FILED
SID J. WHITE
AUG 4 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

KEITH BERNARD BROWN,

Respondent,

v. Case No.:83-759

STATE OF FLORIDA,

Petitioner.
_____/

PRO SE RESPONDENT INITIAL BRIEF ON THE MERITS

Keith Bernard Brown #117276
Baker Correctional Institution
Post Office Box 500
Sanderson, Florida 32087-0500

TABLE OF CONTENTS

PAGE(S)

Table Of Contents.....i

Table Of Citations.....ii

Perliminary Statement.....1

Statement Of The Case And Facts.....2

Summary Of Argument.....6

Argument.....8.

Issue.....8

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?

A. The Significance of Ree and Pope.....11

B. Witt v. State, 387 So.2d 922 (Fla. 1980), clearly constitue reversal of the Respondent's Motion for Post-Conviction Relief.....16

C. Brown, IV, constituted the law of the case that the First District Court of Appeals followed in Ree and Smith.....20

D. This case presents an opportunity for this Court to ensure fairness adn uniformity in Smith.....23

E. Regardless of the Petitioner made of analysis Respondent is entitled to post-conviction relief.....28

Conclusion.....28

Certificate Of Service.....28

Notary.....30

TABLE OF CITATIONS

CASES **PAGE(S)**

Blair v. State, 598 So.2d 1068 (Fla. 1992).....5,14,15,29

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 424 (1977).....17

Brown v. State, 19 Fla.L.Weekly D645 (Fla. 1st DCA March 24, 1994) (Brown, V, attached as Appendix 5).....4,8,9

Brown v. State, 565 So.2d 369 (Fla. 1990) Brown, attached as Appendix I.....2,14

Brown v.State, 576 So.2d 285 (Fla. 1991) Brown, II, attached as Appendix II.....3

Brown v.State, Trial Court Order denying Respondent's Motion For Post-Conviction Relief (Fla. 1993) Brown, III attached as Appendix III.....10

Brown v. State, 617 So.2d 1105 (Fla. 1993) Brown, IV, attached as Appendix IV,.....4

Crocker v. State, 616 So.2d 1180 (Fla. 1st DCA 1993).....26

Dupree v. State, 615 So.2d 713 (Fla. 1st DCA 1993).....26

Fenelon v. State, 594 So.2d 1181 (Fla. 1992).....26

Francis v. Barton, 581 So.2d 583 (Fla. 1991).....22

Fratcher v.State, 621 So.2d 525 (Fla. 4th DCA 1993).....26

Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L. Ed. 649 (1987).....25

Gulf Coast Home Services Inc. v. Department of Rehabilitative Services, 503 So.2d 415 (Fla. 1st DCA 1987).....4

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 82 L.Ed. 1461(1938).....17,18,19

Lewis v. State, 623 So.2d 1205 (Fla. 4th DCA 1993).....26

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed.2d 601 (1965).....17

McCuiston v. State, 534 So.2d 1144 (Fla. 1988).....20

TABLE OF CITATIONS (CONT.)

CASES	PAGE(S)
Owens v. State, 598 So.2d 64 (Fla. 1992)	5,14,15,29
Pope v. State, 561 So.2d 554 (Fla. 1990)	2,12
Ree v. State, 565 So.2d 1329 (Fla. 1990)	2,12
Smith v. State, 598 So.2d 1063 (Fla. 1992)	3,4,8
State v. Jackson, 478 So.2d 1054 (Fla. 1985)	12
State v. Lyles, 576 So.2d 706 (Fla. 1991)	14
State v. Williams, 576 So.2d 281 (Fla. 1991)	14
Stewart v. State, 549 So.2d 171 (Fla. 1989)	12
Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970 18 L.Ed.2d 1199 (1967)	17
United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)	26
Whitehead v. State, 498 So.2d 863 (Fla. 1986)	20
Witt v. State, 387 So.2d 922 (Fla. 1980)	9,10,16,17,18
Florida Constitution, Art. 1, s.s.9,16 Fla.Const	25
Rules Of Criminal Procedure	
Fla.R.Cr.P. 3.701	11
Fla.R.Cr.P. 3.850	3,4,19
Statutes	
Section 921.016(1)(c), Fla.Stat. (1993)	12,24

PRELIMINARY STATEMENT

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

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

Respondent is filing an appendix, the appendix will be referred to as "A" followed by the appropriate page number.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent, 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-2"

Respondent 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 respondent 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 the three (3) year mandatory minimum terms to run concurreatly. Six (6) days after the sentencing, the trial court issue its written reasons. "A-2"

Respondent, filed a direct appeal in the First District of Appeal. Respondent, argued that the trail court erred in departing from the sentencing guidelines "without providing a contemporaneous written statement of the reasons at the time the sentence was imposed." Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990) "A-1"

On April 26, 1990, Pope v. State, 561 So.2d 554 (Fla. 1990), was decided. On July 19, 1990, Ree v. State, 565 So.2d 1329 (Fla.

1990), was decided.

On August 6, 1990, the First DCA decied Brown v. State, supra; rehearing was denied on September 6, 1990. Brown I "A-1" stated:

> "that 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, supra.

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 First District Court of Appeal's mandate issued on September 24, 1990. Respondent sought review in the Florida Supreme Court, and on January 2, 1991, this court denied review in Brown v. State, 576 So.2d 285 (Fla. 1991). "A-4"

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

Respondent, on November 17, 1994, filed the Motion For Post-Conviction Relief, Pursuant to Rule 3.850, F.R.Cr.P., (1988). "A-6" One of the grounds in the Motion alleged: "The trial court erred in departing from the sentencing guidelines without providing contemporaneous written statement of reasons at the time the sentence was imposed. "A-5"

On December 22, 1992, the trial court denied Respondent's Motion for Post-Conviction Relief. "A-5"

Respondent appealed to the First District Court of Appeal the trial court's denial of his Motion for Post-Conviction Relief. Respondent's appeal raised only one issue,

> "respondent contends that in accordance with Smith v. State, 598 So.2d 1063 (Fla. 1992), since his case was not yet final when Ree was decided, it must be reversed and remanded for sentencing within the guidelines."

The State moves for the District Court of Appeal to take judicial notice of the issuance of its September 24, 1990, mandate in Brown v. State, supra, and moved to dismiss the appeal because the Motion for Post-Conviction Relief was untimely. The State argued that, when measured from the date of the DCA's mandate in Brown, I "A-1", respondent's Motion for Post--Conviction Relief was outside the two-year limit of Rule 3.850(b), F.R.Cr.P., by published order in Brown v. State, 617 So.2d 1105 (Fla. 1993) "A-9", the DCA granted the State's motion to take Judicial notice of the date of issuance of mandate in case number 89-2430. Respondent has expressed no objection to this request and such judicial notice appears to be appropriate. Gulf Coast Home Health Services, Inc. v. Department of Rehabilitative Services, 503 So.2d 415 (Fla. 1st DCA 1987). Accordingly, the State request for judicial notice is granted. "A-9" But denied the Motion to dismiss the appeal. Brown, IV "A-
"

In Brown v. State, 19 Fla.L.Weekly D645 (Fla. 1st DCA March 24, 1994), the First District Court of Appeal's reversed the

trial court denial of respondent's motion for post-conviction relief. Brown, V "A-11" The district court of appeal's Judges stated:

> "Appellant's direct appeal was pending in this court when Supreme Court's opinon on rehearing in Ree was issued. Even though this ocurt'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) (Brown, V "A- ") (italics in original)

Brown, V stated the DCA's mandate and certified as having "great public importance the question presented in this brief as the issue. Therefore, this case treated by this respondent's brief may be called Brown, VI.

SUMMARY OF ARGUMENT

ISSUE.

Petitioner is intentionally contradicting and confusing the law. Therefore, the Petitioner brief is without merits and frivolous because the First District Court of Appeal's render the correct decision;

> "the Respondent's case requires that we reverse and remand the Respondent's case for re-sentencing within the guidelines. Brown, V "A- "

Moreover, the certified question should be answered Affirmative.

