IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

LISA WALSH
Assistant Public Defender
Florida Bar No. 964610

Counsel for Petitioner

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

CASES **PAGES**

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

FLORIDA CONSTITUTION

LAWS OF FLA.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INTRODUCTION

This is the Petitioner's brief on the merits requesting that this Court grant certiorari, quash the decision below, and approve the prior decisions of this Court which are in express and direct conflict with the decision below on the same question of law. Petitioner, Eric Weiss, was the defendant in the trial court and the appellant in the Third District Court of Appeal; the Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent. In this brief, the symbol "R" indicates the record on appeal, the symbol "T" indicates the transcripts of hearings, the symbol "S.R." indicates the supplemental record on appeal, and the symbol "A." indicates the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner Eric Weiss was convicted following a jury trial of robbery/ home invasion without a firearm and burglary with assault. (R. 71). At trial, the State introduced evidence that Mr. Weiss participated in a burglary in which he and two other men entered Mr. Warren Hart's home, assaulted the homeowner and a woman taking care of the homeowner's granddaughter in the presence of the child, and stole various items including firearms. (T. 239-243; 170. 178-89). Mr. Weiss presented an unusual alibi defense, in which the homeowner's son, Terry Hart, as well as other witnesses testified that Mr. Weiss was with them at the time of the robbery. (T. 357, 368, 381-83).

Mr. Weiss' sentencing guidelines range was approximately three to five years in state prison. (R. 74). The trial judge imposed an upward guidelines departure sentence of a ten year state prison term, to be followed by two years of community control, to be followed by a five year probationary term. (R. 74, 75-77). Sentence was pronounced on August 19, 1997. (S.R. 1). Ten days later, on August 29, 1997, the trial judge filed written reasons in support of the departure sentence. (S.R. 26-27).

The defendant raised four issues on appeal to the Third District Court of Appeal. (A. 1-29; 99-101). First, the defendant claimed that convictions for both burglary with assault and home invasion robbery violated double jeopardy. (A. 2). Second, the defendant argued that the trial court erred in permitting the State, over objection, to

improperly question the alibi witness concerning the nature of his prior convictions. (A. 2). Third, the defendant challenged his departure sentence on the ground that the trial court failed to file written reasons in support of the departure within seven days, as required by statute and rule of procedure, and under *Ree v. State*, 565 So. 2d 1329 (Fla. 1990) and *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), the defendant was entitled to reversal and remand for sentencing within the guidelines. (A. 3). Finally the defendant challenged the reasons for the departure sentence as unsupported by the record. (A. 2).

The Third District Court of Appeal held in *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), that the defendant's conviction for home invasion robbery should be vacated, and affirmed on all other grounds. (A. 99-101). Specifically, the court held that the failure of the trial court to file written reasons within 7 days from the date of sentencing was not grounds for reversal where (1) there was no error because the term "sentencing" means rendition and not pronouncement, and therefore the court could file written reasons within 7 days from the date sentence was rendered, not pronounced, (2) the error was not preserved and (3) even if preserved, the court's error in failing to comply with the rule was a "meaningless procedural hiccup" in which the defendant suffered no prejudice and was therefore undeserving of relief on appeal. (A. 99-101). The court added that the Appellate Reform Act of 1996, section 924.051, Florida Statutes (1996 Supp.), was meant to and did overrule such decisions as this Court's opinion in *Ree*. (A. 101); *Weiss,* 720 So. 2d at

1115. The petitioner filed a timely notice to invoke discretionary review, briefed jurisdiction and this Court has granted review.

ISSUE PRESENTED

THE RULE ANNOUNCED BY THIS COURT IN *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified by State v. Lyles*, 576 So. 2d 706 (Fla. 1991) AND *Pope v. State*, 561 So. 2d 554 (Fla. 1990), AND REITERATED IN *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), HAS NOT BEEN OVERRULED BY THE APPELLATE REFORM ACT, SECTION 924.06, FLORIDA STATUTES (1996), AND THE FAILURE OF A TRIAL COURT TO TIMELY FILE WRITTEN REASONS IN SUPPORT OF AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES REQUIRES REVERSAL AND RE-SENTENCING WITHIN THE GUIDELINES.

