IN THE SUPREME COURT OF FLORIDA

ALBERT PEASE,	:	
Petitioner,	:	
v.	:	**CASE NO. 87,571**
STATE OF FLORIDA,	:	
Respondent.	:	

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	1
TABLE OF CITATIONS	I
PRELIMINARY STATEMENT	1
ARGUMENT	
IN ACCORD WITH REE 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.**	**1**
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

CASE	PAGE(S)
Gardner v. State 530 So.2d 404 (Fla. 3d DCA 1988)	3
Padilla V. **State** **618** So.2d **165** (Fla. **1993)**	2
Ree v. State 565 So.2d **1329** (Fla. 1990)	2

OTHER AUTHORITIES

Florida Rule of Appellate Procedure 9.140(f)	2

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STATE OF FLORIDA,	)	
	)	
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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Herein, citations to the initial and answer briefs appear as (IB [page number]) and (AB [page number]).

ARGUMENT

> IN ACCORD WITH REE 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 state would convert this *Court* into an automaton which applies the written law rigidly, with no room for what is just or fair under the circumstances. Fortunately, the state and federal guarantees of due process of law and the "interest of justice"

provision of Florida Rule of Appellate Procedure 9.140(f) permit the exercise of the moral sense by the flesh and blood that inhabit the appellate bench. On occasion, the moral imperative may override more mundane judicial concerns such as "uniformity in sentencing" (AB12) or stare decisis (AB13). If this Court finds no other path to affirmance of Pease's downward departure sentence, it should not hesitate to act in the interest of justice.

None of the caselaw cited by the state is precisely on point. Aside from Ree v. State, 565 So. 2d 1329 (Fla. 1990), respondent relies most heavily on Padilla v. State, 618 So. 2d 165 (Fla. 1993). (AB8) Padilla is clearly distinguishable; it involved an upward departure and, apparently, no order whatsoever. Id. at 170.

Respondent takes issue with the contention that the absence of a scoresheet requires remand for resentencing at which time the court may again depart downward, for several reasons, foremost because it was not argued below. (AB10) Petitioner raises this matter initially before this Court because he was the appellee in the district court and sought no relief. Only now that his downward departure sentence has been vacated does he have reason to identify a defect which would reinstate that

sanction. Respondent also states that the record does not reflect that the trial court did not review a scoresheet. (AB10, n.2) In reply, the sentencing transcript establishes, as clearly as one can prove a negative, that the court did not have a score-sheet before it at the time of sentencing.

The state asserts that this Court's precedents "do not apply a double standard in favor of convicted criminals." (AB11) What the state views as a double standard is merely the guarantee against particular government conduct granted to individuals under the state and federal constitutions. See Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988) (state does not have constitutional due process rights to which exclusionary rule attaches).

Citing to the police report, respondent recites the circumstances that led to the conviction and revocation of probation, then concludes that Pease "put himself in this position." (AB14-15) While petitioner's actions were the cause of his legal troubles, it bears repeating that the trial judge's inadvertence -- not Pease's conduct -- brought Pease to this juncture, poised between the probation presently in place and a state prison sentence of at least 5-1/2 years in duration. It also bears repeating that the state did not challenge the validity of the

reasons for departure in the district court, Nor does it challenge the reasons before this Court. As a final reminder, Pease had already been punished for the battery underlying the probation violation with the most severe sanction available for a first degree misdemeanor, one year in county jail.

Finally, respondent asserts that Pease had no reasonable expectation of finality in his downward departure because the state's appeal was authorized by law. (AB15-16) To the contrary, one would be hard pressed to find one whose expectation of finality is more reasonable than that of Mr. Pease. His trial counsel vigorously sought a downward departure, and many members of the community appeared on his behalf as part of that effort. He had every reason to believe that the trial judge, who knew he was imposing a downward departure, would perform the clerical task of memorializing admittedly valid reasons in an order.

The state has not addressed the authority cited in the initial brief (IB15) holding that a lawful sentence may not be increased once an offender has begun to serve it.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court quash the decision of the district court, answer the certified question in the affirmative, and remand for affirmance of the sentence imposed by the trial court.

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 28th day of May, 1996.

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