Respondent precisely demostrated how Smith, apply Ree retrospectively to Respondent's case for Motion of Post--Conviction Relief. Therefore, to the degree that Petitioner relies upon Smith is inaccurate. Moreover, the Petitioner constantly emphasises that the Respondent case became final fifteen months before Smith, this is clearly not the problem because Smith indicated who will and will not benefit from Ree, "Ree, shall apply to all cases not yet final when mandate issed after rehearing in Ree. Ree became final August 3, 1990, (the date the mandate was issued), and respondent mandate was not issued until August 6, 1990, and did not become final until January 2, 1991, the date the Supreme Court denied review. Clearly, Respondent should reap the benefit from Smith.

At the time of Respondent's direct appeal, Ree indicated that contemporaneous written reason would be applied

prospectively, therefore, the Respondent did not benefit from Ree at that time. Since, Smith announced a New Law that recede from Ree, indicating Ree is now retospectived and Smith dicta announced that the New Law shall apply to the Respondent. Brown,V

Consequently, Respondent's claim was correctly decided on direct appeal, and because of the New Law established in Ree through Smith, the Respondent shall be allowed to reap the benefit. Accordingly, the issue is controlled by Witt, and Witt do apply to the Respondent case. Witt clearly states, "its decisioon was not inconsistant with decisions in which it addressed application or changes in the law to cases on collateral review." Petitioner, insist that Witt stated: "its decision do not address application of change in the law to cases on collateral review," which it does not say.

The decision of the First District Court of Appeal that produced the certified question should not have been because if the petitioner was not trying to change the law in the language of Smith for their own purposes, it would not be a certified question. Respondent urges this Court to uphold Smith because Smith already have limited facts.

ARGUMENT

ISSUE

IN VIEW OF SMITH V. STATE, 598 So.2d 1063 (FL. 1992), THE DECISION IN REE V. STATE, SUPRA, 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 DEPOSED OF IN ACCORDANCE WITH REE, AND IN WHICH THE ISSUE WAS RAISED AGAIN BY MOTION FOR POST--CONVICTION RELIEF AFTER ISSUANCE OF SMITH?

The question certified by the First District Court of Appeal is stated as the issue above. This case, Brown, V, arose do to the district court's reversal of Respondent's motion for post--conviction relief relying on Smith. Respondent contends that in accordance with Smith, since his case was not yet final when Ree was decided, it must be reversed and remand for sentencing within the guidelines. See, Brown, 19 Fla.L.Weekly D645 (Fla. 1st DCA March 24, 1994). Petitioner contends that since Respondent filed his Motion For Post-Conviction Relief after the issuance of Smith, Respondent can not obtain benefit from Smith. Clearly, the time factor is not the problem because Smith v. State, 598 So.2d 1063 (Fla. 1993), precisely stipulate who will and will not benefit from Ree through Smith. Id. at 1066.

More specifically, if the petitioner was not trying to contradict the language in the body of Smith v. State, supra, the Respondent would not have to respond to the Petitioner petition.

Respondent correctly used Ree through Smith, Brown, V "A-11", is evidence of the appropriate procedure. Petitioner is

intentially trying to confuse the, (a) fundamental nature of precedent, the wisdom of (b) Witt v. State, 387 So.2d 922 (Fla. 1980) and (c) the doctrine of law of the case. Therefore, the District Court of Appeal corretly reversed and remand Respondent case for re-sentencing within the guidelines because the trial court failed to provide contemporaneous written reasons. Brown, V, 19 Fla.L.Weekly D645 (Fla. 1st DCA March 24, 1994) "A-11"

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

Judgement and sentence August 18, 1989.

August 24, 1989, trial courts written reason for departure from guideline filed; six days after sentencing.

August 31, 1989, Respondent filed Notice of Appeal alleged; trial court errored in the sentence imposed on Respondent.

April 26, 1990, Pope decided.

July 19, 1990, Ree decided.

August 6, 1990, Brown, I "A-1" decided; DCA affirmed the judgement and sentence based upon the language in Ree then; that it was prospectively only: Respondent did not have a problem with that because that was law.

September 6, 1990 Brown, I "A-1" rehearing decided:Denied.

January 2, 1991, Brown II "A-4" decided; in Brown, II this court denied review of Brown, I.

April 2, 1991, Smith decided; recede 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.

June 16, 1992, Smith rehearing decided:Denied.

November 17, 1992, Brown filed Motion For Post--Conviction Relief:Brown, VI claims that he is entitled to relief based on Smith v. State, supra, in which the Florida Supreme Court receded in part from Ree to the extent that it made the Ree holding retroactive.

December 22, 1992, Brown, IV decided;denying motion for post-conviction reilef.

March 24, 1994 Brown, V "A-11" decided; DCA reversed denial for Post-Conviction Relief do to Smith v. State, supra, in which the Florida Supreme Court recede in part from Ree to the extent that it made the Ree holding retroactive.

The Petitioner elaborated on their own understanding not the understanding pertaining to the fundamental nature of precedent and its application to Ree and Pope, nor the wisdom of Witt v. State, 387 So.2d 922 (Fla. 1990), not the law of the case. The Petition concluded by attempting to argue in this Court in a way of confusing the language in the body of Smith, to believe that facts pertaing to Smith is unanswered in Brown, V. The State attempted to confuse the DCA decision in Brown, V, by stating:

> "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 make the pertinent change of law here, not the Ree case, therefore "pipeline cases are those that were not yet final when Smith was decided. Appelle expresses "some" confusion in reconciling the language in the body of the Smith opinion, to 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 motion for post-conviction relief.

Brown, V, 19 Fla.L.Weekly March 24, 1994 (italics in original)

The State intentionally tried to confuse Smith when this Court precisely 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 the Ree "shall" apply to all cases not yet final when mandate issued after rehearing in Ree.

Brown, V, "A-11", Smith, Id.1066 (itialics in original)

A. The significance of Ree and Pope

The Petitioner attempted to interpret Ree to the extent of expressing to this Court the similarities that Ree coincide with the Florida Statute, Rules 3.701(b)(6), Fla.R.Cr.P., and 3.701 (d) (11), Fla.R.Cr.P.. The Petitioner interpretation is specious. Moreover, since Ree has similarities of the Florida Statute, the Petitioner would like for this Court to adopt a Florid Statute to Smith by receding from Smith, which would be illogical, because

Smith is accurat in its facts.

The cases that the Petitioner would like for this Court to reconsider for Smith are: Stewart v. State, 549 So.2d 171 (Fla. 1989); State v. Jackson, 478 So.2d 1054 (Fla. 1985); Pope v. State, 561 So.2d 555 (Fla. 1990). However, Smith have provided the facts without any reconsideration. Moreover, the Petitioner would also like for this Court to believe that Ree is a misunderstood case. Whereas, this Court should adopt Pope facts concerning the way Ree through Smith should render a remedy for the trial court's failure to provide written reasons. Petitioner argument is frivolos. Moreover, the interpretation that the Petitioner interpeted of Statute 921.016(1)(c), Fla.Stat. (1993) would not be correct for this Court to adopt under the constitution by receding in Smith to their way. Petitioner interpretation is fallacious.

Petitioner, emphatically refuse by a way of endeavoring to confuse that Ree v. State, 565 So.2d 1329 (Fla. 1990), has not been receded from prospectively to retroactively in Smith v. State, supra, when this Court modified Ree and held:

> "Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree".

Smith, Id. at 1066 (italics in original)

Clearly, the DCA's decision was correctly applied in Ree through Smith accordance Brown, V "A-11".

Petitioner explained two-in-a-half pages to this Court the definition of precedent, which was sophistical because the

Respondent is certain that this Court is well versed in the definition of precedent and its entirely.

