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IN THE SUPREME COURT OF FLORIDA

HAZEL JONES, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 81,881

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

CONTENTS | **PAGE**

TABLE OF CONTENTS i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT

POINT I

THIS HONORABLE COURT'S DECISION IN POPE v. STATE, 561 SO. 2d 554 (FLA. 1990), DOES NOT REQUIRE THAT A DOWNWARD GUIDELINES DEPARTURE SENTENCE BE REVERSED FOR RESENTENCING WITHIN THE PERMITTED GUIDELINES RANGE WHEN THE TRIAL COURT FAILS TO FILE A WRITTEN CONTEMPORANEOUS ORDER WHERE THE DEFENDANT IS WITHOUT FAULT IN THE SENTENCING PROCESS. 7

POINT II

THIS COURT CAN AFFIRM PETITIONER'S DOWNWARD DEPARTURE SENTENCE ON THE ALTERNATIVE GROUND THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER SENTENCING HEARING. 20

POINT III

IF THE DOWNWARD DEPARTURE ORDER IS INVALID, PETITIONER-DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HER OPEN PLEA TO THE TRIAL COURT. 24

CONCLUSION 26

CERTIFICATE OF SERVICE 26

AUTHORITIES CITED

CASES	PAGE
Anderson v. State, 420 So. 2d 574 (Fla. 1982)	20
Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247 65 L. Ed. 2d 205 (1980)	18
Bogan v. State, 489 So. 2d 157 (Fla. 2d DCA 1986)	7
Boynton v. State, 473 So. 2d 703 (Fla. 1983)	8
Casteel v. State, 498 So. 2d 1249 (Fla. 1986)	7
Downs v. State, 453 So. 2d 1102 (Fla. 1984)	21
Flowers v. State, 586 So. 2d 1058 (Fla. 1991)	17
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963)	20
Lewis v. State, 574 So. 2d 245 (Fla. 2d DCA 1991)	17
Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed. 2d 351 (1987)	8
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)	19
Novicki v. State, 604 So. 2d 572 (Fla. 4th DCA 1992)	11
Owens v. State, 598 So. 2d 64 (Fla. 1992)	11
Padilla v. State, 18 Fla. L. Weekly S181 (Fla. March 25, 1993)	11
Pope v. State, 561 So. 2d 554 (Fla. 1990)	9-11, 13, 15, 16, 18

Ree v. State, 565 So. 2d 1329
(Fla. 1990), modified,
State v. Lyles, 576 So. 2d 706
(Fla. 1991) 9-12, 16, 18, 21, 22

Shull v. Dugger, 515 So. 2d 748
(Fla. 1987) 9, 10, 18

Smith v. State, 598 So. 2d 1063
(Fla. 1992) 11, 13

State v. Allen, 557 So. 2d 960
(Fla. 4th DCA 1990) 24

State v. Brown, 542 So. 2d 1371
(Fla. 4th DCA 1989) 24

State v. Camp, 596 So. 2d 105
(Fla. 1992) 17

State v. Fields, 602 So. 2d 981
(Fla. 3d DCA 1992) 24

State v. Jackson, 478 So. 2d 1054
(Fla. 1985) 8

State v. Jones, 18 Fla. L. Weekly D 1316
(Fla. 4th DCA May 26, 1993) 3, 14, 25

State v. Lyles, 576 So. 2d 706
(Fla. 1991) 10

State v. Salley, 601 So. 2d 309
(Fla. 4th DCA 1992) 13, 21

Strickland v. Washington, 466 U.S. 668,
104 S.Ct. 2052, 90 L. Ed. 2d 674
(1984) 20-22

United States v. R.L.C., __ U.S. __,
112 S.Ct. 1329, 1330 (1992) 17

Williams v. State, 528 So. 2d 453
(Fla. 5th DCA 1988) 17

Wilson v. State, 485 So. 2d 42
(Fla. 5th DCA 1986) 7

Zirkle v. State, 410 So. 2d 948
(Fla. 3d DCA 1982) 23

FLORIDA STATUTES

Section 775.021 17
Section 921.001(6) 6, 7

FLORIDA CONSTITUTION

Fourteenth Amendment 22
Sixth Amendment 20, 22

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.140(f) 19

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.170(f) 25
Rule 3.701 . . . . 7, 8
Rule 3.701(b 7

OTHER AUTHORITIES CITED

Committee Note (1988)

PRELIMINARY STATEMENT

Petitioner, Hazel Jones, was the defendant in the trial court and the Appellant in the district court of appeal. She will be referred to by name or as Petitioner in this brief. Respondent was the prosecution in the trial court and Appellee in the district court.

