IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 83,759

KEITH BERNARD BROWN, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Respondent's Brief on the Merits

I PRELIMINARY STATEMENT

Respondent, KEITH BERNARD BROWN, was the defendant in the trial court and the appellant in the First District Court of Appeal. Petitioner, the State of Florida, was the prosecuting authority and appellee in the courts below. The parties will be referred to as they appear before this Court.

The record on appeal will be referred to as "R" followed by the appropriate page number in parenthesis. Petitioner's brief will be referred to as "PB" followed by the appropriate page number. The appendix attached hereto will be referred to as "A."

For the sake of clarity, respondent will refer to the four Brown opinions by Roman numerals as designated in petitioner's brief:

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

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

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

Brown v. State, 634 So. 2d 735 (Fla. 1st DCA (1994) (Brown IV).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's Statement of the Case and Facts as an accurate chronology of the proceedings in the lower courts. Respondent would add only that following the District Court's decision in Brown I, respondent sought rehearing [A 49-52] and sought discretionary review in this Court [A 53-76] on the very issue of whether the decision in Ree v. State, infra, should be applied to all cases pending appellate disposition at the time Ree was decided. This Court denied review, see Brown II, but ultimately resolved this issue in respondent's favor in State v. Smith, infra.

III SUMMARY OF THE ARGUMENT

Respondent's case was pending on direct appeal when this Court issued its decision in Ree v. State, infra. The First District affirmed respondent's departure sentence, rejecting his argument that Ree applied to pipeline cases such as his. Subsequently, in Smith v. State, infra, this Court ruled that Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree.

Respondent argues that he is entitled to the benefit of Ree, and that the certified question should be answered in the affirmative. Respondent raised the Ree issue on direct appeal and sought discretionary review in this Court on the basis of conflict with Ree and Reed v. State, infra. He did everything he could to preserve this issue for appellate review. He was entitled to relief on direct appeal under existing precedent, and the fact that the district court erroneously affirmed his departure sentence should not now preclude collateral relief. Moreover, respondent's case fits squarely within the time frame covered by Smith, and it would be fundamentally unfair to treat him differently from others who had the good fortune of having their direct appeals heard before Ree was decided on rehearing or after the decision in Smith was rendered.

IV ARGUMENT

ISSUE PRESENTED

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 District Court of Appeal, First District certified the issue above as a question of great public importance. Brown v. State, 634 So.2d 735, 737 (Fla. 1st DCA 1994)(Brown IV)(A 1-3). Respondent urges that this Court answer the certified question in the affirmative.

In its opinion, the District Court stated that it affirmed respondent's sentence on appeal because in Ree, this Court held that its ruling would apply only prospectively. The Court then noted that in Smith v. State, 598 So. 2d 1063 (Fla. 1992), this Court modified Ree and held that Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree. The Court concluded that even though its decision in Brown I was correct under the law as it existed at the time of the appeal, "Smith requires that we reverse and remand this case for resentencing within the guidelines," citing Owens v. State, 598 So. 2d 64 (Fla.1992), and Blair v. State, 598 So. 2d 1068 (Fla. 1992). 634 So. 2d at 736. The Court, however, certified the question whether reversal is required in a case that was in the

pipeline when Ree was decided and in which the issue is raised again in a motion for post-conviction relief after issuance of Smith.

Respondent concurs with the District Court's holding that Smith requires reversal here but disagrees with one premise in the Court's certified question. The Court's opinion correctly reflects that the issue of whether contemporaneous written reasons are required for a departure sentence was raised on direct appeal, but the certified question incorrectly presupposes that the issue was "finally disposed of in accordance with Ree."

On direct appeal, respondent argued that the trial court erred in departing from the sentencing guidelines without providing contemporaneous written reasons at the time sentence was pronounced [A 4-35, 36-48]. Respondent relied in part on this Court's decision in Ree v. State, 14 Fla. L. Weekly S565 (Fla. Nov. 6, 1989)(Ree I), which held that a trial court must issue its written departure order at the time sentencing is imposed. Respondent also relied upon the First District's decision in Walker v. State, 555 So. 2d 1221 (Fla. 1st DCA 1990)(On Motion for Rehearing and Rehearing En Banc), in which the court first held that "Although the contemporaneity requirement is by now well established," 555 So. 2d at 1223, any error was harmless, but on rehearing, reversed and remanded on the basis of Ree I. The court explained that subsequent to its opinion, this Court decided Ree and concluded that Ree was controlling:

> Ree holds that a trial court must issue its written departure statement at the time sentence is pronounced. In the

> instant case, the trial court failed to issue its departure statement until eight days after sentencing. Although we deemed the delay harmless, Ree requires strict contemporaneity and seems to leave no room for harmless error analysis. Under Ree, the instant case would have to be remanded for resentencing.

555 So. 2d at 1225. [A 4-35].

Walker v. State, supra, was decided on January 31, 1990, six months before the decision in Brown I and applied to a case pending disposition when Ree I was decided. However, on July 19, 1990, this Court withdrew its earlier decision and issued a substitute opinion in Ree v. State, 565 So. 2d 1329 (Fla.1990), and again held that a contemporaneous written statement of the reasons for departure is mandatory but further ruled that "This holding, . . ., shall only be applied prospectively." 565 So. 2d at 1331. Based on this holding, the First District denied respondent relief in Brown I.

Petitioner characterizes the court's opinion in Brown I as "insightful" (PB 17), when, in fact, it represented a departure from the court's own precedent. At the time Brown I was issued in August 1990, the First District had reversed the sentence in Walker, as well as in several other cases which did not comport with Ree. See, e.g., Owens v. State, 563 So. 2d 180 (Fla. 1st DCA 1990), quashed, 598 So. 2d 64 (Fla. 1992).[1] The court was

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[1]The District in Owens reversed the sentence and remanded to the trial court for resentencing in accordance with the decision in Ree, but held that the trial court could reimpose
(Footnote Continued)

obviously aware of the contemporaneity requirement and had been applying it to pipeline cases such as respondent's. Thus, precedent existed for reversal in Brown I. Respondent simply had the misfortune of having his appeal heard too late to benefit from Ree I and, according to petitioner, too early to take advantage of Smith v. State, supra. Far from being insightful, the District Court's opinion in Brown I failed to account for a long line of case law establishing that appellate courts must apply the law in effect at the time of its decision. That Ree was intended to apply to pipeline cases was clarified in Smith v. State, supra.

In Smith, this Court declared that Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree. Petitioner stresses that Smith was decided fifteen months after respondent's case became final in Brown II and posits that the holding in Smith should apply only to cases in which sentencing occurred prior to July 19, 1990, the date Ree was decided, and which were pending on appeal at the time Smith was decided in 1992 (PB 20). Such a narrow reading of Smith would effectively preclude everyone but Ms. Smith from getting the benefit of the Smith decision. This view is also contrary to the express language of Smith itself: "Ree shall apply to all cases not yet

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(Footnote Continued)
its departure sentence on remand by providing contemporaneous written reasons. This Court reversed on the authority of Pope v. State, 561 So. 2d 554 (Fla. 1990), and held that the case had to be remanded for resentencing with no possibility of a departure from the guidelines.

final when mandate issued after rehearing in Ree." 598 So. 2d at 1066. See also Owens v. State, supra (Smith applied to case pending on appeal when Ree became final but before decision was issued in Smith). As recognized by the court below in rejecting this same argument, Smith intended to make Ree applicable to cases in the pipeline when Ree became final, not when Smith was issued. Consequently, the date this Court issued Smith is not relevant to the inquiry. Respondent's case unquestionably falls squarely within the relevant time period.

The fact that Ree said that its holding should be applied prospectively does not preclude its application to cases in the judicial "pipeline" after Ree became final and before Smith was decided.[2] Indeed, it would be fundamentally unfair to deny relief to respondent and others similarly situated who diligently raised the issue on direct appeal but whose cases fell between the cracks of this Court's decisions Ree and Smith.

Morales v. State, 613 So. 2d 922 (Fla. 1993), is on point. Morales was sentenced in April, 1986. The trial court imposed a departure sentence but did not file its written reasons until seven days after sentencing. Morales' appeal was pending when

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[2]Petitioner contends that Ree has no precedential value, mistakenly relying on the notion that, "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" (PB 15). Contrary to this notion, the rule in Ree was retrospectively applied to Ree himself, as noted by the Court in Smith v. State, 598 So. 2d at 1064.

Ree was first decided, and pursuant to Ree, the Third District reversed the sentence and remanded for resentencing within the guidelines. Morales v. State, 563 So. 2d 211 (Fla. 3d DCA 1990). Thereafter, the substitute opinion in Ree was issued, and, on remand, the trial court again departed from the guidelines. On Morales' motion to enforce the court's mandate, the District Court withdrew its Morales I opinion. Morales again appealed his departure sentence, and by then Smith was decided, holding that Ree should be applied retrospectively to pipeline cases. Consequently, the district court reinstated its opinion in Morales I, reversed the departure sentence, and remanded for resentencing within the guidlines.

Respondent similarly fell between the cracks of Ree I and Ree on rehearing, and the district court affirmed his departure sentence. After Smith was decided, however, the circuit court denied respondent's motion for post-conviction relief, finding that Smith applied Ree only to cases pending on direct review or not yet final and thus Ree did not apply to the case at bar because respondent's judgment and sentence was final (R 32-35). This was error as respondent's case was pending direct review and not yet final when Ree was decided, and he was entitled to the benefit of that decision, just as the defendant in Morales.

The instant case also fits squarely within the holding of Owens v. State, supra. Owens, like respondent, "was a passenger on a railroad train which was derailed in Smith v. State." 598 So. 2d at 64. Owens' direct appeal was decided on June 18, 1990 (two months before Brown I), while rehearing was pending

in Ree. The First District reversed Owens' departure sentence because the trial judge did not issue its written order until a month after sentence was imposed and remanded for resentencing in accordance with Ree. However, the district court held that on remand, the trial court could again depart and still comply with Ree by issuing a contemporaneous departure order. This Court quashed the district court's decision, stating:

> On rehearing in Ree, this Court stated that Ree would apply prospectively only. [Citation omitted]. Such a prospective application would preclude relief for Owens as he was sentenced before Ree became final. However, Owens was a passenger on a railroad train which was derailed in Smith v. State, 598 So. 2d 1063 (Fla. 1992), when we receded from this position and held that both Ree and Pope are applicable to all cases not yet final at the time mandate issued after rehearing in Ree or at the time Pope was decided. 598 So. 2d at 1066. Thus, both Ree and Pope are applicable to Owens' case.

598 So. 2d 64.

Respondent is entitled to the same result, even though his case came to this Court on collateral review instead of discretionary review, as in Owens and Smith. The method of review is not controlling; the applicable law in effect at the time of the appeal is. See James v. State, 615 So. 2d 668 (Fla. 1993) (defendant entitled to benefit of United States Supreme Court's decision in Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), where James raised the issue at trial and on direct appeal and Espinosa was decided while his appeal was pending from the denial of his motion for post-conviction relief).

