IN THE SUPREME COURT OF FLORIDA

ALBERT PEASE,

Petitioner,

v. **CASE NO.** 87,571

STATE OF FLORIDA,

Respondent.

_____/

INITIAL **BRIEF OF PETITIONER ON THE MERITS**

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IN THE SUPREME COURT OF FLORIDA

ALBERT PEASE,
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Case No. 87,571

INITIAL BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

This case is before the Court on a certified question of great public importance from the First District Court of Appeal:

> 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?

In this brief, petitioner will urge the Court to answer the certified question in the affirmative, quash the decision of the district court, and approve the sentence imposed by the trial court.

Herein, record references follow the format (R[page number]) for documents, (T[page number]) for transcript citations.

STATEMENT OF THE **CASE** AND FACTS

The facts as found by the district court are as follows:

> 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 not typed at that time because the Court's Judicial Assistant was absent."

State v. Pease, **21** Fla. L. Weekly D645 (1st DCA March 11, 1996).

The order included the following reasons for departure:

1. Over fifteen friends, relatives, clergymen and employers testified or wrote letters in support of Albert Pease. Each of these individuals stated that the Defendant's battery underlying the violation of probation was uncharacteristic of the Defendant. Each of these individuals stated they knew the Defendant to be a kind, peaceful and helpful individual. Their testimony support a finding that Pease does not pose a future threat to society. **State** v. Lacey, 553 So. 2d 778 (Fla. 4th DCA 1989).

2. There was a strong showing through letters and testimony of support of relatives and friends for Pease's rehabilitation. State v. Frinks, 555 So. 2d **916** (Fla. 1st DCA 1990); State v. Twelves, 463 So. 2d 493 (Fla. 2d DCA 1985).

3. Some of the witnesses testifying on behalf of Pease knew that he was previously convicted of crimes of violence. They knew that he had been incarcerated for those crimes and that he was on probation as a result of those convictions. They testified as to the efforts made by Pease to change his life upon release from prison, They testified that he obtained employment upon release from prison, They testified that he became very active in

> church activities and that he helped others in his church community. They testified that he is a family man and helps support his step-children. Their testimony support a Court's finding that the Defendant has worked to rehabilitate himself. State v. Lacey, 553 So. 2d 778 (Fla. 4th DCA 1989).

(R30-31)

In its appeal to the district court, the state argued only that the lack of a contemporaneous departure order required reversal and remand for a guideline sentence. The state did not challenge the validity of the reasons given for the court's decision to impose a sentence below the guideline range.

Deeming itself constrained by Ree v. State, 565 So. 2d 1329 (Fla. 1990), and its progeny, including State v. colbert, 660 So. 2d 701 (Fla. 1995), the district court reversed and remanded for a guideline sentence. However, it found that this result "is neither equitable nor just, and it is inconsistent with the practical reality of life on the trial bench." It also stated, "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." Id. at D646. Accordingly, it 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 SENTENCTNG, BUT INADVERTENTLY FAILED TO ENTER CONTEMPORANEOUS WRITTEN REASONS?

Id.

SUMMARY OF THE ARGUMENT

This case presents the question whether an appellate court may affirm a downward departure sentence imposed for valid reasons which are not filed with the sentencing order. Petitioner urges this Court to answer the question with a qualified yes, IF the record shows that the trial court wrote down reasons for departure during the sentencing hearing and IF those reasons are ultimately reflected in a departure order available to the appellate court. Affirmance under these circumstances is permitted under the express terms of Ree v. State, 565 So. 2d 1329 (Fla. 1990), and, in the interest of justice, under Florida Rule of Appellate Procedure 9.140(f). Punishment of Pease for the inadvertence of the trial court would deprive him of the fundamental fairness inherent in due process of law under the state and federal constitutions. Finally, the sentence may be affirmed because imposition of the more severe guideline sentence after an offender has served a portion of the departure sentence violates a prisoner's constitutional rights against double jeopardy.

ARGUMENT

IN ACCORD WITH BEE V. STATE, IN THE INTEREST OF JUSTICE, AND IN RECOGNITION OF *AN* OFFENDER'S RIGHTS AGAINST DOUBLE JEOPARDY, A DOWNWARD DEPARTURE SENTENCE MAY BE AFFIRMED WHEN THE TRIAL COURT ORALLY PRONOUNCED **VALID** REASONS FOR DEPARTURE BUT INADVERTENTLY FAILED TO CONVERT HANDWRITTEN NOTES MADE AT THE BENCH INTO A CONTEMPORANEOUS WRITTEN DEPARTURE ORDER.