Since the Respondent has answered the question that prompted the Petitioner discussion of precedent, this Court knows what Ree represent. Therefore, Brown, V "A-11" should be reversed regardless of Petitioner own view of Ree through Smith in this matter. It was necessay for the resolution of Ree through Smith. Respondent determine that Ree through Smith was precedent to Brown, V, by looking to its facts and what it did or did not do in terms of the outcome effecting Ree through Smith accordance Brown, V "A-11". Its facts regarding the writing requirements were identical in both cases. Smith, Id. at 1066, clarified Ree to apply retroactively "to all cases not yet final when mandate issued after rehearing in Ree." Ree mandate was issued August 3, 1990, Brown, V "A-11", mandate was issued August 6, 1990, and did not became final until January 2, 1991. Ree through Smith did apply the rule to its facts, therefore the Ree through Smith Court said that they will apply the rule retroactively in a past set of cases, "not yet final when mandate issued after rehearing in Ree. Ree through Smith was precedent to Brown, V "A-11" and was not limited by what this Court said in Ree through Smith. It was the proper vehicle that Respondent used and the DCA reversed Brown, V, "A-11"

Therefore, as of the moment that Ree was issued in Smith, Id. at 1066, its language regarding the contemporaneous writing

requirement was precise for the district court of appeal's to follow, and binding on them as precedent. This Court in essence, by stating that Ree through Smith is retroactive, is telegraphing to all of the courts of the state of Florida what this Court shall do if presented with facts meeting the conditions set out in Smith, Id. at 1066. Petitioner question then becomes what type of cases did Ree through Smith indicated that would apply its retroactive application? See, Owens v. State, 598 So.2d 64 (Fla. 1992); Blair v. State, 598 So.2d 1068 (Fla. 1992); Brown v. State, 19 Fla.L.Weekly D645 (Fla. 1994) Brown, V, "A-11", provide an answer to the question.

Petitioner contends that State v. Williams, 576 So.2d 281 (Fla. 1991); State v. Lyles, 576 So.2d 707 (Fla. 1991); and Brown v. State, 565 So.2d 369 (Fla. 1991) Brown, I, "A-11", did not benefit from Ree prospectively rule. Respondent agreed then, but Petitioner seems not to be aware of the change in the law of Ree through Smith v. State, supra, that changes Ree from prospectively to Ree retroactively. Moreover, this Court receded in Lyles and Williams to the extent that this Court declined to apply Ree retroactively to non-final cases. Since the Petitioner expresses much confusion in reconciling in the body of Smith new rule, Respondent feels obligated to explain in what manner of declined that this Court used it in. This Court only meant that in Lyes, Id. at 706 and Williams, Id. at 281, "then", this Court decline retroactively application to both cases. If this Court

would have stated; "in Smith Id. at 1066," this Court decline to apply Ree retroactively to non-final cases, which it did not. Clearly, the Respondent could not benefit from Smith, Id. at 1066.

Therefore, Judge Wolf's opinion in Brown, I "A-1", although decided prior to Williams or Lyles, was insightful when it correctly interpreted Ree prospectively only language. However, The judges decision in Brown, V "A-11", although, decided prior to Smith, Owens and Blair, was insightful when it correctly interpreted Ree through Smith retroactively rule for cases not yet final when mandate issued after rehearing in Ree, expressly stated it would apply to Respondent.

Therefore, at the time the Respondent filed his motion for post-conviction relief, the trial court should have reversed the Respondent motion because Brown, V, "A-11", did have the benefit from Ree through Smith. This is precisely the reason that Smith held, in the sense of establishing precedent, that the contemporaneous written requirement would apply in a situation like Brown, V, "A-11". And, this is precisely the reason that the DCA Court reversed and remand for resentencing in the guidelines the Respondent's motion for post-conviction relief: "this Court [followed]... 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); Blair

v. State, 598 So.2d 1068 (Fla. 1992); Brown, V, "A-11".

Another compelling reason given by the district court for reversing Respondent's motion for post-conviction relief was that Smith expressly decided that the Respondent was entitled to benefit from the new changes in Ree through Smith, Id. at 1066. The DCA's reasoning was impeccable as following not only the precedent of Brown V but also the law of the case. Moreover, the DCA's reversal of the motion ws absolutely correct when analyzed according to the principles of Witt v. State, 387 So.2d 922 (Fla. 1980) regardless of Petitioner own view of whether Ree through Smith language in non-precedent.

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

This case, Brown, V, "A-11", is here as a result of the Petitioner not wanting the Respondent to benefit from retroactively application. Petitioner do not want the Respondent to benefit from Ree through Smith because Smith was decided fifteen months after Respondent case was final. Clearly, the time factor is not a dilema that derived from Smith. Smith accurately stipulates who will and will not benefit retroactively from Ree through Smith; this Court stated:

> "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."

598 So.2d 1068 (Fla. 1992) (italics in original)

Witt v. State, 387 So.2d 922 (Fla. 1980),

Witt controls and indicates that Respondent entitled to relief. If the Petitioner would have read the body of Witt, this certified question would not be. Witt did not benefit from his motion for post-conviction only because this Court stated:

> Applying these principles to the present case, we find that Witt may not raise most of the matters he has presented by way of collateral attack on his original conviction and sentence. Witt Frist, Second and Thrid "alleged" law change are unconstitutional, evolutionary developments in the law, arising from our case by case application of Florida Death Penalty "Statute". Being of that genre, they may not be raised in this proceeding. His fourth alleged law change emantes from an "intermediate" Federal Court and is likewise ineligible for consideration in a 3.850 proceeding. Witt fifth alleged law change, although arguably constitutional in nature and emanating from a proper court, is not in fact a "change of law" inasmuch as it is not a precedent. Id. at 930
>
> [14] Witt's sixth alleged law change the development reflected in Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) is the only claim which, on its face, could qualify "for" relief Rule 3.850. Normally, we would now determine whether Brewer should be retroactively applied tothe instant case under the three-part test of all Stovall and Linkletter. That exercise would be futile, however, for the factual predicate for Witt's sixth claim precludes any benefit for Witt even if Brewer were retroactively applied. The Supreme Court in Brewer did not hold that a defendant may not waive his right to counsel after requesting an attorney. Rather, it merely found that, under the circumstances, that defendant had not done so and the state had failed to meet its burden of proving "an intentional relinquishment or abandenment of a known right or privilege." Id. at 404, 97 S.Ct. at 1242 (quoting Johnson

> v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). In contrast, we specifically hold on Witt's direct appeal that Witt had waived his right to counsel and that "the heavy burden of demonstrating that the defendant knowingly and intelligently waived....his right to counsel...was met under the circumstances in this case" Witt v. State, 342 So.2d at 500. Witt's request for certiorari was denied by the United States Supreme Court. That confirmed, factual determination is now the "law of the case," in order to now raise a legal issue under Brewer v. Williams, for retoractive application.

387 So.2d at 930 (italics in original)

Witt motion for post-conviction relief does not coincide to Respondent Motion For Post-Conviction Relief.

Respondent's claim was constitutional in nature and constituted a development of fundamental significance that devired from this Court. Therefore, Witt did not benefit from his Motion For Post-Conviction Relief only, because his first, second and thrid alleged law change non-constitutional, evolutionary development in the law, arising from this court case application of Florida's death penalty statute. Witt fourth alleged law change emanates from an intermediate federal court and is likewise ineligible for consideration in a 3.850 proceeding. Witt fifth alleged law change, although arguably constitutional in nature and emanting from proper court, is not in fact a "change of law inasmuch as it is not a precedant. Witt sixth alleged law change the development refleced in Brewer v. Williams, supra, is the only claim which on its face, could qualify for relief under

Rule 3.850, however, Witt had waived his right to counsel and that "the burden of demonstration that the defendant knowingly and intelligently waived his right to counsel was met under the circumstances in this case, contray to Brewer v Williams, supra. Normally, this court would determine whether Brewer whould be retroactively applied to Witt case under the three-part test of Stovall and Linkletter. That exercise would be futile, however, for the factual predicate for Witt's sixth claim precludes any benefit for Witt even if Brewer were retroactively applied. The supreme Court in Brewer did not hold that a defendant may not waive his right to counsel after requesting an attorney. Rather, it merely found that, under the circumstances, that defendant had not done so and the state had failed to meet its burden of proving "an intentionally relinquishment or abandonment of known right or privilege." Id. at 404, 97 S.Ct. at 1242 (quoting Johnson v. Zerbst, supra). Moreover, this court stipulated who will benefit from "change of law" under Rule 3.850. This court stated:

> To summarize, we today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 "unless" the change: (a) emanates form this court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of "fundamental significance."

