

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED

SID. J. WHITE

JAN 21 1999

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

ELI BUTLER JR.,

Petitioner,

v.

CASE NO. 96-4448

SUPREME COURT NO. 94,614

STATE OF FLORIDA,

Respondent.

AMENDED PETITIONER'S BRIEF ON JURISDICTION

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

LEON COUNTY COURTHOUSE  
SUITE 401  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(850) 488-2458

ATTORNEY FOR PETITIONER  
FLA. BAR NO. 242705

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I     PRELIMINARY STATEMENT	1
II    STATEMENT OF THE CASE AND FACTS	2
III   SUMMARY OF ARGUMENT	3
IV    ARGUMENT	4
 <u>ISSUE PRESENTED</u>	
THIS COURT SHOULD EXERCISE ITS DISCRETIONARY REVIEW AUTHORITY BECAUSE THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS COURT AND OF ANOTHER DISTRICT COURT OF APPEAL.	4
 V     CONCLUSION	 7
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Belson v. State</u> , 719 So. 2d 1230 (Fla. 3d DCA 1998)	6
<u>Butler v. State</u> , 23 FLW D2605 (Fla. 1st DCA November 30, 1998)	1
<u>Davis v. State</u> , 661 So. 2d 1193 (Fla. 1995)	4,5
<u>Denson v. State</u> , 711 So. 2d 1225 (Fla. 2d DCA 1998)	6
<u>Jordan v. State</u> , 23 FLW D2130 (Fla. 3d DCA, September 16, 1998)	4,5
<u>Maddox v. State</u> , 708 So. 2d 617 (Fla. 50 DCA 1998), review pending case no. 92,805	6
<u>Mike v. State</u> , Supreme Court case no. 93,163	6
<u>Pierre v. State</u> , 708 So. 2d 1037 (Fla. 3d DCA 1998), April 29, 1998	3
<u>Pope v. State</u> , 561 So.2d 554 (Fla. 1990)	3,4,5,6
<u>Speights v. State</u> , Supreme Court case no. 93,207	6
<u>State v. Colbert</u> , 660 So. 2d 701 (Fla. 1995)	5
<u>State v. McKnight</u> , Supreme Court case no. 94,256	6
<u>Weiss v. State</u> , 23 FLW D2380 (Fla. 3d DCA, October 21, 1998)	4,5,6

CONSTITUTIONS AND STATUTES

Florida Statutes (Supp. 1996)

Section 924.051(3)	3,4
--------------------	-----

OTHER SOURCES

Florida Rules of Criminal Procedure

Rule 3.800	2
------------	---

IN THE SUPREME COURT OF FLORIDA

ELI BUTLER JR.,  
Petitioner,  
v. CASE NO. 96-4448  
SUPREME COURT NO. 94,614  
STATE OF FLORIDA,  
Respondent.

---

---

AMENDED PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

This case comes to the Court on review from a decision of the First District Court of Appeal, Butler v. State, 23 FLW D2605d (Fla. 1st DCA November 30, 1998), which is attached in this brief in Appendix A.

Petitioner was the appellant in the District Court and the Defendant in the Circuit Court; he will be referred to as Petitioner or by name. The state prosecuted the case below and will be referred to as Respondent or State.

This brief is prepared in 12 point Courier New type.

## II STATEMENT OF THE CASE AND FACTS

The facts as stated by the District Court are essentially that the trial court failed to file a timely written order explaining its upward departure sentence on Petitioner. The trial court did explain on the record at the sentencing hearing why it was imposing an upward departure sentence, and Petitioner's counsel objected to the reasons announced by the trial court during the sentencing hearing.

Petitioner did not object in the trial court to the court's failure to file written reasons justifying the departure sentence. The District Court found that since the issue was not presented to the trial court, it was not preserved. In addition, the court found that Petitioner had failed to demonstrate prejudice by the failure to file written reasons. To the extent that error occurred, the Court found it was not fundamental and therefore affirmed the departure sentence.

This Petition for Discretionary Review, based on conflict in the law concerning the proper remedy when a defendant objects to an upward departure below but fails to file a motion to correct sentence under Rule 3.800 when the trial court does not file a written departure order - follows.

### III SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with this court's decision in Pope v. State, 561 So.2d 554 (Fla. 1990). It also conflicts with the Third District's opinion in Pierre v. State, 708 So. 2d 1037 (Fla. 3d DCA 1998), April 29, 1998. In both cases, the trial judges did not file written reasons in support of an upward departure sentence within the time period set by statute. The sentences were therefore vacated for imposition of a guidelines sentence.

In this case, the trial court, fully aware that it was departing from the sentencing guidelines in imposing a maximum 15-year sentence against appellant, failed to enter a written order of departure. The posture of the case is identical to that of Pope v. State, supra, and Pope has not been overruled by this Court. The subsequent enactment of the Criminal Appeals Reform Act, section 924.051(3), Fla. Statutes (supp. 1996), has created a line of cases which conflict with Pope, supra, and this Court needs to resolve the conflict.

#### IV ARGUMENT

##### ISSUE PRESENTED

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY REVIEW AUTHORITY BECAUSE THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THIS COURT AND OF ANOTHER DISTRICT COURT OF APPEAL.

As noted, the First Districts Court's opinion in this case conflict with this Court's opinion in Pope v. State, 561 So. 2d 554 (Fla. 1990). The opinion did not mention Pope, supra. Instead, without acknowledging that it was in conflict with Pope, it relied on the Criminal Appeals Reform Act, Section 924.051(3), Fla. Statutes Supp. 1996) and some recent cases decided under it, Weiss v. State, 23 FLW D2380 (Fla. 3d DCA, October 21, 1998); and Jordan v. State, 23 FLW D2130 (Fla. 3d DCA, September 16, 1998). The First District also relied upon this Court's 1995 decision in Davis v. State, 661 So. 2d 1193 (Fla. 1995), which held that a defendant could not raise the issue of a trial court's failure to file contemporaneous written reasons for departure for the first time in a collateral proceeding.