SUMMARY OF ARGUMENT

The court's three conclusions in *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), were in error and this Court should quash the lower court's opinion. First, the word "sentencing" as pertains to Rule 3.703(28)(A), Rules of Criminal Procedure, requiring that written reasons be filed within 7 days of sentencing, means pronouncement, not rendition of sentence. Rule 3.703 references oral pronouncement and not rendition, and the term "sentence" is specifically defined as pronouncement by criminal rule within the same section as the departure rules. Moreover, legislative intent and caselaw out of this Court and the district courts define sentencing in terms of pronouncement and not rendition.

Second, failure to preserve by filing a motion to correct sentence, via Rule 3.800(b), does not preclude review of this issue because the instant error constitutes fundamental error. Alternatively, this serious, patent sentencing error was raised along with a preserved issue and a fundamental issue.

Third, where the error in the instant case was at the least serious and patent, there is no need for the defendant to make an additional showing of harmfulness. Additionally, if the reform Act imposes an additional requirement that the appellant must demonstrate harmfulness in a sentencing context, this requirement is a nullity. The Legislature lacks the authority, under Article V, section 2(a) of the Florida Constitution to **indirectly** abrogate a rule of procedure once it has been created by this Court. Only by a two-thirds

bicameral majority vote may the Legislature directly overrule a rule of procedure.

ARGUMENT

THE RULE ANNOUNCED BY THIS COURT IN *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified by State v. Lyles*, 576 So. 2d 706 (Fla. 1991) AND *Pope v. State*, 561 So. 2d 554 (Fla. 1990), AND REITERATED IN *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), HAS NOT BEEN OVERRULED BY THE APPELLATE REFORM ACT, SECTION 924.06, FLORIDA STATUTES (1996), AND THE FAILURE OF A TRIAL COURT TO TIMELY FILE WRITTEN REASONS IN SUPPORT OF AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES REQUIRES REVERSAL AND RE-SENTENCING WITHIN THE GUIDELINES.

It is undisputed that the trial judge in the instant case failed to file written reasons in support of an upward departure within 7 days of pronouncement of sentence.

On direct appeal, the Third District Court of Appeal refused to follow the rule announced by this Court in *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified by State v. Lyles*, 576 So. 2d 706 (Fla. 1991), that where a trial court fails to timely file written reasons in support of an upward departure from the guidelines, an appellate court must reverse and remand for re-sentencing within the guidelines without possibility for departure. The Third District was incorrect in its three reasons for affirming this sentence and this Court should accordingly quash the lower court's opinion.

Introduction

Rule 3.703(d)(28)(A), Florida Rules of Criminal Procedure, provides that 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 7 days after 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 7 days after 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.

effective October 1, 1995, 660 So. 2d 1374 (Fla. 1995). This rule was adopted to give effect to Section 921.0016(1)(c), Florida Statutes (1995), which contains substantially similar language, but does not include the option of a trial judge filing a signed scoresheet checklist.

This Court has consistently and repeatedly held that failure to timely file written reasons in support of a guidelines departure sentence is reversible error. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987), *citing Williams v. State*, 492 So. 2d 1308 (Fla. 1986) (citations omitted); *Ree v. State*, 565 So. 2d 1329 (Fla. 1990); *State v. Lyles*, 576 So. 2d 706 (Fla. 1991); *Pope v. State*, 561 So. 2d 554 (Fla. 1990); *State v. Colbert*, 660 So. 2d 701 (Fla. 1995). *See, e.g.*, *Pease v. State*, 712 So. 2d 374 (Fla. 1997) (affirming downward departure where trial judge failed to file written reasons through fault of State, but reaffirming that the State is not excused from doing what it is obligated to do when it seeks an *upward* departure).

It is the Third District Court of Appeals' position that

> It was always difficult, at best, to discern a rational justification for setting aside an otherwise appropriate sentence just because a piece of paper was filed immaterially late.

This Court's justification for *Ree* and its progeny is more than rational. In *Ree*, this Court relied upon the rationale expressed in *Jackson v. State*, 478 So. 2d 1054, 1055 (Fla. 1985), wherein it was explained that written reasons were required for two reasons. 478 So. 2d at 1055. First, a trial judge might disregard reasons stated orally after due consideration and second, a reviewing court would be spared the difficulty of culling the record for the judge's reasons for departing. *Jackson*, 478 So. 2d at 1055-56. More importantly, committing reasons for departure to writing was a critical step, this Court explained in *Ree*, because "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." *Id.*, 565 So. 2d at 1332.