Witt v. State, supra (italics in original)

Clearly, the Respondent met the criteria of (a), (b) and (c), therefore the district court of appeal's correctly reversed

the Respondent's motion for post-conviction relief. Brown, V, "A-11"

The Petitioner's reliance on McCuiston v. State, 534 So.2d 1144 (Fla. 1988); Whitehead v. State, 498 So.2d 863 (Fla. 1986), is misplaced and misleading. The sentence in McCuiston and Whitehead was based entirely upon "habitual offenders statute, and this Court held that "a habitual offenders statutes is not an adequate reason to depart from the sentencing guidelines. Moreover, McCuiston filed under Fla.R.Cr.P., 3.850, "asserting the illegality of his sentence. the motion was denied. This Court stated the reason that McCuiston motion for post-conviction relief was denied by stating:

> "The Second District Court of Appeal's pointed out that the sentence McCuiston received was valid when it was imposed and became final but could not have been properly imposed after the Whitehead decision. The Court concluded that the Whitehead did not have retroactive application and affirmed the denial of McCuiston 3.850.

McCuiston v. State, supra, (italice in original)

Clearly, McCuiston and Whithead is misplaced and misleading accordance Brown, V, "A-11". Brown, V deals with retroactive application. Witt ensures finality of decisions on one hand and fairness and uniformity on the other hand.

C. Brown, V, constituted the law of the case that the First District Court of Appeal's followed in Ree through Smith.

The Respondent is aware that this Court is not bound by Brown, I, "A-1", a First District Court decision. On the other

hand, it would further this Court case, Smith, Id. at 1066, be decided that the DCA's decision in Brown, V, followed adhered to Ree through Smith as the law of the case.

Since this Court refused to review Brown, I "A-1", adjudicated the point of law, explicitly relying upon Ree, Id. at 369 prospectively only language, that comtemporaneous writing requirements did not apply to Brown, 1, "A-1". However, Brown, V, "A-11", is reversed and remand for re-sentencing in the guidelines by the First District Court of Appeal's, Brown, V, "A-11", adjudicated the point of law explicitly relying upon Ree through Smith, Id. at 1066 retoractively application, that the contemporaneous writing requirements do apply to Brown, V, "A-11". In the post-conviction relief motion, the DCA's Court followed the correct law of the case that Brown, V established. In the interest of constitutional in nature and a development of fundamental significance that derived from this court, Brown, V have been correctly reversed and remand for re-sentencing in the guidelines.

It is clear that without Smith, Respondent would have no argument whatsoever that the contemporaneous writing rule applied to him. However, do to Smith Respondent do have an argument that Ree through Smith, this Court changed Ree language from prospectively to retroactive. Therefore, the Respondent should benefit from Smith v. State, supra. Although, the Petitioner do not want the Respondent to benefit from Smith, Id. at 1066,

because Smith was decided fifteen months after the law in Brown, I, "A-1" was decided. The time factor is not a problem because this Court precisely stipulated that only the cases not yet final when mandate issued after rehearing in Ree will benefit from Ree through Smith, Id. at 1066 retroactive application. Clearly, the Respondent shall benefit from Ree through Smith because Ree mandate was issued August 3, 1994, the Respondent mandate was issued August 6, 1990, and did not become final until January 2, 1991, when this Court denied review. Brown, V, "A-11".

If ever the goal of fairness and unformity should apply through the law of a case, as well as through the application or Witt, Id. at , it should be definately applied in Brown, V, "A-11". As Francis v. Barton, 581 So.2d 583, 584 (Fla. 1991) summarized in a situation similar to Witt:

> "Issue raised and deposed of an direct appeal are procedurally barred in post-conviction proceddings. When they are "evolutionary refinements, rather than major constitutional changes, in the law and do not require retroactive application on post-conviction proceedings. The issue of the Jury override is, therefore, procedurally barred in this succesive petition. We consider the propriety of finding witness elimination in aggravation on direct appeal, and using a different argument to relitigate. Therefore, the Second and Third issues are procedurally barred. [citations omitted]

Francis, Id. at 584 (italics in original)

A unanimous Francis Court analyzed the case using the priniciples of Witt and concluded that the decision in Francis was an evalutionary refinement of the law and not one which

should have retroactively applied. Francis, Id. at 548 (italics in original), therefore, Francis, post-conviction was procedurally barred. However, for the Petitioner to compare Brown, V "A-", with Francis is misplaced and misleading. Brown, V deals with (A), a decision that emanated from this Court (B), constitutional in nature, and (C), constitutes a development of fundamental significance. Brown, V (A), should benefit from Witt and Smith. If the goal of individual miscarriage of justice or to permit roving judicial error corrections in absent of fundamental and constitutional law changes and evolutionary refinement barred Francis and Witt, the certainly the goal of fundamental significance and constitutional in nature that derived from this Court, and properly raised in accordance with post-convictional relief, should benefit from Smith and Witt. Accord Brown, V, "A-11".

D. This case presents an opportunity for this Court to ensure fairness and unifomity Smith.

Smith, as precedent, became the law of the State, because Smith facts includes its arrival in the appellate process through Witt, is applicable as precedent to Brown, V, "A-11" case. Moreover, Smith, dicta suggestes its intentions to include that contemporaneous writing rule to cases that has (a) emantes from this Court, (b), constitutional in nature and (c), constituties a development of fundamental significance, like in Brown, V,"A-11". In addition, the Petitioner would like for this Court to adopt

Statute 921.016 (1)(c), Fla.Stat. (1993), basing on providing a fifteen day window for the Judge's to reduce the departure reasons in writing, which would be fallacious. Therefore, without the Petitioner's ideal, Smith's language already indicates to the district court's who will and will not benefit from Ree "retroactive" rule; "all cases not yet final when mandate issued after rehearing in Ree. Smith Id. at 1066. Moreover, this case Brown, V, presents an opportunity for this Court to ensure fairness and uniformity in Smith.

Theoretically, there is only one basic way inwhich a defendant can apply a rule that has newly announced, that would like to benefit from Ree or created, as in Smith. This Court have stipulated that the new rule will only be retroactively to all cases not yet final when the mandate issued after rehearing in Ree. This limited the application to those cases pending at the time Ree case was decided. This Court can know that such limit application, would severely undermine finality, would be reserved for the most significant changes in the law, generally ones that are profound and constitutionally based. To use Witt term, this would likely be reserved for "constitutional in nature", "constitutes a development of fundamental significance that derived from this Court, and that would also allow invocation through collateral review. This is the "pipeline" rule; that is, the new rule is applicable to all cases in the appellante direct appeal "pipline" at the time of the decision. This is the rule Smith created pretaing to the contemporaneous writing

requirements.

Smith ensured fairness and uniformity not only law regarding the application of the contemporaneous writing rule on direct appeals, but language appearing "justice" to pipeline rule over all changes in the law. This Court stated:

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

598 So.2d at 1066.

This Court have an obligation to stand by. This Court stated:

> "...We are persuaded that the principals of fairness and equal treatment underlying Griffith, which are embodied in the due process and equal protection provisions of Article I, Section 9 and 16, of the Florida Constitution, compel us to adopt a similar even handed approach to the retrospective application of the decisions of this court with respect to all non-final cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendant must be applied in a fair and even handed manner. Art. I, s.s. 9, 16 Fla.Const. "[T]he integrity of judicial review requires that we apply (rule changes) to all similar cases pending on direct review." Griffth, 479 U.S. at 323, 107 S.Ct. at 713. Moreover, "selective application of new rules violates the priciple of treating similarly situated defendants the same, "because selective application causes 'actual inequity' when the Court" "chooses which of many similarly

> situated defendants should be the chance beneficiary 'of a new rule'". Id. (quoting Johnson, 475 U.S. at 556 n.16, 102 S.Ct. at 2590 n.16).