The record on appeal is consecutively numbered. All references to the record will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner-Defendant, Hazel Jones, was charged by Information filed in the Seventeenth Judicial Circuit (Broward County) with Count I, obtaining property by a worthless check and Count II, grand theft (R 12-13).

Petitioner, Hazel Jones, appeared in court on May 7, 1992, and the Public Defender was appointed at that time to represent her (R 4). Petitioner had been previously sentenced on October 2, 1991, by Judge Fleet to five (5) years in prison (R 4-5). The Information, at bar, was filed against Ms. Jones on January 3, 1992 (R 6). However these present charges should have been filed against Petitioner with the original set of criminal charges that originally lead to her five (5) year prison sentence (R 6, 8). Judge Fleet explained: "This should have gone down the first time around except for the handwriting comparison." (R 8). The trial judge noted that he had previously sentenced Ms. Jones to five (5) years in prison (R 6, 10). Petitioner's Fla.R.Crim.P. 3.701 permitted guideline range was 9-22 years in prison (R 18).

The trial judge orally explained why he was *not* sentencing Petitioner within her sentencing guidelines ranges for this case:

> "This case should have been resolved the first time around and the Defendant shouldn't be required to pay the penalty or whatever delay was occasioned in the investigation."
>
> (R 10)

Petitioner's trial counsel requested the trial judge to sentence Ms. Jones to "time served" (R 10). The trial judge rejected this proposed disposition (R 10, 11). The Trial Court

wanted Petitioner placed on one (1) year probation to run *concurrent* with her controlled release (parole) with a special condition that she pay restitution (R 9). However this plea proposed by the trial judge was opposed by Respondent-State (R 8, 9).

At this point, Petitioner pled nolo contendere to the two (2) counts of the Information pursuant to the *open plea* proposal of the trial judge (R 12-13, 14-15). As part of this plea agreement, the trial judge explained to Ms. Jones that:

> "If the State wins the appeal you will be able to take back your no contest plea and start from scratch on this case."
>
> (R 13)

The trial judge placed Petitioner on concurrent terms of one (1) year probation for each count (R 17-19). The Trial Court ordered Petitioner to pay restitution as a special condition of her probation (R 19-21). Respondent-State of Florida filed a timely Notice of Appeal with the Fourth District Court of Appeal (R 22).

On May 26, 1993, the Fourth District reversed Petitioner-Defendant's Fla. R. Crim. P. 3.701 downward departure sentence on the ground that the trial judge "departed downward from the guidelines without timely, written reasons -- although we do know that he had a good reason for doing so. The State thus argues on appeal from the sentence that, under Pope v. State, 561 So. 2d 554 (Fla. 1990), we must reverse and remand for the purpose of resentencing within the guidelines." [Footnote omitted]. State v. Jones, 18 Fla. L. Weekly D 1316 (Fla. 4th DCA May 26, 1993).

However the Fourth District certified the following question to this Honorable Court:

> DOES POPE v. STATE, 561 SO. 2D 554 (FLA. 1990), REQUIRE BELOW GUIDELINES DEPARTURE SENTENCING WITHOUT CONTEMPORANEOUS WRITTEN REASONS, WHERE THE DEFENDANT IS WITHOUT FAULT IN THE SENTENCING PROCESS, TO BE REVERSED FOR RESENTENCING WITHIN THE GUIDELINE?

Timely Notice of Discretionary Review was filed by Petitioner-Defendant. See Appendix 1.

SUMMARY OF THE ARGUMENT

Point I

The policy and principles articulated in Pope v. State, 561 So. 2d 554 (Fla. 1990), which mandate a remand for resentencing within the guidelines when the trial court fails to file a contemporaneous written guidelines downward departure order are inapplicable in a State appeal of a downward departure sentence. At bar, the trial judge offered an open plea to Petitioner-Defendant, orally articulated a ground for departure at the sentencing hearing, and most importantly, the defendant was not at fault in the sentencing process.

