to sentencings after July 19, 1990, the Smith majority held that the contemporaneous writing rule applied to Smith but that Smith was entitled to an exception because the prosecutor failed to execute "the ministerial act" of

writing reasons that the trial court dictated. Looking at Smith's facts, then, to determine the case law it established, that is, to determine its role as precedent, Smith for the first time established precedent that the contemporaneous-writing rule applies to cases in which the sentencing occurred prior to July 19, 1990, Ree's decision date, and that were pending at the time of Smith.[7]

The question here is whether Respondent should benefit from this change in the law even though Smith was decided fifteen months after Respondent's sentence became final. The answer to this question begins with Smith itself, as it expressed approval for the general rule that collateral review is not a proper vehicle for benefitting from changes in the law. Respondent has not demonstrated, and he cannot demonstrate, that Smith represents a change in the law sufficiently distinguishable from those Witt and numerous other cases have held were insufficient to be applied through collateral review. One of those other cases, McCuiston v. State, 534 So. 2d 1144 (Fla. 1988), will be discussed next.[8]

McCuiston, is strikingly similar to this case. It controls as precedent.[9] In McCuiston, the Second District Court of Appeal on direct appeal had previously affirmed that defendant's

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[7] Of course, Smith's case was "pending" when Smith was decided.

[8] For others, see, for example, Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992); Routly v. state, 590 So. 2d 397, 403-404 (Fla. 1992); State v. Glenn, 558 So. 2d 4 (Fla. 1990). But see Bass v. State, 530 So. 2d 282 (Fla. 1988); Moreland v. State, 582 So. 2d 618 (Fla. 1991). For parallel conceptual discussions regarding federal habeas proceedings, see Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989); Henderson v. Singletary, 968 F.2d 1070, 1073 (11th Cir. 1992).

[9] It is also interesting to note that McCuiston, supra at 1146, minimized the significance of Bass v. State, 530 So. 2d 282 (Fla. 1988), which Smith, supra at 1066 n. 5, also suggested was an exception to the general rule. Similarly, State v. Glenn, 558 So. 2d 4, 8 n. 3 (Fla. 1990), minimized the significance of Bass.

sentence "above the guidelines recommendation on the basis that McCuiston had been declared to be an habitual felony offender." Id. at 1145.

> Thereafter, this Court in *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986), held that finding a defendant to be an habitual offender is not a legally sufficient reason for departing from the recommendation of the sentencing guidelines. McCuiston then filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, asserting the illegality of his sentence. The motion was denied. The Second District Court pointed out that the sentence McCuiston received was valid when it was imposed and became final but could not have been properly imposed after the *Whitehead* decision. The court concluded that *Whitehead* did not have retroactive application and affirmed the denial of McCuiston's 3.850 motion.

Id. at 1145 (italics in original). A unanimous McCuiston Court analyzed the case using the principles of Witt and concluded that "the decision in *Whitehead* was an evolutionary refinement of the law and not one which should have retroactive application." Id. at 1146 (italics in original).

In McCuiston and here, the reviewed trial court decision to exceed the guidelines sentence was made prior to a new decision of this Court: in McCuiston, Whitehead was the new decision; here, Smith was the new decision.[10] In McCuiston and here, the District Court of Appeal made its decision regarding the direct appeal based upon law as it existed at the time of the DCA decision: in McCuiston, pre-Whitehead was existing law at the time of the DCA's decision; here, pre-Ree was existing law because even by Ree's explicit language, it was prospective only. In McCuiston and here, the defendant then filed a motion for post-conviction relief that was based upon what was thought to be a change in the law regulating

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[10] As the State argued, supra, Ree itself is not precedent for reversing and remanding for guidelines departures without contemporaneous supportive written reasons. It pronounced the rule that the Court said it would apply in the future.

departures from sentencing guidelines subsequent to the affirmance of his decision on direct appeal. In McCuiston the purported change in the law did not concern "a fundamental and constitutional change" or a "jurisprudential upheaval," and, given the reliance of trial judges on the old rule, McCuiston was not allowed to benefit from Whitehead through his motion for post-conviction relief. Here, the change in the law, if anything, is less "jurisprudentially" significant than Whitehead. Therefore, for the same reasons that McCuiston approved the DCA decision affirming the trial court's denial of the 3.850, this Court should disapprove the DCA's decision reversing the trial court's denial of the 3.850.

Witt and McCuiston denied collateral attack as a vehicle to raise newly created rights. Witt recognized that its rule and application promotes the goal of finality in the criminal justice system. 387 So. 2d at 925. Witt elaborated:

> To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accommodate such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterrence and rehabilitation. We reject, therefore, in the context of an alleged change in the law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.

