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IN THE SUPREME COURT OF FLORIDA

ALBERT PEASE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,571

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Albert Pease, the defendant and Appellee below, will be referred to as 'Petitioner." Respondent, the State of Florida, the prosecution and Appellant below, will be referred to as "the State." The record on appeal, trial transcript, sentencing transcript and Petitioner's initial brief on the merits, will be referred to by the symbols "R," "T," "S" and "IB," respectively, followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the instant case pursuant to article V, section 3(b)(4) of the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The record shows that Petitioner was on probation following convictions for burglary, aggravated batteries, and resisting an officer with violence, based on the following conduct:

> [u]pon entry[,] [Petitioner] threw [an] Iron Water Pipe Cover at . . . Victim #1 . . . and struck her in the head, who then fell to the floor. Victim #2 . . . ran out the back door in an effort to escape, [Petitioner] caught [her] outside . . . at which time [he] choked [her] to the ground, and then kicked her in the head and stomach[,] [even though she was approximately five months pregnant] . . . .

> At this time Victim #3 . . . came outside . . . to see what was going on. [Petitioner] then armed himself with a wooden lawn chair and attacked [her]. [She] was struck in the head once, and fell to the ground[.] She got to her feet and ran inside . . . her residence, where [Petitioner] followed, now armed with a metal pipe. [Petitioner] struck Victim #3 at least once more, before making his escape.

(R 1-5, 9-12). The trial court found that Petitioner violated his probation, based on a misdemeanor battery, and sentenced him below the guideline range. (R 22-24; T 3-5, 46, 50). The guideline sentence would have been seven to nine, recommended; five and one-half to 12 years permitted incarceration. (T 46). However, on December 13, 1994, the trial court departed below the guidelines by sentencing Petitioner to one year in county jail, followed by five years' probation.[1] (R 22-24; T 50-51). On December 28, 1994, the State filed a notice of appeal. (R 18). Thereafter, on February 28, 1995, the trial court filed a nunc pro tunc written statement of reasons supporting the downward departure sentence it had imposed. (R Supp.). On March 28, 1995, the First District Court of Appeal granted Petitioner's motion to supplement the record with

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'Petitioner committed the underlying offense prior to January 1, 1994 and, therefore, is not subject to 1994 sentencing guideline rules pursuant to Rule 3.702.

the trial court's February 28, 1995 writing, and Petitioner subsequently supplemented the record accordingly. (R. Supp.).

On January 26, 1996, the First District rendered its initial decision in the instant case. State v. Pease, 21 Fla. L. Weekly D263 (Fla. 1st DCA Jan. 26, 1996). However, both Petitioner and the State moved for clarification. Consequently, on March 11, 1996, the First District rendered its final decision in the instant case. State v. Pease, 21 Fla. L. Weekly D645 (Fla. 1st DCA Mar. 11, 1996). The district court reversed the departure sentence because the trial court failed to file contemporaneous written reasons supporting it. Id. However, the district court certified the following question of great public importance:

> MAY A DOWNWARD DEPARTURE SENTENCE BE AFFIRMED WHERE THE TRIAL COURT ORALLY PRONOUNCED VALID REASONS FOR DEPARTURE AT THE TIME OF SENTENCING, BUT INADVERTENTLY FAILED TO ENTER CONTEMPORANEOUS WRITTEN REASONS?

Id. at D646. (emphasis in original). The district court explained that its decision "fail[ed] to give effect to the well-reasoned decision of the trial court, and is fundamentally unfair to [Petitioner] in this case." Id. The district court further explained that it could not "ignore the plight of [Petitioner] in this situation of a downward departure. It seems inequitable that a defendant would be required to spend a greater amount of time

incarcerated as a result of an inadvertent error of an officer of the state, the trial judge." Id.

SUMMARY OF ARGUMENT

This Court should decline Petitioner's invitation to review this well-settled area of the law. Even if this Court reviews this case, this Court will find that Petitioner's departure sentence must be reversed and the case remanded for imposition of a guideline sentence. Florida statutes, rules and well-settled case law require that the instant departure reason have been reduced to writing and filed contemporaneous to sentencing. The trial court's failure to follow the above procedure mandates reversal, and the imposition of a guideline sentence. Neither due process nor double jeopardy protections prohibit reversal in the instant case. Rather, stare decisis and an evenhanded application of relevant law require reversal of Petitioner's sentence. Accordingly, this Court must answer the certified question in the negative, and affirm the district court's decision.