In these limited circumstances, the harsh "remedy" of a remand for imposition of a guidelines sentence should be *modified* to allow this cause to be remanded to the trial court for imposition of a contemporaneous written guidelines departure order by the trial court. The rule of lenity and the principle of strict construction of penal statutes coupled with the notion of fundamental fairness support this result. This Honorable Court should reverse the decision of the Fourth District Court of Appeal and affirm the downward guidelines departure sentence imposed by the trial court on Petitioner-Defendant.

Point II

In the alternative, defense counsel's failure to secure a written contemporaneous downward departure order in the instant case resulted in *per se* ineffective assistance of counsel in violation of the Sixth Amendment. See State v. Salley, 601 So. 2d

309 (Fla. 4th DCA 1992). The Trial Court's downward guidelines departure order should be affirmed on this alternative basis.

Point III

Petitioner entered an "open plea" to the charges with the trial judge. If this Honorable Court should find that the downward departure is invalid, on remand, Petitioner should be given an opportunity to *withdraw* her open plea to the court. Especially, in the instant case, where the Trial Court expressly assured Petitioner that she could withdraw her plea if the Respondent-State was ultimately successful on appeal. Further, the Fourth District has already granted Petitioner this relief. State v. Jones, 18 Fla. L. Weekly at D1317. Hence if the downward departure order is ultimately held to be invalid, Petitioner-Defendant respectfully requests this Honorable Court to allow her to withdraw her open plea to the Trial Court on remand.

ARGUMENT

POINT I

THIS HONORABLE COURT'S DECISION IN POPE v. STATE, 561 SO. 2d 554 (FLA. 1990), DOES NOT REQUIRE THAT A DOWNWARD GUIDELINES DEPARTURE SENTENCE BE REVERSED FOR RESENTENCING WITHIN THE PERMITTED GUIDELINES RANGE WHEN THE TRIAL COURT FAILS TO FILE A WRITTEN CONTEMPORANEOUS ORDER WHERE THE DEFENDANT IS WITHOUT FAULT IN THE SENTENCING PROCESS.

The purpose of the Florida sentencing guidelines is "to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process." Fla.R.Crim.P. 3.701(b). It is incumbent upon the trial judge to approve all guidelines scoresheets. Section 921.001(6), F.S. (1991), further imposes upon the sentencing judge the duty to determine and provide written reasons for departure from a defendant's permitted guidelines sentence range. This duty can *not* be delegated to the prosecutor, Bogan v. State, 489 So. 2d 157 (Fla. 2d DCA 1986); Wilson v. State, 485 So. 2d 42 (Fla. 5th DCA 1986), or usurped by an appellate court. Casteel v. State, 498 So. 2d 1249, 1252 (Fla. 1986).

Fla.R.Crim.P. 3.701(d)(11) provides, in pertinent part, that "any sentence outside of the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure."

The Committee Note (1988) to said rule further specifies:

> If a sentencing judge departs from the permitted range, reasons for departure shall be articulated at the time sentence is imposed. The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public of the reasons for departure.

This Court has decided numerous decisions interpreting the statute and rules pertinent to written guidelines departure sentences. Beginning with State v. Jackson, 478 So. 2d 1054 (Fla. 1985), *abrogated on other grounds*, Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed. 2d 351 (1987), this Court held that Section 921.001(6) F.S. (1983) and Fla.R.Crim.P. 3.701(b)(6) and (d)(11) "clearly mandate that a trial judge state in writing reasons for any departure from the guidelines." Id. at 1054. This Court adopted the reasons previously specified by Judge Barkett in Boynton v. State, 473 So. 2d 703 (Fla. 1983), to justify the necessity of written reasons for departure:

> First, it is very possible ... that the "reasons for departure" plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at hearings by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.
>
> Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts. In *R.B.S. v. Capri*, the court noted:
>
>> It is not the function of an appellate court to cull the underlying record in an effort to locate findings and underlying reasons which would support the order. The statute should be complied with in the future.
>>
>> 384 So. 2d [692] at 696-697.
>
> Lastly, the development of the law would best be served by requiring the precise and

considered reasons which would be more likely to occur in a written statement than those tossed out orally in a dialogue at a hectic sentencing hearing... This effort would best be served by requiring the thoughtful effort which "a written statement providing clear and convincing reasons" would produce. This, in turn, should provide a more precise, thoughtful, and meaningful review which ultimately will result in the development of better law.