Id. at 928-29. As a means to enforce a statutory interpretation, which has subsequently been modified by the legislature, Smith was not constitutional in stature. Moreover, applying Smith to this case, where the trial court reasonably relied upon existing law, would be the miscarriage of justice. It would correct no error. It would create error. This case should have been finalized at BrownI, which reasonably interpreted and applied law existing at that time.

Witt promotes finality in the criminal justice system. The doctrine of the law of the case furthers the same goal.

**C. BrownI constituted the law of the case that the First District Court of Appeals should have followed in BrownIV.**

Of course, this Court is not, per se, bound by BrownI, a First District Court decision. On the other hand, it would further **this Court's** prior cases to decide that the DCA's BrownIV decision should have adhered to BrownI as the law of the case.

Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965), is a leading doctrinal case in the area. It explained the rule and related concepts:

> Early in the jurisprudence of this state it was established that all points of law adjudicated upon a former writ of error or appeal became 'the law of the case' and that such points are 'no longer open for discussion or consideration' in subsequent proceedings in the case. * * *
>
> ... law of the case, res judicata and stare decisis -- which are adhered to by this court and courts of other jurisdictions in order to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid 'piecemeal' appeals and to bring litigation to an end as expeditiously as possible. Respecting the doctrine of 'law of case', it was said:
>
> > By 'law of the case' is meant the principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings, and will *seldom* be reconsidered or reversed, even though they appear to have been erroneous.

177 So. 2d at 2, 3 (italics in original). Also, see Airvac, Inc. v. Ranger Insurance Co., 330 So. 2d 467, 469 (Fla. 1976)("Enunciations in a prior appellate decision upon the same case becomes the law governing that case ..."); Johnson v. Dugger, 911 F.2d 440, 453-54 (11th

Cir. 1990)(deference to Florida Supreme Court's invocation of law of the case and policies supporting the doctrine).

Since this Court refused to review BrownI, BrownI was the law of the case. BrownI adjudicated the point of law, explicitly relying upon Ree's prospectivity language, that the contemporaneous writing requirement does not apply to Respondent's sentence. In denying the post-conviction motion, the trial court followed the law of the case BrownI established. In the interest of finality and discouraging "piecemeal" appeals, BrownIV should have followed BrownI.

It is clear that without Smith, Respondent would have no argument whatsoever that the contemporaneous writing rule applied to him. Smith was decided fifteen months after the law of this case was finalized through this Court's denial of review of BrownI.

If ever the goal of finality should apply through the law of the case, as well as through the application of Witt, it should apply here. As Francis v. Barton, 581 So. 2d 583, 584 (Fla. 1991), summarized in a situation with a far more serious claim than Respondent's:[11]

> Issues raised and disposed of on direct appeal are procedurally barred in postconviction proceedings. [citations omitted] are evolutionary refinements, rather than major constitutional changes, in the law and do not require retroactive application in postconviction proceedings. The issue of the jury override is, therefore, procedurally barred in this successive petition. [citations omitted] We considered the propriety of finding witness elimination in aggravation on direct appeal, and using 'a different argument to relitigate the same issue is inappropriate.' [citation omitted] Therefore, the second and third issues are procedurally barred. [citations omitted]

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[11] For another death penalty case that reasoned that "it is inappropriate to use a different argument to relitigate the same issue," see Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

If the goal of finality barred Francis from raising issues in a death penalty case concerning jury override, concerning an allegation of the State knowingly presenting misleading evidence, and concerning an aggravating factor pertaining to the death sentence, **then certainly the goal of finality should preclude Respondent from raising a claim that was previously decided correctly in accordance with pre-Smith law concerning the trial judge's reduction of reasons to writing a few days after the sentencing.**

**D. This case presents an opportunity for this Court to clarify confusing language in Smith.**

Smith, as precedent, became the law of the State, but because Smith's facts included its arrival in the appellate process through a direct appeal, it is not applicable as precedent to this case. Moreover, Smith's dicta suggested its intention to not extend the contemporaneous writing rule to cases on collateral review, like this one. In addition, the legislature has now amended the statute on which Smith was based to provide a fifteen-day window for the judge to reduce departure reasons to writing. See §921.016(1)(c), Fla. Stat. (1993). However, Smith's language has induced widespread confusion among the district courts of appeal. Therefore, this case presents an opportunity to clarify Smith.

