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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT  
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CASE NO. 75,792

VIRGIL ROBINSON,

Petitioner,

vs .

THE STATE OF FLORIDA,

Respondent.

\* \* \* \* \*

ON PETITION TO INVOKE DISCRETIONARY REVIEW

\* \* \* \* \*

RESPONDENT'S BRIEF ON THE MERITS

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POPE v. STATE, 15 F.L.W. S243 (Fla. 1990) SHOULD BE APPLIED PROSPECTIVELY AS HELD IN REE v. STATE, 15 F.L.W. S395 (Fla. 1990) THEREBY HAVING NO EFFECT ON THE HOLDING IN ROBINSON v. STATE, 541 So.2d 1261 (Fla. 3d DCA 1989) ALLOWING THE TRIAL COURT TO DEVIATE FROM THE GUIDELINE ON REMAND.

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## INTRODUCTION

The State of Florida was the appellee in the Third District Court of Appeal and the plaintiff in the trial court. The Petitioner, Virgil Robinson, was the appellant in the Third District Court of Appeal and the defendant in the trial court. The parties shall be referred to as they stood in the trial court.

## STATEMENT OF THE CASE AND FACTS

The State of Florida accepts the defendant's Statement of the Case and Facts as a substantially true and correct reflection of the proceedings below but would add that Ree v. State, 14 F.L.W. 565 (Fla. 1989) has been revisited at 15 F.L.W. S395 (Fla. 1990). The new opinion specifically finds that this Court's holding shall be applied prospectively.

QUESTION PRESENTED

WHETHER THE TRIAL COURT CAN DEVIATE FROM THE GUIDELINES ON A REMAND WHEN THE COURT FAILED TO GIVE WRITTEN REASONS FOR THE DEPARTURE AT THE ORIGINAL SENTENCING HEARING.

SUMMARY OF THE ARGUMENT

Ree v. State, 15 F.L.W. S395 (Fla. 1990) and Pope v. State, 15 F.L.W. S243 (Fla. 1990) have no discernible differences in that the cases are ordered remanded for resentencing; in Ree for lack of contemporaneous written reasons and Pope for sentencing within the guidelines. Ree is specifically applied prospectively and Pope should be likewise, thereby not affecting the ruling by the Third District Court of Appeal.

## ARGUMENT

POPE v. STATE, 15 F.L.W. S243 (Fla. 1990) SHOULD BE APPLIED PROSPECTIVELY AS HELD IN REE v. STATE, 15 F.L.W. S395 (Fla. 1990) THEREBY HAVING NO EFFECT ON THE HOLDING IN ROBINSON v. STATE, 541 So.2d 1261 (Fla. 3d DCA 1989) ALLOWING THE TRIAL COURT TO DEVIATE FROM THE GUIDELINE ON REMAND.

Petitioner's real argument is that Pope v. State, 15 F.L.W. S243 (Fla. 1990) should be applied retrospectively so that defendant would have the benefit of that holding. However, the Third District Court of Appeal ruled in Robinson v. State, 541 So.2d 1261 (Fla. 3d DCA 1989) that the cause should be remanded to the trial court indicating that the trial court could deviate from the guidelines if she clarified her oral reasons and put them in writing. This ruling came subsequent to Pope which stated that sentencing on remand must be within the guidelines. However, Pope and Ree v. State, 15 F.L.W. S395 (Fla. opinion cited July 19, 1990) have no discernible differences in that they are both holdings requiring remands for resentencing. In Ree, the sentence must be remanded if written reasons for departure are not contemporaneous with the actual sentencing. In Pope, upon remand the sentence must be within the guidelines. The holding in Ree is specifically prospective. The State would contend that the holding in Pope should likewise be prospective. If applied prospectively, Pope would not govern the ruling in Robinson.

CONCLUSION

For the foregoing argument and authority, the State of Florida, respectively requests this Court to affirm the Third District Court's decision and remand the cause for the trial court to deviate from the guidelines if oral reasons are set down in writing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was furnished by mail to **ROBERT KALTER**, Assistant Public Defender, 1351 N.W. 12th Street, Room 800, Miami, FL 33125 on this 19<sup>th</sup> day of September, 1990.



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bfs.