In *Pope*, this Court explained that if this error occurs, remand for resentencing within the guidelines was required to "avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure." *Id*, 561 So. 2d at 556. It was clear from the inception of this rule that because departure from the guidelines is extraordinary and should be accompanied by serious thought and reflection, written reasons were

required and ironically[1], because of the interest of finality and judicial economy, failure to comport with the rule required reversal and re-sentencing within the guidelines.

This Court has deemed the rule in *Ree* to be so important that it has survived even in the face of this Court's pronouncement that "sentencing should not be a game in which a wrong move by a judge means immunity for the prisoner." *Harris v. State*, 645 So. 2d 386 (Fla. 1994). Twice, the issue of whether failure to abide by the rule requires reversal and remand within the guidelines has been brought before this Court after *Harris*, and this Court has continued to abide by its rule.

In 1995, in *State v. Colbert*, 660 So. 2d 701, 702 (Fla. 1995), a case in which the trial court did not file written reasons until 9 days after sentence was pronounced, this Court was urged by the State, citing *Harris*, 645 So. 2d at 388, to recede from *Ree*, on the ground that the error was one of form and not substance. This Court rejected the State's position, which has remained the same and has been understood by this Court since *Ree*. *Colbert*, 660 So. 2d at 701, 702. This Court refused to overrule *Ree*, noting that the rules established by criminal rule and statute were now relaxed so as to provide a reasonable window within which to file written reasons. *Id*. This Court saw no reason why a trial

---

[1] The Appeals Reform Act was purportedly created to reduce an appellate caseload. *See Mizell v. State*, 716 So. 2d 829, at note 1 (Fla. 3d DCA 1998). Apparently, economy in the appellate courts was also the reason behind the per se reversal rule, which the lower court is now using the Reform Act to abolish.

court could not comport itself within this reasonable time period. It is notable that *Colbert* involved late filing of written reasons, rather than the complete failure to file written reasons.

In 1997, in *Pease v. State*, this Court affirmed where the trial judge inadvertently failed to file written reasons in support of a **downward departure**, but differentiated between an upward and a downward departure as follows:

> There is a significant difference between this situation and those situations where the State itself complains about something the State was obligated to do in order to increase a defendant's guideline's sentence, i.e., the State's obligation to see that written reasons are timely prepared and filed, if the State is going to punish the defendant more severely than the guidelines provide. Obviously, the State's mistake cannot be used as an excuse for the State's failure to do what the State itself was obligated to do.

712 So. 2d 374, 376 (Fla. 1997). The rule announced in *Ree*, as applied to upward departures, was reaffirmed. In a concurring opinion, Justice Overton noted that the trial judge now has a 7 day window (the time period applicable in the instant case) in which to timely file reasons, and is not restricted by a contemporaneous filing requirement. 712 So. 2d at 377 (Kogan, C. J. and Anstead, J. concur). Again, within this reasonable time period, there simply is no excuse for failure to follow the rule. This Court has continuously rejected the same argument presented by the State since *Ree* was decided, and has continued to reaffirm *Ree*.

Now the Appellate Reform Act, Section 924.051, Florida Statutes (1996), is urged upon this Court as a means to invalidate *Ree* and its progeny. Section 924.051, Florida Statutes (1997), provides, in pertinent part,

> (3) An appeal may not be taken from a judgement or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

The Third District Court of Appeal held in *Weiss* that failure to timely file written reasons is a mere "procedural hiccup" unworthy of reversal where the Appellate Reform Act effectively has applied the general harmless error statute applicable to errors such as this one.[2] In addition, the court in *Weiss* held that no error occurred because the rule requires filing written reasons within 7 days of rendition, rather than pronouncement of sentence and asserted that the error was unpreserved. The petitioner shall address these conclusions.

A. A trial court must file written reasons within 7 days from the date sentence is pronounced, not rendered.

The Third District Court of Appeal concluded that rule 3.703(d)(28)(A), Florida

---

[2] The court opined that the Reform Act "rendered the general harmless error statute, section 924.33, Florida Statutes (1997); see § 59.041, Fla. Stat. (1997), unequivocally applicable to alleged sentencing miscues such as the one now urged upon us." *Weiss*, 720 So. 2d at 1115.