In Reed v. State, 565 So. 2d 708 (Fla. 5th DCA 1990)(On Motion for Rehearing), the court rejected the state's argument that Pope v. State, 542 So. 2d 423 (Fla. 1990), should not be applied retroactively to cases pending on appeal when Pope was decided, reasoning:

> The state claims that the trial court, which imposed sentence before the supreme court's Pope decision, was entitled to rely on case law as it existed at that time. However, this case is a 'pipeline case,' and, therefore, the question of retroactivity is not implicated. A 'pipeline case' is one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the supreme court. Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the Pope rule at this time. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); State v. Castillo, 486 So.2d 565 (Fla.1986); Wheeler v. State, 344 So.2d 244 (Fla.1977); McIntire v. State, 381 So.2d 1154 (Fla. 5th DCA 1980).
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> This principle, that the law in effect at the time of appeal should be applied, is applicable to motions for rehearing. See, e.g., Williams v. State, 546 So.2d 1120 (Fla. 4th DCA 1989); Winfield v. State, 503 So.2d 333 (Fla. 2d DCA 1986).

565 So. 2d at 708-709.

Reed's holding that an appellate court must apply the law in effect at the time of its decision is not a novel concept. This Court has often held, in a variety of contexts, that its decisions should be applied to "pipeline cases." For example,

in Castillo v. State, 486 So. 2d 565 (Fla. 1986), this Court held that its decision in State v. Neil, 457 So. 2d 481 (Fla. 1984), applied to all cases pending on direct appeal at the time Neil became final, stating:

> Generally, an appellant is entitled to the benefit of the law at the time of appellate disposition. Dougan v. State, 470 So.2d 697, 701 n. 2 (Fla.1985). We see no exception to this principle in this case. Our comment in Neil that it should not be applied retroactively was intended to apply to completed cases.

Id.

Likewise, in Bundy v. State, 471 So. 2d 9 (Fla. 1985), the Court deemed inadmissible hypnotically refreshed testimony and expressly held that its new rule would be prospective only, but further held that the ruling be applied to "any conviction presently in the appeals process." Id., at 18-19.

In Wheeler v. State, 344 So. 2d 244 (Fla. 1977), the Court applied its decision in Roberts v. State, 335 So. 2d 285 (Fla. 1976), requiring trial judges to instruct juries as to the consequences of a verdict of not guilty by reason of insanity, to cases not yet final on appeal, despite the fact that the trial judge did not have the benefit of the decision in Roberts. The Court said:

> The decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial. [Citations omitted].

Id., at 245.

In the same vein, the Court in Smith v. State, supra, held that Ree should apply with respect to all nonfinal cases. In so holding, this Court was

> persuaded that the principles of fairness and equal treatment under Griffith [v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)], which are embodied in the due process and equal protection provisions of article I, sections 9 and 16 of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinal cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Aft. I, §§ 9, 16, Fla.Const. "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review." Griffith, 479 U.S. at 323, 107 S.Ct. at 713.

598 So. 2d at 1066 [footnote omitted]. The Court went on to explain that selective application of new rules violates the principle of treating similarly situated defendants the same, becauses it causes actual inequity when the Court chooses which of many similarly situated defendants should be the beneficiary of the new rule. The Court concluded that

> 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.

Id. [Footnote omitted].[3]

Such application of the law is especially compelling here. Respondent raised this issue on appeal before the final opinion in Ree was even issued, based on existing case law (A 4-35, 36-48); respondent sought rehearing on the basis of the substitute opinion in Ree, expressly arguing that Ree "should be applied to all cases pending review at the time Ree was decided" (A 49) and, finally, he sought discretionary review in this Court on the basis of conflict jurisdiction with Ree and Reed (A 53-76). In short, respondent did all he could possibly do to preserve the issue and correct his illegal departure sentence on appeal. That he failed because his was a pipeline case and the District Court misapplied the "prospective only" holding of Ree should not preclude an appellate court from now granting the relief to which respondent is obviously entitled. See Moreland v. State, 582 So. 2d 618, 620 (Fla. 1991)(defendant entitled to relief on motion for post-conviction relief where he challenged jury districts at trial and raised the issue on direct appeal while the same issue was pending in the Supreme Court, the Supreme Court reversed the convictions of other defendants similarly situated and defendant would have obtained same result had his case been appealed to that Court, the Supreme Court noting that "It would be fundamentally unfair to deny Moreland the relief . . . mere-

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[3]Petitioner characterizes this language as "sweeping" (PB 26, 27), when it actually reflects a long line of precedent.

ly because his sentence directed his appeal to a court other than this one."), and Bedford v. State, 633 So. 2d 13, 14 (Fla. 1994)(illegal sentence may be corrected even after it has been erroneously affirmed by the Supreme Court).

Moreover, respondent should not be denied relief when it was merely by chance that this Court accepted discretionary review of State v. Smith, 592 So. 2d 1100 (Fla. 3d DCA 1990), and denied review in Brown I.[4] Respondent was similarly situated to Smith and others whose cases were in the pipeline, and he is entitled to similar treatment. Morales v. State, supra; Owens v. State, supra; see also, Bass v. State, 530 So. 2d 282, 283 (Fla. 1988)("[I]t would be manifestly unfair for prisoners such as Bass, who received consecutive minimum mandatory sentences prior to Palmer, to be treated differently from those who had the good fortune of being sentenced for similar conduct after that decision was rendered."). Any other result would lead to the "actual inequity" which Smith intended to prevent. Smith v. State, 598 So. 2d at 1066.

Petitioner contends that respondent should not be allowed to, in effect, obtain an undeserved windfall through a second appeal of the same issue (PB 7-8, 30), and further claims that

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[4]It is noteworthy that the District Court's opinion in State v. Smith, 592 So. 2d 1100 (Fla. 3d DCA 1990), became final on June 5, 1990, and Brown I was decided only two months later, on August 6, 1990 (Rehearing denied September 6, 1990). Presumably both cases were pending discretionary review in this Court at the same time.

respondent is not entitled to relief through collateral review, relying exclusively on this Court's decision in Witt v. State, 387 So. 2d 922 (Fla. 1980). Petitioner's reliance on Witt is misplaced.

It is significant that this Court has previously applied decisional law to cases in the pipeline even in collateral proceedings, where the issues were raised and wrongly rejected on direct appeal. See James v. State, supra; Moreland v. State, supra. Respondent's case falls under this category. Moreover, both Smith and Brown IV rejected the notion that Witt governed, distinguishing cases in the pipeline from those where the issue was first raised on collateral review. In Smith, the Court explicitly stated that Witt did not apply in the context of pipeline cases and reasoned that its holding

> is not inconsistent with Witt v. State, 387 So.2d 922 (Fla.), cert denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), where we addressed the retrospective application of changes in criminal law to cases on collateral review. Although we have occasionally applied precedent retrospectively on collateral review, see, e.g., Bass v. State, 530 So. 2d 282 (Fla.1988), we have in 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. See, e.g., Jones v. State, 569 So.2d 1234 (Fla.1990); State v. Jones, 485 So.2d 1283 (Fla.1986); Bundy v. State, 471 So.2d 9 (Fla.1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986); Gonzalez v. State, 367 So.2d 1008 (Fla.1979). 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 649 (1987),

and United States v. Johnson, 457 U.S. 537, 102 S.Ct., 73 L.Ed.2d 202 (1982).

598 So. 2d at 1066, n. 5. The District Court acknowledged this footnote in Brown IV and correctly applied Smith to the instant case.

By distinguishing between collateral and nonfinal cases, Smith made clear its intention that Ree apply to cases in the appellate pipeline when Ree was decided. Respondent's appeal was in the pipeline, as recognized by the court below, and he thus is entitled to the benefit of Ree even though his case is now before the Court on appeal from the denial of a motion for post-conviction relief. That his sentence was affirmed by the District Court on direct appeal because of confusion about the retrospective application of Ree to nonfinal cases should not prevent his obtaining collateral relief.[5]

In Benedit v. State, 610 So.2d 699 (Fla. 3d DCA 1992), the court reversed the trial court's summary denial of a motion to vacate under Florida Rule of Criminal Procedure 3.850 where the defendant's conviction and sentence for possession of a firearm during the commission of a felony were unquestionably barred by double jeopardy. Citing both Witt and Moreland v. State, 582 So. 2d 618 (Fla. 1991), the district court concluded that

> it would be fundamentally unfair to follow a concedely erroneous affirmance of this

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[5]McCuiston v. State, 534 So. 2d 1144 (Fla. 1988), on which petitioner also relies, is distinguishable as McCuiston's case was not in the pipeline when this Court issued its decision in Whitehead v. State, 498 So. 2d 863 (Fla. 1986).

> conviction by this court on a direct appeal from the subject conviction where the same point was raised and incorrectly rejected without discussion, [Citation omitted], especially when the law at the time of the direct appeal was less than a model of clarity on this issue.

Id., at 609-610. Following this rationale, even if the retroactive application of Ree to pipeline cases was uncertain prior to the issuance of Smith, the law is now clear, and it would be fundamentally unfair to allow respondent's departure sentence to stand because of the District Court's erroneous affirmance in Brown I.

In Moreland v. State, supra, this Court recognized that "Fundamental fairness, . . ., is also a concern in deciding if a case's holding should be applied retroactively," 582 So. 2d 618, and held that the doctrine of finality in Witt "should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." Id., at 620. The Court concluded that Moreland's case presented a more compelling objective because Moreland made the claim, on which other defendants received relief, both in the circuit court and on appeal, and he would have received relief had his appeal been before the Supreme Court. The same principles of fairness and uniformity are at force here.

Smith v. State and Moreland v. State therefore control the disposition of this case, not Witt v. State.

As then-Judge Anstead aptly stated in his dissenting opinion in Bedford v. State, which was subsequently adopted by this Court, quashing the District court's majority opinion:

> The purpose of all criminal justice rules, practices and procedures is to secure the just determination of every case in accordance with the substantive law. While imperfect, our criminal justice system must provide a remedy to one in confinement under an illegal sentence. There is no better objective than to seek to do justice to an imprisoned person.

Bedford v. State, 617 So. 2d 1134, 1135 (Fla. 4th DCA 1993) (Anstead, J., dissenting), quoting, Hayes v. State, 598 So. 2d 135, 138 (Fla. 5th DCA 1992), quashed, Bedford v. State, 633 So. 2d 13 (Fla. 1994). Respondent's only remedy here was to seek collateral review. Equity and fairness dictate that this Court answer the certified question in the affirmative, affirm the opinion of the lower court and remand the cause for resentencing.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court approve the decision of the District Court of Appeal, First District, and remand this cause for resentencing within the guidelines.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by delivery to Stephen R. White, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to Respondent, Mr. Keith Brown, on this 27th day of September, 1994.

Paula S. Saunders
PAULA S. SAUNDERS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 83,759

KEITH BERNARD BROWN, :

Respondent. :

_____/

A P P E N D I X

TO

RESPONDENT'S BRIEF ON THE MERITS

Keith Bernard BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 93-342.

District Court of Appeal of Florida, First District.

March 24, 1994.

Rehearing Denied May 5, 1994.

Defendant was convicted in the Circuit Court, Duval County, David C. Wiggins, J., of second-degree murder and armed robbery, and he appealed. The District Court of Appeal, 565 So.2d 369, affirmed. Defendant moved for postconviction relief. The Circuit Court, David C. Wiggins, J., denied motion, and appeal was taken. The District Court of Appeal held that case would be remanded for resentencing within guidelines for trial court's failure to issue written reasons for departure from guidelines contemporaneously with sentence.