ARGUMENT

ISSUE

MAY A DOWNWARD DEPARTURE SENTENCE BE AFFIRMED WHERE THE TRIAL COURT ORALLY PRONOUNCED VALID REASONS FOR DEPARTURE AT THE TIME OF SENTENCING, BUT INADVERTENTLY FAILED TO ENTER CONTEMPORANEOUS WRITTEN REASONS?

This issue of what does "contemporaneous" or "simultaneous" written reasons for departure require has been repeatedly addressed by both this Court and the Florida legislature. There is no current controversy or ambiguity in the law. This Court should decline the invitation of Petitioner to revisit and introduce ambiguity and still another reversal of direction.

Petitioner argues that Ree v. State, infra, was satisfied by the trial court's personal written notes that were made at sentencing. Petitioner further claims that due process requires that his sentence not be reversed and remanded for an unduly harsh guideline sentence simply because the trial court made a clerical error; and, indeed, that double jeopardy forbids such a reversal. Accordingly, Petitioner urges this Court to answer the certified question affirmatively and, thus, affirm his departure sentence.

Petitioner's departure sentence must be reversed and the case remanded for imposition of a guideline sentence. Florida statutes, rules and well-settled case law require that the instant departure

reason have been reduced to writing and filed contemporaneous to sentencing. The trial court's failure to do so mandates reversal, and the imposition of a guideline sentence. Neither due process nor double jeopardy prohibit reversal in the instant case. Rather, *stare decisis* and an evenhanded application of relevant law require reversal of Petitioner's sentence. Accordingly, this Court must answer the certified question in the negative, and affirm the district court's decision.

Petitioner's claims concerning Ree, infra, due process and double jeopardy are all issues that require determinations of law. Thus, the standard of review is de novo. Philip J. Padovano, Florida Appellate Practice s 5.4B, at 32 (1994 Supp.).

1. Ree and it progeny require that Petitioner's sentence be reversed for imposition of a guideline sentence because the trial court failed to contemporaneously file written departure reasons.

Section 921.001(6), Florida Statutes (1989) provides that "[a]ny sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge." The Florida Rules of Criminal Procedure contain the same requirement. "[D]epartures from the presumptive sentence established in the guidelines shall be articulated in writing . . . ." Fla. R. Crim.

P. 3.701(b)(6); see Fla. R. Crim. R. 3.701(d)(11)(same). Case law is clear that a trial court, when imposing a departure sentence, must contemporaneously file written reasons supporting the departure. E.g., State v. Colbert, 660 So. 2d 701, 702 (Fla. 1995); State v. Brown, 655 So. 2d 82, 84 (Fla. 1995); King v. State, 623 So. 2d 486, 489 (Fla. 1993); Robertson v. State, 611 So. 2d 1228, 1234 (Fla. 1993); Ferguson v. State, 566 So. 2d 255 (Fla. 1990); Pope v. State, 561 So. 2d 554, 555-56 (Fla. 1990); Ree v. State, 565 So. 2d 1329, 1331 (Fla. 1990); State v. Oden, 478 So. 2d 51 (Fla. 1985). The key requirement of Rule 3.701 is that the written reasons must actually be filed on the day of sentencing. Colbert, supra at 702 (vacating departure sentence 'because trial judge did not file contemporaneous written reasons for the departure . . ."); Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993)("[T]he law does not allow the trial judge to submit those reasons in writing after the sentence has been imposed."); Ree, supra at 1331 (holding that the writing must be 'issued" at the time of sentencing). It is equally clear that failure to contemporaneously file written departure reasons results in reversal of the departure sentence and imposition of a guideline sentence, even when the stated reasons were valid. Padilla, supra at 170 (reversing departure even though "the judge could have

validly departed from the recommended guideline sentence . . ."); see Owens v. State, 598 So. 2d 64 (Fla. 1992); State v. Lyles, 576 So. 2d 706, 708-09 (Fla. 1991); Robinson v. State, 571 So. 2d 429, 429-30 (Fla. 1990). Accordingly, well-settled law clearly mandates that the trial court contemporaneously produce written reasons supporting a departure sentence, and to likewise file the writing.

