IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EUGENE EVANS,

Respondent.

CASE NO. 88,451

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal, will be referred to as Petitioner or the State. Respondent, EUGENE EVANS, the Appellant in the First District Court of Appeal will be referred to as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. The symbol "ST" will refer to the transcript of the hearing held to supplement the record on appeal. Each symbol will be followed by the appropriate page number in parentheses.

All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

1. On March 16, 1994, the State charged the defendant with armed robbery with a firearm. (R 1).

2. On September 15, 1994, a jury convicted the defendant of armed robbery with a firearm. (R 77).

3. The State prepared a sentencing guidelines scoresheet that reflected a permitted minimum sentencing range of 53.7 months in state prison and a maximum sentencing range of 89.6 months in state prison. (R 89-90).

4. On October 18, 1994, the trial court adjudicated the defendant guilty of armed robbery with a firearm, and sentenced the defendant to 15 years in state prison. (T 135). The trial court orally pronounced 4 reasons for the departure sentence: 1) the offense was committed within 6 months of the defendant's discharge from state prison; 2) the victim suffered extraordinary emotional trauma; 3) the defendant is not amendable to rehabilitation or supervision; and 4) the defendant has an extensive unscorable juvenile record. (T 135-36).

5. On November 16, 1994, the defendant filed a timely notice of appeal challenging his judgment and sentence. (R 108).

6. On June 7, 1995, the Public Defender for the Second Judicial Circuit filed an *Anders* brief.

7. On January 30, 1996, the District Court of Appeal *sua sponte* directed the defendant's appellate counsel to address the issue of the departure sentence. According the District Court, "the record indicates that the court imposed an upward departure sentence under the guidelines, yet this court's review of the record indicates that the [trial] court failed to comply with Florida Rule of Criminal Procedure 3.702(d)(18)(A)."

8. On February 8, 1996, the defendant's appellate counsel filed a supplemental brief which stated that appellate counsel had contacted the Honorable John Bryan, the trial judge below, and had learned that:

> While Judge Bryan insists the written reasons were memorialized at the time of sentencing, he concedes that they were inadvertently returned to the probation office, along with the PSI, and were not filed with the clerk until February 6, 1996.

(Defendant's supplemental brief at 5). The defendant attached a copy of a Notice filed by Judge Bryan which indicated that the departure reasons were filed on February 6, 1996.

9. On February 21, 1996, the State filed a Motion to Relinquish Jurisdiction to the trial court in order to supplement or reconstruct the record in order to determine what happened to the written departure reasons.

10. On February 22, 1996, the District Court relinquished jurisdiction for 10 days in order to allow the trial court to supplement the record with those documents showing when the written reasons for the departure sentence were filed.

11. The State filed an amended motion to extend the time for relinquish of jurisdiction for 20 days.

12. On March 1, 1996, the trial court conducted a hearing to determine facts surrounding the written departure reasons in the instant case, and to answer questions such as when and where the written departure reasons were filed. (ST 10).

13. At the March 1, 1996, hearing, the following facts were developed. Judge Bryan stated that he received two calls, one from the appellant's appellate counsel and the other call from an attorney general, concerning the location of the written reasons for departure. (ST 10). At this point, Judge Bryan asked his judicial assistant to have the clerk send the court file to the judge's office. (ST 11). After examining the court file, Judge Bryan stated that he did not find the written departure reasons in the court file. (ST 11). Judge Bryan then checked the possibility of whether or not the written departure reasons could have been misfiled in another file. (ST 11). Consequently, Judge Bryan checked some "other close-in-time filed of Eugene Evans." (St 11).

Although the written departure reasons were not in the file, Judg Bryan distinctly remembered filling out a departure sheet. (St 12). Judge Bryan then contacted the local probation and parole office and asked the officer to check his filed and see if the guidelines departure sheet was in the probation and parole file. (St 12). The probation and parole officer pulled the PSI, and he informed Judge Bryan that the original scoresheet was in the file with the PSI. (ST 12).