Id. at 1055-56.

In Ree v. State, 565 So. 2d 1329 (Fla. 1990), *modified*, State v. Lyles, 576 So. 2d 706 (Fla. 1991), this Court subsequently held that trial courts must produce *contemporaneous written reasons* when they depart from the guidelines. This Court explained the two options available to a sentencing judge if a departure sentence is deemed warranted:

Second, after hearing argument and receiving any proper evidence or statements, the trial court can impose a departure sentence by writing out its findings at the time sentence is imposed, while still on the bench. Third, if further reflection is required to determine the propriety of extent of departure, the trail court may separate the sentencing hearing from the actual imposition of sentence. In this event, actual sentencing need not occur until a date *after* the sentencing hearing.

Id. at 1332.

In Pope v. State, 561 So. 2d 554 (Fla. 1990), this Court citing Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), held that an appellate court which reverses a departure sentence because there were no written reasons for departure must remand for resentencing *within the guidelines* with no possibility of departure, rather than remanding for resentencing to permit the Trial Court to specify

written reasons for the departure sentence. In Shull, this Court had previously held that a sentencing judge would *not* be permitted to provide new reasons for departure, on remand, when the initial reasons for departure had been reversed by an appellate court. This Court explained that such a result was necessary to avoid multiple appeals, multiple re-sentencings, and unwarranted efforts to justify an original departure by the sentencing judge. Id.

In Pope, this Court applied the principles and policy reasons articulated in both Shull and Jackson to support its decision to require resentencing with *no* possibility of departure from the guidelines range on remand.

In State v. Lyles, 576 So. 2d 706 (Fla. 1991), this Court modified its Ree decision to the extent that when express oral findings of fact and articulated reasons for departure are made from the bench and then reduced to writing without substantive change on the same date, the written reasons for the departure sentence are sufficiently "contemporaneous" in accordance with requirements of Ree even if they are not filed until the following business day. This Court explained the necessity for the modification to Ree as follows: "To adopt a contrary view would be placing form over substance. The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view, prejudice the defendant in any respect." Id. at 708-709. This Court cautioned however that "it would not be proper under Ree to enter the written reasons a few days after the imposition of sentence." Id. at 709. This Court further

articulated the rational behind its Ree decision:

> Written reasons must be issued on the same day as sentencing. It is important to recognize that, if a sentence is entered and filed with the clerk on the day of sentencing, but the written reasons are delayed in being prepared and consequently are not filed on the same date, the decision to appeal may have to be made without the benefit of those written reasons because the time for appeal begins to run from the date the sentencing judgment is filed, not the written reasons.

Id. at 708.

This Court has recently reiterated its Ree decision in Owens v. State, 598 So. 2d 64 (Fla. 1992), and its Pope decision in Padilla v. State, 18 Fla. L. Weekly S181, S183 (Fla. March 25, 1993). In Novicki v. State, 604 So. 2d 572 (Fla. 4th DCA 1992), the Fourth District relied on this Court's decisions in Lyles and Owens to affirm an upward departure order which was pronounced orally at the time of sentencing and the trial judge subsequently filed the written departure order later that same day.

In Smith v. State, 598 So. 2d 1063 (Fla. 1992), this Court initially held that its decisions in Ree and Pope should now be applied retrospectively to sentences imposed *prior* to its effective date. Of particular significance for this cause, was this Court decision on the merits. In the trial court, the trial judge entered into a plea colloquy with Petitioner-Defendant Smith and agreed to give her a "last chance" probation on the condition that she complete a drug program. The defendant agreed to pled guilty and the trial judge imposed this sentence which constituted a downward guidelines departure sentence. During the plea colloquy,

the trial judge directed the prosecutor to write down on the guidelines scoresheet that the downward departure was based on the defendant's "drug dependency." The prosecutor had not yet prepared the guideline scoresheet. The prosecutor objected to the downward departure but agreed to prepare a scoresheet with the court's reason for downward departure as directed by the trial court. However the scoresheet ultimately prepared in the case did *not* contain the trial judge's reason for downward departure. The state appealed.