Theoretically, there are a number of basic ways in which a court can apply a rule that it has newly announced, as in Ree, or created, as in Smith. First, the court may announce that the new rule will be retroactively applied to **all** cases practicably possible. This would not limit the application to those cases pending at the time that the case is decided announcing or creating the new rule. We might assume that such a wholesale application, which would severely undermine finality, would be reserved for the most significant changes in the law,

generally ones that are profound and constitutionally based. To use Witt's term, this would likely be reserved for "jurisprudential upheavals" that would likely also allow invocation through collateral relief. Second, a rule may be applied to cases pending on direct appeal at the time of the decision creating the rule. This is the so-called "pipeline" rule; that is, the new rule is applicable to all cases in the appellate direct appeal pipeline at the time of the decision. This was the rule Smith created pertaining to the contemporaneous writing requirement. Smith created the rule because it applied it to the facts in that case before it excepted from the contemporaneous writing requirement the clerical failure in that case. Finally, a court may announce in a case that a rule will be applied only in future cases, that is, prospectively where the trial court and other decision makers will be armed with knowledge of the new rule when a decision is made at that level. This is the rule that Ree used, and since its announced rule was to be applied only prospectively, that is, to trial court decisions made after Ree, Ree established no precedent. Instead, Ree put all Florida courts on notice what this Court intended to do in the future. It indicated intended precedent for an appropriate future case.

Smith created confusion because it not only changed the law regarding the application of the contemporaneous writing rule on direct appeals, but it used what appeared to be sweeping language, appearing to blanket the pipeline rule over all changes in the law:

> ... any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. [citation omitted] To benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review.

598 So. 2d at 1066. This sweeping language has had a number of repercussions. As the Smith dissenters pointed out, such an all-encompassing rule ignores the police and lower courts -- to which we might add, prosecutors:

> ... it is unnecessary and inadvisable to adopt a blanket rule ... . There are a few instances in which the police or the courts have justifiably relied on prior case law to the extent that if a new rule is applied retroactively to all cases pending on appeal [pipeline cases] the impact on the criminal justice system is overwhelming. This is particularly true in sentencing where an objection is not ordinarily required in order to preserve a point for appeal.
>
> * * * Because many trial judges were under the impression that it was all right if they announced the departure reasons at sentencing and filed their written statements a few days later, the State requested on rehearing that we apply *Ree* prospectively. Had we not done so, hundreds of sentencings on appeal would have been needlessly reversed.

598 So. 2d at 1067 (italics in original). Then-Justice Grimes writing for himself and Justice Harding, continued by distinguishing the contemporaneous writing requirement from ones with the import of the constitution. Id. at 1068. They concluded:

> When this court makes a clear break with prior precedent, we have an obligation to consider the impact on the criminal justice system. There are few things more unsettling to our society than instability in the law. We will be making a grave mistake to adopt a blanket rule of retroactivity.

Id. These reservations were prophetic because the district courts of appeal have applied Smith's blanket rule unexpectedly, creating instability in the law. An obvious example is applying the blanket pipeline-application language of Smith to Fenelon v. State, 594 So. 2d 1181 (Fla. 1992).

Fenelon prohibited a jury instruction specifically focusing upon a suspect's flight. It explicitly stated that it was prospective only: "in future cases"; "henceforth the jury instruction on flight shall not be given." Id. at 295. Fenelon was decided February 13, 1992.

Since Smith was decided about two months later and since it contained the blanket language discussed above, the district courts of appeal interpreted Smith to indicate this Court's intent that even a new rule announced previous to Smith should be applied to all pending direct appeal cases. Thus, the following are among the cases in which the DCA's reversed based upon a Fenelon violation and Smith's pending-cases language:

- Crocker v. State, 616 So. 2d 1180 (Fla. 1st DCA 1993);
- Dupree v. State, 615 So. 2d 713 (Fla. 1st DCA 1993).
- Fratcher v. State, 621 So. 2d 525 (Fla. 4th DCA 1993);
- Lewis v. State, 623 So. 2d 1205 (Fla. 4th DCA 1993)(citing additional cases from the 1st DCA and 3d DCA).

Taylor v. State, 630 So. 2d 1038 (Fla. 1994), rectified the misunderstanding Smith occasioned pertaining to Fenelon and perhaps exemplified this Court's commitment to prospective application in selected situations. To minimize similar future misunderstandings, it would be helpful if this Court announced, as a part of its opinion in this case, that Smith's rule applying a change in the law to pending cases was not intended to apply to changes in the law occurring prior to Smith's date of decision.

Similarly, Smith contained sweeping language that directly conflicted with Smith's apparent intent to not apply the contemporaneous writing rule through collateral review, See Id. at 1066 n. 5. Smith said that "we now hold that Ree shall apply to all cases not yet final when mandate issued after rehearing in *Ree*." 598 So. 2d at 1066 (italics in original). This is the language that BrownIV relied upon in reversing the trial court's denial of the motion for post-conviction relief. In spite of footnote five, the language confused the DCA, just as the sweeping language confused a number of DCAs into applying Fenelon to pending appeals.