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

This reservation was prophetic because the district court's of appeal have applied Smith's rule expectedly, creating stablility in the law. An obvious example is applying the "pipeline" application language of Smith to Fenelon v. State, 594 So.2d 1181 (Fla. 1992).

Fenelon prohibited a jury instruction specifically focusing upon a suspect's flight. It explicitly stated that it is retroactively; "in past cases"; henceforth the jury instruction on flight should not have been given. Fenelon was decided February 13, 1992. Since Smith was decided about two months later and since it contained the language discussed above, the district court's of appeal's interpreted Smith to indicate this Court's intent that even a new rule announced previous to Smith "shall" be applied to all pending direct appeal cases. Thus, the following in among the cases inwhich the DCA's "correctly" reversed based upon Fenelon violation and Smith's pending case language:

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

To ensure future fairness, it would be helpful if this Court announce again, as part of its opinion in this case, that Smith's rule applying a change in the law to pending cases is only intended to apply to changes in the law occuring to cases "not yet final when mandate issued;" pipeline; only.

Smith contains the language that directly coincides with Brown , V, appartent intent to apply contemporaneous writing rule through collatera; "pipeline"; review. See Id. at 1066 n.4. Smith states that "we hold that Ree shall apply to all cases not yet final when mandate issued after re-hearing in Ree". Id. at 1066.

This language that Brown, V, relied upon in reversing the trial's court's denial of the motion for post-conviction relief. In footnote five is the language that the DCA considered to reverse Brown, V, just as the language the DCA considered to applying Fenelon, to pending appeals. Fenelon contained language indicating that through Smith it would benefit retroactive application. Smith containded language indicating, Ree contemporaneous writing rule would apply retroactively through collateral; "pipeline"; relief. In both situations, Smith displayed unpartiality messages to the DCA's.

Since Smith have been properly applied to Fenelon and Brown, V, the goal of stability in the law, "thanks to this court, Smith has been well served by limiting it facts; that is:

> ....any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new different factual situation, must be given retroactive

> application by the courts of this state in every case pending on direct review or not yet final. [citation omitted] To benefit from the change in law, the defendant "must" have timely objected at trial in an objection was required to preserve the issue for appellate review.

598 So.2d at 1066.

This limitation would be consistent with the doctrine enunicated in Witt v. State, supra, "that an alleged law change will not be considered in a capital case under 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. It would not allow the Court, on a selected basis, to consider the positive and negative repercussions of 'a newly announced rule on defendants, the police, Judges and prosecutors...depending only upon whether the new rule is applied retroactively. And it would be consistent with the "precedent" of Smith: Smith facts concerning the retroactve rule.

CONCLUSION

E. Regardless of Petitioner made of analysis, Respondent is entitled to post-conviction relief.

Petitioner has presented several misplaced and misleading arguments for this Court to consider, by expressing much confusion in the body of the language in Smith and Witt. Petitioner has not presented any accurate facts disputing that the Respondent is not entitled to benefit from retroactive

application through the "pipeline" of Ree and Smith.

The Respondent has properly corrected the confusion of Smith and Witt, the Petitioner cannot reasonably mantain he was ignorant the Respondent is entitled to relief.

Furthermore, the Respondent case was well settled in a matter consistant with Ree through Smith, and it should remain settled under Witt and the law of the case. As the First District Court of Appeals aptly put it, "Smith requires that we reverse and remand this case for re-sentencing within the guidelines. See, Owens v. State, supra, Blair v. State, supra.

Respectfully submitted,

Keith B. Brown, pro se
Baker Correctioanl Institution
Post Office Box 500
Sanderson, Florida 32087-0500

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing RESPONDENTY INITIAL BRIEF ON THE MERITS has been furnished to The Attorney General, The Captiol, POL"01, Tallahassee, Florida 32399-2500, by U.S. Mail this 2 day of August, 1994. By the undersigned.

Keith Bernard Brown

NOTARY

STATE OF FLORIDA)
)ss.
COUNTY OF BAKER)

SWORN TO OR AFFIRMED AND SUBSCRIBED before me this 2nd day of August, 1994, by Keith B. Brown, #117276, who is personally known to me or who has produced Department of Corrections I.D. as identification, and who did take an oath.

WILLIAM D. LEWIS
MY COMMISSION # CC 309721
EXPIRES: August 18, 1997
Bonded Thru Notary Public Underwriters

Notary Public, State of Florida

WILLIAM D. LEWIS

My Commission Expires:

IN THE SUPREME COURT OF FLORIDA

KEITH BERNARD BROWN,

Respondent,

v. Case No.:83-759

STATE OF FLORIDA,

Petitioner.
_____/

APPENDIX TO

RESPONDENT'S INITIAL BRIEF ON THE MERITS

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

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

3. Brown v. State, Trial Court Order Denying Respondent's Motion For Post-Conviction Relief, Circuit Court No.:89-1820CF (In the Circuit Court, In And For Duval County, Florida, filed December 22, 1992) (Brown, III)

4. Brown v. State, 617 So.2d 1105 (Fla. 1st. DCA 1994) (Brown, IV)

5. Brown v. State, 19 Fla.L.Weekly D645 (Fla. 1st. DCA March 24, 1994) (DCA Case No.:93-342, the opinion being reviewed) (Brown, V)

So.2d 539 (Fla. 1st DCA 1979); *Fischer v. Fischer*, 503 So.2d 399 (Fla. 3d DCA 1987); *Delehant v. Delehant*, 442 So.2d 1009 (Fla. 4th DCA 1983). Even where the party paying the ownership expenses is awarded exclusive possession of the property and the court finds that one half of the monthly payments is fair rental value for use of the other party's one-half interest in the property, this principle of law still applies on the theory that one spouse may not be required to build the other spouse's equity in the property. *Smith v. Smith*, 390 So.2d at 1224; *Singer v. Singer*, 342 So.2d 861, 862 (Fla. 1st DCA 1977). We express no view on the wisdom or fairness of this principle.

Because our reversal necessarily affects the lower court's overall plan for equitable distribution of the marital property, child support, and alimony, we vacate all these provisions of the final judgment and remand for reconsideration.

REVERSED AND REMANDED.

SMITH, J., concurs.

BOOTH, J., specially concurs with opinion.

BOOTH, Judge, specially concurring.

I concur in the result of this opinion.

BROWN I

Keith Bernard BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 89-2430.

District Court of Appeal of Florida, First District.

Aug. 6, 1990.

Rehearing Denied Sept. 6, 1990.

Defendant was convicted in the Circuit Court, Duval County, David Wiggins, J., of second-degree murder and armed robbery. Defendant appealed. The District Court of Appeal, Wolf, J., held that: (1) trial court did not err in sentencing procedure he used at time he sentenced defendant, and (2) imposition of life sentence without possibility of parole for second-degree murder did not violate due process and did not constitute cruel and unusual punishment.

Affirmed.

1. Courts ⇐100(1)

Supreme Court decision in *Ree v. State*, requiring that written reasons for departure from sentencing guidelines be produced at sentencing hearing, applied prospectively only; therefore, trial court did not commit error at time it sentenced defendant when it departed from Sentencing Guidelines without providing contemporaneous written statement of reasons.

2. Constitutional Law ⇐270(1)
Homicide ⇐354(2)

Defendant's life sentence without possibility of parole for second-degree murder did not violate due process, although since State waived death penalty prior to trial on charge of first-degree murder, maximum sentence which may have been imposed for second-degree murder for which defendant was convicted exceeded maximum sentence which could have been imposed for first-degree murder. West's F.S.A. § 921.001(10); U.S.C.A. Const.Amends. 5, 14.