Rules of Criminal Procedure and section 921.0016(1)(c), Florida Statutes, require a trial court to file written reasons in support of a guidelines departure within 7 days from the date sentence is rendered, rather than within 7 days from the date sentence is pronounced. No error occurred in the instant case, the court reasoned, where the trial judge filed its sentencing order within 7 days from rendition of the sentencing order. This conclusion runs contrary to the actual language of the applicable provisions, the definition contained in the rules of procedure, legislative intent in this area and this Court's jurisprudence.

To begin with, the language contained in the applicable statute and rule reference pronouncement and do not mention rendition. Section 921.0016(1)(c), Florida Statutes (1995) provides that a departure sentence

> must be accompanied by a written statement delineating the reasons for the departure, filed within 7 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 within 7 days after the date of sentencing.

Rule 3.703(d)(28)(A), Florida Rules of Criminal Procedure (1995) similarly provides that where there is a departure sentence:

> The written statement shall be filed in the court file within 7 days after 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 7 days after 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.

Both the statute and rule reference **oral pronouncement** and not rendition in defining "sentencing." The statute references the words "orally stated reasons for departure from the guidelines at sentencing" and the rule references "orally stated reasons for departure articulated at the time sentence was imposed." The language of a statute is plain and unambiguous, and the plain meaning of the statute should be given effect:

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Holly, M.D. v. Auld, M.D., 450 So. 2d 217, 218 (Fla. 1984), *quoting A.R. Douglas, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931).

Additionally, the rule of criminal procedure pertaining to sentencing defines the term "sentence" as the time of oral pronouncement:

> **Rule 3.700. Sentence Defined; Pronouncement and Entry; Sentencing Judge**
> **(a) Sentence Defined**. The term sentence means the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty.

effective June 16, 1994, 639 So. 2d 15 (Fla. 1994). This rule precedes all rules pertaining to sentencing, including the departure rules. It is determinative of this issue. In *Fox v.*

District Court of Appeal, Fourth District, 553 So. 2d 161 (Fla. 1989), this Court expressed the fundamental injustice of interpreting the term "sentence" in multiple ways. In *Fox*, this Court upheld dismissals of State appeals from downward departure sentences on the ground that they were untimely, where the appeals were taken within 15 days from the date written reasons were filed, but more than 15 days from the date sentence was pronounced and the trial judge signed a written sentencing order. This Court explained, "[i]t would be unjust and illogical to suppose that pronouncement commences the sentence for the purpose of the defendant's imprisonment, but not for the purpose of starting the time for appeal." 553 So. 2d at 163.

Additionally, examining legislative intent,[3] "sentencing" means the date of pronouncement. It is the Legislature's clear intent to require a trial judge to file written reasons within a strict time period: 7 days from the date sentencing is pronounced. Prior to the enactment of Section 921.0016(c), Florida Statutes (1993), a trial judge was required to **contemporaneously** file written reasons at the time sentence **was pronounced**. *See Ree v. State*, 565 So. 2d 1329 (Fla. 1990), modified, *State v. Lyles*, 576 So. 2d 706 (Fla.

---

[3] As explained above, this rule, 3.703, gave effect to a previously enacted statute. The petitioner does not abandon the argument, *infra* at 27, that this is a rule of procedure adopted by this Court and the Legislature does not have the power to alter or abolish it. The petitioner is simply showing that resorting to any construction will not yield the result in *Weiss*.

1991).

In response, the Legislature enacted the instant provision extending the time within which a trial judge may file its written reasons to 15 days. Ch. 93-406, § 13, at 2941-42, Laws of Fla. (1993). This time period was later shortened to 7 days. Ch. 95-184, § 7, at 1698, Laws of Fla. (1995). The Legislature's enactment of a strict time period **in response to** the Supreme Court's decision in *Ree* that written reasons must be filed contemporaneously **at the time sentencing is pronounced** indicates clear legislative intent that the trial judge file written reasons within 7 days from the date sentence is pronounced. The Legislature intended to give the trial courts some leeway, but restricted the time period to 7 days.