Judge Bryan then filed a Notice of Filing, original October 18, 1994, Reasons for Departure Aggravating Circumstances, and sent copies to interested parties. (ST 13). Judge Bryan further stated that when he received the written departure reasons from the Department of Corrections that it jogged his memory that during the sentencing day, he realized that there wasn't a departure scoresheet attached to his copy of the scoresheet. (ST 13). Judge Bryan asked one of the probation officers to get him a copy of the departure scoresheets. (ST 13). On receiving the copy of the departure scoresheet, Judge Bryan intended to consider a departure on the appellant's case. (St 13). Judge Bryan stated that he "believed until a couple of days ago that I filed it with the clerk." (St 13). In fact, Judge Bryan stated:

> I do not have an absolute independent recollection of to whom I handed that document. What I do know is that it ended back with the Department of Corrections, Probation and Parole, in their file, and I don't know how it ended up there. It could have been that I handed it to them in a stack with other PSIs. It could have been that I handed it to the clerk, and the clerk handed it to them. But it ended up filed, but misfiled, as I see it, over at the Department of Corrections rather than in the clerk's office file.

(ST 14-15). Judge Bryan further stated that he specifically recalled reading departure reasons during sentencing proceeding. (ST 15).

After Judge Bryan's statement, the prosecutor below asked a few questions. Judge Bryan stated that it is his normal practice to execute written reasons contemporaneously with the sentencing, and that he normally entrusts the clerk with putting the proper documentation in the court file. (ST 16). Judge Bryan stated that although the normal practice is that he has the court file open at the bench during the sentencing, he did not have any independent recollection as to whether this particular file had been open. (St 17). Judge Bryan further stated that when he accepts a document for filing his normal practice is to write "filed before me" on the document, but he noted that it was not done on this document. (St 17-18). Judge Bryan stated that he occasionally accepts documents

to be filed in the court file, but that it is "fairly rare in the courtroom." (ST 22).

Judge Bryan noted that the written departure reasons in the court file are date stamped February 6, 1996, which followed the discovery of the reasons in the probation and parole office. (ST 19). The Judge then stated that until a few weeks ago, he thought the written departure reasons were part of the acarid file at the time he entered the departure reason. (ST 23).

Finally, at the close of the hearing, the prosecutor asked the Judge to include the clerk's notes which indicate that a departure sentence was given. (ST 25). Judge Bryan agreed to include the clerk's notation in this supplementary record because it "further confirms [the departure sentence] being done at that time." (ST 26).

14. On March 4, 1996, this Court extended the relinquishment of its jurisdiction for 20 days.

On April 16, 1996, the First District in a one paragraph per curium opinion containing no unique facts reversed and remanded for resentencing within the guidelines.

15. On May 1, 1996, the State filed a motion for rehearing, clarification and certification. In the motion for rehearing, the State requested the First District clarify the opinion to include

the fact that the departure order had been misfiled. The motion also cited the Second District's opinion in San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992), and requested that the First District reconsider its opinion in light of the Second District's decision or certify conflict.

16. On June 18, 1996, the First District issued a per curium opinion denying the State's motion for rehearing and certification, but granting the motion for clarification. The First District added a paragraph to its earlier opinion including the pertinent facts that the departure order was contemporaneously written with the oral pronouncement but mistakenly misfiled with the pre-sentence investigative report in the probation file, instead of the court file.

17. On July 3, 1996, the case was reassigned to current counsel and a notice to invoke this Court's jurisdiction based on conflict was timely filed. On July 16, 1996, the State filed its jurisdictional brief establishing conflict between the decision below and San Martin. Respondent conceded conflict in his jurisdictional response but argued that the issue was too rare to be of great public importance.[1] On October 4, 1996 this Court

[1] The rarity of the issue may be a consideration when one District Court certifies an issue as a matter of great public

issued an order accepting jurisdiction and establishing a briefing schedule.

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importance. However, this consideration is irrelevant when a case is before this Court based on conflict between District Courts of Appeal. The policy rationale behind conflict jurisdiction, uniformity in the law, is automatically undermined when two decisions conflict.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to and Article V, § 3(b)(3), FLA. CONST. which provides, in pertinent part:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The decision below, Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996), expressly and directly conflicts with San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992). In both cases, the trial courts properly and timely prepared written departure orders. In both cases, subsequent to the trial courts' preparing the departure orders, a clerical error occurred. In both cases, the clerical errors resulted in the departure orders not being included in the original record on appeal. On these facts, the First District reversed the departure sentence in this case, whereas the Second District affirmed the departure sentence in San Martin, *supra*. Indeed, the First District itself recognized the conflict between its decision and the Second District's decision in San Martin, *supra*, but declined to certify the conflict. Both cases expressly rely on this Court's decision in Ree v. State, 565 So. 2d 1329

(Fla. 1990), to reach completely contrary decisions. Opposing counsel in his jurisdictional brief agreed that Evans, *supra*, directly and expressly conflicts with San Martin, *supra*.