3. Criminal Law ⇐1213.8(3)

Imposition of life sentence without possibility of parole for violent crime of second-degree murder did not constitute cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

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

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

WOLF, Judge.

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.

[1] 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*, 565 So.2d 1329 (Fla.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.

[2] 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 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

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.

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.

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).

[3] 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, JJ., concur.

In the Interest of M.R., S.R., and H.R., All Children.

Nos. 90–458, 90–470.

District Court of Appeal of Florida, First District.

Aug. 6, 1990.

Rehearing Denied August 30, 1990.

Proceeding was brought to terminate parental rights. The Circuit Court, Leon County, Terry P. Lewis, Acting J., terminated parental rights and disapproved maternal grandmother's proposed plan of conduct. Parents and grandmother appealed. The District Court of Appeal, Allen, J., held that unexplained failure of parents' appointed counsel to appear at adjudicatory hearing deprived parents of right to meaningful assistance of counsel.

Affirmed in part, vacated in part, and remanded.

1. Chapter 39, Part VI, Florida Statutes.

1. Constitutional Law ⇐306(2)
Infants ⇐205

Right of impoverished parents to assistance of appointed counsel in proceedings for termination of parental rights is basic right guaranteed by due process provisions of State and Federal Constitutions. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9.

2. Constitutional Law ⇐274(5)
Infants ⇐205

Impoverished parents' due process right to assistance of appointed counsel in proceedings for termination of parental rights entitles parents to services sufficient to provide meaningful assistance. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9.

3. Constitutional Law ⇐274(5)
Infants ⇐205

Unexplained failure of parents' appointed counsel to appear at adjudicatory hearing on termination of parental rights failed to satisfy meaningful assistance of counsel required by due process clauses of State and Federal Constitutions. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. Const. Art. 1, § 9.

Gregory J. Cummings, Joseph S. Conlin, John D. Carlson of Gatlin, Woods, Carlson & Dowdery, Tallahassee, for appellants.

Donna B. Bass, Asst. Dist. Legal Counsel, Dept. of Health and Rehabilitative Services, Tallahassee, for appellee Dept. of Health and Rehabilitative Services.

Susan L. Turner, Holland & Knight, Tallahassee, for Guardian Ad Litem.

ALLEN, Judge.

This is an appeal from a final order terminating the parental rights of the parents of three young children.[1] The children's maternal grandmother, who was granted standing in the proceedings below, also appeals from the trial court's disapproval of

576 So.2d

BROWN II

SUPREME COURT—Continued

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Brantley v. State	77114	12/31/90	Cause dism.	3d DCA 570 So.2d 364
Breitz v. Lykes-Pasco Packing Co.	76282	12/24/90	Rev. den.	2d DCA 561 So.2d 1204
Brooks v. State	76606	1/2/91	Rev. den.	1st DCA 564 So.2d 641
✓ Brown v. State	76616	1/2/91	Rev. den.	1st DCA 565 So.2d 369
Brunetti v. Ocala Breeders' Sales Co.	76809	12/11/90	Rev. dism.	3d DCA 567 So.2d 490
Burke Co. v. U.S. Telephone Co.	76910	1/31/91	Rev. den.	3d DCA 571 So.2d 33
Carol Management Corp. v. Robbins	76233	12/10/90	Rev. den.	3d DCA 559 So.2d 1189
Carter v. State	76700	11/27/90	Mand. den.	
Chanrai Investments, Inc. v. Clement	76656	1/15/91	Rev. den.	5th DCA 566 So.2d 838
Chapman v. State	76756	1/24/91	Rev. dism.	2d DCA
Chavez v. City of Tampa	76139	11/1/90	Rev. den.	2d DCA 560 So.2d 1214
Chester v. State	77177	1/22/91	Rev. dism.	1st DCA
City of Fort Lauderdale v. Mattlin	76924	1/31/91	Rev. den.	4th DCA 566 So.2d 1330
Cocoa Masonry of Pinellas County v. Samhat	76897	12/11/90	Rev. dism.	2d DCA 567 So.2d 450
Curtin v. Bass	76855	1/29/91	App. dism.	3d DCA 568 So.2d 441
Dania Jai Alai Palace, Inc. v. Calloway	76276	12/10/90	Rev. den.	4th DCA 560 So.2d 808
Department of Agriculture and Consumer Services v. Collins	74946	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Curry	75334	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Gridley	74964	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Hill	74796	2/12/91	Proh. gr.	
Department of Agriculture and Consumer Services v. Langston (Thomas J.)	75333	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Langston (Thomas M.)	74958	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Lenfestey	75309	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Miller	74949	1/29/91	Proh. gr.	
Department of Agriculture and Consumer Services v. Pack	74947	11/28/90	Proh. gr.	
Department of Agriculture and Consumer Services v. Parker	74948	11/28/90	Proh. gr.	

* Date of decision or date rehearing denied (if requested).

** Court or agency rendering decision appealed and citation (if reported).

BROWN III

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 89-1820-CF

DIVISION: CR-B

THIS INSTRUMENT IS NOT A COMPUTER NHD

FILED
DEC 22 1992
Henry W. Cook
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

KEITH BERNARD BROWN
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

This cause came to be heard upon Defendant's Motion for Post-Conviction Relief filed on November 17, 1992, pursuant to Florida Rule of Criminal Procedure 3.850. On August 18, 1989, after a jury convicted him of second-degree murder with a firearm and armed robbery, Defendant was sentenced to consecutive terms of life and twenty-seven (27) years in prison with concurrent three-year minimum mandatory sentences for firearm possession. Defendant's judgments and sentences were affirmed on appeal. Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), rev. denied, 576 So.2d 285 (Fla. 1991). Defendant now raises three grounds for post-conviction relief.

First, Defendant claims that the court erred in not giving written reasons for departing from the sentencing guidelines until after it had imposed sentence on Defendant. This ground had been raised and rejected on direct appeal. The First District held that the Florida Supreme Court's decision in Ree v. State, 565 So.2d 1329 (Fla. 1990), requiring written reasons for departure to be

given at the sentencing hearing, was not to be retroactively applied in Defendant's case. Brown, 565 So.2d at 370.

However, Defendant claims that he is entitled to relief based on Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992), in which the Florida Supreme Court receded in part from Ree to the extent that it made the Ree holding retroactive. Defendant's argument is unavailing as it is inconsistent with the supreme court's overall holding in Smith that changes in the law should be applied retrospectively only in cases pending on direct review or not yet final. Id. at 1066. In fact, there in language in the decision to the effect that this court should not retroactively apply Ree in the case at bar since judgment and sentence have become final and Defendant collaterally raises the instant claim in a motion for post-conviction relief.[1] Id. at 1066, n. 5.

Second, Defendant claims that he was convicted and sentenced for armed robbery in violation of the double jeopardy clauses of the Florida and United States Constitutions. Defendant alleges that he was acquitted of grand theft of a jeep in juvenile court on September 29, 1988. Defendant claims that his subsequent conviction for armed robbery in the instant case involved the same

---

[1] 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.

jeep. These claims are refuted by the record. Defendant was arrested and charged as a juvenile for grand theft auto in Case No. 88-5293-CJA. However, the state entered a nol pros in the case on September 21, 1988. Defendant was then transferred to circuit court to be tried as an adult after Defendant was indicted by a grand jury for first-degree murder and armed robbery arising from the same criminal incident. Because the nol pros of Defendant's previous juvenile charges was not an adjudication on the merits, Defendant cannot successfully claim a double jeopardy violation. See Bernard v. State, 261 So.2d 133 (Fla. 1972); State v. Carter, 452 So.2d 1137 (Fla. 5th DCA 1984).