Reversed and remanded.

Courts ⇐100(1)
Criminal Law ⇐1181(2)

Case would be remanded for resentencing within guidelines for trial court's failure to issue written reasons for departure from guidelines at time of sentencing; defendant's direct appeal was pending when Supreme Court in *Ree* held that written reasons for departure must be issued contemporaneously with sentence and that this ruling applies prospectively only, case was finally disposed of in accordance with *Ree* and issue was raised again by motion for postconviction relief after issuance of Supreme Court's opinion in *Smith* holding that *Ree* applies to all cases not yet final when mandate issued after rehearing in *Ree*.

Charlie J. Gillette, Jr., Brannon & Gillette, P.A., Jacksonville, for appellant.

Robert A. Butterworth, Atty. Gen., and Charlie McCoy, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant was convicted of second degree murder and armed robbery. The recommended guidelines sentencing range was 22–27 years. The trial court imposed a life sentence for the second degree murder and a consecutive 27 year sentence for the armed robbery, with 3-year concurrent minimum mandatory terms for use of a firearm. On direct appeal, appellant argued his sentence had to be remanded for imposition of a sentence within the guidelines range because the written reasons for departure were not given contemporaneously. This court affirmed because in *Ree v. State*, 565 So.2d 1329 (Fla. 1990), the supreme court said its ruling, requiring contemporaneous written reasons for departure, would apply only prospectively. *See Brown v. State*, 565 So.2d 369 (Fla. 1st DCA 1990), *review denied*, 576 So.2d 285 (Fla.1991).

Subsequently, in *Smith v. State*, 598 So.2d 1063, 1066 (Fla.1992), the supreme court modified *Ree*, and held

> 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....
>
> Our decision today requires us to recede in part from *Ree* to the extent that we now hold that *Ree* shall apply to all cases not yet final when mandate issued after rehearing in *Ree*.

Relying on *Smith*, on November 17, 1992, appellant filed his rule 3.850 motion for postconviction relief. He alleged he was sentenced on August 18, 1989; six days later, on August 24, 1989, the court filed written reasons for departing from the guidelines; because the written reasons were not contemporaneous, the sentence must be vacated and he must be resentenced within the guidelines.

The trial court denied appellant's motion for post-conviction relief, reasoning as follows:

> Defendant's argument is unavailing as it is inconsistent with the supreme court's over-

all 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 retroactively apply *Ree* in the case at bar since the judgment and sentence have become final and Defendant collaterally raises the instant claim in a motion for post-conviction relief. [footnote] *Id.* at 1066, n. 5

[footnote: The court cannot conceive of any possible prejudice to Defendant by this 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.]

In *Pope v. State*, 561 So.2d 554, 556 (Fla. 1990), the court 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." The problem in *Pope* was that while the trial court orally announced reasons for departure, they were never reduced to writing.

Next, in *Ree v. State*, 565 So.2d 1329 (Fla. 1990), the court held that written reasons for departure must be issued at the time of sentencing, however, it stated this ruling would apply prospectively only. Then in *State v. Lyles*, 576 So.2d 706 (Fla.1991), the court stated that "written reasons [for departure] must be issued on the same day as sentencing." The court also said *Ree* would not apply retroactively to the case at hand. And in *State v. Williams*, 576 So.2d 281 (Fla.1991), the court "approved a departure sentence that had been imposed without contemporaneous written reasons because the sentence had been imposed before *Ree*, even though Williams' appeal was not final when *Ree* was issued." *Smith* at 1064.

Finally, in *Smith*, the court held "that *Ree* shall apply to all cases not yet final when mandate issued after rehearing in *Ree*." *Smith* at 1066. The court receded from *Lyles* and *Williams* "to the extent they declined to apply *Ree* retrospectively to non-final cases." *Id.*

Appellant contends that in accordance with *Smith*, since his case was not yet final when *Ree* was decided, it must be reversed and remanded for sentencing within the guidelines. Appellee contends appellant's case became final on January 2, 1991, six months before *Smith* announced a new application of the rule of law established in *Ree;* therefore, he is not entitled to resentencing under the guidelines. The state argues the language in *Smith* means that the rules apply retroactively to cases which were in the "pipeline" when *Smith* became final. The state's position appears to be that the *Smith* case makes the pertinent change of law here, not the *Ree* case, therefore "pipeline" cases are those that were not yet final when *Smith* was decided. Appellee expresses some confusion in reconciling the language in the body of the *Smith* opinion, to the effect that *Ree* applies to all cases not yet final when it was issued, with language in footnote five of the *Smith* opinion, distinguishing cases "in the pipeline" from cases on collateral review from motions for post-conviction relief.[1]

Appellant's direct appeal was pending in this court when the supreme court's opinion on rehearing in *Ree* was issued. Even though this court's decision was correct under the law as it existed at the time, *Smith* requires that we reverse and remand this case for re-sentencing within the guidelines. *See Owens v. State*, 598 So.2d 64 (Fla.1992), and *Blair v. State*, 598 So.2d 1068 (Fla.1992).

We certify the following question as one of great public importance:

1. In footnote five of *Smith*, the court said its decision was not inconsistent with decisions in which it addressed application of changes in the law to cases on collateral review. "We have in numerous cases 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." 598 So.2d at 1066.

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 order denying appellant's motion for post-conviction relief is reversed and remanded for further proceedings consistent with this opinion. We hereby grant appellee's request to stay our mandate in this case pending the outcome of proceedings on the certified question.

ZEHMER, C.J., and JOANOS and WEBSTER, JJ., concur.

BUSH LEASING, INC., f/k/a Bush & Cook Leasing, Inc., Appellant/Cross Appellee,

v.

Jose GALLO, Appellee/Cross Appellant.

BUSH LEASING, INC., f/k/a Bush & Cook Leasing, Inc., Appellant,

v.

Jose GALLO, Appellee.

Jose GALLO, Appellant,

v.

BUSH LEASING, INC., f/k/a Bush & Cook Leasing, Inc., Appellee.

Nos. 92-3609, 92-4362 and 92-4363.

District Court of Appeal of Florida, First District.

March 24, 1994.

Rehearing Denied May 4, 1994 in No. 92-3609.

Suit was brought by automobile injury victim against putative lessor of tort-feasor's automobile. The Circuit Court, Alachua County, Stephan Mickle, J., entered judgment for victim against putative lessor, awarded prejudgment interest from date that parties entered into stipulation as to amount of damages, and denied victim's claim to attorney fees. Appeals were taken. The District Court of Appeal, Wolf, J., held that: (1) purported lease of automobile was a "lease," for purposes of holding putative lessor liable under dangerous instrumentality doctrine; (2) requirements that lessee take out $500,000 single coverage insurance did not comply with requirements of statute providing lessor with immunity from dangerous instrumentality lawsuits provided specified levels of insurance coverage were maintained; (3) conditional offer to settle made by victim did not comply with statutory requirement allowing for recovery of attorney fees when final judgment exceeded amount of settlement offer; and (4) victim was not entitled to prejudgment interest from date of stipulation of amount of damages, as stipulation included provision for such interest.

Affirmed in part; reversed in part.

1. Sales ⇐456

For purposes of characterizing transfer of personal property, a "sale" will be deemed to have been consummated if a conditional sales contract is involved, even though seller holds legal title as security for payment of purchase price, and "lease" will be deemed to have occurred if there is delivery of property to another person under certain limitations for specified period of time after which property is to be returned to an owner.

See publication Words and Phrases for other judicial constructions and definitions.

2. Sales ⇐456

In determining whether document is lease or conditional sales contract, court is to look at level of beneficial ownership maintained by putative lessor.

3. Automobiles ⇐192(6)

Putative automobile lease qualified as lease for purposes of doctrine under which

A-8882

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN, :

Appellant, :

v. : CASE NO. 89-2430

STATE OF FLORIDA, :

Appellee. :

_____ :

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN,

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STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, KEITH BERNARD BROWN, was the defendant in the lower court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecuting authority.

The record on appeal consists of five volumes. Volume I will be referred to herein as "R" followed by the appropriate page number in parenthesis. The four volumes of transcript of proceedings in the lower court are consecutively numbered and will be referred to as "T."

II STATEMENT OF THE CASE AND FACTS

The state direct filed an information charging appellant, a juvenile, with the second degree murder and armed robbery of Michael Louis Cole on August 16, 1988 (R 1, 2). On February 9, 1989, the grand jurors of Duval County indicted appellant for the first degree murder of Michael Cole by shooting him with a firearm (Count I), and armed robbery with a firearm of a motor vehicle from the person of Michael Cole (R 21-23).

Prior to trial the state filed a motion in limine to preclude the defense from introducing any evidence pertaining to the disposition of Steven Holloway's case, and any prior statements made by Holloway (R 44-45). The trial court did not rule on the motion before the trial began on July 24, 1989.

Prior to jury selection, the state indicated that it would not seek the death penalty, and appellant personally waived the right to trial by a 12 person jury (T 11-12). A six person and one alternate jury was selected (T 15-81).

Seventeen witnesses testified at trial. The evidence was as follows.

Donnie Simmons worked at Consolidated Freight Company and knew the victim, Michael Cole. He was working the 6:00 p.m. to 2:30 a.m. shift with Mr. Cole on August 15-16, 1988. Simmons and Cole talked in the parking lot for ten or fifteen minutes prior to leaving work that morning. Cole left the business at approximately 2:45 a.m., driving his Suzuki Jeep (T 93-99).

At approximately 3:00 a.m. on August 16, 1988, a security guard, Darryl Pidgeon, travelled Ellis Avenue to patrol a Winn

Dixie a few blocks away. As he returned on Ellis Avenue a few minutes later, he found a body lying face down in the middle of the road. He checked the body for a pulse and then called the police. Pidgeon stated that the body was not in the road when he first drove down Ellis Avenue and there was no other traffic in the area (T 100-106).

Officer Win Winfrey was the first officer on the scene. He checked the body and blocked the roadway with his patrol car (T 108-112).

Evidence technician P.C. Talamo photographed the body and searched the area for evidence. Photographs of the victim were admitted into evidence over objection (T 113-120).

Talamo testified on cross-examination that he did not find any evidence of an automobile accident on the road (T 123).

The medical examiner, Bonifacio Floro, performed an autopsy on Mr. Cole on August 16, 1988. The victim died of a single gunshot wound to the chest which perforated the heart and lung, causing massive internal bleeding. Photographs of the victim were admitted into evidence without objection (T 130-139).

Granzie Whigham lives in Hilliard, Florida, but spent the summer of 1988 in Jacksonville with his grandmother. Whigham met Keith Brown during the summer playing basketball and going to clubs on the weekends. He met Steven Holloway through Keith three days before Cole's death. He did not know where Holloway lived and Holloway had never been to his home (T 140-148).