Applying the above rules of law to the facts in the instant case, it is clear that the trial court failed to satisfy Ree. The record shows that Petitioner was on probation following convictions for armed burglary, aggravated batteries, and resisting an officer with violence. (R 9-12), Petitioner violated his probation by committing a misdemeanor battery. (R 22-24; T 3-5). On December 13, 1994, the trial court sentenced Petitioner below the guideline range. A guideline sentence would have been seven to nine, recommended; and five and one-half to 12 years permitted incarceration. (T 46). The trial court, however, only sentenced Petitioner to one year county jail, followed by five years' probation, absent filed written reasons. (R 22-24; T 50-51). Finally, on February 28, 1995, the trial court filed the required writing; however, that was two and one-half months after sentencing, and the State had already filed notice of appeal. (R 18; R Supp.). Accordingly, the trial court reversibly erred by

failing to contemporaneously file the writing. Thus, Petitioner's sentence must be reversed and the case remanded for imposition of a guideline sentence.[2]

Petitioner's reliance on the trial court's explanation that its written reasons were based on 'notes made on the bench by the Court at the time of sentencing . . ." is misplaced. (R Supp.). First, the trial court did not file the notes; consequently, they are not part of the record. Because the notes are not part of the record, Petitioner'sargument that relies on them must fail. See Operation Rescue v. Women's Heath Center, 626 So. 2d 664, 670 (Fla. 1993); Applegate v. Barnett Bank, 377 So. 2d 1150, 1152 (Fla. 1979); Hines

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Petitioner, in exceeding the certified question, relies on Pietri v. State, 644 So. 2d 1347 (Fla. 1994), for the argument that this Court should remand the case for resentencing, and that the trial court should be allowed to reimpose the departure because the trial court did not examine the scoresheet. (IB 10). Petitioner's argument is meritless because: (1) he failed to raise this issue before the trial court and the First District, therefore, he waived it, Bertolotti v. Dugger, 514 So. 2d 1095, 1096 (Fla. 1987); Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Castor v. State, 365 So. 2d 701, 703 (Fla. 1978); (2) the record shows that the State, at minimum, prepared two scoresheets (an original and another after the first was lost) and informed the trial court of its contents (T 46-47); (3) the record does not show that the trial court did not review either scoresheet, Applegate, supra; (4) Pietri is factually distinguishable because in that case, the State completely failed to prepare or present a scoresheet based on its belief that the defendant stipulated to his sentence; and (5) Petitioner's claim fails to address Pope, supra. Thus, Pietri is inapposite to the instant case.

v. State, 549 So. 2d 1094, 1095 (Fla. 1st DCA 1989). The notes, moreover, do not satisfy Ree because the trial court did not file them contemporaneous to sentencing. Consequently, the notes did not satisfy the purpose of Ree, which is to enable parties to make more intelligent decisions concerning the filing of appeals. Colbert, supra at **702**. Thus, this Court must not rely on the trial court's reference to his personal notes.

The First District invites this Court to distinguish this case from Colbert v. State, supra, because this case involves a downward departure while Colbert involved an upward departure. Pease, at D646. This Court must not accept this invitation for the following reasons. Neither statutes, rules nor this Court's numerous precedents draw such a distinction. Section **921.001**(6) and Rule **3.701** concern "any" departure sentence without distinction. This Court's above cited precedents speak to departure sentences generally, and do not apply a double standard in favor of convicted criminals. See supra. Furthermore, this Court has already applied Ree and its progeny to the detriment of criminals who received downward departures absent timely filed written reasons. E.g., Whipple v. State, **596** So. 2d **669** (Fla. **1992**); Branam v. State, 554 So. **2d 512** (Fla. 1990) (holding that "Unless upward or downward departures are justified by valid

written reasons, a trial judge may not depart from the guidelin[e] recommendation."); see Gartrell v. State, 626 So. 2d 1364 (Fla. 1993); Smith v. State, **598 So. 2d 1063, 1067** (Fla. **1992).** Finally, the purpose of the sentencing guidelines--to promote uniformity in sentencing--would be uniquely compromised if this Court decided that departures in favor of criminals are not subject to the relevant statutes, rules and Ree, while upward departure are burdened accordingly. Thus, this Court cannot draw the distinction that the appellate court seeks; thus, Petitioner's departure sentence must be reversed.[3]