Turning to the merits, this Court concluded

> that had the trial court failed to carry out its duty to order the reason for departure committed to writing at the time of sentencing, the district court would have been correct in ordering resentencing pursuant to *Pope*. However, the physical process of writing the reasons in this instance was nothing more than a ministerial act at the precise direction of the court in the nature of specific dictation. But for the State's failure to timely prepare a scoresheet and comply with the court's order, the reason for departure would have been contemporaneously written at the sentencing, and thereby valid within the meaning of *Ree* and *Pope*. Smith should not be penalized for the State's failure to carry out the court's timely and unambiguous instructions. Under these circumstances, we conclude that the district court erred by reversing and remanding for resentencing pursuant to *Pope*.

Id. at 1066.

However in so holding this Court indicated that its decision in Ree was really directed at *upward* guidelines departures. As opposed to downward departures this Court noted:

> We emphasize that nothing in this opinion is intended to recede from the essential holding

> of *Ree*. As we stated in that opinion, fundamental principles of justice compel a court to carefully and thoroughly <u>think through its decision when it restricts the liberty of a defendant beyond the period allowed in the sentencing guidelines</u>. Requiring a court to write its reasons for departure at the time of sentencing reinforces the court's obligation to think through its sentencing decision, and it preserves for appellate review a full and accurate record of the sentencing decision.

<u>Id</u>. at 1067. [Emphasis added].

In <u>State v. Salley</u>, 601 So. 2d 309 (Fla. 4th DCA 1992), the Fourth District found that the Trial Court's orally stated reason for departure made at the sentencing hearing coupled with a "court status" sheet signed by the trial judge was deemed "a sufficient writing to satisfy <u>Pope</u>." However the Fourth District further held that this Court's decision in <u>Smith</u> provided an *alternative* basis to affirm the downward departure.

In <u>Salley</u>, the defense counsel informed the trial judge that she would have an appropriate order presented to the trial court for downward departure later that same afternoon. However no order was submitted. Judge Warner writing for the Fourth District held that "just as in <u>Smith</u>, the trial court had exercised its discretion in sentencing and had delegated the ministerial act of preparation of the order. Appellant [sic] should not be penalized by defense counsel's failure to follow through and prepare the order. Although it was Appellant's [sic] court appointed counsel who was neglectful rather than the state, we believe that <u>Smith</u> is still applicable." <u>State v. Salley</u>, 601 So. 2d at 310.

Turning to the facts at bar, Petitioner entered an open plea

with the trial judge over the State's objection wherein in exchange for Petitioner's plea of nolo contendere she would be placed on one (1) year probation (R 10-11, 12-13). This does represent a downward departure from Petitioner's permitted guidelines sentence range (R 18).

The Trial judge at the sentencing hearing explained his reason for departing downward from Petitioner's guidelines range:

> "This case should have resolved the first time around and the Defendant shouldn't be required to pay the penalty of whatever delay was occasioned in the investigation."
>
> (R 10)

Petitioner had previously pled guilty and received a sentence of five (5) years in prison on October 29, 1991 (R 4-5). The worthless check involved here was written on April 6, 1991 (R 4-5). The Information in the instant case was filed on January 3, 1992 (R 6).

Petitioner initially contends that the Trial Court did *not* err in departing downward from Petitioner's permitted guideline range. The Trial Court did articulate a reason for the downward departure "delay in prosecution" which is not used to calculate the guidelines range or prohibited by the rules. The Fourth District held in the instant case that they "would certainly have no difficulty in affirming these reasons, if set down in a contemporaneous written order, as a valid basis for a leniency departure from the guidelines." State v. Jones, 18 Fla. L. Weekly at 1317 n. 1.

The foregoing survey of the appellate decisions on

contemporaneous written departure orders firmly supports Petitioner's position that there should be a further modification of this Court's decisions in Ree and Pope to allow a remand to the trial court for the filing by the trial judge of a written contemporaneous departure order as opposed to the harsh "remedy" of a guideline sentence. This should apply *solely* in a state appeal where the trial judge offers the defendant a plea bargain, the trial judge pronounces his ground or grounds for departure in open court, and most importantly, the defendant is *without fault* in the sentencing process.

