IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO: 83,954

1ST DCA CASE NO: 92-3833

ROBERT DAVID DOMBERG, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW

CORRECTED REPLY BRIEF OF PETITIONER ROBERT DAVID DOMBERG

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ARGUMENT

The arguments of the state disregard the fact that there were (a) no oral reasons for departure ever articulated; (b) that Domberg was told at sentencing by the court that he was required to file a notice of appeal within the next thirty days; (c) that Domberg filed a notice of appeal twenty six days after sentencing; and (d) that the court filed written reasons for departure thirty eight days after sentencing. This court also issued rules for sentencing guidelines prior to the sentencing of Domberg which required that "(r)easons for departure shall be articulated at the time sentence is imposed."[1] *The Florida Bar: Amend. to Rules, Etc.*, 451 So. 2d 824, 828, Committee Note (d)(11) (Fla. 1984). The state bases its complete argument on *State v. Williams*, 463 So. 2d 525 (Fla. 3d DCA 1985), a case that issued after the sentencing of Domberg and was of no precedential value whatsoever to the court in *Domberg I.*[2] When these facts are kept in mind, the futility of the arguments by the state is evident.

In *Domberg I* the proper disposition of the case, if the lack of jurisdiction to file written departure reasons had been raised, would have resulted in at a minimum a new sentencing. It is more likely that the court would have followed this court in *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985); *State v. Oden*, 478 So. 2d 51, 51 (Fla. 1985) *quoting Oden v. State*, 463 So. 2d 313, 314 (Fla. 1st DCA 1984) ("[i]t was reversible error for the trial

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[1] It should be noted that in the Brief for Petitioner at 4 Domberg notes that § 921.001(6) Fla. Stat. requires contemporaneous written reasons for a departure sentence. This only becomes evident when read in conjunction with the rules of criminal procedure which give effect to this statute. *The Florida Bar*, 451 So. 2d at 828 Committee Note (d)(11).

[2] Domberg v. State, 518 So. 2d 1360 (Fla. 1st DCA 1988).

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court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefore at the time each sentence was pronounced"); and *Shull v. Dugger,* 515 So. 2d 748 (Fla. 1987) (no departure permitted once appellate court reverses reasons for departure sentence) and remanded for a guideline sentence without departure. The guidelines recommended a fifteen year sentence, not the one hundred ten year statutory maximum departure sentence imposed by the trial court. Since the departure reasons were void, because they were filed when the court was without jurisdiction, they are in effect non existent. *Domberg I* and *II*[3] should have been remanded with no possibility for departure.

The state rests its complete argument on *Williams,* 463 So. 2d 525. *Williams,* 463 So. 2d 525 had no precedential value at the time of sentencing and at the time *Domberg I* was decided. This aberrant case was decided after Domberg was sentenced. At the time *Domberg I* was decided, no other court in this state had followed *Williams,* 463 So. 2d 525. All of the case law in every circuit was to the contrary. This aberrant opinion in *Williams,* 463 So. 2d 525 notes that its holding is contrary to the law in the First District which controlled *Domberg I* on direct appeal. *Williams,* 463 So. 2d at 526, n.2. The case law as it existed in the First District at the time of the appeal is cited in the Brief for Petitioner at 5, Section B.[4] *See also, Oden,* 463 So. 2d 313 *approved,* 478 So. 2d 51; *Roux v. State,* 455

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[3] Domberg v. State, 636 So. 2d 527 (Fla. 1st DCA 1994).

[4] Thus the argument of the state that Fox v. District Court of Appeal, Fourth Dist., 553 So. 2d 161 (Fla. 1989) finally settled the issue of the applicability of *Williams*, 463 So. 2d 525 is false. *Fox* merely disapproved *Williams*, 463 So. 2d 525 explicitly, because the state attempted to cite it as authority. No district court ever followed *Williams,* 463 So. 2d 525 and the Third District itself refused to follow it and issued a subsequent opinion to the contrary.

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So. 2d 495 (Fla. 1st DCA 1984); *Jackson v. State,* 454 So. 2d 691 *approved,* 478 So. 2d 1054; *Shull,* 515 So. 2d 748.

Williams, 463 So. 2d 525 is an aberrant case that was followed by no other court including the Third District itself. The Third District abandoned *Williams*, 463 So. 2d 525 and did not apply its holding in subsequent cases prior to the disposition of *Domberg I.* For example, in *State v. Williams,* 515 So. 2d 1051 (Fla. 3d DCA 1987) the court stated that a departure sentence was illegal because at sentencing

> the court did not announce the reasons it later expressed in its order, and that the order, signed more than two months after the sentencing, fails to comply with Florida Rule of Criminal Procedure 3.701(d)(11), which requires that "[r]easons for departure shall be articulated at the time sentence is imposed." "[I]t [is] reversible error for the trial court to depart from the guidelines without providing *a contemporaneous* written statement of the reasons therefore *at the time each sentence was pronounced." Ree v. State,* 512 So.2d 1085 (Fla. 4th DCA 1987), *State v. Oden,* 478 So.2d 51 (Fla. 1985), *appeal after remand,* 502 So.2d 64 (Fla. 1st DCA 1987), (emphasis supplied); *see Elkins v. State,* 489 So.2d 1222 (Fla. 5th DCA 1986).