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[3] Petitioner relies on State v. Hunter, **610** So. 2d **115** (Fla. 4th DCA 1992) and San Martin v. State, **591** So. 2d **301** (Fla. 2d DCA **1991)** as examples **of** cases that did not reverse for failure to follow Ree (IB 11-12); however, both unique cases are inapposite to the instant case. In Hunter, supra, the defendant expressly asked that the written reasons be timely filed. Id. at 15. In addition, the trial court ordered the court reported to transcribe, that day, his oral statement of reasons. Id. at 115-16. However, the trial court failed to file the written statement until a week later. Id. Accordingly, the second district, relying on Smith, supra, did not reverse the defendant's departure sentence based on the defendant having expressly requested that the writing be filed timely. Id. at **115-16.** In contrast, in the instant case, Petitioner did not make a specific request for the timely filing, In addition, the trial court did not order that a transcript of his oral statement be produced and filed. Finally, dicta in Smith, supra (stating "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 Pone . . .") is on point to the issue in the instant case, and requires reversal of Petitioner's

2. Due process requires that this Court adhere to *stare* *deciais* and apply *Ree* evenhandedly to downward departures.

Adherence to precedent is an essential part of our judicial system. Perez v. State, **620 So. 2d 1256, 1259** (Fla. **1993)**(Overton, J., concurring). This "ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge. . . . [Plrecedent requires that, when the facts are the same, the law should be applied the same." Id. Consequently, when reviewing well-settled laws courts must consider the risk of undermining public confidence in the rule of law. Id. "There are few things more unsettling in our society than instability in the law." Smith, **598** So. 2d at 1068)(Grimes, C.J., concurring in result only). Furthermore, this Court stated that "[t]he essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before

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sentence. Thus, Hunter in inapposite to the instant case.

In San Martin, supra, the district court did not order resentencing where a timely writing was absent from the record on appeal because the case "progress notes" confirmed that a timely written statement was filed, and the trial court filed a nunc pro tunc order stating that the writing had been timely prepared, but that it must have been lost by the clerk's office. Id. at 302. Thus, the district court found that "the [trial] court contemporaneously prepared and filed the order with the clerk." Id. In contrast, the trial court in the instant case simply failed to follow Ree, there was no other error. Thus, San Martin is inapposite to the instant case.

judgment is rendered." Scull v. State, 569 So. 2d 1251 (Fla. 1990). Moreover, both due process and the integrity of this Court depend on the 'evenhanded" application of any rule of law that substantively affects the life or liberty of criminal defendants. Smith, supra at 1066.

Turning to the facts in the instant case, it is clear that due process requires that Petitioner's sentence be reversed. Adherence to Stare decisis clearly requires that this Court reverse Petitioner's sentence, and remand the case for imposition of a guideline sentence. Moreover, Petitioner has failed to articulate a right deprived of him without being heard. Finally, the evenhanded application of law requires reversal. Thus, due process requires that Petitioner be resentenced within the guidelines.

Finally, this Court must not be swayed by feelings of "fairness" into creating an exception to Ree to benefit Petitioner. He is not a victim of circumstance. The Petitioner traveled down a long road to get to the sentencing hearing of December 13, 1994. Along that journey, Petitioner threw an iron water pipe cover through a window to gain entry into a home; threw the cover at a person's head; followed a second victim, who was about five months pregnant, outside the home, and choked her and kicked her in the head and stomach; hit a third victim in the head with a lawn chair, chased

her into her neighboring home, hit her with a pipe; and then escaped. (R 1-5). Accordingly, Petitioner put himself in this situation; thus, this Court must not create an exception to the law for his benefit. Petitioner's sentence must be reversed.