Finally, Defendant claims that he was denied the effective assistance of counsel based on his attorney's failure to raise the double jeopardy claim. For the reasons given above, this claim is without merit. In addition, Defendant asserts that his attorney failed to subpoena three alibi witnesses whose testimony allegedly would have established Defendant's innocence: Robert Herring, Bernard Prince, and Joseph Melton. However, the record shows that Robert Herring and Joseph Melton were both deposed and subpoenaed. Although there is no indication that Bernard Prince ever became involved in these proceedings, the court views this alleged alibi witness with the utmost skepticism as it is all too aware of Defendant's previous attempt to induce a friend to give perjured testimony at trial in order to cover up Defendant's involvement in the instant offenses. The details of this are documented in the court's "Statement of Reasons for Upward Departure from Sentencing

Guidelines." Moreover, Defendant has failed to show sufficient prejudice as Defendant was identified as the perpetrator of the crime by an eyewitness. See Gardner v. State, 405 So.2d 470 (Fla. 3d DCA 1981).

In view of the above, it is

ORDERED AND ADJUDGED that Defendant's Motion for Post-Conviction Relief is DENIED.

Defendant shall have thirty (30) days from the date of this order to appeal the court's decision.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 22 day of December, 1992.

DAVID C. WIGGINS
Circuit Judge

Copies to:

Office of the State Attorney

Keith Bernard Brown #117276 F-100
Baker Correctional Institution
P.O. Box 500
Olustee, Florida 32072

Keith Bernard BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 93–342.

District Court of Appeal of Florida, First District.

May 7, 1993.

Defendant's motion for postconviction relief was summarily denied by the Circuit Court, Duval County, David C. Wiggins, J. Defendant appealed. The District Court of Appeal held that two-year time limit for moving for postconviction relief commenced running when state Supreme Court disposed of petition for review of state court's decision on direct appeal.

Motion to dismiss appeal denied.

Criminal Law ⇐998(14.1)

Criminal conviction and sentence became final, so as to commence two-year time limit for filing motion for postconviction relief, when state Supreme Court disposed of petition for review of district court's decision on direct appeal. West's F.S.A. RCrP Rule 3.850(b).

Charlie J. Gillette, Jr., of Brannon & Gillette, Jacksonville, for appellant.

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

ORDER ON APPELLEE'S MOTIONS TO DISMISS AND FOR JUDICIAL NOTICE

PER CURIAM.

Keith Bernard Brown appeals the summary denial of his motion for post-conviction relief. The State of Florida, appellee in this cause, moves to dismiss the appeal and for this court to take judicial notice of the issuance of mandate in Brown's direct appeal. For the reasons that follow, we deny the motion to dismiss and grant the motion for judicial notice.

Brown was tried and convicted of second degree murder and armed robbery. His judgment and sentences were affirmed on direct appeal in *Brown v. State*, 565 So.2d 369 (Fla. 1st DCA 1990). Appellant petitioned the Supreme Court of Florida for review of our decision, but the petition was denied on January 2, 1991. *Brown v. State*, 576 So.2d 285 (Fla.1991). Meanwhile, as apparently no stay of mandate was requested or ordered, *see State v. McKinnon*, 540 So.2d 111 (Fla.1989), this court's mandate issued on September 24, 1990.

Brown filed his motion for post-conviction relief on November 17, 1992, and the trial court, finding no merit to movant's claims, denied relief and attached certain portions of the record to its order. The state now moves for dismissal of this appeal, arguing that Brown's judgment and sentences became final on September 24, 1990, when mandate issued in our case number 89–2430, the direct appeal described above. Thus, according to appellee, the motion for post-conviction relief was untimely under Florida Rule of Criminal Procedure 3.850(b), which requires that a motion be filed no more than two years after the judgment and sentence become final, with certain exceptions that are apparently not applicable here. In support of its argument, appellee relies primarily on *Brown v. State*, 577 So.2d 644 (Fla. 1st DCA), *review denied*, 591 So.2d 180 (Fla. 1991) (hereafter *Brown*) and *Austin v. State*, 527 So.2d 867 (Fla. 1st DCA), *review denied*, 536 So.2d 243 (Fla.1988). Appellant opposes the motion, pointing to *Ward v. Dugger*, 508 So.2d 778 (Fla. 1st DCA 1987) which held that, for these purposes, the judgment and sentence are not final until disposition by the supreme court of the petition for discretionary review. As appellant's motion for post-conviction relief was filed within two years of denial of his petition for review by the Florida Supreme Court, the motion would be timely under the rationale of *Ward*.

Appellee also moves for this court to take judicial notice of the date of issuance of mandate in case number 89-2430. Appellant has expressed no objection to this request and such judicial notice appears to be appropriate. *Gulf Coast Home Health Services, Inc. v. Department of Rehabilitative Services*, 503 So.2d 415 (Fla. 1st DCA 1987). Accordingly, appellee's request for judicial notice is granted.

We do not find, however, that the state's motion to dismiss is so well-taken. As a threshold matter, even if we were to find appellee's position on the interpretation of Rule 3.850(b) to be correct, it has not shown grounds for dismissal of this appeal. An appealable order was entered by the trial court and appellant timely filed a notice of appeal. Nothing has occurred in the appellate proceedings to warrant dismissal. Instead, the state is actually arguing that the trial court reached the correct result for the wrong reason, that is, the motion for post-conviction relief should have been denied as untimely. The proper method to present such an argument is to argue for affirmance in the answer brief, not by moving to dismiss. *See Brown*, 577 So.2d at 645; *cf. Diaz v. Florida Department of Corrections*, 511 So.2d 669 (Fla. 1st DCA 1987) (improper to use motion to dismiss to argue that appeal lacks merit); Fla. R.App.P. 9.315(c) (party may not move appellate court for summary affirmance).

In the interest of judicial economy we nevertheless will resolve the question presented by the appellee's motion to dismiss. While we agree with appellee that there is apparently conflicting language in this court's opinions in *Ward* and *Brown*, we do not agree that the latter overruled the former. In *Brown*, the appellant's direct appeal resulted in affirmance and mandate issued May 22, 1986. Brown then attempted to appeal this court's decision to the Florida Supreme Court, but the appeal was dismissed on September 8, 1986. His motion for post-conviction relief was filed August 23, 1989, and this court affirmed denial of the motion, finding it to have been untimely filed. In so doing, it found "[t]he final step in the appellate process here occurred on May 22, 1986, when this court issued its mandate." *Brown*, 577 So.2d at 645. By contrast, the *Ward* opinion squarely held that the judgment and sentence become final and the two year time limit of Rule 3.850(b) commenced when the Florida Supreme Court disposes of a petition for review of the district court's decision on direct appeal. 508 So.2d at 779.

We believe *Ward* was correctly decided and, to the extent *Brown v. State*, 577 So.2d 644 (Fla. 1st DCA 1991) may appear to conflict with *Ward*, we recede from *Brown*.[1] The discussion in *Brown* was dicta, as appellant's motion for post-conviction relief was untimely whether measured from issuance of mandate or denial of his appeal to the supreme court of our decision. Further, the *Ward* holding appears to be correct. *See Gallo v. State*, 571 So.2d 78 (Fla. 4th DCA 1990); *cf. Burr v. State*, 518 So.2d 903 (Fla.1987) *vacated on other grounds*, 487 U.S. 1201, 108 S.Ct. 2840, 101 L.Ed.2d 878 (1988), *opinion on remand*, 550 So.2d 444 (Fla.1989), *vacated*, 496 U.S. 914, 110 S.Ct. 2608, 110 L.Ed.2d 629 (1990), *affirmed in part, remanded in part*, 576 So.2d 278 (Fla.1991) (time for filing motion for post-conviction relief in death penalty case did not commence until United States Supreme Court disposed of petition for writ of certiorari for review of state supreme court's disposition on appeal of judgment and sentence).

For the foregoing reasons, we grant appellee's motion for judicial notice but deny appellee's motion to dismiss the appeal.

IT IS SO ORDERED.