The key to Petitioner's request is the concept of "no fault" on the part of the Defendant. Judge Farmer writing for the Fourth District in the instant case lamented the harsh result of the Pope decision in the instant circumstances:

> We do not understand why the remedy for the trial court's failure to enter contemporaneous written reasons for guideline leniency, i.e. a sentence less severe than the minimum prescribed by the guidelines, is to resentence within the guidelines unless the defendant asks to have his plea vacated. The defect is attributable to no conduct, action or inaction by the defendant. The remedy punishes the defendant for a trial judge's mistake. We wonder why the remedy isn't simply to remand to the trial judge for the entry of the written reasons.
>
> We distinguish this, of course from the converse situation where the trial court imposes more severe punishment than the guideline maximum and with the penalty prescribed by the law violated, but has failed to file seasonably a written explanation of the reasons for the departure. The idea underlying a reversal of that sentence with a remand for resentencing within the guidelines is simply an application of the strict

construction which must be applied to all penal statutes. *See § 775.021, Fla. Stat. (1991).* A trial court can sentence more harshly than the guidelines allow, but only if on sentencing day the judge strictly complies with the letter of the guidelines departure provisions. *See § 921.001(5), (6), (7) and (8), Fla. Stat. (1991); Fla. R. Crim. P. 3.701(d)(11).*

> We are concerned that to apply that same result to leniency departures would amount to a profound alteration of these principles. It would also seem a result in search of a rationale. It might reasonably be seen as adding a perverse twist to the old aphorism-- "When the constable blunders the guilty go free"-- by holding that when the judge blunders, the innocent get punished.

Id. at 1316-1317.

[Emphasis added] [Footnote omitted].

Judge Farmer's point is well taken. Why should Ms. Jones have to pay an extreme price for the trial judge's failure to file a contemporaneous written downward departure order. The instant sentencing hearing was held well after this Court's decisions in Ree and Pope were decided. The trial judge sitting in a criminal division of the Circuit Court surely knew or should have known about this Honorable Court's decisions in both cases and the necessary steps needed to insure that a downward guidelines departure sentence offered by the trial judge be, at a minimum, procedurally correct.

This Court has already modified the Pope rule where the prosecutor has neglected to fulfill his duty. Smith. The Fourth District has done likewise where defense counsel was deficient. Salley. In this limited circumstance, Petitioner also respectfully

requests this Honorable Court to further modify its decisions in Ree and Pope and allow a remand for imposition of a contemporaneous written downward departure order.

The Florida criminal code embodies the principle that "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed, when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Section 775.021(1), F.S. (1991). This statute is tied up with the rule of lenity which requires courts to interpret a criminal statute so that it does not increase a defendant's penalty when there is ambiguity in the law's intention. The rule of lenity requires that if an ambiguity exists it should be construed to the defendant's benefit. State v. Camp, 596 So. 2d 1055 (Fla. 1992); Lewis v. State, 574 So. 2d 245 (Fla. 2d DCA 1991).

The rule that a statute shall be construed most favorably to the accused applies to the Florida sentencing guidelines. Flowers v. State, 586 So. 2d 1058, 1059 (Fla. 1991); Lewis v. State, 574 So. 2d 245, 246 (Fla. 2d DCA 1991). Also the rule of lenity has been applied in resolving an ambiguity in the application of the sentencing guidelines. See Williams v. State, 528 So. 2d 453, 454 (Fla. 5th DCA 1988).

The United States Supreme Court has made clear that the "rule of lenity" applies not only to interpretations of substantive criminal prohibitions but also to the penalties they impose. United States v. R.L.C., __ U.S. __, 112 S.Ct. 1329, 1330 (1992);

Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L. Ed. 2d 205 (1980).

Not only "strict construction" and the "rule of lenity" support Petitioner's position but also many of the principles and policy reasons articulated in Jackson, Shull, and Pope have no real significance in the instant downward departure situation. The trial judge articulated one (1) ground for downward departure at Petitioner's sentencing hearing. There would be no need to cull through expensive sentencing transcripts in search of possible reasons to support the downward departure. See Pope, 561 So. 2d 555, Jackson, 478 So. 2d at 1055-1056. There is no possibility that some unintended or imprecise result would be visited upon the sentencing judge. Pope, 561 So. 2d at 556; Jackson v. State, 478 So. 2d at 1056. Another purpose articulated for the necessity of written reasons for departure was "[t]o avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure..." Pope, 561 So. 2d at 556. This problem of multiple appeals, multiple resentencing would not be a concern with a downward guidelines departure.