SUMMARY OF ARGUMENT

The First District's decision in Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996), is incorrectly decided and in conflict with the Second District's decision in San Martin, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992). The trial court substantially complied with the applicable statute. The trial court properly reduced to writing his departure reasons at the sentencing hearing. The trial court then timely filed the written departure order. However, the departure order was mistakenly filed in the probation file instead of the court file. Respondent should not obtain a windfall of seven and a half years deleted from his sentence because the departure order got mixed in with his PSI. A clerical error in the ministerial act of filing should not entitled a defendant to a lower sentence. It is one matter to hold the trial court responsible for failing to comply with legal precedent requiring written reasons if a trial court wishes to depart from the guidelines, it is quite another to hold a trial court responsible for a such minor miscues as misfiling an order, something which happens routinely in any law office or court. The decision in Evans is contrary to this Court's cardinal tenet that form not be elevate form over substance.

ARGUMENT

ISSUE

WHETHER A CONTEMPORANEOUSLY WRITTEN DEPARTURE ORDER, THAT WAS TEMPORARILY MISFILED BUT SUBSEQUENTLY RESTORED TO THE PROPER COURT FILE, IS VALID?

The First District's decision in Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996), is incorrectly decided and in conflict with the Second District's decision in San Martin, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992). The trial court substantially complied with the applicable statute. The trial court properly reduced to writing his departure reasons at the sentencing hearing. The trial court then timely filed the written departure order. However, the departure order was mistakenly filed in the probation file instead of the court file. Respondent should not obtain a windfall of seven and a half years deleted from his sentence because the departure order got mixed in with his PSI. A clerical error in the ministerial act of filing should not entitleNovember 18, 1996 a defendant to a lower sentence. It is one matter to hold the trial court responsible for failing to comply with legal precedent requiring written reasons if a trial court wishes to depart from the guidelines, it is quite another to hold a trial court responsible for a such minor miscues

as misfiling an order, an event that can occur in any law office or court and just as easily be corrected, as here. The decision in Evans is contrary to this Court's tenet that form not be elevate over substance.

The trial court orally pronounced four reasons for its upward departure sentence and contemporaneously prepared a written order containing these departure reasons. Because of a clerical error, the contemporaneously written departure order was misfiled in the probation file instead of the court file.[2]

On appeal, the First District held that the trial court's contemporaneously written departure order was not "filed" within fifteen days of sentencing as required by § 921.0016(1)(c), FLA. STAT. (1993) and FLA. R. CRIM. P. 3.702(d)(18)(A). The First District held that it was "constrained" by this Court's holdings in State v. Colbert, 660 So. 2d 701 (Fla. 1995) and Ree v. State, 565 So. 2d 1329 (Fla. 1990), to "strictly construe" the requirement

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[2] No objection in the trial court is required to preserve the failure of a trial court to file a departure order. Davis v. State, 661 So. 2d 1193, 1197 (Fla. 1995)(failure to file written reasons is error that may be raised for the first time on appeal without a contemporaneous objection required because it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written order at the sentencing hearing because, at that stage, counsel does not know whether a written order is being filed or what it will say).

that a written departure order be filed timely. Accordingly, the First District vacated respondent's sentence and remanded this case for resentencing within the guidelines. The First District recognized the conflict between its decision and the Second District's decision in San Martin, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992), in a footnote, but refused to certify conflict.[3] This Court accepted review.

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[3] The footnote in its entirety is:

> We are cognizant that our decision appears to conflict with that rendered by the Second District in San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), *review denied*, 598 So. 2d 78 (Fla. 1992), which affirmed an upward departure sentence involving written reasons filed outside the 15-day period due to a clerical error. Appellee did not argue this case in its brief, but instead relied upon it for the first time in its motion for rehearing, clarification and certification. Under the circumstances, we decline to entertain that authority now. See Cartee v. Department of Health & Rehab. Servs., 354 So. 2d 81 (Fla. 1st DCA 1978) (on petition for reh'g).

