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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ELI BUTLER, JR,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 94,614

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner Butler, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form. It also can be found at 23 Fla. L. Weekly 2605. The state accepts petitioner's statement for the purpose of this review.

SUMMARY OF ARGUMENT

Petitioner's reliance on the decision in Pope v. State, 561 So.2d 554 (Fla. 1990), interpreting sentencing guidelines statutory law as it existed in 1990, does not show direct and express conflict with controlling, contemporary decisions interpreting statutory and procedural law as it now exists. Petitioner has not shown any basis for the constitutional exercise of discretionary jurisdiction.

ARGUMENT

ISSUE I

DOES THE DECISION BELOW THAT CLAIMS OF NON-FUNDAMENTAL SENTENCING ERROR MUST BE PRESERVED IN THE TRIAL COURT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS APPLYING SECTION 924.051(3), FLORIDA STATUTES AND FLORIDA RULE OF APPELLATE PROCEDURE 9.140(D)? (RESTATED)

Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("regardless of whether they are accompanied by a dissenting or concurring opinion"). In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies

jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Petitioner's reliance on this Court's decision in Pope is completely misplaced. In Pope, applying statutory law on the sentencing guidelines as they existed in 1990, this Court held, for policy reasons, "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." Pope, 561 So.2d at 556. There was no preservation of sentencing error issue in Pope, the decision rests entirely on statutory interpretation of the sentencing guidelines. Since Pope issued, the Florida Legislature has amended chapter 924, Florida Statutes (Supp 1996) to require that all non-fundamental sentencing errors be properly preserved in the trial court by presentation of the same claim of error to the

trial court which is presented to the appellate court.
§§924.051(1)(b), 924.051(3). This Court, in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996), has explicitly upheld the authority of the legislature to condition the constitutional right to appeal upon the proper preservation of error in the trial court.

Applying this rationale to the amendment of section 924.051(3), we believe **the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error** or the assertion of fundamental error. Anticipating that we might reach such a conclusion, this Court on June 27, 1996, promulgated an emergency amendment designated as new Florida Rule of Criminal Procedure 3.800(b) to authorize the filing of a motion to correct a defendant's sentence with ten days. [cite omitted] Because many sentencing errors are not immediately apparent at sentencing, **we felt that this rule would provide an avenue to preserve sentencing errors and thereby appeal them.** Amendments at 775.

In implementation of the legislative enactment, and in a culmination of rule changes which originated prior to the legislative enactment of the Criminal Appeal Reform Act of 1996, this Court also promulgated Florida Rule of Appellate Procedure 9.140(d) which, unequivocally, and without exception, requires:

(d) Sentencing errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:

- (1) at the time of sentencing; or
- (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

Petitioner Butler had thirty days pursuant to rule 3.800(b) to raise any claim of prejudicial sentencing error in the trial court and failed to do so. There was no reason, as the district court decided, to permit him to eschew the orderly remedy

provided by this Court and the Florida Legislature by sandbagging a "gotcha" claim for the appellate court.

The above is the controlling law as it now exists. Petitioner has not cited a single decision of any district court, or of this Court, which is in direct and express conflict with the decision below that unpreserved, non-fundamental sentencing errors may not be raised for the first time on appeal. Thus, there is no constitutional basis for the exercise of discretionary jurisdiction.

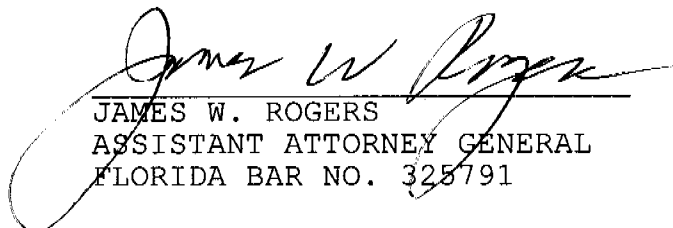
The state will not develop the point because it would add unnecessary complexity to a simple issue but it should be noted that the sentencing guidelines statutes themselves have been extensively revised on a more-or-less continuous basis in the years since 1990 and bear little resemblance to the statute on which Pope rests. Enough to say that under current statutory law, the sentencing court, without explanation, "may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control." § 921.002(1)(g), Florida Statutes (Supp 1998). Moreover, such "departures" within the statutory maximum are not appealable. § 921.002(1)(h), Florida Statutes (Supp 1998). Thus, aside from the absence of a constitutional basis for discretionary review, any such review would have little if any relevance to the future administration of justice.

CONCLUSION

There is no constitutional basis for the exercise of discretionary review and the petition for such review should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

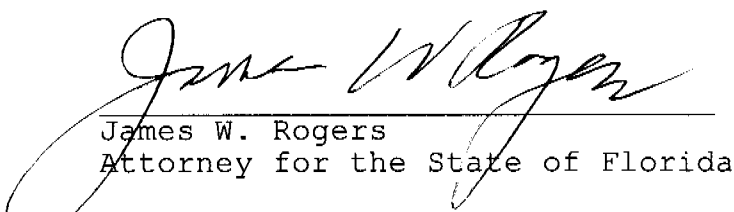

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301 this 28th day of January 1999.


James W. Rogers
Attorney for the State of Florida

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