And finally this Honorable Court in Ree emphasized the notion that the "contemporaneous written departure order" was mandated because a "departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." Ree, 565 So. 2d at 1365. In Smith, this court again noted that "fundamental principles of justice compel a court to carefully and thoroughly think through its decision when it *restricts the liberty*

of a defendant beyond the period allowed in the sentencing guidelines." Smith, 598 So.2d at 1067. [Emphasis added]. Obviously the concerns and attention needed to impose a greater punishment are totally inapplicable to a downward guideline departure sentence. This fact coupled with the notion that a greater sentence should not result after a successful appeal, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969) all support Petitioner's position.

In these circumstances, the harsh "remedy" of a remand for imposition of a guideline sentence should be modified in the interest of justice[1] to allow this cause to be remanded to the trial court for imposition of a written contemporaneous guidelines departure order by the sentencing judge. The rule of lenity and the principle of strict construction of penal statutes coupled with the notion of fundamental fairness support this result. This Honorable Court should reverse the decision of the Fourth District Court of Appeal and affirm the downward guidelines departure sentence imposed by the trial judge on Petitioner-Defendant.

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[1] See Fla. R. App. P. 9.140(f) ("In the interest of justice, the court may grant any relief to which a party is entitled.")

POINT II

THIS COURT CAN AFFIRM PETITIONER'S DOWNWARD DEPARTURE SENTENCE ON THE ALTERNATIVE GROUND THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HER SENTENCING HEARING.

Petitioner's downward departure sentence can be affirmed on the alternative ground that Petitioner received *per se* ineffective assistance of counsel in violation of her Sixth Amendment right to counsel at her plea/sentencing hearing. The right of a criminal defendant to have reasonably effective counsel is absolute and is required at every essential step of the proceedings. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963); Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 90 L. Ed. 2d 674 (1984), the United States Supreme Court examined the legal issues raised where a claim of ineffective assistance of counsel has been made. In determining the appropriate standard for review, the Supreme Court required, first, that the defendant identify the acts or omissions of counsel that are alleged not to have been the result of reasoned professional judgment. Once specific areas of defect are raised, the reviewing court can decide whether, in light of all the circumstances, the identified acts or omissions are outside the range of professionally competent assistance. 466 U.S. 692; 104 S.Ct. at 2066. Finally, the defendant must show that, except for the particular errors of counsel which have been found to be unreasonable, a "reasonable probability" existed that the result of the trial would have been

different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; 104 S.Ct. at 2068. This Court has mandated that the analytical framework set out in Strickland be utilized when reviewing claims of ineffective assistance of counsel. See Downs v. State, 453 So. 2d 1102 (Fla. 1984).

Petitioner contends that considering *all* the circumstances at the sentencing hearing the representation by appointed defense counsel was clearly deficient and fell short under the reasonableness standard. The trial judge repeatedly announced that he would impose a downward departure sentence at the sentencing hearing (R 10, 12, 13). The trial judge articulated oral grounds for this downward departure (R 10). In light of Ree v. State, 565 So. 2d 1329, 1330 (Fla. 1990), which was final well *before* the sentencing hearing in this cause, it was incumbent upon Petitioner's appointed trial counsel to *insure* that the trial court entered a contemporaneous written downward departure order on the date that the downward departure was rendered. Defense counsel should have made absolutely sure that the downward departure sentence order was procedurally correct and complied fully with this Court's decision in Ree.

In State v. Salley, 601 So. 2d 309 (Fla. 4th DCA 1992), the Fourth District in a state appeal came to the conclusion that there was a sufficient written downward departure order in the record and affirmed the Defendant-Appellee's downward departure sentence. However the Fourth District also noted:

> Furthermore, if the failure of defense counsel to submit the written order would be the reason for reversing and remanding for a sentence within the guidelines, we could not think of a clearer case where ineffective assistance of counsel would be so apparent on this face of the record as to give relief on direct appeal rather than in collateral proceedings. See *Stewart v. State, 420 So. 2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L. Ed. 2d 366; Gregory v. State, 588 So. 2d 676 (Fla. 3d DCA 1991).*

Id. at 310 n. 2 [Emphasis added].