Id. at 1053. Every other district, including the First District which controlled *Domberg I,* held to the contrary of *Williams,* 463 So. 2d 525. Thus *Williams*, 463 So. 2d 525 is totally irrelevant to the disposition of this case. The argument of the state that "(p)etitioner's claim now that appellate counsel should have pursued the fruitless tactic of attempting to get *Williams*, 463 So. 2d 525 overturned in order to persuade the district court to do a useless act is a classic example of hindsight as the basis for a claim of ineffective assistance of counsel," is ludicrous. Brief for Respondent at 15.

Relying on *Williams*, 463 So. 2d 525, the state mischaracterizes the law and argues that "the controlling law at the time of the sentencing **and** at the time of appeal held that the entry of the departure order itself, not the oral pronouncement and entry of the

sentencing order, signalled the commencement of the right to appeal." Brief for Respondent at 9. This is false. Once again the state cites no cases for this proposition except *Williams,* 463 So. 2d 525, which was contrary to precedent in the First District and had been effectively overruled by the Third District in *Williams,* 515 So. 2d 1051. All of the case law was to the contrary. Brief for Petitioner at 5, Section B.

Next the state confuses the issue when it argues to this court that at the time of sentencing district courts were divided as to whether oral pronouncements in the record served as written orders of departure. Brief for Respondent at 11. First, this is a totally irrelevant issue since there were absolutely no oral reasons for departure ever articulated by the sentencing court in *Domberg.* This total lack of any reason for departure (either oral or written) at the time of sentencing was contrary to the rules of this court regarding sentencing guidelines which required that "(r)easons for departure shall be articulated at the time sentence is imposed." *The Florida Bar,* 451 So. 2d at 828, Committee Note (d)(11).[5] Second, this case was controlled by the First District which clearly required a separate written statement. *E.g., Roux,* 455 So. 2d 495 (Fla. 1st DCA 1984); *Jackson,* 454 So. 2d 691 *approved,* 478 So. 2d 1054; *Shull,* 515 So. 2d 748. *See also, Oden,* 463 So. 2d 313 (Fla. 1st DCA 1984).

The state also erroneously argues that "assuming that the Williams bar could be breached, petitioner's appellate counsel would have been faced with the formidable task of

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[5] The state erroneously argues that "(t)he Florida Legislature disagreed with both *State v. Jackson* and *Ree* by amending section 921.0016, Florida Statutes." Brief for Respondent at 12, n.1. The state fails to recognize that this court relied upon the clear text of the rules regarding guideline sentences which require that reasons for departure be "articulated" at sentencing. *The Florida Bar,* 451 So. 2d at 828, Committee Note (d)(11).

persuading the district court that it should perform the useless act of remanding for entry of a written departure order when a comprehensive written order was already in the record on appeal." Brief for Respondent at 13. This is erroneous. Domberg would have been entitled to a new sentencing. At this new sentencing the court would not have been able to consider the several erroneous reasons for departure relied upon by the trial court and mentioned in the opinion by *Domberg I*. Of course, at a new sentencing hearing Domberg could have chosen not to be sentenced under the guidelines at all, as it was his choice, the crime having occurred before the institution of the sentencing guidelines. Domberg may have presented mitigating evidence to support a departure downward, for the sake of argument. Since there were no oral and by operation of law no written reasons for departure, the court in *Domberg I,* should have remanded for sentencing with no possibility for departure. *Shull,* 515 So. 2d 748; *Jackson,* 478 So. 2d 1054. The arguments by the state, that it can tell what the thought process was of the First District Court of Appeal, what would have happened upon remand and what the disposition of the First District would have been when faced with an illegal sentence, is strained beyond comprehension. Brief for Respondent at 13-4.

The state next argues that "appellate counsel cannot be faulted, in view of the time-honored practice of trial courts to enter written orders subsequent to oral pronouncements, for not anticipating that this court in *Ree* would reject that long standing practice." Brief for Respondent at 15. This argument by the state is fallacious. First, it must be remembered that there were no oral pronouncements at sentencing in the case before the court, as there were in *Ree*, and therefore this whole line of argument is erroneous.

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Secondly, it was not this court in *Ree* that rejected a "time-honored practice" and a "long-standing practice", not that there ever was such a "time honored practice." At the time of the sentencing of Domberg and at the time of *Domberg I*, it was clear that "contemporaneous" written reasons for departure were required. *Jackson,* 454 So. 2d 691; *Oden,* 463 So. 2d 313. *The Florida Bar,* 451 So. 2d at 828, Comm. Note (d)(11). There was nothing to anticipate. Regardless of how the concept of "contemporaneous written reasons" is interpreted, a total lack of written reasons at the time the court is divested of jurisdiction cannot be interpreted as contemporaneous.