To clarify the procedural posture here, a few facts need to be emphasized. First, the trial court announced at the sentencing hearing that it would upwardly depart from the sentencing guidelines, and Petitioner's attorney objected to the departure. Second, the trial court never filed a written order of departure. Third, Petitioner attempted to raise the error on

direct appeal, not in a collateral motion. Davis, supra, is clearly not applicable because it held that defendants who had not raised a departure without written reasons issue on direct appeal were precluded from raising the argument in a collateral motion. This court did find that the failure to file written findings does not constitute fundamental error, but Davis, supra, did not overrule Pope, supra.

The Third District's recent decision in Jordan v. State, 23 FLW D2130 (Fla. 3d DCA, September 16, 1998) is still on rehearing at this writing. The Court held that it could only entertain an unpreserved sentencing error which would constitute fundamental error. The Defendant argued that since the written departure order was filed more than seven days after sentencing, the departure order was invalid and must be reversed. See State v. Colbert, 660 So. 2d 701 (Fla. 1995). However, the Defendant had not presented this argument to the trial court, and the Third District found that the claimed sentencing error had not been properly preserved for review under the Criminal Appeals Reform Act and this court's Amendments to the Florida Rules of Criminal Procedure, 685 So. 2d 1253 (Fla. 1996), effective January 1, 1997). In apparent conflict with this Court's Davis v. State, opinion, the Third District found that the proper procedure was for the Defendant to file a motion to correct sentence rather than raising it on direct appeal.

Subsequently, in Weiss v. State, 23 FLW D2380 (Fla. 3d DCA,



October 21, 1998) the Third District repeated its holding that a departure sentence without timely written justification could not be raised on direct appeal in the absence of a motion to correct below.. Again, this Court's contrary decision in Pope v. State, supra, was not mentioned.

This Court has recently accepted for review a number of cases presenting the issue of what types of unpreserved sentencing errors are fundamental and can be raised on direct appeal in the absence of an objection or motion to correct sentence in the lower court. See e.g. State v. McKnight, Supreme Court case no. 94,256 (improper but unobjected to habitual offender sentencing); Speights v. State, Supreme Court case no. 93,207 (improper habitual offender predicate); Mike v. State, Supreme Court case no. 93,163 (unobjected to public defender lien). And of course, there is abundant conflict in recent case law concerning what types of sentencing errors can be presented on direct appeal in the absence of an objection or motion to correct below. See, Belson v. State, 719 So. 2d 1230 (Fla. 3d DCA 1998); Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), review pending case no. 92,805; Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998). The issue in this case is a small but important subspecies of those cases, and this Court should accept it for review to resolve the issue of whether upward sentencing departures can be upheld when trial courts have failed to file written departure orders as required by statute and rule.

V CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court to exercise its discretionary jurisdiction and accept this case to resolve the conflict between the First District, and the Third District, and this Court.

Respectfully submitted,

*Nancy Daniels*

NANCY A. DANIELS  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT  
Leon County Courthouse  
301 South Monroe Street  
Suite 401  
Tallahassee, Florida 32301  
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to J. Ray Poole, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Criminal Appeals Division, Tallahassee, Florida, and a copy has been mailed to appellant, ELI BUTLER, on this 21 day of January, 1999.

*Nancy Daniels*  
NANCY A. DANIELS

IN THE SUPREME COURT OF FLORIDA

ELI BUTLER, JR.,

Petitioner,

v.

CASE NO. 96-4448

SUPREME COURT NO. 94,614

STATE OF FLORIDA,

Respondent.

INDEX TO APPENDIX

Appendix - DCA Opinion dated November 30, 1998

# Appendix

AD

IN THE DISTRICT COURT OF APPEAL,  
FIRST DISTRICT, STATE OF FLORIDA

ELI BUTLER, JR.,  
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED.

v.

CASE NO. 96-4448

STATE OF FLORIDA,  
Appellee.

Opinion filed November 30, 1998.

An appeal from the Circuit Court for Madison County.  
Paul S. Bryan, Judge.

Nancy A. Daniels, Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; J. Ray Poole, Assistant Attorney  
General, Tallahassee, for Appellee.

WEBSTER, J.

In this direct criminal appeal, the sole issue presented is whether appellant  
is entitled to be resentenced pursuant to the sentencing guidelines because the trial  
court failed timely to file written reasons justifying its upward departure sentence.

It is undisputed that the trial court did explain on the record at the sentencing

NOV 30 1998  
PUBLIC DEFENDER  
AND JUDICIAL CLERK

hearing why it was imposing an upward departure sentence. Although appellant's counsel objected to the reasons announced by the trial court during the sentencing hearing, appellant does not challenge the sufficiency of those reasons on appeal. Appellant did not object in the trial court to the failure timely to file written reasons justifying the departure sentence imposed. Because the issue raised was never presented to the trial court, it was not preserved. In addition, appellant has failed to demonstrate how he has been prejudiced by the failure timely to file written reasons. To the extent that error occurred, it is not "fundamental." Davis v. State, 661 So. 2d 1193 (Fla. 1995). Accordingly, we affirm. § 924.051(3), Fla. Stat. (Supp. 1996). See Weiss v. State, 23 Fla. L. Weekly D2380 (Fla. 3d DCA Oct. 21, 1998); Jordan v. State, 23 Fla. L. Weekly D2130 (Fla. 3d DCA Sept. 16, 1998).

AFFIRMED.

WOLF and LAWRENCE, JJ., CONCUR.