3. Double jeopardy does not forbid the reversal of Petitioner's original sentence, and remand for a guideline sentence.

Petitioner strays from the certified question, arguing that double jeopardy forbids reversal of his sentence for imposition of a guideline sentence. (IB 15-17), However, in Harris v. State, 645 So. 2d 386, 388 (Fla. 1994), this Court explained that the 'Double Jeopardy Clause is not an absolute bar to the imposition of an increased sentence on remand from an authorized appellate review of an issue of law concerning the original sentence." Id. Double jeopardy is not violated where the defendant has not been deprived a "reasonable expectation of finality in his original sentence," and has not been repeatedly prosecuted. Id.; United States v. DiFrancesco, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980); Gartrell, supra; Cheshire v. State, 568 So. 2d 908, 913 (Fla. 1990). Here, double jeopardy does not forbid remand for a guideline sentence. Florida Rule of Appellate Procedure 9.140 c) authorized the underlying appeal. The issue is purely a legal

matter that did not deprive Petitioner of a reasonable expectation of finality in his sentence. Finally, Petitioner has not been repeatedly prosecuted. Thus, imposition of a guideline sentence on remand will not violate double jeopardy. Petitioner's sentence must be reversed for imposition of a guideline sentence.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests that this Honorable Court answer the certified question in the negative; and affirm the First District's decision to reverse Petitioner's departure sentence and remand the case for imposition of a guideline sentence.

Respectfully submitted,

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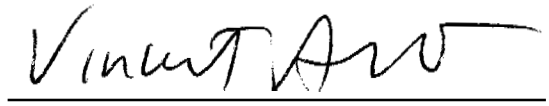
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Leon County Courthouse, Suite 401, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 06 day of May, 1996.



Vincent Altieri

Assistant Attorney General

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APPENDIX

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When a defendant fails to present evidence of his inability to pay the ordered restitution, notwithstanding an opportunity to do so, or fails to timely object to the restitution ordered based on lack of financial resources, any error in the court imposing restitution on that basis is waived. *Blair v. State*, 21 Fla. L. Weekly D151 (Fla. 4th DCA Jan. 10, 1996); *Freeman v. State*, 653 So. 2d 1151, 1151 (Fla. 4th DCA 1995) (Warner, J., concurring); *Sims v. State*, 637 So. 2d 21, 23 (Fla. 4th DCA 1994); *Padilla v. State*, 622 So. 2d 160 (Fla. 4th DCA 1993). This holding is in accordance with decisions from other districts. See *Bain v. State*, 655 So. 2d 1321 (Fla. 3d DCA 1995); *Bolling v. State*, 631 So. 2d 310 (Fla. 5th DCA 1994); *Abbott v. Srare*, 543 So. 2d 411 (Fla. 1st DCA 1989). This reasoning is also in accordance with supreme court precedent.

In *Spivey v. Sfare*, 531 So. 2d 965, 967 n.2 (Fla. 1988), our supreme court specifically stated that the defendant "failed to object and present evidence of his inability to pay the ordered restitution and so has waived his right to challenge the order on those grounds." In *State v. Whitfield*, 487 So. 2d 1045, 1046 (Fla. 1986), *receded from on other grounds, Davis v. State*, 661 So. 2d 1193 (Fla. 1995), our supreme court held that "sentencing errors which do not produce an illegal sentence or an unauthorized departure from the sentencing guidelines still require a contemporaneous objection if they are to be preserved for appeal." In *Dailey v. Stare*, 488 So. 2d 532 (Fla. 1986). our supreme court explained that where the asserted error in sentencing involves factual matters requiring an evidentiary determination and thus not apparent or determinable from the record on appeal, a contemporaneous objection is required to preserve the issue. Finally, in *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991), the same principles were applied to otherwise legal conditions of probation:

> In the absence of an objection, we believe that a defendant may appeal a condition of probation only if it is so egregious as to be the equivalent of fundamental error.

Our supreme court's holdings in *Whitfield*, *Dailey*, *Spivey* and *Larson* restrict the effect of broad dicta in *Stare v. Rhoden*, 448 So. 2d 1013, 1016 (Fla. 1984), that the contemporaneous objection rule is inapplicable to claims of error during sentencing. See *Walker v. Sfare*. 462 So. 2d 452, 454-55 (Fla. 1985) (Shaw, J., concurring).

Defendant cites to *Strickland v. Stare*, 610 So. 2d 705 (Fla. 4th DCA 1992), *Williams v. Sfare*, 578 So. 2d 846 (Fla. 4th DCA 1991), and *Perers v. State*, 555 So. 2d 450 (Fla. 4th DCA 1990), in support of his proposition that the trial court had an affirmative duty under section 775.089(6), Florida Statutes (1993), to determine whether he had the financial ability to pay the restitution ordered. None of those cases dealt with the issue of preservation of the error for appellate review.