The issue before this Court is whether a criminal offender who receives a downward departure sentence for valid reasons may be compelled to serve a more severe guideline sentence solely because the trial court neglected to convert handwritten reasons for departure into a contemporaneous order. Or, in the words of the district court,

> 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?

Petitioner urges this Court to answer the question with a qualified yes, IF the record shows that the court contemporaneously wrote down reasons for departure and IF those reasons are ultimately reflected in a departure order available to the appellate court, Affirmance under these circumstances is permitted under the express terms of Ree v. State, 565 So. **2d** 1329 (Fla. 1990), and in the interest of justice under Florida

Rule of Appellate Procedure 9.140(f). Moreover, punishment of Pease for the inadvertence of the trial court would deprive him of the fundamental fairness inherent in due process of law under the state and federal constitutions. Finally, imposition of the more severe guideline sentence after Pease has served a portion of the departure sentence would expose Pease to unconstitutional double jeopardy.

A. Ree

The applicable guideline rule in this case, which arose in 1990, is Florida Rule of Criminal Procedure **3.701**. Pertinent to this case, Rule 3.701(d)(11) provides:

> (11) Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors which reasonably justify aggravating or mitigating the sentence. Any sentence outside of the permitted range must **be** accompanied by a written statement delineating the reasons for the departure.

This Court applied the rule in Ree v. State, 565 So. 2d 1329 (Fla. 1990), in which it answered the following certified question in the affirmative:

> Must a trial court produce written reasons for departure from the sentencing guidelines at the sentencing hearing?

The Court ruled that an order supporting an upward departure on

violation of probation issued five days after the sentencing hearing violated Rule 3.701(d)(11), compelling reversal and remand for a guideline sentence. The Court stressed the importance of contemporaneous written reasons, on the rationale that "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." Id. at 1332. Addressing concerns that the requirement would force judges to determine the punishment before the sentencing hearing, the Court wrote:

> When the state has urged a departure sentence, the trial court has three options. First, if the trial judge finds that departure is not warranted, he or she then may immediately impose sentence within the guidelines' recommendation, or may delay sentencing if necessary. 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 or extent of departure, the trial 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.

Here, the trial court followed the second of the three options laid out in Ree. In the *nunc pro tunc* sentencing order,

the trial court referred to "hand written draft notes made on the bench by the Court at the time of sentencing." These notes satisfied Ree's requirement that the court 'write out its findings at the time sentence is imposed, while still on the bench." Judge Gary explained that the notes were not then reduced to a typed order because his judicial assistant was absent. Evidently, the judge did not have a third option of writing the reasons on the scoresheet. The parties could not find the original scoresheet, on which sentencing for violation of probation should be based, and no new scoresheet appears in the record or the court file below.[1] (T46) This case preceded the 1994 guidelines revisions, which in Rule 3.702(d)(18)(a) authorizes use of a signed, written transcription of orally stated reasons.

The handwritten notes referred to by Judge Gary satisfy both the requirements of Ree and Rule 3.711(d)(11). The rule requires only a contemporaneous writing, These circumstances are

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[1] Sentencing proceeded on the representations of the prosecutor as to the sentencing range. (T46) The absence of a scoresheet, examined by the judge for accuracy, is a legitimate reason to vacate the sentence and order resentencing. Florida Rule of Criminal Procedure 3.701(d)(1); Pietri v. State, 644 So. 2d 1347 (Fla. 1994). Upon remand, the trial court could again depart downward with valid written reasons.

materially similar to the facts of San Martin v. State, 591 So, 2d 301 (Fla. 2d DCA 1991), rev. denied, 598 So. 2d 78 (Fla. 1992). There the appellate court held that the trial court had concurrent jurisdiction during the appeal to enter a nunc pro tunc departure order replacing an earlier order lost or misfiled by the trial court clerk. Here, the clerical error was made by the court, not the clerk. The penalty to appellant should be no greater for the difference.