The state next erroneously argues that because the departure order was signed one day prior to the filing of the notice of appeal but not filed for thirteen days after the order was signed, it is the date of signature rather than the date of filing that controls for purposes of divestment of jurisdiction. The state cites no authority for this proposition because all of the authority is to the contrary. See Brief for Petitioner at 5, Section B. Although the cause is irrelevant, the state then argues that it was the change of venue that caused this thirteen day delay. An equally plausible explanation is that the trial judge realized that his order was untimely and the notice of appeal had already been filed, backdated the order and filed it with the Clerk on December 3rd. The conclusion of the state that the actual filing was "of lesser significance", Brief for Respondent at 6, and that therefore "the circumstances and the controlling case law of the time" shows that there was no ineffective assistance of counsel" is therefore totally without support. Brief for Respondent at 7. It must be noted that the state cites no case law for this proposition because there is none. All of the authority is to the contrary. The point is that it is the date at which the order was

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filed with the Clerk that controls. See Brief for Petitioner at 5, Section B. This has always been the rule both prior to, after the sentencing of Domberg, at the time *Domberg I* was decided and remains the rule of law today. This precedent holds that the court is divested of jurisdiction upon the filing of a notice of appeal. *Wolfson v. State,* 437 So. 2d 174 (Fla. 2d DCA 1983) (court divested of jurisdiction upon filing notice of appeal); *Smith v. State,* 407 So. 2d 399 (Fla. 1st DCA 1981) (after notice of appeal court cannot modify or correct or change a sentence). *Green v. State,* 527 So. 2d 277, 278 (Fla. 2d DCA 1988) and *Williams*, 515 So. 2d 1051 are also on point and were precedent at the time *Domberg I* was decided. The court in *Green* held that where a trial court "did not enunciate any reasons for departure at sentencing"... "and the written order containing the reasons was not entered until one month after entry of the written judgment and sentences"... the departure must be reversed. *Green,* 527 So. 2d at 278.[6] *See* Brief for Petitioner at 5, Section B.

Next the state argues that the district court in *Domberg II* was not applying the case law at the time of sentencing but rather at the time of the appeal and that this can inferred because the "state of the law continued until 1990 when this court issued its decision requiring simultaneous entry of the written order with oral pronouncement." Brief for Respondent at 7. This argument is both irrelevant because this court hears this case on the merits and is also fallacious. This was not the holding of *Domberg II.* The district court held that it was applying the case law as it existed in 1984 at the time of sentencing and that this court in *Ree,* 565 So. 2d 1329 further clarified the definition of contemporaneous written

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[6] *See also, Fox*, 553 So. 2d at 163; State v. Lyles, 576 So. 2d 706, 708 (Fla. 1991). The "sentence, rather than the written reasons for departure, constitutes the final order appealed." *Fox* at 163.

order. The court in *Domberg II* held that

> claims such as those raised in Domberg's petition require the court to "turn back the appellate clock," to determine whether an absence of contemporaneous written departure reasons was cognizable error in 1984 when the petitioner was sentenced. *Domberg II,* 636 So. 2d at 529.

Clearly this court must apply the case law as it existed at the time the appeal became final.[7] Brief for Petitioner at 4, Section A. The case law in the First District clearly required written reasons for departure at the time *Domberg I* was decided. Why the state even attempts to defend *Domberg II* on this issue is unclear.

In its conclusion, the state again is citing no law for support of its proposition when it argues that "under this controlling case law, petitioner's notice of appeal filed prior to the entry of the departure order was premature and did not become operative until the departure order was entered." Brief for Respondent at 9. This is ludicrous and once again the state cites no case for this proposition but we must infer it is relying upon *Williams,* 463 So. 2d 525. The case law is clear that the filing of a notice of appeal divests the court of jurisdiction. Brief for Petitioner at 5, Section B. Domberg was advised by the trial judge at sentencing that he had thirty days within which to file the notice of appeal. R-10919. The departure order was not filed until after this thirty days had expired. If Domberg had waited until the departure order was filed thirty eight days after sentencing to file a notice of appeal, clearly the state would have argued that Domberg waived his right to appeal by not filing a notice of appeal within thirty days of the date of the sentence, as he had been

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[7] Although irrelevant to this case since it is the time a case becomes final that controls, case law at the time of sentencing also required contemporaneous written reasons and required a new sentencing. The *Domberg I* court was not aware that the trial court had been divested of jurisdiction at the time it filed its written reasons for departure.

so advised by the sentencing court. Thus the proposition that Domberg filed his notice of appeal prematurely is fallacious.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above was mailed to James W. Rogers, Senior Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399, on February 28, 1995.

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