Whigham met appellant and Holloway near the Cleveland Arms Apartments around midnight on August 16. The three went to the Club Soda in Granzie's rented car. Granzie drove to the club, but appellant was driving after they left the club. They road around for an hour when they pulled up behind a green jeep at a traffic light. Appellant said he was "going to jack him," the driver, but Granzie did not know at the time what appellant was talking about. Keith followed the jeep around the corner, then sped up, and bumped into the back of the other car. The driver stopped and got out of the jeep. Granzie described the man as a heavy set white man, wearing shorts. Keith stopped three or four feet behind the jeep and also got out; he pointed a gun at the man, and told him to run and to get down. The man put his hands in front of his face and tried to move away from the gun. Holloway got out of the car and appellant fired one shot at the man (T 148-162). Granzie stated the man was shot in the middle of the road (T 167).

Steve Holloway got into the driver's side of the jeep, and Keith got into the passenger side. Granzie backed up and drove off in his car. He could hear Keith cussing at him as he drove away. When he got home, Granzie sat in the dark for a half hour or so and then heard appellant outside hollering and cussing at him (T 162-165). Granzie saw appellant again the next day, but did not talk to him. He also saw Steven Holloway riding around in the green jeep. He stated he did not talk to either of them after the night of the shooting (T 167-168, 171).

Whigham went to the police three weeks after the incident. (T 170-171). He admitted testifying in his deposition that he went to the police after an aunt had called saying he went home because he shot a man in Jacksonville, and he thought there was a warrant out for him (T 191). Whigham was never charged with anything in connection with the case (T 173).

Whigham testified that Steven Holloway had a beebee gun on him that night (T 163-164). A beebee gun was found in the jeep after it was taken into police custody (T 261).

On August 17, 1988, Officer Jennings was on patrol when he saw a Suzuki Samurai jeep matching the description of a car in a BOLO he received earlier that day. As he followed the jeep, the two black male occupants abandoned the car in the road and fled on foot. Jennings verified that the vehicle was stolen (T 196-200). Officer O'Neal located Steven Holloway on the other side of the river and returned him to the scene, where Officer Jennings identified him as the driver of the stolen car (T 207-208, 210, 212-213). Holloway was arrested and the next day an arrest warrant was issued for appellant (T 231-232).

Appellant was arrested two weeks later in a pool room near the Cleveland Arms Apartments on a warrant for auto theft. The arresting officer advised him of his rights, and appellant told the officer that he couldn't have stolen a car, that he was out of town for three weeks, and got back to town that morning (T 215-216, 220-222).

Homicide Detective Ray Meyer responded to the scene of the murder on the morning of August 16. The body was in the middle

of Ellis Road, lying across the center line. After identifying the victim, Meyer contacted Cole's family and got a description of his vehicle. He issued a BOLO for the 1988 green and white Suzuki Samurai jeep (T 226-230). After the jeep was stopped on August 17, Meyer transported the vehicle to the FDLE to be processed for fingerprints and other evidence (T 230-231).

Meyer interviewed appellant after his arrest on August 31. After being advised of his rights, appellant told the detective that he had no knowledge of the victim's death or the theft of Mr. Cole's car and said he was out of town at the time of the auto theft and murder (T 232, 239-243).

Meyer subsequently interviewed Granzie Whigham on September 12, following which he charged appellant with first degree murder (T 243-245).

FDLE crime analyst Thomas Pulley lifted fingerprints from the top portion of the outside window on the passenger side of the jeep. These prints were identified as Keith Brown's right palm print (T 257-264, 265, 272-275). Fourteen latent prints were removed from the vehicle. Four of the prints were identified as Steven Holloway's. Seven other prints of value could not be identified (T 265, 281-283).

On June 25, 1989, correctional officer Going searched the the cell of a female inmate, Quitaji Davis, and seized a letter from a paper bag inside a drawer. He turned over the letter to Detective Meyer, who delivered it to the handwriting examiner, Don Quinn (T 246-248, 284-287, 326).

Quitaji Davis testified that she received the letter from Keith in June while she was an inmate at the Montgomery Correctional Center. She knew appellant well and was engaged to his brother. In the letter, appellant asked Ms. Davis to call his investigator, George Sloan, and tell him that she had not seen Keith the previous summer, but she had seen Steve Holloway in a green jeep in August, and Steve said that he killed a man. Ms. Davis called the investigator, as appellant requested, and told him the facts provided in the letter. Quitaji was subsequently charged with perjury (T 289-295).

Ms. Davis stated that Steven Holloway never told her that he shot a man and stole his jeep in August. In fact, she saw appellant in the green jeep at Steve's house in the middle of August. She said she asked Keith about the jeep and he said it was theirs. A few days later, she asked Keith again about the jeep, and he told her he killed a man and asked if she had seen any news reports on television about anyone being shot. He also told her that Steve was arrested with the jeep (T 295-298).

On cross-examination, Ms. Davis stated that it was common knowledge at the Cleveland Arms that Steve was arrested in the jeep. She first saw the jeep in the middle of August. Steven was driving it. She later saw appellant in the jeep at Steve's house. She had seen five or six other people also riding in the jeep. The first time she saw the car, it had seats and a radio in it. When she saw the jeep the second time, the seats, radio and spare tire were missing (T 299-304). Davis' perjury charge

was still pending. She said she had not been promised anything in exchange for her testimony (T 305-306).

Thomas Blue identified written examinations that appellant completed in a G.E.D. program while in jail (T 316-319). Don Quinn, an expert in handwriting analysis, compared appellant's written examinations with the letter received by Quitaji Davis and determined that the four page letter to Davis was authored by appellant (T 322-329). Quinn read the letter to the jury (T 329-331).

The state rested (T 333). Appellant moved for a judgment of acquittal on both counts, which motion was denied (T 334-337).

Before presenting its defense, defense counsel advised the court that he intended to call the co-defendant Steven Holloway to elicit statements Holloway made to appellant in the presence of a former bailiff in October. Counsel requested the court to declare Holloway an adverse witness or call him as a court witness as Holloway was listed as a state witness, and had agreed to testify for the state against appellant as part of his plea bargain, and had denied making the statement in his deposition. The state objected on the ground that the defense was intending to impeach its own witness and asked that the testimony be proferred. The court ruled that Holloway's statements were admissible, but that the defense could not elicit anything regarding the plea agreement since the state did not call Holloway as its witness (T 338-349).

Steven Holloway testified that he was arrested in August for murder and auto theft. He had numerous meetings with the prosecutor and Detective Meyer since his arrest. Holloway and Keith Brown went to court on the same date in the fall of 1988. Holloway did not recall making a statement to appellant on that occasion in the presence of William Lavant. He denied telling appellant, "I don't know why they have you here," and "I don't know why they have you arrested" (T 350-352).

Jessie Lee Furlow lives at the Cleveland Arms Apartments. He testified that he saw Steven Holloway in August in a Suzuki Sumarai jeep. Furlow heard that Holloway had a radio, and he needed one for his car. He traded an amp for the radio, which he said Holloway took out of the jeep. The witness identified photographs of Mr. Cole's jeep. He stated there were seats in the jeep the first time he saw it, but there were no seats the second he saw it (T 353-356). Furlow stated that he never saw appellant riding in the jeep. He said he rode in the jeep, as did half the neighborhood (T 357-358).

Fabian Melton also lives at the Cleveland Arms Apartments. He testified that he had known appellant for 12 years. He also knew Steve Holloway and Jessie Furlow. Granzie Whigham was his first cousin. Melton never saw Holloway in the jeep because he was in jail at the time. Melton got out of jail in January and talked to Whigham a few weeks later on the telephone. He asked Granzie why Keith was in jail, and Granzie told him that Steven Holloway paid him [Granzie] to say that Keith was driving a car

and wrecked a man's jeep, that Keith had a gun, jumped out, and shot the man (T 360-364).

On cross-examination, Melton stated that appellant was his very best friend, and they had done many things together in the past. The prosecutor asked whether Melton tried to see Keith at the prison farm after he got out of jail, and Melton responded, "No, sir. I ain't heard from him since the last time we got arrested together" (T 365).

Melton said that he and Granzie were not friends, although they were related. Granzie called to talk to Melton's brother, and Melton answered the phone and asked what happened to Keith. Granzie said Steven Holloway paid him to say the things that he said (T 366-367). Melton said that he talked to his counselor, Odella Anderson, about his association with Keith Brown several times, but he denied telling Ms. Anderson that appellant was a great influence on him in the past or that appellant had been a bad influence on him over the years. Melton agreed that he and appellant had "done just about everything together" in the past (T 367). The prosecutor then asked if Melton was close friends with appellant's brother, Carlos, and if Carlos had had his own problems, too (T 368). Appellant's objection was sustained (T 368-369). Melton then stated that Carlos Brown had a criminal case pending also, and Melton was going to be a defense witness (T 369-369-370).

The final defense witness was William Lavant. Mr. Lavant was a witness interviewer for the Public Defender's Office and a preacher. He previously worked in the courthouse as a part-

time bailiff. While working as a bailiff, Lavant transported appellant from the jail to the courtroom and back. Sometime in the fall of 1988, Lavant was escorting appellant back to jail when they passed Steven Holloway (T 376-380). Holloway began to laugh and make fun of appellant and said, "Hey man what are you doing down here. You know you didn't have anything to do--anything to do with this, and I know you didn't have anything to do with it" (T 381).

Mr. Lavant testified on cross-examination that Mr. David, appellant's counsel, was still in the courtroom when he heard Holloway's statement, and he reported the conversation to the attorney. Lavant was a bailiff for over a year and he handled between six and 25 prisoners on a daily basis. He did not tell his supervisor about the conversation (T 383-384).

The defense rested (T 395).

The state presented two rebuttal witnesses.

Granzie Whigham testified on rebuttal that he knew Fabian Melton. They were first cousins, but they were not very close. Granzie had not seen Melton since two Christmases ago. Granzie knows Melton's brother, Shawn, but denied calling Melton's home in January to talk to Shawn. He denied having any conversation with Melton where he told Melton that Steven Holloway paid him to say that Keith Brown shot and killed a man and took the jeep (T 416-418).

Odella Anderson testified that she is employed as a H.R.S. delinquent intake-counselor, supervising delinquent youths who have committed offenses and been given court ordered sanctions.

She was assigned to be Fabian Melton's counselor and supervised him from January through October of 1988. During the course of her counseling with Melton, they frequently discussed Fabian's association with appellant. Fabian told her that Keith Brown "had a great influence over him as far as contributing to his delinquent behavior" (T 424-426).

Appellant objected to this testimony and moved for a mistrial. The trial court denied the motion for mistrial and suggested that the prosecutor "lead this witness" to avoid further references to delinquent behavior (T 426-427).

When the testimony resumed, the prosecutor inquired of the witness:

> Q Ms. Anderson, when Fabian Melton made this statement to you that Keith Brown has been a great influence upon him, you don't mean delinquent behavior, you mean an influence upon his state of mind, is that right?
>
> A Yes.

(T 428). Ms. Anderson also testified that Melton's reputation in the community for truth and veracity was poor (T 428).

The state rested (T 428). Appellant renewed his motions for judgment of acquittal, which motions were again denied (T 429-430).

Following the charge conference (T 396-400, 406-409, 413-414), closing arguments (T 431-501), and charge to the jury (R 46-81; T 501-526), the jury retired to deliberate and returned with verdicts finding appellant guilty of the lesser included offense of second degree murder with a firearm on Count I and

guilty as charged of robbery with a firearm on Count II (R 82-83; T 526-527).