Section 775.089(6), Florida Statutes (1993). imposes no mandatory duty on the trial court to make affirmative findings of ability to pay before ordering restitution. The issue of ability to pay is an evidentiary matter and the burden was on defendant to come forth with evidence on this issue. While the trial court may have been statutorily-required to consider defendant's financial resources if evidence had been presented to it, where defendant neither presented evidence of his inability to pay nor even raised the issue before the trial court, defendant has not preserved the issue for appellate review.

While the restitution order is enforceable, defendant may still raise his inability to pay in a subsequent violation of probation proceeding. *See* § 948.06(4), Fla. Stat. *(1993); Massie v. State*, 635 So. 2d 110 (Fla. 2d DCA 1994). In recognition of the fact that the time of enforcement is the critical time to consider defendant's ability to pay, section 775.089(6) was amended, effective May 8, 1995, to provide that the defendant's ability to pay is to be considered at the time there is an attempt to enforce the restitution order. *See* Ch. 95-160, § 1, at 1623, Laws of Fla.

Defense counsel did object at the restitution hexing to the sufficiency of evidence on the valuation of the stolen vehicles and their contents enabling us to review this issue on the merits. We find that there was competent. substantial evidence to support the amount of restitution. *See Sfare v. Hawthorne*, 573 So. 2d 330 (Fla. 1991).

Accordingly, we affirm. (GLICKSTEIN and STEVENSON, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Resentencing required where trial court failed to provide contemporaneous written reasons for downward departure sentence—Question certified: May a downward departure sentence be affirmed where the trial court orally pronounced valid reasons for departure at the time of sentencing, but inadvertently failed to enter contemporaneous written reasons?

STATE OF **FLORIDA. Appellant.** v. ALBERT PEASE, **Appellee. 1st District.** Case No. **95-74.** Opinion **filed March 11, 1996.** An appeal from the Circuit Court for Gadsden County. William Gary, **Judge.** Counsel: Robert A. Butterworth, Attorney General; James W. Rogers, Senior **Assistant** *Attorney* **General. Tallahassee,** for appellant. **Nancy A. Daniels. Public** Defender; Glen P. Gifford. **Assistant Public Defender. Tallahassee,** for appellee.

ON **MOTION FOR** CLARIFICATION

[Original Opinion at 21 Fla. L. Weekly D263a]

[Editor's note: Revised opinion contains changes in the listing of counsel, in the fourth sentence of the final paragraph, and in the wording of the certified question.]

(WOLF, J.) Appellant and appellee seek clarification of our opinion in *State v. Pease*, 21 Fla. L. Weekly D263 (Fla. 1st DCX Jan. 26, 1996). We grant the motions for clarification, withdraw our prior opinion, and substitute the following revised opinion.

The state of Florida appeals from a sentence imposed after a violation of probation, alleging that the trial court erred by failing to issue contemporaneous written reasons supporting appellee's downward departure sentence. We are constrained to reverse by prior precedent established by *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), and its progeny, including *Stafe v. Colbert*, 660 So. 2d 701 (Fla. 1995); nevertheless, we find that the result in this case is neither equitable nor just, and it is inconsistent with the practical reality of life on the trial bench.'

Appellee was on probation for armed burglary, aggravated burglary with a deadly weapon, and resisting arrest with violence. He then committed a misdemeanor, battery for which he received a one-year sentence in the Leon County Jail.

On December 13, 1994, the trial court held a hearing regarding appellee's violation of probation.' Appellee admitted that he had violated probation by committing the battery. During the sentencing hearing. 14 people testified on appellee's behalf. in addition, five other people submitted letters to the court, including his employer who stated he was willing to continue employing appellee. Defense counsel requested a downward departure for the violation of probation.

The state informed the court that the permitted sentence would be five to twelve years, and the guidelines recommended seven to nine years. The court noted that although the underlying offenses for the probation "bordered on heinous," the offense violating the probation was "a moment of stupidity." He also noted that appellee had no other violations, had a job to support his family, and had developed a strong support system as evidenced by the numerous witnesses who testified in his behalf. Appellee was sentenced to a one-year term for the violation of probation that would run concurrently with the sentence for the misdemeanor battery. The one-year term was followed by five years of probation.'