This footnote is in contravention with the rules of appellate procedure. The State's petition for rehearing properly cited San Martin as an additional authority. The rule of appellate procedure governing motions for rehearing, rule 9.330(a), provides in pertinent part:

> A motion for rehearing or clarification shall state with particularity the points of law or fact that the court has overlooked or misapprehended.

The Sentencing Guidelines provision governing departure sentences, § 921.0016(1)(c), FLA. STAT. (1993), provides:

> A state prison sentence which varies upward or downward from the recommended guidelines prison sentence by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure, filed within 15 days after the date of sentencing. A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 15 days after the date of sentencing.

Florida Rule of Criminal Procedure 3.702(d)(18)(A), provides:

> If a sentencing judge imposes a sentence that departs from the recommended guidelines sentence, the reasons for departure shall be orally articulated at the time sentence is imposed. Any departure sentence must be accompanied by a written statement, signed by the sentencing judge, delineating the reasons for departure. The written statement shall be filed in the court file within 15 days of the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time sentence was imposed is sufficient if it is signed by the sentencing judge and filed in the court file within 15 days of the date of sentencing. The sentencing judge may also list the written reasons for departure in the space provided on the guidelines scoresheet and shall sign the scoresheet.

Additionally authority is properly cited for the first time under the language of the rule. *But see*, Williams v. Noel, 112 So. 2d 5, 8 (Fla. 1959)(petition for rehearing was denied where additional authority was cited for the first time in petition but Supreme Court did not overlook the cases but in fact considered and rejected the cases in its original decision). The motion also properly pointed out that the district court's decision had created direct and express conflict with San Martin, *supra*.

The standard of review is *de novo*. Whether a departure order that was contemporaneously written and timely filed, but in the wrong file was "filed" withing the meaning of the statute and rule is a legal question. Legal issues relating to departure orders are reviewed *de novo*. United States v. Crouse, 78 F. 3d 1097, 1100 (6th Cir. 1996)(legal questions related to a district court's decision to depart from the sentencing guidelines are reviewed *de novo*).

The trial court substantially complied with both the statute and the rule. The trial court reduced its departure reasons to writing at the sentencing hearing. Thus, the departure order was contemporaneous. The trial court chose not to avail itself of the fifteen day period allowed for filing, but instead filed the written departure order contemporaneously with the sentencing hearing. While the departure order was filed in a timely manner, it was placed in the probation file, not the court file. The temporarily misfiled departure order was subsequently discovered and restored to the proper court file. Thus, the trial court properly and substantially complied with the statutory requirements governing departure orders.

In San Martin, *supra*, the trial court imposed an upward departure sentence. The trial court orally pronounced its decision

to depart and prepared a contemporaneously written departure order. However, this written departure order was lost or misplaced. Nine months later, the trial court entered a replacement departure order. The trial court's *nunc pro tunc* replacement departure order recited that the trial court previously had prepared a departure order, but the order "must have been lost or misplaced". Id. at 302. The defendant argued that this violated the requirements of Ree v. State, 565 So. 2d 1329 (Fla. 1990), which mandated that departure orders be contemporaneously entered. The Second District disagreed, finding no violation of Ree, *supra*. The Second District held that a *nunc pro tunc* order, replacing a lost order, is a procedural matter and affirmed the departure sentence. This Court declined review.

In both the instant case and San Martin, the trial courts properly and timely prepared written departure orders. In both cases, subsequent to the trial courts' preparing the departure orders, a clerical error occurred. In both cases, the clerical errors resulted in the departure orders being omitted from the original record on appeal prepared at the direction of the appellant. In both cases, the record on appeal was supplemented with the missing departure order by the appellee. The only factual distinction between the two cases strengthens the state's position

here that the First District misapplied Ree: in San Martin, the original departure order was completely lost; here, the original departure order was temporarily misfiled and subsequently located.