The trial court adjudicated appellant guilty and ordered a predisposition report and PSI prior to sentencing (T 528-529).

Sentencing was held on August 18, 1989. The state filed a notice of intent seeking a departure from the sentencing guidelines based on: (1) escalating pattern of criminality; (2) the excess use of force in the commission of the robbery resulting in the homicide; (3) attempt to cover up the commission of the crime, and (5) lack of respect for the law and judicial system (R 86-91). Defense counsel asked the court to impose a guidelines sentence, and argued in mitigation appellant's age of 17 and lack of sophistication, the facts that the Steven Holloway received a ten year sentence for dealing in stolen property and accessory after the fact, that appellant was a good student and working toward his GED (T 542-550, 553-554, 564-565). Appellant personally addressed the court and maintained his innocence (T 551-553). The prosecutor recounted appellant's prior record as a juvenile and asked the court to impose the maximum penalties (T 554-563).

Appellant was certified as an adult for sentencing (R 93), and sentenced to a term of life in prison on Count I, and to a consecutive term of 27 years in prison on Count II, with three year mandatory minimum terms on each count to run concurrently. The court awarded appellant credit for 352 days time served on each count (R 94-98; T 565-568). The recommended range under the guidelines was 22 to 27 years, with a permissive range of

17 to 40 years (R 99). In a separate written order filed six days after sentencing, the court provided the following reasons for its upward departure: an escalating pattern of criminality based on eight prior felony delinquency adjudications and three misdemeanor adjudications, from November 1986 to February 1988; appellant's attempt to cover up the commission of the crime by asking Quitaji Davis to commit perjury; the aggravating circumstances which set the case apart from the average second degree murder; and appellant's unamenability to rehabilitation (R 100-104). The trial judge also entered a separate order, pursuant to Section 39.111, Florida Statutes, finding the suitability of adult sanctions for appellant (R 105-106).

Appellant's motion for new trial (R 84-85) was denied by written order (R 92; T 538-541).

Notice of appeal was timely filed on August 31, 1989 (R 109), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal. This appeal follows.

III SUMMARY OF ARGUMENT

Appellant contends in this brief that the trial court committed reversible error in denying his motion for mistrial when a state witness testified on rebuttal that Mr. Brown was a bad influence on a defense witness' delinquent behavior. This testimony implicated appellant in other criminal activity and constituted an attack on appellant's character when his character had not been placed in issue. The testimony was highly prejudicial and deprived appellant of his right to a fair trial.

Appellant contends in Issue II that the trial court erred in departing from the sentencing guidelines without providing contemporaneous written reasons for its departure. Appellant's sentences must be reversed and the case remanded for imposition of sentences within the recommended guidelines range.

In the third issue, appellant argues that his sentence of life in prison without the possibility of parole violates equal protection and due process, as guaranteed by the United States and Florida Constitutions.

IV ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN TESTIMONY WAS IMPROPERLY INTRODUCED INFERRING PRIOR CRIMINAL CONDUCT ON THE PART OF APPELLANT, THEREBY DEPRIVING HIM THE FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Florida law has consistently deemed inadmissible evidence tending to show that the defendant was arrested, charged, suspected or convicted of crimes for which the accused is not on trial, the theory being that the jury is bound to be unfairly prejudiced against the defendant by reason of their knowledge of the unrelated crime. See, e.g., Keen v. State, 504 So.2d 396 (Fla. 1987); Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); Clark v. State, 337 So.2d 858 (Fla. 2d DCA 1976). This prohibition also stems from the fundamental principle that unless a defendant has first chosen to place his good character in issue, the state is not permitted to attack his character. See Section 90.404(1)(a), Florida Statutes; and Perez v. State, 434 So.2d 347 (Fla. 3d DCA 1983); Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965). This principle was established in 1886, see Mann v. State, 22 Fla. 600 (1886), and remains entrenched in the law.

Appellant contends he is constitutionally entitled to a new trial trial because evidence of other arrests or bad acts, relevant only to disparage appellant's character and to show

his propensity to commit crimes, was introduced at his trial, thereby denying him the right to a fair trial.

At trial, defense witness Fabian Melton testified that he and appellant were good friends. Melton never saw the jeep in August because he was in jail. When Melton got out of jail in January, he talked to Granzie Whigham and he asked Granzie why Keith was in jail. Granzie told him that Steven Holloway paid him to say that Keith wrecked a man's jeep, had a gun and shot the man.

On cross-examination, Melton testified that appellant was his very best friend, and they had done many things together in the past. The prosecutor asked if he tried to see appellant at the prison farm after he got out of jail, and Melton responded, "No, sir. I ain't heard from him [Keith] since the last time we got arrested together" (T 365). The prosecutor then inquired whether he talked to his counselor about his associations with appellant. Melton said he had, but denied telling Ms. Anderson that appellant was a bad influence on him in the past. Melton repeated that he and appellant had "done just about everything together" in the past (T 367), implying having done everything bad together in the past, including getting arrested, and then admitted that appellant's brother, Carlos, also had a pending charge.

The prosecutor resumed this theme on rebuttal in questioning Odella Anderson. Ms. Anderson was Fabian Melton's in-take counselor and "supervise[d] delinquent kids that have committed offenses and been placed under a court order and make sure they

follow through their court sanctions" (T 425). She counseled Melton for eight months, during which they discussed Melton's association with appellant. The prosecutor questioned her as follows:

> Q And during the course of your counseling discussions with Fabian Melton did he ever make a statement to you about what influence if an Keith Brown has been upon him in the past?
>
> A Yes, he did. He mentioned that Keith was -- had a great influence over him as far as contributing to his delinquent behavior.

(T 426). Appellant objected and moved for a mistrial, arguing:

> I just talked about this with the witness outside. We went over this at the bench -- contributing to his delinquent behavior -- I am going to ask for a mistrial. There is no reason for this, no reason to have this witness up here period, and I cannot imagine that she said this after we talk about it about four times.

(T 426-427). The court denied appellant's motion for mistrial, but instructed the prosecutor to lead the witness, which he did as follows:

> Q Ms. Anderson, when Fabian Melton made this statement to you that Keith Brown has been a great influence upon him, you don't mean delinquent behavior, you mean an influence upon his state of mind, is that right?
>
> A Yes.

(T 428). The prosecutor's leading question was just as suggestive of bad influence as the former question and made a difference without a distinction. It mattered not whether appellant was an influence on Melton's criminal conduct or upon his state

of mind. This was improper rebuttal on a collateral matter and a backhanded method of attacking Keith Brown's character under the guise of impeaching a defense witness.

The fact that Fabian Melton was adjudicated delinquent and under court ordered sanctions, that he had been arrested before with appellant, and the two friends had "done just about everything together," and that Melton considered Keith to be a great influence over his delinquent behavior, was not relevant to any issues at trial, was an attack on appellant's character and was highly prejudicial. The court thus erred in denying the motion for mistrial.

In Robinson v. State, 487 So.2d 1040 (Fla.1986), the Court reversed a death sentence for a new sentencing proceeding after the prosecutor brought up two crimes that the defendant had not been charged with, or convicted of, in cross-examining several defense witnesses. The Court rejected the state's argument that the questioning was permissible to attack the witnesses' credibility, and recognized the danger of such testimony, stating, "Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial." Id., at 1042.

The Supreme Court followed Robinson in Keen v. State, 504 So.2d 396 (Fla.1987), where the Court found that a prosecutor's improper cross-examination of the defendant in the guilt phase of a capital trial could not be harmless. There, the state had filed a pretrial Williams rule notice to rely on evidence of an attempted murder of Keen's sister-in-law eight years before the murder for which he was on trial. The trial court excluded the

state's proferred Williams rule evidence. On cross-examination of Keen, however, the prosecutor asked Keen about the attempted murder. Keen's motion for mistrial was denied, but the Supreme Court reversed his first degree murder conviction, finding the prosecutor's question so inflammatory and prejudicial that it destroyed Keen's right to a fair trial. The same is true here.

The fact that appellant's prior crimes were not identified is of no consequence. First it is noteworthy that the criminal behavior alluded to involved delinquent behavior, which is not admissible for purposes of impeachment. Section 90.610((1)(a), Florida Statutes. Furthermore, there was never any proof of a prior conviction, and the mere fact of an unrelated crime, or arrest or charge, is simply too prejudicial by inferring guilt of the crime charged to be admissible. Jackson v. State, 451 So.2d 458 (Fla.1984). Finally, appellant did not testify and had not placed his character in issue.

In Chapman v. State, 417 So.2d 1028 (Fla. 3d DCA 1982), a defendant's conviction was reversed where witnesses alluded to prior crimes committed by the defendant, even though the crimes were not specifically identified. In Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982), the police officer testified that the victim advised him that the defendant had stated to her that he had been in prison before. The court reversed, indicating that the state may not impugn the character of an accused unless he first puts his character into issue. The court ruled that the defendant's motion for mistrial should have been granted, and indicated that the error was not cured by the judge's curative

instruction. Finally, in Harris v. State, 427 So.2d 234 (Fla. 3d DCA 1983), a police officer testified that the defendant had a "prior felony past." In concluding that the judge committed reversible error in failing to grant the motion for mistrial, the court noted that the testimony was "utterly inadmissible" as its sole relevance was to attack the defendant's character or to show his propensity to commit crime. Further, the court noted:

> [T]he presentation before a jury of testimony inadmissible, as here, . . ., has generally been considered classic grounds for a mistrial given its usual devastating impact upon a jury.

Id., at 234. Accord, Jackson v. State, supra, at 461, quoting, Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976)("[t]here is no doubt that this admission would go far to convince men of ordinary intelligence that the defendant was probably guilty of the crime charged").

The state's cross-examination of Fabian Melton and direct examination of Odella Anderson clearly inferred prior criminal conduct on appellant's part and denied him the right to a fair trial. Appellant is entitled to a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES WITHOUT PROVIDING A CONTEMPORANEOUS WRITTEN STATEMENT OF THE REASONS AT THE TIME SENTENCE WAS IMPOSED.

Appellant was sentenced on August 18, 1989. Prior to the sentencing hearing, the state filed a notice of intent to seek an upward departure from the recommended guidelines sentence. There was a great deal of discussion at the hearing from both the state and defense regarding the propriety of a departure sentence, following which the trial court noted that appellant was a habitual career criminal at the age of 17, showed no remorse for his acts and represented a danger to society (T 565-567). The court then sentenced appellant to consecutive terms of life in prison and 27 years. This was a departure from the recommended guidelines range of 22 to 27 years.

Six days after the sentencing hearing, on August 24, 1989, the court filed its Statement Of Reasons For Upward Departure From Sentencing Guidelines, providing four reasons for exceeding the guidelines range: escalating pattern of criminality, attempt to cover up the crime through elaborate efforts, the particularly aggravating circumstances which set the case far and above the average second degree murder, and unamenability to rehabilitation (R 100-104). None of these reasons, which the exception perhaps of escalating pattern of criminality, were delineated orally at the time of sentencing.

In Ree v. State, 14 FLW 565 (Fla. November 16, 1989), the Supreme Court ruled that a trial court must issue its written

departure statement at the time sentence is pronounced. The trial court in Ree filed its written reasons five days after sentencing the defendant. The Supreme Court reversed, noting that the rules and statute required contemporaneous written reasons. Accord Walker v. State, Case No. 87-2017 (Fla. 1st DCA Jan. 31, 1990)(On Motion For Rehearing and Rehearing En Banc)(Ree requires strict contemporaneity and seems to leave no room for harmless error analysis).