Turning to the Strickland test, Petitioner has met both prongs. As to the first prong of the test, it is apparent that appointed defense counsel, Elizabeth Fein, was deficient in failing to secure a contemporaneous written downward departure order from the trial judge. See Ree. The prejudice to Petitioner is supreme. The prosecutor had announced in open court the State's intention to appeal. Respondent-State appealed the downward departure and the *sole* ground for their appeal was the lack of a contemporaneous written downward departure order issued by the trial judge. See Appellant-State's Initial Brief in the Fourth District, State v. Jones, Case No. 92-1594, Appendix 2. The trial judge indicated in open court that the State may even win this appeal (R 13).

Since Petitioner has established that she was rendered *per se* ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments at the sentencing hearing, Salley, the downward departure order of Judge Fleet should be affirmed on this alternative basis. As noted by the Fourth District in Salley why should Petitioner be severely penalized by defense counsel's failure to effectively represent her at the sentencing hearing.

An appellate court must affirm a ruling of the lower court if the ruling is supported by any basis in the record. Zirkle v. State, 410 So. 2d 948 (Fla. 3d DCA 1982). Hence this alternative basis supports affirmance of Petitioner-Defendant's downward departure sentence.

POINT III

IF THE DOWNWARD DEPARTURE ORDER IS INVALID, PETITIONER-DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HER OPEN PLEA TO THE TRIAL COURT.

Petitioner entered an *open plea* to the trial court (R 9). It was the trial judge that proposed to Petitioner that if she pled nolo contendere she would receive one (1) year probation (R 9, 10-11, 12). The only reason Petitioner pled nolo contendere to the charges was to receive probation (R 12-13). The Trial Court expressly explained to Petitioner as part of her plea that:

> "If the State wins the appeal you will be able to take back your no contest plea and start from scratch on this case."

(R 13) [Emphasis supplied].

Petitioner informed the trial judge that she understood this crucial portion of her plea agreement with the Trial Court (R 13).

The Fourth District in State v. Brown, 542 So. 2d 1371 (Fla. 4th DCA 1989), held that under the Florida sentencing guidelines a trial judge is not free to offer a plea bargain to a defendant with some sentence below the permitted guidelines sentence range over the State's objections. However the Court further held that:

> If on remand it should appear that the plea negotiated and the sentence imposed by the court are not viable, the defendant shall be given the opportunity to withdraw her plea. *State v. Nichols, 536 So. 2d 1052 (Fla. 4th DCA 1988).*

Id. at 1372 [Emphasis supplied]. See also State v. Allen, 557 So. 2d 960, 961 (Fla. 4th DCA 1990); State v. Fields, 602 So. 2d 981, 982 (Fla. 3d DCA 1992).

If this Honorable Court finds that the downward departure

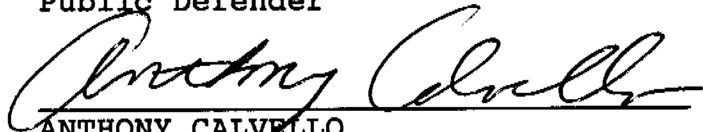
order is invalid, (But see Points I and II), Petitioner has demonstrated "good cause" for the withdrawal of her open plea to the trial court. See Fla.R.Crim.P. 3.170(f). On the authority of Brown and Allen, Petitioner should be given the opportunity, on remand, to withdraw her open plea to the court. Especially, in the instant case, where the trial judge expressly informed Petitioner as part of the plea that she would be given an opportunity to *withdraw her plea* if Respondent-State proved successful on appeal (R 12, 13). The Trial Court so informed both Petitioner and her defense counsel not once but twice (R 12, 13). Further, the Fourth District has already granted Petitioner this relief. See State v. Jones, 18 Fla. L. Weekly at 1317. Hence if the downward departure order is ultimately held to be invalid, Petitioner-Defendant respectfully requests this Honorable Court to allow her to withdraw her open plea to the trial judge on remand to the Trial Court.

CONCLUSION

Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and affirm the order of the trial judge departing downward from Petitioner's Fla.R.Crim.P. 3.701 permitted guidelines sentence range.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 2nd day of July, 1993.

Attorney for Hazel Jones