In Rodwell v. State, 588 So. 2d 19 (Fla. 5th DCA 1991), *rev. denied*, 599 So. 2d 657 (Fla. 1992)[4], the Fifth District affirmed the trial court's departure sentence. The departure order was contemporaneously written at sentencing but not filed until five days later. Relying on this Court's decision in State v. Lyles, 576 So. 2d 706 (Fla. 1991), the Fifth District reasoned that orally pronounced departure reasons that are reduced to writing on the same day are contemporaneous. The ministerial act of filing the order at a later date did not prejudice the defendant in any respect. The Fifth District explained that the Supreme Court in State v. Lyles 576 So. 2d 706 (Fla. 1991), did not hold that filing the order more than one business day later would amount to prejudice, but that the Supreme Court was simply responding to the actual facts in the case by holding a one day delay was not prejudicial. The clear principle from the Fifth district's holding

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[4] *Contra*, Mock v. State, 625 So. 2d 1335 (Fla. 5th DCA 1993)(reversing and remanding for resentencing within the guidelines when a written departure order was not filed until five months after it was prepared). In Mock, the filing delay was not explained. However, in the instant case, the reasons for the delay are clear and purely a mistake.

is that a defendant must show prejudice from the delay in the purely ministerial act of filing the departure order to prevail.

In the instant case, Evans was not prejudiced by the temporary misfiling of the departure order.[5] The order was subsequently discovered and restored to the proper file. The written departure order did not provide additional or different grounds for the departure than the oral pronouncement. The written reasons were substantially similar to the orally pronounced reasons for departure. Indeed, the orally pronounced reasons for the upward departure were more detailed than the written departure order. The written departure order states that the offense was committed within six months of discharge from a release program or state prison, but the orally pronouncement on this departure reason was that the offense was committed within one week of discharge. The written departure order states that the victim suffered extraordinary physical or emotional trauma but does not describe the nature of the trauma. However, the oral pronouncement was that

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[5] Indeed, the misfiling presents respondent with his sole opportunity to have his departure sentence reversed. The actual grounds for the departure were never challenged. This appeal started in the First District with a brief filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 493 (1967), wherein opposing counsel confessed that the departure reasons were legally valid and supported by the record. (1st DCA IB at 7).

the victim suffered extraordinary emotional trauma because the victim thought he was about to be killed when the Evans threatened him with a gun. Appellate counsel would have more grounds to attack the departure based on the orally pronounced reasons available to her in the transcripts than the standardized reasons listed in the written departure form. Thus, appellate review was not, in any manner, curtailed by the misfiling.

In State v. Lyles, 576 So. 2d 706 (Fla. 1991)[6], this Court affirmed a departure sentence because the holding in Ree requiring contemporaneously written reasons was prospective only and the sentence was imposed prior to the Ree decision. However, this Court clarified its holding in Ree and found that the written reasons entered had been contemporaneously written in accordance with Ree. Id. at 707. At the sentencing hearing, the trial court orally pronounced its departure reasons. On that same day, the trial court prepared a written departure order. Id. at 708. The written departure order contained the same reasons as the oral

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[6] *But see*, Blair v. State, 598 So. 2d 1068 (Fla. 1992)(a written departure order not prepared until after the hearing and not filed until five days after the hearing required resentencing within the guidelines). However, it is not clear from the Blair opinion if the departure reasons were reduced to writing on the same day as the sentencing. In the instant case, the departure reasons were reduced to writing at the sentencing hearing, not after.

pronouncement but the written reasons provided supporting legal authority and were more detailed than the orally pronounced reasons. The written departure order, while written on the same day as the oral pronouncement, was not filed until the next business day, which was actually three days later. Lyles claimed this delay was contrary to Ree because the written reasons were not issued and filed at the time of sentencing. Id. at 708.

This Court explained that when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date, the written reasons for the departure sentence are contemporaneous, in accordance with Ree. To adopt a contrary view would be placing form over substance. Id. at 708. The ministerial act of filing the written reasons with the clerk on the next business day did not prejudice the defendant in any respect. Id. at 709.

In State v. Colbert, 660 So. 2d 701 (Fla. 1995), this Court answered a certified question doubting the continued validity of Ree in the affirmative and declined to recede from Ree. At the sentencing hearing, the trial judge orally pronounced his reasons for the upward departure, but did not sign the written reasons for the departure until eight days later. The written reasons, which

were substantially the same as the oral reasons, were filed the next day. The departure order was dated *nunc pro tunc* to the date of the sentencing hearing. The Fifth District vacated the upward departure remanded for resentencing within the guidelines because the trial judge did not file contemporaneously written reasons for the departure sentence. Colbert v. State, 646 So. 2d 234 (Fla. 5th DCA 1994). Thereafter, the Fifth District certified as a question of great public importance whether it was per se reversible error when a trial court orally pronounces departure reasons at sentencing but does not reduce them to writing until five days later.