Here, the judge filed his written reasons six days after the sentencing hearing. Because the court failed to file its written reasons contemporaneously, appellant's sentences must be reversed and the cause remanded for resentencing within the recommended guidelines range.

ISSUE III

APPELLANT'S LIFE SENTENCE UNDER THE GUIDELINES WITHOUT POSSIBILITY OF PAROLE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTTION AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Appellant was tried on the charges of first degree murder and armed robbery and was convicted of second degree murder and armed robbery. The state waived the death penalty prior to the trial, thus exposing appellant to a maximum sentence of life in prison with the possibility of parole in 25 years, if convicted as charged. Although convicted of a lesser offense, appellant was sentenced to life in prison without possibility of parole. See Section 921.001(10), Florida Statutes (1988 Supp.)(persons sentenced pursuant to guidelines are not eligible for parole).

Appellant thus received a worse sentence by virtue of his conviction for a lesser crime.

The consequences of life sentences without possibility of parole resulting from the application of the sentencing guidelines in Florida have not been adequately explored or resolved. While appellant was convicted of an admittedly serious offense, it should be noted that the guidelines recommended sentence was 22 to 27 years, not an insignificant penalty for a 16 year old or anyone convicted of two first degree felonies.

A person sentenced under the guidelines for any crime is not eligible for parole. There is no express exception for a life sentence under the guidelines. A person convicted of a first-degree murder who receives a life sentence is eligible

for parole. This, of course, cannot be due to the gravity of the offense, as first degree murder is the most serious offense recognized in Florida. The disparity in the sentencing is due to a legal anomaly created by Chapter 921, which exempts first degree murder from guidelines sentencing.[1]

It is illogical, and unfair, that the maximum sentence for second degree murder exceeds the maximum sentence for a capital offense. The jury below found appellant guilty in Count II of armed robbery, thus implicitly finding that the homicide was a first degree felony murder. Appellant's conviction on Count I of the lesser included offense of second degree murder can only be explained as an exercise of the jury's inherent pardon power presumably because the jury believed a lesser sentence was warranted. Because Florida law provides that a life sentence for first degree murder is less onerous than the life sentence for second degree murder, the legislature has created an arbitrary classification which violates equal protection and due process

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[1]Recently, in Stewart v. State, 14 FLW 430 (Fla. Aug. 31, 1989), the Supreme Court rejected an argument in a capital case that the jury should have been instructed first degree murder carries a possible life penalty with no possibility of parole, because the law provides otherwise. The Court noted that when the legislature amended Chapter 921 in 1983 to exclude capital felonies from guideline sentencing, it left unchanged Section 775.082, Florida Statutes, which provides the penalties for a first degree murder conviction, including the language "shall be required to serve no less than twenty-five years before becoming eligible for parole." The Court concluded that Section 921.001(8) [renumbered as Section 921.001(10), Florida Statutes (1988 Supp.)] prohibits parole eligibility only for offenders sentenced pursuant to the guidelines. Id., at 432.

as guaranteed by Article I, Sections 2 and 9, Florida Constitution, and Amendments V and XIV, United States Constitution.

Appellant contends that his life sentence without any possibility for parole violates the constitutional guarantees of equal protection and due process of law and should be reversed for resentencing to a term of years as provided by statute.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, appellant requests, in Issue I, that this Court reverse his convictions and remand the cause for a new trial. In Issue II, appellant requests that this Court reverse his sentences and remand for resentencing within the recommended guidelines range. In Issue III, appellant requests that the Court reverse his life sentence for second degree murder and remand for resentencing to a term of years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Mr. Keith Brown, #117276, Baker Correctional Institution, Post Office Box 500, Olustee, Florida, 32072, on this 2nd day of February, 1990.

Paula S. Saunders
PAULE S. SAUNDERS

4-8882

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN, :

Appellant, :

v. : CASE NO. 89-2430

STATE OF FLORIDA, :

Appellee. :

_____ :

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN,

Appellant,

v. CASE NO. 89-2430

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This brief is submitted in reply to the Answer Brief of Appellee. Appellee's brief will be referred to herein as "AB" followed by the appropriate page number. All other references will be as set forth in the initial brief.

II ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN TESTIMONY WAS IMPROPERLY INTRODUCED INFERRING PRIOR CRIMINAL CONDUCT ON THE PART OF APPELLANT, THEREBY DEPRIVING HIM THE FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Appellee argues that Fabian Melton's testimony was wholly permissible to reveal bias or a motive for Melton to testify on appellant's behalf. If the state's cross-examination of Melton merely showed that Melton and appellant were close friends, and that appellant was an influence on Fabian, appellant would have no grounds to complain. The state's cross-examination, and its evidence on rebuttal, went much farther however. It implicated appellant in other criminal activities and constituted a direct attack on appellant's character, contrary to Sections 90.404(1) and 90.610, Florida Statutes.

Fabian Melton testified as to his long-standing friendship with appellant. On cross-examination, he testified that he and appellant were best friends, they had done many things together in the past, including getting arrested, but he denied telling his intake counselor that appellant was a bad influence on him. He twice repeated, in response to the state's questions, that he and appellant had done just about everything together, such as getting arrested, and also admitted that Carlos, appellant's brother, had a pending charge. The purpose of this questioning was not merely to show bias or motive, but to show appellant's bad character and propensity. Certainly the question regarding

appellant's brother had no other purpose than to show guilt by association.

The impropriety was merely reinforced on rebuttal when the state called Odella Anderson for the sole purpose of establishing that Fabian Melton had been adjudicated delinquent, placed under court ordered supervision, and that appellant was somehow responsible for Melton's delinquent behavior. This was clearly a backhanded method of attacking Keith Brown's character, under the guise of impeachment, and improper rebuttal. See Dupont v. State, 15 FLW 295 (Fla. 4th DCA Jan. 31, 1990).

In Dupont, the defendant was charged with battery. Dupont testified, on direct examination, that he struck the victim in self-defense. On cross-examination, Dupont denied that he verbally threatened the alleged victim in an elevator as they left the courthouse after a trial recess. The state then presented rebuttal testimony to prove the elevator threat took place. In reversing Dupont's conviction, the district court held that the rebuttal evidence was improper, reasoning:

> When a witness is testifying on cross-examination, any answer to a non-material collateral matter is conclusive and cannot be impeached by normal means of impeachment, including contradictory testimony by another witness. The test is whether the proposed testimony can be admitted into evidence for any purpose independent of the contradictions. There are two types of evidence that pass this test: (1) facts relevant to a particular issue; and (2) facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency. Gelabert v. State, 407 So.2d 1007, 1009-1010 (Fla. 5th DCA 1981). The elevator verbal threat which happened

several months after the fistfight was irrelevant and failed to meet the test.

Id.

Similarly, here, the rebuttal testimony was improper. The testimony regarding appellant's bad influences on Melton in the past constituted a non-material collateral matter, and Melton's response on cross-examination was conclusive. The evidence was not relevant to any issue at trial, nor did it discredit Melton by showing his bias, corruption, or lack of competency. It was thus error to permit the state to contradict Melton's testimony by another witness on rebuttal.

Appellee justifies this rebuttal testimony as being proper reputation evidence, under Section 90.609, Florida Statutes (AB 8). Contrary to this assertion, Anderson's testimony, directly contradicting Melton's earlier denial on cross-examination, did not "refer only to character relating to truthfulness," Section 90.609; it was a singular attack on appellant's character, when appellant's character had not been placed in issue.

Anderson's "correction of her earlier testimony" (AB 8) at the prosecutor's suggestion did not cure the prejudicial effect of this testimony. The jury heard repeatedly that Melton had a close association with appellant, was involved in criminal acts with him, and had been adjudicated delinquent. Whether Melton considered appellant to be a great influence over him as far as contributing to his delinquent behavior or a great influence on his state of mind, the implication was the same: appellant was a bad person and had propensity to crime.

Although appellant did not initially object to the state's questions regarding Melton's close association with appelllant, he timely objected when the state injected the prejudicial link between Melton and appellant's brother (T 368) and again during the rebuttal testimony of Odella Anderson (T 426-427). Defense counsel noted that he had talked to Anderson outside before she testified and that the substance of her testimony had been discussed at the bench, implying that the objectionable testimony was contrary to a previous court ruling. See Keen v. State, 504 So.2d 396 (Fla.1987)(prosecutor's question on cross-examination of defendant about collateral crime which trial court excluded from evidence was reversible error; Court held it was error to deny Keen's motion for mistrial without reference to whether a curative instruction was requested or given). Counsel further argued that there was no reason for this witness to testify on rebuttal. Once his objection was overruled and the motion for mistrial denied, appellant was under no obligation to request a curative instructive or object further.

Appellee's reliance on Straight v. State, 397 So.2d 903 (Fla.1981), is misplaced. The issue in Straight concerned the impropriety of a question implicating Straight in an unrelated crime, and not the admission of improper evidence. The Court noted that while the state's question was calculated to elicit irrelevant and prejudicial testimony, and was highly improper, it was harmless in light of the fact that the court sustained the objection, the question was never answered, and the jury was instructed to disregard the question.

The issue here, unlike that in Straight, does not concern the impropriety of a single question, but rather the admission of improper and irrelevant evidence, which tended to undermine the whole theory of defense and show appellant's bad character and propensity to crime. The Court did not sustain appellant's objection to Anderson's testimony, and the invidious question was answered twice.

The improper rebuttal merely underscored the improprieties in the state's cross-examination of Melton. At that point, the only remedy to cure the prejudicial impact of the testimony was to grant a mistrial. The state's questioning of Fabian Melton, and direct examination of Ms. Anderson, clearly inferred prior criminal activity on appellant's part and denied him the right to a fair trial. Appellant is entitled to a new trial.

ISSUE II

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINES WITHOUT PROVIDING A CONTEMPORANEOUS WRITTEN STATEMENT OF THE REASONS AT THE TIME SENTENCE WAS IMPOSED.

Ree v. State, 14 FLW 565 (Fla. Nov. 16, 1989), requires that written reasons for departure be provided at the time of sentencing. Appellee would have this Court excuse the trial court's failure to provide written reasons for its departure at the time of sentencing because the state served notice on appellant of its intent to seek a departure three days before the sentencing hearing, and suggested the same reasons relied on by the trial judge. This argument is specious. The state's request for an upward departure sentence and suggested reasons to support the departure are neither binding on the court, nor in compliance with the statute and rules. Section 921.001(5), Florida Statutes, requires the trial judge to make findings of fact supported by a preponderance of the evidence in order to depart, and Section 921.001(6) requires that the judge explain those findings in writing. See Florida Rule of Criminal Procedure 3.701(d)(11). The State's notice did not relieve the Court of its statutory obligations.

Appellee further contends that the holding in Ree should not be applied retroactively (AB 12). Ree does not constitute a change in the law, but a clarification of existing law, see State v. Jackson, 478 So.2d 1054 (Fla.1985), and State v. Oden, 478 So.2d 51 (Fla.1985). The Court in Ree noted that the rules and statute, Section 921.001(6), Florida Statutes, that created

the sentencing guidelines required contemporaneous written reasons, and that it was reversible error to depart without providing a contemporaneous written statement of the reasons at the time of sentencing.