On December 13, 1994 (the same day as the hearing), the court entered a written order revoking probation and sentencing appellant. The court did not include written reasons for the departure. The state filed a timely notice of appeal on December 28. 1994.

On February 28. 1995, the trial court entered an order for downward departure from the guidelines sentence nunc pro tunc December 13, 1994. The order stated that it was "based upon the hand written draft notes made on the bench by the Court at the time of sentencing [and that] [t]he order was no: typed at that time because the Court's Judicial Assistant was absent."

When a trial court sentences a derk,?.dE.: for a term less than

the time suggested in the sentencing guidelines. it must provide written reasons contemporaneously with the sentence. *Ree v.* [redacted] 565 So. 2d 1329 (Fla. 1990); *Pope v. State*, 561 So. 2d 554 ([redacted] 1990); *Schummer v. State*, 657 So. 2d 3 (Fla. 1st DCA 1995); *State v. Howell*, 572 So. 2d 1009 (Fla. 1st DCA 1991). If a trial court gives its reasons in its oral pronouncement and later commits them to written form, it commits reversible error. *State v. Colbert*, 660 So. 2d 701 (Fla. 1995). In the instant case, the trial court failed to issue reasons until February 28, 1995, after the state had filed a notice of appeal. Because the court failed to issue reasons at the time of the sentencing order, the sentence is vacated, and we remand for resentencing within the guidelines.

We recognize that this opinion fails to give effect to the well-reasoned decision of the trial court, and is fundamentally unfair to appellee in this case.[4] We also recognize that the supreme court has recently answered a certified question as to upward departure sentences in *State v. Colbert*, *supra*. We feel, however, we cannot ignore the plight of appellee in this situation of a downward departure. It seems inequitable that a defendant would bc required to spend a greater mount of time incarcerated as a result of an inadvertent error of an officer of the state, the trial judge. We, therefore, certify the following question to be one of great public importance:

> MAY A *DOWNWARD DEPARTURE* SENTENCE BE AFFIRMED **WHERE THE TRIAL COURT ORALLY** PRONOUNCED VALID **REASONS FOR DEPARTURE** AT THE TIME OF SENTENCING, BUT INADVERTENTLY **FAILED** TO ENTER **CONTEMPORANEOUS** WRITTEN REASONS?

(VAN NORTWICK, J., concurs; MINER, J., concurs in result only.)

[redacted] While we arc not the first court to criticize *Ree* and its progeny, we feel we [redacted] so here because of the inequitable result it causes in this caw. See Justice Wells' concurring opinion in *Colbert v. State*, *supra*.

[2]Appellee committed the underlying offenses for the violation of probation prior to January I. 1994, and therefore is not subject to the 1994 sentencing guidelines rules pursuant to 3.702. but rather 3.701(d)(11) which states:

> Departures fmm the recommended or permitted guidclinc sentence should be avoided unless there arc circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outride the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction or the instant offenses for which convictions have not been obtained.

[3]We would note that the state docs not challenge the reasons stated for the downward departure, but only the fact that the wrirt.cn reasons were not entered at the time of the sentencing.

[4]Just as the striking of well-thought-out reasons for upward departures orally announced by a trial court would appear to be fundamentally unfair to the citizens of the state of Florida.

* * *

Criminal law—Sentencing—Guidelines—No **merit to** argument that under Rule **of Criminal** Procedure **3.702, probationary** split departure sentence was error **because** incarcerative portion **of** sentence deviated **more** than **25 percent from the** recommended guidelines prison sentence—It **the trial court imposes a split** sentence, the incarcerative **portion of the** sentence **may deviate more than 25** percent **from the** recommended guidelines **prison** scntcncc **if** the **trial court otherwise complies** with **the** applicable statutes **and** rules in **imposing the** departure **sentence—Question certified**

CHRISTOPHER ROBERTS, Appellant. v. STATE OF **FLORIDA**, Appellee. 1st District. Caw No. 95-557. Opinion filed March 11, 1996. An appeal **from** the Circuit Court for **Baker County. Nath C. Doughtic**. Judge. Counsel: Nancy **A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender,** [redacted] assee, for Appellant. Robert A. Butterworth, Attorney General; Trisha E. [redacted] and Amelia L. Beisner, Assistant Attorneys General, Tallahassee, for Appellee.