The State argued that to avoid placing form over substance, this Court should recede from Ree. The majority declined to overrule Ree. However, the concurrence expressed its concern with Ree, and questioned whether justice was served by reversing an otherwise valid departure sentence based upon a procedural sentencing error. Id. at 703. (Wells, concurring).

The facts of the instant case are closer to the facts of Lyles than those of Colbert. In Colbert, the trial court failed to reduce his reasons to writing until eight days after the oral pronouncement at sentencing. In the instant case, as in Lyles, the trial court reduced the departure reasons to writing on the same

day as sentencing. Indeed, in the instant case, the departure order was written at the sentencing proceeding. Thus, under the holding in Lyles, the written reasons were contemporaneous prepared.

While under the holding of Colbert, a procedural error by the trial court itself entitles a defendant lower sentence, a clerical error in ministerial act of filing should not entitled a defendant to a lower sentence also. It is one matter to hold the trial court responsible for failing to comply with legal precedent requiring written reasons, it is quite another to hold a trial court responsible for a such technicalities as misfiling. Respondent should not obtain a windfall of seven and a half years deleted from his sentence because the departure order got mixed in with his PSI and was filed in respondent's probation file instead of his court file.

In sum, a contemporaneously written, timely filed but temporarily misfiled departure order is valid. Such an order substantially complies with the applicable statute and rule. A trial court's departure order should not be held invalid based on a clerical error in the ministerial function of filing the order. This Court should affirm the Second District decisions in San Martin and reverse the First District's decision in Evans.

CONCLUSION

Based on the foregoing, the State respectfully submits the rationale of Lyles and San Martin should be followed and the decision of the First District Court of Appeal in Evans should be disapproved, and the departure order entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Jamie Spivey, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 18th day of November, 1996.

Charmaine M. Millsaps

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Assistant Attorney General

Appendix

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

EUGENE EVANS,

Appellant,

v. CASE NO. 94-3845

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed June 18, 1996.

An appeal from the Circuit Court for Columbia County.
Paul S. Bryan, Judge.

Nancy A. Daniels, Public Defender, Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, James W. Rogers, Senior Assistant Attorney General, and Thomas Crapps, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION.

PER CURIAM.

This cause is before us on appellee's motions for rehearing, clarification and certification. We deny the motions for rehearing and certification, but grant the motion for clarification, and, accordingly, withdraw our former opinion of April 16, 1996, and substitute the following in lieu thereof.

Although the trial court orally pronounced four reasons supporting appellant's upward departure sentence, its written reasons for departure were not filed within 15 days of sentencing, as required by section 921.0016(1)(c), Florida Statutes (1993), and Florida Rule of Criminal Procedure 3.702(d)(18)(A). After writing its departure reasons contemporaneously with its oral sentencing pronouncement, the court assumed that the written reasons had been placed in the court file, but the record discloses that they were erroneously included in the probation file containing the pre-sentence investigative report, apparently due to clerical error. Despite the fact that the error in the misfiling may not have been attributable to the lower court's actions, we are constrained to conclude that the sentence imposed must be reversed and the cause remanded for resentencing within the guidelines on the ground that the courts have consistently strictly construed the requirement that written reasons supporting departures be timely filed.[1] See

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[1]We are cognizant that our decision appears to conflict with that rendered by the Second District in San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), review denied, 598 So. 2d 78 (Fla. 1992), which affirmed an upward departure sentence involving written reasons filed outside the 15-day period due to a clerical error. Appellee did not argue this case in its brief, but instead relied upon it for the first time in its motion for rehearing, clarification and certification. Under the circumstances, we decline to entertain that authority now. See Cartee v. Department of Health & Rehab. Servs., 354 So. 2d 81 (Fla. 1st DCA 1978) (on petition for reh'g).

State v. Colbert, 660 So. 2d 701 (Fla. 1995); Ree v. State, 565 So. 2d 1329 (Fla. 1990); State v. Pease, 669 So. 2d 314 (Fla. 1st DCA 1996) (on motion for clarification); Hooks v. State, 656 So. 2d 624 (Fla. 1st DCA 1995); Wilcox v. State, 664 So. 2d 55 (Fla. 5th DCA 1995).

REVERSED and REMANDED for resentencing.

ERVIN, WEBSTER and MICKLE, JJ., CONCUR.