Whether or not the error is deemed harmless, the failure to provide written reasons at the time of sentencing requires reversal. Ree v. State, supra; Holmes v. State, 15 FLW 487 (Fla. 4th DCA Feb. 21, 1990); Walker v. State, 15 FLW 360 (Fla. 1st DCA Jan. 31, 1990). Appellant's sentence must, therefore, be reversed.

ISSUE III

APPELLANT'S LIFE SENTENCE UNDER THE GUIDELINES WITHOUT POSSIBILITY OF PAROLE VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Appellee mischaracterizes appellant's argument as a challenge to the extent of departure by the trial court. Appellee correctly notes that appellant has not challenged the validity of the trial court's departure reasons; nor is he complaining about the extent of departure. What appellant does contend is that the legislature has created an irrational scheme, whereby persons convicted of less serious offenses are actually exposed to more serious penalties than those convicted of more serious crimes. This constitutes a violation of equal protection and due process.

At the commencement of trial, appellant faced a maximum penalty of life in prison with the possibility of parole in 25 years if convicted as charged; he was acquitted of first degree murder, convicted of second degree murder and sentenced to life in prison with no possibility of parole. Thus, he received a more severe sanction than had he been convicted as charged of a capital offense. This sentencing disparity, created by Chapter 921, is arbitrary and unreasonable and renders appellant's life sentence with no parole unconstitutional.

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in the initial brief, appellant requests, in Issue I, that this Court reverse his convictions and remand the cause for a new trial. In Issue II, appellant requests that this Court reverse his sentences and remand for resentencing. In Issue III, appellant requests that the Court reverse his life sentence for second degree murder and remand for resentencing to a term of years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Keith B. Brown, #117276, Baker Correctional Institution, Post Office Box 500, Olustee, Florida 32072, on this 15th day of March, 1990.

Paula S. Saunders
PAULA S. SAUNDERS

IN THE FIRST DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN,

Appellant,

vs. CASE NO. 89-2430

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, KEITH BERNARD BROWN, by and through his undersigned counsel, respectfully requests this Court to rehear its decision filed August 6, 1990, pursuant to Fla.R.App.P. 9.330, and as grounds therefor states:

1. In its opinion, this Court held that although Ree v. State, 15 FLW S395 (Fla. July 19, 1990), requires that written reasons for a departure from the sentencing guidelines be produced contemporaneously at the sentencing proceeding, the "new requirements" under Ree are to be applied prospectively only. Slip opinion, at 3.

2. The requirement for contemporaneous written reasons under Ree is not new, see Pope v. State, 561 So.2d 554 (Fla. 1990), and State v. Jackson, 478 So.2d 1054 (Fla. 1985), and should be applied to all cases pending review at the time Ree was decided.

3. In Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990)(On Rehearing), the district court held that the law in effect at the time of appeal should be applied. In an earlier appeal of Reed's sentence, the district court vacated Reed's sentence and remanded for resentencing because the trial court failed to provide written reasons for its departure sentence. Following Reed's resentencing, the district court affirmed the departure sentence on the authority of Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). The Florida Supreme Court subsequently reversed the district court's decision in Pope and held that where a sentence is vacated for lack of written reasons, resentencing on remand must be within the guidelines, Pope v. State, 561 So.2d 554 (Fla. 1990). The Supreme Court's opinion in Pope was issued after the affirmance of Reed's sentence, but before the mandate had issued. Reed then timely moved for rehearing, and the district court granted rehearing, vacated the sentence, and remanded for resentencing within the guidelines range based on the authority of Pope. The court held that because this was a pipeline case, Pope applied and the question of retroactivity was not implicated, stating:

> The state opposes what it terms a retroactive application of Pope to this case. The state claims that the trial court, which imposed sentence before the supreme court's Pope decision, was entitled to rely on case law as it existed at that time. However, this case is a 'pipeline case,' and, therefore, the question of retroactivity is not implicated. A 'pipeline case' is one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the supreme court. Smith v. State, 496 So.2d

983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the Pope rule at this time. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); State v. Castillo, 486 So.2d 565 (Fla. 1986); Wheeler v. State, 344 So.2d 244 (Fla. 1977); McIntire v. State, 381 So.2d 1154 (Fla. 5th DCA 1980).

This principle, that the law in effect at the time of appeal should be applied, is applicable to motions for rehearing. See, e.g., Williams v. State, 546 So.2d 1120 (Fla. 4th DCA 1989); Winfield v. State, 503 So.2d 333 (Fla. 2d DCA 1986).

15 FLW at D1868.

4. Appellant's case is a "pipeline case" and he is clearly entitled to the benefit of a controlling decision issued by the Supreme Court before his appeal becomes final. This Court must, therefore, apply Ree to the instant case, vacate Brown's departure sentence and remand the case for resentencing within the guidelines.

WHEREFORE, based on the foregoing arguments and reasoning, appellant requests that this Court rehear this appeal and order that appellant receive a guidelines sentence.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

Paula S. Saunders

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Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant at his known, on this 14th day of August, 1990.

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IN THE SUPREME COURT OF FLORIDA

KEITH BERNARD BROWN,

Petitioner,

v. CASE NO. 76,616

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN,

Petitioner,

v. CASE NO. 76,616

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, KEITH BERNARD BROWN, was the defendant in the trial court and the appellant in the District Court of Appeal, First District. Respondent, the State of Florida, was the prosecuting authority and appellee in the courts below. The parties will be referred to in this brief as they appear before the Court.

Petitioner is filing an appendix herewith containing the opinion of the lower court and petitioner's motion for rehearing. The appendix will be referred to as "A" followed by the appropriate page number.

II STATEMENT OF THE CASE AND FACTS

Petitioner, a juvenile, was indicted for first degree murder and armed robbery with a firearm. Following a jury trial, he was convicted of the lesser offense of second degree murder and armed robbery as charged (A 1).

Petitioner was certified as an adult for sentencing. The recommended guidelines sentence in the case was 22 to 27 years. The state filed a notice of intent to seek a departure from the sentencing guidelines based on: (1) the escalating pattern of criminality; (2) excess use of force in the commission of the robbery resulting in the homicide; (3) attempt to cover up the commission of the crime; and (4) lack of respect for the law and the judicial system (A 2).

The trial court sentenced petitioner to a term of life in prison for the murder and to a consecutive term of 27 years in prison for the armed robbery with three year mandatory minimum terms to run concurrently. Six days after the sentencing, the trial court issued its written order detailing the reasons for the departure sentence. The written reasons were substantially similar to the ones relied on by the prosecution (A 2-3).

On appeal to the District Court of Appeal, First District, petitioner argued that 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. The district court acknowledged this Court's decision in Ree v. State, 15 FLW S395 (Fla. July 19, 1990), but affirmed petitioner's departure sentence, finding that Ree adopted "new

requirements [which] are only to be applied prospectively" (A 3).

Petitioner timely moved for rehearing urging the district court to reconsider its decision in light of Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990)(On Rehearing) (A 5-8). On September 6, 1990, the district court denied the motion for rehearing (A 9), and on September 10, 1990, petitioner timely filed its notice to invoke this Court's discretionary jurisdiction (A 10-11).

This brief on jurisdiction follows.

III SUMMARY OF ARGUMENT

The requirement for contemporaneous written reasons under this Court's decision in Ree v. State, infra, is not new, and although that decision is to be given prospective application only, it should be applied to all cases pending appellate disposition at the time Ree was decided. The opinion of the lower court conflicts with the decision of this Court in Ree and the opinion of the Fifth District Court of Appeal in Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990). This Court should accept review of the instant case and reverse the decision of the district court with directions to remand the cause to the trial court for resentencing within the recommended guidelines range.

IV ARGUMENT

ISSUE PRESENTED

THE OPINION OF THE DISTRICT COURT IN BROWN V. STATE, 15 FLW D2014 (Fla. 1st DCA Aug. 6, 1990), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS IN REE V. STATE, 15 FLW S395 (Fla. July 19, 1990), AND IN REED V. STATE, 15 FLW D1867 (Fla. 5th DCA July 19, 1990).

Petitioner scored in the recommended guideline range of 22 to 27 years. The trial court departed from the guidelines, and sentenced petitioner to life in prison for second degree murder and to a consecutive term of 27 years for armed robbery, with a three year mandatory minimum sentence on each count to run concurrently. Six days after imposing the departure sentence, the trial court issued its written reasons to support the departure from the guidelines. The district court affirmed the departure sentence, stating:

> The question of the legality of the procedure utilized by the trial judge in departing from sentencing guidelines has now been resolved by the supreme court in Ree v. State, 15 FLW S395 (Fla., July 19, 1990). While Ree requires that the written reasons for a departure from sentencing guidelines be produced at the sentencing hearing, the new requirements are only to be applied prospectively. We, therefore, find that the trial judge did not commit error in the sentencing procedure which he utilized at the time he sentenced the defendant.

Brown v. State, 15 FLW D2015 (Fla. 1st DCA Aug. 6, 1990)(A 3).

Petitioner contends that the lower court's holding is in direct and express conflict with this Court's decision in Ree v. State, 15 FLW S395 (Fla. July 19, 1990), and with the deci-

sion of the Fifth District Court of Appeal in Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990).

In Ree, this Court held that written reasons for departing from the guidelines must be issued at the time the sentence is imposed. The Court noted that its ruling was compelled by the decisions in State v. Jackson, 478 So.2d 1054 (Fla. 1985), and State v. Oden, 478 So.2d 51 (Fla. 1985), as well as by Section 921.001(6), Florida Statutes (1987), and Florida Rules of Criminal Procedure 3.701(d)(6, 11), and said:

> We conclude that Jackson and Oden compel us to answer the certified question in the affirmative and require that written reasons be issued at the time of sentencing. . . .
>
> * * *
>
> . . . [W]e are equally persuaded that the statute and rules that create the sentencing guidelines require written reasons for departure that are 'contemporaneous.' Oden. To be 'contemporaneous,' reasons must be issued at the time of sentencing.

15 FLW at S396. The Court further held that its holding should only be applied prospectively. Id.

The requirement for contemporaneous written reasons under Ree is not new. See Florida Rules of Criminal Procedure 3.701 (d)(6, 11); and see, Pope v. State, 561 So.2d 554 (Fla. 1990); State v. Oden, supra; State v. Jackson, supra; Elkins v. State, 489 So.2d 1222 (Fla. 5th DCA 1986). Although the decision in Ree is to be applied prospectively only, the holding should be applied to all "pipeline" cases pending review at the time Ree was issued. Ree was decided on July 19, 1990. The opinion in

petitioner's case was issued August 6, 1990, and rehearing was denied September 6, 1990. Petitioner was thus entitled to the benefit of Ree, which was the controlling law in effect at the time of appellate disposition. See Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990).