This intent would be subverted by the Appellee's interpretation of the statute. No strict time limitation exists within which a trial judge's sentencing order must be filed or rendered.[4] Therefore, the strict time limitation created by Section 921.0016(c), Florida Statutes, would be circumvented by late filing of a sentencing order. The Legislature could not have intended such a construction. The Legislature does not create strict time periods with the intent that they may be circumvented at the will of the trial judge or the lassitude

[4] Although, in *Fox*, it is presumed that the trial court will sign the sentencing order **in court** at the same time sentence is pronounced. 553 So. 2d at 162. No good reason exists why days elapse before the signing and filing of the sentencing order in the instant case.

of the clerk:

> [T]he primary and overriding consideration in statutory interpretation is that a statute should be construed and applied so as to give effect to the evident intent of the legislature regardless of whether such construction varies from the statute's literal meaning. In other words, criminal statutes are not to be so strictly construed as to emasculate the statute and defeat the obvious intention of the legislature.

See State v. Nunez, 368 So. 2d 422, 423-24 (Fla. 3d DCA 1979) (citations omitted). The Legislature could not have intended that a strict time period vary according to when a particular sentencing order is filed.

This Court has defined sentencing in terms of the time of oral pronouncement. In *State v. Colbert,* 660 So. 2d 701, 702 (Fla. 1995), this court disapproved a trial court's attempt to comply with *Ree*, where the trial court **announced at sentencing** its reasons for departing upward, failed to file contemporaneous written reasons, and, eight days later, filed an order *nunc pro tunc* to the date of **pronouncement** of sentence. In *State v. Lyles*, 576 So. 2d 706 (Fla. 1991), this Court required that the written reasons in support of departure be prepared and entered with the clerk **the same day sentence is pronounced**. *Id.* at 708. This Court clearly explained in *Lyles* that "[w]ritten reasons **must be issued on the same day as sentencing**" and "we modify [the trial judge's] options to allow the trial judge the leeway to reduce to writing, **immediately after the hearing**, the reasons orally stated to the defendant in open court. It is important that these written reasons are

entered **on the same date as the sentencing**." *Id.* (emphasis added). This Court made it abundantly clear in *Lyles* that "sentencing" means pronouncement and not rendition. The only modification of *Ree* in *Lyles* was that as long as the written reasons are entered the same day as they are pronounced, the ministerial act of filing with the clerk may be extended until the next business day. *Id.* at 708. The trial judge in *Weiss* did not enter written reasons until 9 days after sentence was pronounced and did not file them until 10 days after sentence was pronounced.

The Third District, reasoned, relying on *Lyles*, that since it is the filing of the sentencing order, not the reasons for departure, which triggers the time for taking an appeal, the clock does not begin to run until the sentencing order is filed. Not only does this run contrary to the definition of "sentencing" by this Court, but it would have the narrow exception created in *Lyles* swallow the rule. The trial judge in the instant case pronounced sentence on one day, and did not even commit to writing the reasons for the departure until 9 days had elapsed. What is illustrated by the facts in the instant case is that where there is no rule requiring a trial judge to render sentence on the same day it is pronounced, under the Third District's reasoning, the result is exactly what this Court in *Fox* desired to prevent. "Sentencing" becomes an amorphous time, meaning one thing for the prisoner, and something completely different for the practitioner and the court. The sentenced prisoner goes off to prison, and the trial judge may wait a week, several, perhaps longer to

render the sentence, and then for an additional 7 days in which to comply with the statute. This is not the result which the language of the statute suggests, not what the legislature or this Court intended in promulgating the statute and rule, and is not what this Court intended as a result in *Lyles*. Trial courts are and have been restricted to a generous but strict window -- one week -- in which to comply with the rule. To hold otherwise would render the rule nugatory.

B. An appellant may raise unpreserved fundamental sentencing error on appeal. Alternatively, the appellant may accompany preserved or fundamental issues with an unpreserved sentencing issue raising serious, patent sentencing error.

The Third District also based its decision on the ground that the Appellate Reform Act, section 924.051, Florida Statutes (1996) was meant to overrule the rule enunciated by this Court in *Ree*. Errors which are not both preserved and harmful must be affirmed, the court reasoned.