SMITH, ZEHMER and ALLEN, JJ., concur.

1. Appellee's reliance on *Austin v. State*, 527 So.2d 867 (Fla. 1st DCA), *review denied*, 536 So.2d 243 (Fla.1988) is misplaced because after affirmance of his judgment and sentence by this court, Austin petitioned the supreme court for a writ of habeas corpus, which is not a vehicle to review this court's decision. In fact, the *Austin* opinion cites *Ward* with approval.

> The law defines disability as the inability to do any substantial gainful activity by reason of any medical determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy . . . .

The hearing officer concluded that the preponderance of the evidence did not prove appellant was disabled.

Appellant contends that although the hearing officer accurately set forth the review process, it is not clear that the hearing officer applied the five step analysis properly. Appellant asserts the Office of Disability Determination and the hearing officer erred in relying solely on one test result which at best was inconclusive as to whether appellant met the Appendix 1 listing, and disregarding other evidence, including the examining physician's opinion, and the hearing officer erred in not considering the combined effects of all the impairments.

In this case, as in *Fricker v. HRS*, 606 So. 2d 446 (Fla. 1st DCA 1992) and *Walker v. HRS*, 533 So. 2d 876 (Fla. 1st DCA 1988), the hearing officer did not apply the five step sequential evaluation clearly and in sufficient detail to enable us to review the order. The hearing officer found appellant met step one in that he is not employed; therefore he is not engaged in substantial gainful activity. The hearing officer also found appellant met step two in that he is significantly limited in work activities because of his chronic asthma and chronic obstructive pulmonary disease, steroid dependency, and hypertension. Step two involves a threshold inquiry; the most significant part of the sequential evaluation begins with step three. *Id.* at 837.

At step three, a determination is made whether claimant's impairment meets or is medically equivalent to an impairment listed in Appendix 1.[1] In the instant case, the hearing officer merely concluded, "your combination of impairments do not meet this criteria." We cannot determine from the order whether this conclusion was based solely on claimant's FEV rating, which exceeds the rating in Appendix 1. The hearing officer did not explain why claimant's combination of impairments is not equivalent to an impairment under Appendix 1; it is not clear what combination of impairments he considered.

If there is a negative answer to step three, the evaluation is not concluded; the hearing officer must go on to step four or step five, "under which an evaluation would be made regarding the claimant's ability to perform his or her former occupation or any other work within the national economy." *Id.* at 837.

> Step four involves a determination of whether the claimant can engage in his or her past relevant work. . . . If so, the claimant will not be found disabled. If, however, the claimant is found unable to engage in his or her past relevant work, the decision-maker moves to step five involving the determination of the claimant's residual functional capacity and his or her age, education and past work experience, in order to evaluate whether there are other jobs existing in the national economy that the claimant can perform.

Fricker v. HRS, 606 So. 2d 446, 447 (Fla. 1st DCA 1992). *Fricker* and *Walker v. HRS*, 554 So. 2d 1202 (Fla. 1st DCA 1989) ("*Walker II*")indicate that at this point, the burden shifts to HRS "to show appellant was either capable of performing his former occupation or alternate work available in the national economy." *Id.* at 1203.

Although it is unclear, it appears the hearing officer may have determined under step four that appellant had shown he was unable to return to past relevant work. He said: "If your impairment(s) prevent you from doing past relevant work and the agency cannot make a decision based on your current work activity or on the medical facts alone, then a review of your residual functional capacity (RFC) must be completed and evaluated to determine whether you can do other work."

The hearing officer's review of the RFC consisted of restating the results of the FEV and MVV tests, and reiterating the reviewing physician's report that appellant's pulmonary function improves with treatment, and his hypertension can be managed with medication. He said nothing about how these factors affect appellant's ability to perform any other work within the national economy, nor did he address other problems appellant has, such as arthritis and poor vision. He said nothing about appellant's age, education and past work experience.

"In the absence of the hearing officer's detailed evaluation of the criteria and questions under the cited regulations, we are unable to provide adequate appellate review of that decision." *Carosharo v. HRS*, 598 So. 2d 302 (Fla. 1st DCA 1992).

REVERSED and REMANDED for further proceedings consistent with this opinion. (ZEHMER, C.J., JOANOS and WEBSTER, JJ., CONCUR.)

---

[1]There is apparently no question that appellant meets the durational requirement.

* * *

Criminal law—Sentencing—Guidelines—Departure—Appeals—In view of supreme court decision holding that its earlier decision requiring contemporaneous written reasons for departure sentence should be applied to all cases not yet final when mandate issued after rehearing in earlier case, reversal and remand is required for imposition of guidelines sentence in a case that was pending on direct appeal when earlier decision was rendered, that was finally disposed of in accordance with earlier decision, and in which issue was raised again by motion for post conviction relief after issuance of supreme court's later decision—Question certified

KEITH BERNARD BROWN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 93-342. Opinion filed March 24, 1994. An appeal from the Circuit Court for Duval County. David C. Wiggins, Judge. Charlie J. Gillette, Jr. of Brannon & Gillette, P.A., Jacksonville, for Appellant. Robert A. Butterworth, Attorney General and Charlie McCoy, Assistant Attorney General, 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 post-conviction 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 overall holding in *Smith* that changes in the law should be applied retrospectively only in cases pending on direct review or not yet final. *Id.* at 1066. In fact, there is language in the decision to the effect that this court should not 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:

> 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., JOANOS and WEBSTER, JJ., CONCUR.)

---

[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.

* * *

Criminal law—Prisoners—Mandamus—Control release—Last date of conditional release supervision for prisoner released under control release statute may lawfully be calculated with reference only to sentences imposed for offenses committed on or after October 1, 1988—Prisoner did not waive objection to method of determination of his last date of supervision by not challenging terms of conditional release prior to revocation—Writ of mandamus to be issued requiring Parole Commission to recalculate late date of conditional release supervision

FREDERICK WESTLUND, Appellant, v. FLORIDA PAROLE COMMISSION, and GENE HODGES, as Chairman of the Florida Parole Commission, and DEPARTMENT OF CORRECTIONS, and HARRY K. SINGLETARY, as Secretary of the Department of Corrections, Appellees. 1st District. Case No. 93-2139. Opinion filed March 24, 1994. An Appeal from the Circuit Court for Leon County. L. Ralph Smith, Jr., Judge. Alan H. Schrieber, Public Defender; Stacey J. Pastel and Diane M. Cuddihy, Assistant Public Defenders, Ft. Lauderdale, for Appellant. William L. Camper, General Counsel; John N. Hogenmuller, Assistant General Counsel, Florida Parole Commission; Louis A. Vargas, General Counsel; Susan A. Maher, Deputy General Counsel, Department of Corrections; Tallahassee, for Appellees.

(PER CURIAM.) Frederick Westlund appeals the denial of his petition for writ of mandamus. Because we believe that the Florida Parole Commission and the Department of Corrections improperly applied the Conditional Release Program Act, section 947.1405, Florida Statutes (1991), we reverse with directions that the writ issue to require appellees to reconsider their authority to detain appellant in light of this opinion.

The Conditional Release Program Act [Act] applies to all covered crimes committed on or after October 1, 1988. It mandates that certain offenders,[1] if released prior to serving their full sentences, be supervised for the remainder of the terms of their sentences. Appellee Florida Parole Commission is responsible for administering the conditional release program and supervising conditional releasees. The Department of Corrections determines when an affected inmate will be conditionally released.

Westlund was convicted of three offenses[2] he committed on February 3, 1988, and of two offenses[3] he committed on December 9, 1988. On April 1, 1991, appellant was resentenced for all five crimes. For the three earlier drug-related offenses, he received two seven-and-one-half-year sentences (each with a five-year minimum mandatory) and one five-year sentence, all with credit for time served. For the two later offenses, he received two four-and-one-half year sentences for attempted burglary and resisting arrest with violence, each with credit for time served. All five sentences were to run concurrently.