Fenelon contained language indicating that it would be only prospectively applied, just as Smith contained language indicating that the contemporaneous writing rule would not be applied through collateral relief. In both situations, Smith sent a confusing message to the DCAs.

Since Smith has been misapplied to Fenelon and to BrownIV, the goals of "stability in the law," Strazzulla, supra at 3; Smith at 1068 (Grimes and Harding dissenting) and the orderly administration of justice, See Witt at 928-29, would be well-served if Smith were limited to its facts, that is, to **direct appeals** claiming a failure to contemporaneously file written departure reasons. This limitation would be consistent with the doctrine enunciated in State v. Williams, 576 So. 2d 281, 283 (Fla. 1991), that in the absence of an announcement by the Court that a new rule will be applied otherwise, it will be applied to all cases pending on appeal "under the 'pipeline' theory." It would allow the Court, on a selected basis, to consider the positive and negative repercussions of a newly announced rule on defendants, the police, judges, and prosecutors -- depending upon whether the new rule is applied retroactively, pipelined, or applied only prospectively. And, it would be consistent with the **precedent** of Smith: Smith's facts concerned the contemporaneous writing rule, and Smith was a direct appeal.[12]

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[12] It is also interesting to note that Smith's sentencing transpired after the date of the initial pre-rehearing Ree.

**E. Conclusion: Regardless of the mode of analysis, Respondent is not entitled to post-conviction relief.**

The State has presented several arguments for the Court's consideration. Limiting Smith to its facts would be optimal for the criminal justice system, affording this Court the discretion to weigh a variety of factors when announcing changes in the law. Since Smith was a direct appeal, Smith limited to its facts would be consistent with its footnote five and would preclude relief for Respondent.

However, the State has discussed other theories under which Respondent is entitled to no relief. Even if Smith remains unfettered, it expressly recognized the distinction between direct appeals and collateral attack. It expressly recognized the vitality of a Witt analysis, under which Respondent is entitled to no relief.

Furthermore, the well-settled concept of law of the case is closely allied to Witt's collateral relief analysis. This case was settled in a manner consistent with Ree's dicta, and it should remain settled under Witt and the law of the case. As the trial court aptly put it, Respondent should receive no "undeserved windfall" (R 33) because the trial court followed the law as it existed when it drafted its written reasons.

## CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court answer the certified question in the negative, disapprove the decision of the First District Court of Appeal, and affirm the trial court's denial of the motion for post-conviction relief.

Respectfully submitted,

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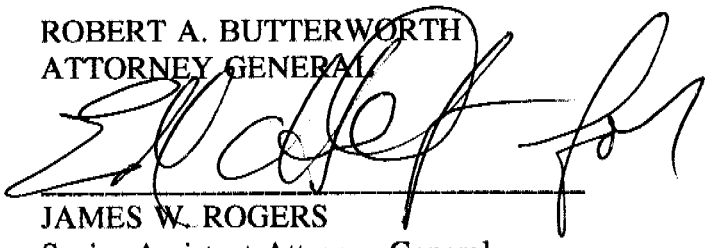
ATTORNEY GENERAL



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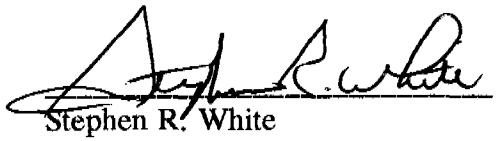
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS and its Appendix, have been furnished by U.S. Mail to Charlie J. Gillette, Jr., Esquire; 3410 North Myrtle Avenue; Jacksonville, Florida 32209, this 7th day of July, 1994.



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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KEITH BERNARD BROWN,

Respondent.

CASE NO. 83,759

APPENDIX TO
PETITIONER'S INITIAL BRIEF ON THE MERITS

1. Brown v. State, 565 So. 2d 369 (Fla. 1st DCA 1990)(BrownI)

2. Brown v. State, 576 So. 2d 285 (Fla. 1991)(BrownII)

3. Brown v. State, 617 So. 2d 1105 (Fla. 1st DCA 1993)(BrownIII)

4. Brown v. State, 19 Fla. L. Weekly D645 (Fla. 1st DCA March 24, 1994)(DCA case no. 93-342, the opinion being reviewed)(BrownIV)

5. Statement of Reasons for Upward Departure from Sentencing Guidelines, Circuit Court No. 89-1820CF (In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, dated August 23, 1989 and filed August 24, 1989)

6. Order Denying Defendant's Motion for Post-Conviction Relief, Circuit Court No. 89-1820CF (In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, filed December 22, 1992)(attachments to Order, not appended)