Even when there is no writing whatsoever, downward departure sentences have been approved under analogous circumstances. In Smith v. State, 598 So. 2d 1063 (Fla. 1992), the Court reaffirmed the core holding of Ree in a case involving a downward departure without timely written reasons, and ruled it applicable to cases not yet final when Ree was decided. However, finding that the state had failed to follow the judge's directions to prepare a scoresheet containing the reason for departure specified by the judge, the Court approved the sentence. "Smith," wrote the Court, "should not be penalized for the State's failure to carry out the court's timely and unambiguous instructions." Id. at 1067,

In State v. Hunter, 610 So. 2d 115 (Fla. 4th DCA 1992), the district court affirmed "even though the trial court failed to

put its reasons for deviating from the sentencing guidelines in writing the same day that sentencing took place." Defense counsel expressly requested a downward departure and asked the court to provide a contemporaneous written order. Id. at **115.** Here, too, defense counsel expressly requested a downward departure. (T49) The grounds, amply laid out in the court's order, were clear from the letters and testimony of appellant's friends and loved ones. As in Hunter, "[t]he defendant was obviously relying on the trial court to enter the required order and he should not be penalized when the order is not timely filed." Id. at **116.**

Consistent with San Martin, Smith and Hunter, the validity of Pease's sentence should not hinge on whether an officer of the state properly performed a clerical task.

B. Due Process

The district court recognized that reversal of the departure sentence was fundamentally unfair to Pease. Fundamental fairness is the primary component of due process of law, guaranteed under Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution. State v. Smith, 547 So. 2d 131, 134 (Fla. **1989).** Basic due process and fundamental fairness in sentencing are legitimate concerns of an

appellate court, See Brown v. State, 633 So. 2d 112, 115 (Fla. 2d DCA 1994) (Altenbernd, J., concurring and dissenting). This Court has observed that substantive due process may implicate availability or harshness of remedies, while procedural due process ensures "fair treatment through the proper administration of justice where substantive rights are at issue." Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991). Both concerns arise here, where the remedy of remand for a guideline sentence because of the trial court's inadvertence is unduly harsh, and the result does not comport with the principle of fair treatment in the proper administration of justice. As stated by the Mississippi Supreme Court in disapproving a life sentence for burglary of a dwelling: 'Our law is not susceptible of mechanical operation, nor are our courts robots." Ashley v. State, 538 So. 2d 1181 (Miss. 1989).

In a similar vein, this Court has observed that sentencing is not a game in which one wrong move by the judge means immunity for the prisoner. Harris v, State, 645 So, 2d 386 (Fla. 1994). A necessary corollary is that one misstep by the judge does not mean a harsher penalty for the prisoner. In State v. Colbert, 660 So. 2d 701 (Fla. 1995), this Court declined an invitation to parlay its statement in Harris into grounds for approval of an

upward departure sentence without written reasons, finding "no intervening circumstances" compelling the suspension of Ree. Id. at 702. The basic concerns of fundamental fairness and the equitable administration of justice arising from reversal of a downward departure for good reasons appearing in the record make this a different case. On these facts, Justice Wells' concern that reversal based upon a procedural sentencing error does not conform with the proper administration of justice is compelling. Id. at 703 (Wells, J., concurring).

A significant consideration in a discussion of fairness and the equitable administration of justice is the exact nature of the punishment imposed by the trial court. At the time of his sentencing for violation of probation, Pease had already been separately punished for the conduct constituting the violation, through a separate one-year sentence for battery, the statutory maximum. On violation of probation based on the same battery, the court imposed a one-year county jail sentence, concurrent to the battery sentence, plus five more years on probation. The judge reasonably concluded that the interest of justice did not compel a harsher sanction for what he termed a "moment of stupidity." (T48) The trial court's decision should not be rescinded solely because of a clerical error,

C. Double Jeopardy

The result required by the district court ruling, imposition of a guideline sentence of at least 5-1/2 years in prison, would violate Pease's rights against double jeopardy under Article I, Section 9 of the Florida Constitution and the Fifth Amendment to the U.S. Constitution. The downward departure, imposed for valid reasons, is a legal sentence which may not be increased without violating double jeopardy.

In Gartrell v. State, 626 So.2d 1364 (Fla. 1993), this Court held that a downward departure without written reasons is not an illegal sentence and therefore may not be altered via Florida Rule of Criminal Procedure 3.800(a). If a sentence is not illegal, it may not be increased after the offender has begun serving it, under the state and federal Double Jeopardy clauses. Troupe v. Rowe, 283 So.2d 857, 860 (Fla. 1973). See also, Gonzalez v. State, 596 So. 2d 711, 712-713 (Fla. 3d DCA 1992), and cases cited therein (trial court violated double jeopardy in revoking 2-1/2-year sentence already commenced and imposing 5-1/2-year sentence).

