

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

MAR 14 1990

CLERK, SUPREME COURT

By Deputy Clerk

C
[Signature]

CASE NO. 74,908

ROBERT RAY FERGUSON,)
Petitioner,)
vs.)
STATE OF FLORIDA,)
Respondent.)

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar # 249238
112 Orange Avenue - Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
WHERE THE TRIAL COURT FAILED TO PROVIDE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES, THE APPELLATE COURT MUST VACATE THE DEPARTURE AND REMAND TO THE TRIAL COURT FOR RESENTENCING WITHIN THE GUIDELINES, RATHER THAN GIVING THE TRIAL COURT A SECOND CHANCE TO DEPART.	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Boynton v. State</u> 473 So.2d 703 (Fla. 4th DCA 1985)	4
<u>Crigler v. State</u> 526 So.2d 176 (Fla. 2d DCA 1988)	5
<u>Ferguson v. State</u> 548 So. 2d 1183 (Fla. 5th DCA 1989)	1,2
<u>Florence v. State</u> 532 So.2d 1345 (Fla. 4th DCA 1988)	5
<u>Jenkins v. State</u> 528 So.2d 527 (Fla. 2d DCA 1988)	6
<u>Martinez v. State</u> 526 So.2d 1080 (Fla. 2d DCA 1988)	5
<u>Nichols v. State</u> 521 So.2d 372 (Fla. 2d DCA 1988)	5
<u>Pope v. State</u> 542 So.2d 423 (Fla. 5th DCA 1989) rev. granted, Case No. 74,163	1,6
<u>Rangel v. State</u> 532 So.2d 84 (Fla. 3d DCA 1988)	5
<u>Shull v. Dugger</u> 515 So.2d 748 (Fla. 1987)	5,6
<u>State v. Jackson</u> 478 So.2d 1054 (Fla. 1985)	4,5,6
<u>Waldron v. State</u> 529 So.2d 772 (Fla. 2d DCA 1988)	6

IN THE SUPREME COURT OF FLORIDA

ROBERT RAY FERGUSON,)
)
 Petitioner,)
)
 vs.) CASE NO. 74,908
)
 STATE OF FLORIDA,)
)
 Respondent.)

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner Ferguson appealed to the District Court of Appeal, Fifth District, following a guidelines departure sentence. On appeal, he contended that the departure sentence was illegal because the trial court failed to provide written reasons to justify the departure. *Ferguson v. State*, 548 So.2d 1183 (Fla. 5th DCA 1989). The petitioner contended that the appellate court must reverse the sentence and remand for resentencing within the presumptive guidelines range (especially since the trial court provided no justification, even orally).

The district court agreed that the sentence must be vacated due to the failure to provide written reasons for departure, but disagreed with the relief requested. The court, citing *Pope v. State*, 542 So.2d 423 (Fla. 5th DCA 1989), held that the trial judge, on remand, would be given the opportunity

to now provide written reasons and impose the same departure sentence. Ferguson v. State, supra.

The petitioner filed a timely notice to invoke discretionary review because of the conflicting cases. This Court accepted jurisdiction on February 13, 1990. This brief follows.

SUMMARY OF ARGUMENT

Where a trial court has failed to provide written reasons for the departure, case law from other districts and this Court require that the sentence must be vacated and remanded to the trial court for resentencing within the recommended guidelines range. A trial court which fails to comply with all of the rules concerning imposition of a departure sentence is not permitted a second chance to make its sentence legal.

ARGUMENT

WHERE THE TRIAL COURT FAILED TO PROVIDE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES, THE APPELLATE COURT MUST VACATE THE DEPARTURE AND REMAND TO THE TRIAL COURT FOR RESENTENCING WITHIN THE GUIDELINES, RATHER THAN GIVING THE TRIAL COURT A SECOND CHANCE TO DEPART.

The opinion of the Fifth District in the instant case, if allowed to stand, would permit judges to ignore with impunity the guidelines requirement that reasons for departure be in writing. Written reasons are required to be filed at the time the departure sentence is imposed so that meaningful and expeditious appellate review of the departure sentence can occur. The opinion of the district court here, which would allow for multiple, costly, and time-consuming appeals from a single sentence, expressly and directly conflicts with cases correctly holding that, in a resentencing following the failure to provide written reasons, the trial court is limited to the presumptive guidelines range.