(BENTON, J.) Christopher Roberts **appeals his** sentence for burglary of **a** dwelling in the course of which he committed an assault, all in violation of section 810.02(a), Florida Statutes (1993). On appeal, he argues that **the** trial court erred in imposing a probationary split departure sentence because the incarccrative portion of the sentence deviated more **than** 25 percent from the recommended guidelines prison sentence. **We** affirm, but certify a question to the Florida Supreme Court **as** a matter of great public importance.

On November 21, 1994. Mr. Roberts entered a plea of nolo cantendere to an information charging ***burglary*** of a dwelling with **an** assault committed in the course of the offense. There was no agreement **as** to a sentence. The trial court departed from **the** applicable 1994 sentencing guidelines **range** of 34.5 months to 57.5 months, imposing a departure sentence **of 72 months** instate prison followed by 24 months on **probation.** Contemporaneously, the trial court filed written reasons' for the departure sentence.[1]

On appeal, Mr. Roberts contends that under Florida Rule of Criminal Procedure **3.702 a** court cannot order incarceration in **excess** of the 1994 guidelines **range** if it imposes **a** split sentence. Florida Rule of Criminal Procedure 3.702(d)(19) states:

> The sentencing **court** shall impose or suspend sentence for each separate count, **as** convicted. The total sentence shall be within the guidelines sentence unless a **departure** is ordered.
>
> ***If a split sentence is imposed. the incarcerative portion of the sentence must nor dcviart more rhan 25 percent from the recommended guidelinesprison sentence.*** **The** total sanction (incarceration and community control or probation) shall not exceed the term provided **by** general **law** or the guidelines recommended sentence where **the provisions** of subsection 921.001(5) apply,

(Emphasis added.) **The** first sentence of subdivision (d)(19) states **that** a sentence **shall be** imposed or suspended "for each separate count, as convicted." There **is** no exception to this requirement.

The second sentence of subdivision (d)(19) ***mandates*** that **the** "total sentence" for each count on which **a** defendant is convict**ed** not exceed the guidelines "unless a departure *is* ordered." The third sentence of subdivision (d)(19), starting a new **paragraph** dealing **with** split sentences, contains no exception to the requirement ***that*** "the incarcerative portion ***of*** the **sentence** must not deviate **more** than **25** percent from the recommended guidelines prison sentence." The fourth sentence, stating that the "total sanction . . . shall not exceed the term provided **by** general law[,]" also contains no exception.

Florida **Rule of** Criminal Procedure 3.702(d)(19) restates the substance of commission note to subdivision (d)(12) of Florida Rule of Criminal Procedure 3.701 (the former sentencing guidelines), which provides:

> The sentencing court shall impose or suspend sentence for each separate count, **as** convicted. The total sentence shall **not** exceed **the** guideline scntence. unless the provisions of subdivision (d)(11) are complied **with.**
>
> *If a split* ***sentence is imposed*** *(i.e. a combinorion of state prison and probation supervision),* ***tht incarcerative portion imposed shall nor be less than the minimum of the guideline range nor exceed the maximum of the range.*** The total sanction (incarcerauon and probation) shall not cxcccd **the** termprovided by general **law.**

(Emphasis added.) In *State* v. *Rice*, 464 **So. 2d** 684 **(Fla. 5th DCA** 1985), the **court** stated:

> The **State docs** not argue the **power** of the **trial** court to depart from **a** presumptive sentence **by** reducing it, but contends only that the sentence imposed is a split sentence and that it therefore violates Committee Note (d)(12) to Florida Rule **of** Criminal Procedure 3.701 because the incarcerative portion **of the** sentence **is less than** the minimum of the guideline **range.** At the time of sentencing, Committee Note (d)(12) **read as follows:**[2]

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[1]The second paragraph of this committee note has since been amended to read:

> If a split sentence is imposed ... the incarceration portion imposed shall not be less than the minimum of the guideline nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law

While the amended section does not apply retroactively, it would not change the result in this case.

[2]The sentencing **court shall** impose or suspend sentence for each separate count, **as** convicted. The total Sentence shall not exceed the guideline sentence, unless the provisions of