This case differs from Cheshire v. State, 568 So. 2d 908 (Fla. 1990), in which mathematical errors led the trial court inadvertently to impose a downward departure sentence. This

Court determined that resentencing within the guidelines was required by Pope v. State, 561 So. 2d 554 (Fla. 1990). The Court concluded that the double jeopardy ban "does not guarantee a defendant the benefit of a judge's good-faith mathematical or clerical errors." 568 So.2d at 913. Here, Pease invokes double jeopardy not as a windfall to lock in an erroneously calculated sentence, but as a shield to preclude the use of technical noncompliance with the guidelines to increase an otherwise lawful sentence. As in State v. Johnson, 591 So. 2d 204 (Fla. 4th DCA 1991), in which the downward departure without written reasons was grounded in a plea bargain, the trial court "knowingly and deliberately entered a reduced sentence." Although the Johnson court recognized the double jeopardy concern, it also deemed itself constrained by Pope to remand for a guideline sentence, and withdrew a certified question.

In Johnson and Pope, written departure reasons were nonexistent. In Ree, supra, this Court held that a guideline sentence must be imposed on remand when the written reasons were issued tardily. However, neither Pope nor Ree address the concern that the increase in sentence violates double jeopardy, because both cases involved upward departures, and both were remanded for *reduced* sentences, If this Court finds that the

trial court invalidly imposed a downward departure, the question whether imposition of a guideline sentence, an *increased* sanction, violates double jeopardy should also be resolved.

In summary, Pease urges this Court to answer the certified question in the affirmative and approve the downward departure for any of three reasons: (1) the trial court made a contemporaneous writing, as required by Ree, (2) in the interest of justice under Florida Rule of Appellate Procedure 9.140(f), Pease is entitled not to be penalized for the trial judge's inadvertent error, or (3) imposition of the more severe guideline sentence after commencement of a lawful sentence would violate double jeopardy.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF **SERVICE**

I DO HEREBY CERTIFY that a true and correct **copy** of the foregoing has been furnished to Vincent Altieri, Assistant Attorney General, by delivery **to** The **Capitol**, Plaza Level, Tallahassee, FL, on this 15th day of April, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ALBERT PEASE,

Petitioner,

v. **CASE NO. 87,571**

STATE **OF FLORIDA,**

Respondent.

APPENDIX

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. State,* 543 *So.* 2d 411 (Fla. 1st DCA 1989). This reasoning is also in accordance with supreme court precedent.

In *Spivey v. State,* 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 *Stare v. Whitfield*, 487 *So.* 2d 1045, 1046 (Fla. 1986), *receded from on other grounds, Davis v. Stute,* 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. State,* **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 *State 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. Stare,* 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. State,* 578 *So.* 2d 846 (Fla. 4th DCA 1991), and Peters *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. Stare,* 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 hearing 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 Stute 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 DCA 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 Rce v. *State*, 565 *So.* 2d 1329 (Fla. 1990), and its progeny, including *Stare 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.[2] 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.[3]

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 not typed at that time because the Court's Judicial Assistant was absent."

When a trial court sentences a defendant for a term less than

the time suggested in the sentencing guidelines, it must provide written reasons contemporaneously with the sentence. Ree *v. State, 565 So.* 2d 1329(Fla. 1990); Pope *v. Srate,* 561 So. 2d 554 (Fla. 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. *Stare 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 tiled 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 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. 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.)

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

'Appellee committed the underlying offenses for the violation of probation prior to January 1, 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 from *the* recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outside 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.

'We would note that the state does not challenge the reasons stated for the downward departure, but only the fact that the written reasons were not entered at the time of *the* sentencing.

'Just as the striking of well-thought aut 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—If the trial court imposes a split sentence, the incarcerative portion of the sentence may deviate more than 25 percent from the recommended guidelines prison sentence 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. Case No. 95-557. Opinion filed March 11, 1996. An appeal from the Circuit Court for Baker County. Nath C. Doughtie. Judge. Counsel: Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Trisha E. Meggs 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 incarcerative 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 contendere to an information charging burglary of a dwelling with an assault committed in the course of the affense. 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 in state prison followed by 24 months on probation. Contemporaneously, the trial court filed written reasons' for the departure sentence.[2]

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 not deviate more than 25 percent from the recommended guidelines prison 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 convicted 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 sentence, unless the provisions of subdivision (d)(11) are complied with.
>
> ***If a split sentence is imposed (i.e. a combination of state prison and probation supervision), rhc incarcerative portion imposed shall not be less than the minimum of the guideline range nor exceed the maximum of the range.*** The total sanction (incarceration and probation) shall not exceed the term provided by general law.

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

> The State does 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:'

'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.

> 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