In State v. Jackson, 478 So.2d 1054 (Fla. 1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987), this Court ruled that written reasons must be provided when a judge imposes a departure sentence. Adopting the rationale of then Judge Barkett in Boynton v. State, 473 So.2d 703, 706-707 (Fla. 4th DCA 1985), the Court opined that the

requirement of written reasons over oral reasons would allow for more precision in the sentencing process and for more expeditious, meaningful appellate review. State v. Jackson, *supra* at 1055-1056.

Shull v. Dusser, 515 So.2d 748 (Fla. 1987), requires that where a guidelines sentence is reversed for a deficiency in the written reasons, the trial court cannot have another "bite of the apple" but must sentence the defendant to the presumptive guidelines sentence. Under Shull v. Dusser, a trial judge who fails to comply with all the rules concerning imposition of a departure sentence (*i.e.* clear and convincing reasons provided in a written order contemporaneously with the pronouncement of the sentence), is not permitted a second chance to make its sentence "legal." To hold otherwise, the Court held, would needlessly subject the defendant to unwarranted multiple appeals and resentencings. Shull v. Dusser, *supra* at 750.

Numerous district court decisions have applied the holding of Shull v. Dugger, *supra*, to the identical situation here to require that, where a trial court fails to provide written reasons for departure, the sentence must be vacated and the court, on remand for resentencing, is not permitted to depart, but must resentence the defendant within the presumptive guidelines range. Rangel v. State, 532 So.2d 84 (Fla. 3d DCA 1988); Florence v. State, 532 So.2d 1345 (Fla. 4th DCA 1988); Nichols v. State, 521 So.2d 372 (Fla. 2d DCA 1988); Crisler v. State, 526 So.2d 176 (Fla. 2d DCA 1988); Martinez v. State, 526

So.2d 1080 (Fla. 2d DCA 1988); Jenkins v. State, 528 So.2d 527 (Fla. 2d DCA 1988). This line of cases should be followed here.

The sentencing guidelines, and the requirement of written reasons for departure have been around for many years (since, at least State v. Jackson, supra, in 1985). Trial courts have no legitimate excuse to refuse to follow this simple legal requirement. The rationale for these rulings is precisely that announced in State v. Jackson, and Shull v. Dugger, supra. The trial court, which is imposing a departure sentence (and which recognizes that it is imposing a departure sentence)' should be given only one opportunity to correctly and lawfully impose such sentence, rather than allowing for multiple "bites of the apple," and requiring the defendant to undergo multiple resentencings and multiple appeals in a single case. The fifth district court, in the instant case, however, chose to disregard this logic and issued a ruling contrary to these opinions relying on its previous decision in Pope v. State, 542 So.2d 423 (Fla. 5th DCA 1989). In Pope, which case is pending decision in this Court, Case No. 74,163, the fifth district recognized the conflict on the face of the opinion.

'This situation is entirely different from the situation where the trial court, at the initial sentencing, does not believe that it is sentencing the defendant to a departure sentence. See, e.g., Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988).

This Court should follow the rationale of Shull v. Dugger, supra, and the other above-cited cases, to vacate the decision of the fifth district court of appeal, and remand the case for resentencing solely within the presumptive guidelines range. In so doing, this Court will provide teeth for the long-established requirement of written reasons for guidelines departures.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, vacate the petitioner's sentence, and remand the case to the trial court for the imposition of a sentence within the presumptive guidelines range.

Respectfully submitted,

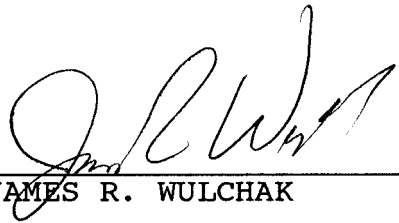
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar # 249238
112 Orange Avenue - Suite A
Daytona Beach, FL 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, and to Mr. Robert R. Ferguson, Inmate # A-082906, P.O. Box 333, Raiford, FL 32083, this 12th day of March, 1990.



JAMES R. WULCHAK