In Reed v. State, supra, the district court correctly held that the law in effect at the time of appeal should be applied. In an earlier appeal of Reed's sentence, the court vacated the sentence and remanded for resentencing because the trial court failed to provide written reasons for its departure sentence. Following Reed's resentencing, the district court affirmed the departure sentence on the authority of Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). This Court subsequently reversed the district court's opinion in Pope and held that where a sentence is vacated for lack of written reasons, resentencing on remand must be within the recommended guideline range. Pope v. State, 561 So.2d 554 (Fla. 1990). This Court's decision in Pope was issued after the affirmance of Reed's sentence, but before the mandate had issued. Reed then timely moved for rehearing, and the district court granted rehearing, vacated the sentence and remanded for resentencing within the guidelines range based on the authority of Pope. The court held that because this was a pipeline case, Pope applied, and the question of retroactivity was not implicated. The court reasoned:

> The state opposes what it terms a retroactive application of Pope to this case. The state claims that the trial court, which imposed sentence before the supreme court's Pope decision, was entitled to rely on case law as it existed

> at that time. However, this case is a 'pipeline case,' and, therefore, the question of retroactivity is not implicated. A 'pipeline case' is one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the supreme court. Smith v. State, 496 So.2d 983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the Pope rule at this time. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); State v. Castillo, 486 So.2d 565 (Fla. 1986); Wheeler v. State, 344 So.2d 244 (Fla. 1977); McIntire v. State, 381 So.2d 1154 (Fla. 5th DCA 1980).
>
> This principle, that the law in effect at the time of appeal should be applied, is applicable to motions for rehearing. See, e.g., Williams v. State, 546 So.2d 1220 (Fla. 4th DCA 1989); Winfield v. State, 503 So.2d 333 (Fla. 2d DCA 1986).

15 FLW at D1868.

Petitioner's case was a "pipeline case," and he is clearly entitled to the benefit of a controlling opinion issued by this Court while his appeal was pending. Because the district court refused to apply Ree to the instant case, the opinion expressly and directly conflicts with Reed v. State. This Court should, therefore, accept jurisdiction of the instant case and resolve this conflict.

V CONCLUSION

The decision now before the Court is in direct and express conflict with the decisions in Ree v. State, supra, and Reed v. State, supra. Based upon the foregoing, petitioner respectfully requests that this Court accept review of the instant cause and hear this appeal on the merits.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

for PAULA S. SAUNDERS
Assistant Public Defender
Florida Bar No. 308846
Leon County Courthouse
Fourth Floor North
301 South Monroe Street
Tallahassee, Florida 32301

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Keith B. Brown, #117276, Baker Correctional Inst., Post Office Box 500, Olustee, Florida, 32072, on this 20 day of September, 1990.

for PAULA S. SAUNDERS

IN THE SUPREME COURT OF FLORIDA

KEITH BERNARD BROWN,

Petitioner,

v. CASE NO. 76,616

STATE OF FLORIDA,

Respondent.

_____/

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

KEITH BERNARD BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

* NOT FINAL UNTIL TIME EXPIRES TO
* FILE MOTION FOR REHEARING AND
* DISPOSITION THEREOF IF FILED.
*
* CASE NO. 89-2430

Opinion filed August 6, 1990.

An appeal from the Circuit Court for Duval County; David Wiggins, Judge.

Barbara Linthicum, Public Defender; Paula S. Saunders, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Charlie McCoy, Assistant Attorney General, Tallahassee, for appellee.

WOLF, J.

The appellant was tried for first degree murder and armed robbery. Prior to trial, the state announced its intent not to seek the death penalty.

The appellant was convicted of second degree murder as well as armed robbery. The appellant raises three points on appeal. The issues are: (1) Whether the trial court erred in not

granting a mistrial where testimony inferring prior criminal conduct by the defendant was introduced; (2) 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; and (3) Whether appellant's life sentence without possibility of parole violates the Eighth Amendment to the United States Constitution and the due process clause of the state and federal constitutions. We find no merit as to issue 1 and affirm without further opinion based on Harmon v. State, 527 So.2d 182 (Fla. 1988). As to issues 2 and 3, we affirm for the reasons enumerated herein.

Second degree murder and armed robbery with a firearm are first degree felonies punishable by imprisonment for a term of years not exceeding life. The recommended guideline sentence for the defendant in the instant case was 22 to 27 years in prison.

The appellant, a juvenile, was certified as an adult for sentencing. The state also filed a notice of intent to seek a departure from the sentencing guidelines based on: 1) escalating pattern of criminality; 2) the excess use of force in the commission of the robbery resulting in the homicide; 3) attempt to cover up the commission of the crime; and 4) lack of respect for the law and the judicial system.

The court sentenced the defendant to a life term for the murder and 27 years for the robbery with the three-year mandatory minimums to run concurrently. Six days after sentencing, the trial court issued a written opinion outlining the reasons for

the departure from the guideline sentence. The reasons were substantially similar to the ones relied on by the prosecution.[1]

The question of the legality of the procedure utilized by the trial judge in departing from sentencing guidelines has now been resolved by the supreme court in Ree v. State, 15 FLW S395 (Fla., July 19, 1990). While Ree requires that the written reasons for a departure from sentencing guidelines be produced at the sentencing hearing, the new requirements are only to be applied prospectively. We, therefore, find that the trial judge did not commit error in the sentencing procedure which he utilized at the time he sentenced the defendant.

The appellant has also challenged the legality of the life sentence for second degree murder without possibility of parole. He argues that since the state waived the death penalty prior to trial that the maximum sentence which may have been imposed for second degree murder (life without possibility of parole) exceeded the maximum sentence which may have been imposed for first degree murder (life sentence with eligibility for parole in 25 years).[2] The appellant argues that this scenario violates due

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[1] The appellant does not challenge the sufficiency of the reasons enumerated by the trial court for departing from the recommended sentencing guidelines.

[2] Pursuant to § 921.001(10), Fla. Stat. (1989), persons sentenced for second degree murder pursuant to sentencing guidelines are not eligible for parole.

process, equal protection and constitutes cruel and unusual punishment.

Appellant ignores the fact that even though the prosecutor waived the death penalty that the maximum sentence for first degree murder, pursuant to statute, was the death penalty. The minimum sentence was a life sentence with eligibility for parole after 25 years.[3] The defendant is essentially complaining because the potential maximum sentence for second degree murder exceeds the minimum sentence for first degree murder. Since there are a number of factors other than seriousness of the crime which enter into sentencing decisions, this is clearly not a problem. Nor is a problem created because a life sentence for first degree murder is less severe than the life sentence for second degree murder. Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987).

Further, this court has previously held that the imposition of a life sentence without possibility of parole for a violent crime does not constitute cruel and unusual punishment. Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987).

Accordingly, we affirm the conviction.

WIGGINTON and BARFIELD, J.J., CONCUR.

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[3] Appellant cannot, after having been given the advantage of not facing the death penalty, argue that the exercise of the prosecutor's discretion in his favor creates a constitutional problem.

IN THE FIRST DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN,

Appellant,

vs. CASE NO. 89-2430

STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, KEITH BERNARD BROWN, by and through his undersigned counsel, respectfully requests this Court to rehear its decision filed August 6, 1990, pursuant to Fla.R.App.P. 9.330, and as grounds therefor states:

1. In its opinion, this Court held that although Ree v. State, 15 FLW S395 (Fla. July 19, 1990), requires that written reasons for a departure from the sentencing guidelines be produced contemporaneously at the sentencing proceeding, the "new requirements" under Ree are to be applied prospectively only. Slip opinion, at 3.

2. The requirement for contemporaneous written reasons under Ree is not new, see Pope v. State, 561 So.2d 554 (Fla. 1990), and State v. Jackson, 478 So.2d 1054 (Fla. 1985), and should be applied to all cases pending review at the time Ree was decided.

3. In Reed v. State, 15 FLW D1867 (Fla. 5th DCA July 19, 1990)(On Rehearing), the district court held that the law in effect at the time of appeal should be applied. In an earlier appeal of Reed's sentence, the district court vacated Reed's sentence and remanded for resentencing because the trial court failed to provide written reasons for its departure sentence. Following Reed's resentencing, the district court affirmed the departure sentence on the authority of Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). The Florida Supreme Court subsequently reversed the district court's decision in Pope and held that where a sentence is vacated for lack of written reasons, resentencing on remand must be within the guidelines, Pope v. State, 561 So.2d 554 (Fla. 1990). The Supreme Court's opinion in Pope was issued after the affirmance of Reed's sentence, but before the mandate had issued. Reed then timely moved for rehearing, and the district court granted rehearing, vacated the sentence, and remanded for resentencing within the guidelines range based on the authority of Pope. The court held that because this was a pipeline case, Pope applied and the question of retroactivity was not implicated, stating:

> The state opposes what it terms a retroactive application of Pope to this case. The state claims that the trial court, which imposed sentence before the supreme court's Pope decision, was entitled to rely on case law as it existed at that time. However, this case is a 'pipeline case,' and, therefore, the question of retroactivity is not implicated. A 'pipeline case' is one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the supreme court. Smith v. State, 496 So.2d

983 (Fla. 3d DCA 1986). The appellate process is not completed until a mandate is issued. Thibodeau v. Sarasota Memorial Hospital, 449 So.2d 297 (Fla. 1st DCA 1984). Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the Pope rule at this time. Cantor v. Davis, 489 So.2d 18 (Fla. 1986); State v. Castillo, 486 So.2d 565 (Fla. 1986); Wheeler v. State, 344 So.2d 244 (Fla. 1977); McIntire v. State, 381 So.2d 1154 (Fla. 5th DCA 1980).

This principle, that the law in effect at the time of appeal should be applied, is applicable to motions for rehearing. See, e.g., Williams v. State, 546 So.2d 1120 (Fla. 4th DCA 1989); Winfield v. State, 503 So.2d 333 (Fla. 2d DCA 1986).

15 FLW at D1868.

4. Appellant's case is a "pipeline case" and he is clearly entitled to the benefit of a controlling decision issued by the Supreme Court before his appeal becomes final. This Court must, therefore, apply Ree to the instant case, vacate Brown's departure sentence and remand the case for resentencing within the guidelines.

WHEREFORE, based on the foregoing arguments and reasoning, appellant requests that this Court rehear this appeal and order that appellant receive a guidelines sentence.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders
PAULA S. SAUNDERS #308846
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant at his known, on this 14th day of August, 1990.

Paula S. Saunders

PAULA S. SAUNDERS
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Saunders APD

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

September 6, 1990

CASE NO: 89-02430

RECEIVED
SEP 6 1990
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

L.T. CASE NO. 89-1820 CF

Keith Bernard Brown v. State of Florida

Appellant(s), Appellee(s).

ORDER

Motion for rehearing, filed August 14, 1990, is DENIED.

By order of the Court

RAYMOND E. RHODES
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Paula S. Saunders

Charlie McCoy

Sondra Joyner
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

KEITH BERNARD BROWN, :

Defendant/Petitioner, :

v. : CASE NO. 89-2430

STATE OF FLORIDA, :

Plaintiff/Respondent. :

_____:

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that KEITH BERNARD BROWN, Defendant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered **August 6, 1990**, and the decision on the motion for rehearing rendered **September 6, 1990.** The decision expressly and directly conflicts with a decision of another district court of appeal of or of the Supreme Court on the same question of law.

Respectfully submitted,

BARBARA M. LINTHICUM
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS #308846
Assistant Public Defender
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(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, on this 10th day of September, 1990.

Paula S. Saunders
PAULA S. SAUNDERS