

IN THE SUPREME COURT OF FLORIDA

JOHNNIE LEE JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CASE NO. 74,004

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents	i
Authorities Cited	ii
Argument	1-3
THE DISTRICT COURT ERRED IN AFFIRMING PETI- TIONER'S THIRD DEPARTURE SENTENCE IN VIOLATION OF PRECEDENT <b>FROM</b> THIS COURT.	
Conclusion	4
Certificate of Service	4

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Acosta v. State</u> , 489 So.2d 63 (Fla. 4th DCA 1986)	3
<u>Brown v. State</u> , 521 So.2d 110 (Fla. 1988)	3
<u>Jones v. State</u> , 502 So.2d 1375 (Fla. 4th DCA 1987) ( <u>Jones I</u> )	1,2,3
<u>Jones v. State</u> , 526 So.2d 176 (Fla. 4th DCA 1988) ( <u>Jones 11</u> )	2
<u>Jones v. State</u> , 14 F.L.W. 798 (Fla. 4th DCA March 29, 1989) ( <u>Jones 111</u> )	1
<u>Roberts v. State</u> , 14 F.L.W. 387 (Fla. July 27, 1989)	1,2,3
<u>Shull v. Dugger</u> , 515 So.2d 748 (Fla. 1987)	2
<u>State v. Acosta</u> , 506 So.2d 387 (Fla. 1987)	3
<u>Troup v. Rowe</u> , 283 So.2d 857 (Fla. 1973)	3
<u>Van Buren v. State</u> , 500 So.2d 732 (Fla. 2d DCA 1987)	3
<u>Waldron v. State</u> , 529 So.2d 772 (Fla. 2d DCA 1988)	1,3
<u>Westover v. State</u> , 521 So.2d 344 (Fla. 2d DCA 1988)	3
<u>Whitehead v. State</u> , 498 So.2d 868 (Fla. 1986)	1,2,3

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN AFFIRMING PETITIONER'S THIRD DEPARTURE SENTENCE IN VIOLATION OF PRECEDENT FROM THIS COURT.

Respondent asserts that the District Court of Appeal acknowledged it was "in error" to find in Jones I that the initial sentence of 50 years imprisonment was a departure sentence (Respondent's Brief - 8). Not so. There is no honest way for the district court to repudiate its holding in Jones I, that the trial court deviated from the guidelines based on the habitual offender statute. Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987) (Jones I), Jones v. State, 540 So.2d 245 (Fla. 4th DCA 1989) (Jones 111). In Jones 111, the Fourth District has stated only that the trial court did not know that the initial sentence was a departure at the time he imposed it. Jones 111, supra.

Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988) and Roberts v. State, 14 F.L.W. 387 (Fla. July 27, 1989), allow reimposition of a guideline departure when the original sentence was a departure only because of an error in the facts of the scoresheet. Here the original departure resulted from an error of law, the trial court's belief that the habitual offender status was a way to avoid imposing a guideline sentence. He was wrong. Whitehead v. State, 498 So.2d 868 (Fla. 1986). The semantics employed to describe the trial court's action and legal error do not govern what remedy appellant must be awarded.

Since the district court has not withdrawn or found an error in the initial Whitehead reversal, Shull v. Dugger, 515 So.2d 748 (Fla. 1987) applies. Under Shull v. Dugger, it is the reason for the initial appellate reversal which determines whether another departure sentence may be entered on resentencing and since the initial appellate reversal in Jones I stands, Shull v. Dugger must be applicable here.

After the initial Whitehead reversal, appellant's case was remanded for resentencing and he received a sentence of 25 years imprisonment. That 25 year sentence was vacated and remanded for resentencing within the guidelines range of a lesser term of years of three to seven in Jones v. State, 526 So.2d 176 (Fla. 4th DCA 1988) (Jones 11), but petitioner received a more harsh sentence of 50 years imprisonment which was affirmed by the Fourth District Court of Appeal. Approval of the new Roberts exception cannot justify this result of a higher departure sentence even though petitioner did appeal the 25 year sentence which had been imposed and which was vacated in Jones 11. If Roberts does apply, then the 25 year sentence was lawful.

There is no basis consistent with petitioner's constitutional protections against Double Jeopardy and fundamental principles of fair play to allow on resentencing an increase of 25 years imprisonment. Double Jeopardy prohibits the increase in sentence that occurred when the state, through neglect or oversight failed to advance or discover their legal argument (now known as the Roberts exception) that petitioner could have received a departure sentence on the second resentencing after

the Whitehead reversal. Double Jeopardy prohibits this kind of increase of a "lawful" sentence. Troup v. Rowe, 283 So.2d 857 (Fla. 1973), Van Buren v. State, 500 So.2d 732 (Fla. 2d DCA 1987), Brown v. State, 521 So.2d 110 (Fla. 1988), Westover v. State, 521 So.2d 344 (Fla. 2d DCA 1988). See also Acosta v. State, 489 So.2d 63 (Fla. 4th DCA 1986), affirmed on other grounds, State v. Acosta, 506 So.2d 387 (Fla. 1987).

If the new exception of Waldron, as affirmed by this Court recently in Roberts v. State, **is** applicable here, then a sentence of more than three to seven years may stand. But the Waldron/Roberts rationale can in no way be applied to allow for a more harsh departure sentence than that imposed after the Whitehead reversal in Jones I and at the very most, only a sentence of 25 years imprisonment, not as a habitual offender, may be sustained consistent with Double Jeopardy principles.

CONCLUSION

Based on the foregoing and for the reasons and authorities advanced in petitioner's initial brief, petitioner requests this Court to reverse and remand for a sentence consistent with the guidelines recommended range of three to seven years or to remand for imposition of a 25 year sentence and no higher.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to JOAN FOWLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 23<sup>rd</sup> day of August, 1989.

Margaret Good

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