With respect to preservation, the court cited to its opinion in *Jordan v. State*, 23 Fla. L. Weekly D2130, 1998 WL 621355 (Fla. 3d DCA Case No. 97-2002, September 16, 1998), *rehearing and certification denied*, 1999 WL 140423 (Fla. 3d DCA March 10, 1999), in which the court held that the defendant failed to preserve a *Ree* error by failing to file a motion to correct sentence in the trial court, pursuant to rule 3.800(b), Florida Rules of Criminal Procedure (1996). In order to be preserved for review, this sentencing

error must be brought before the trial court via a motion to correct sentence and failure to do so will preclude review on appeal. *Jordan*, 1998 WL 621355 *2.

The requirement that the litigant file a 3.800(b) motion creates more problems than it fixes. Either the defendant or trial counsel is required to prove a negative: did the trial judge comply with the requirements of rule 3.703(28)(A) and file written reasons within 7 days of sentencing? *Jordan* completely overlooks the impracticality of placing such a requirement upon a pro se defendant or his trial counsel. A litigant must scour the court file after the 7 day window has elapsed, but before the thirty days from sentencing, to determine if the order was filed. This would have proven fruitless in the instant case. The first day the order was available for inspection in the instant case was September 9, 1997, the date the order was recorded. (S.R. 26). September 9, 1997 is 21 days from the date of the sentencing and just 9 days from the date the notice of appeal was filed. (S.R. 1, 26; R. 78). There is nothing to prevent the recording date from surpassing the 30 day window in which a criminal defendant must determine whether to appeal.

The motion to correct sentence, pursuant to rule 3.800(b), must be pursued regardless of whether the order was actually filed and let the lower court sort it out. The backlog created by spurious 3.800(b) motions, apparently, is not the court's problem and the relatively minor inconvenience of correcting a patent sentencing error on appeal outweighs the extra burden placed on the circuit courts.

Indeed, the Third District Court of Appeal in *Weiss* appears internally conflicted in predicating its affirmance upon lack of preservation. Along with citing *Jordan*, with approval, on the preservation issue, it cited its own opinion in *Mizell v. State*, 716 So. 2d 829 (Fla. 3d DCA 1998), in which the court criticized the State's attempt to hamstring appellate courts from correcting obvious sentencing errors, characterizing such an attempt as "legal churning." On one hand, *Jordan*, the court held that a *Ree* error fails unless preserved by a motion filed under rule 3.800(b). On the other, *Mizell*, the court complained that it had routinely and without much trouble corrected obvious sentencing errors and an attempt to hamstring the courts from doing so, rather than alleviating the headache, augments it.

This conflict can be resolved as follows. The Second District Court of Appeal held in *Bain v. State*, 1999 WL 34708 (Fla. 2d DCA January 29, 1999), and *Denson v. State*, 711 So. 2d 1225 (Fla. 2d DCA 1998), that a sentencing issue is cognizable on appeal, even where unpreserved if either (1) it constitutes fundamental error or (2), the error is a serious, patent error raised **along with** other preserved or fundamental issues. *Denson*, 711 So. 2d at 1227, 1229.

The court explained the purpose of the Appellate Reform Act in *Denson*:

> the intent and goals of this collective effort have been to minimize frivolous appeals, to maximize the efficiency of the appellate system, and to place the task of correcting most

sentencing errors in the lap of the circuit court.

711 So. 2d at 1227. Therefore, if a litigant is properly before the appellate court on a preserved issue, the goals of the appellate reform act are served by the court reviewing unpreserved, but serious, sentencing errors obvious on the face of the record.

The court defined which issues are serious, patent errors by example. Included within this definition are such errors as written sentences which do not comport with oral pronouncement, and excluded are errors concerning costs, conditions of probation or jail credit. *Denson*, 711 So. 2d at 1229, 1230.

In *Bain v. State*, the court reaffirmed the principle established in *Denson* that the court could review unpreserved but serious, patent sentencing errors, where a preserved error is properly before the court. The court refined its reasoning and additionally concluded that unpreserved, yet fundamental sentencing error could be reviewed independently. 1999 WL 34708 *6.

In defining fundamental sentencing error (that which may be raised absent another preserved issue), the court explained that "fundamental" error embraces not only an illegal error, as defined by *State v. Mancino*, 714 So. 2d 429 (Fla. 1998), but any error which is "so egregious as to demand correction for the sake of protecting the integrity of our system of justice." 1999 WL 34708 *10. Included would be errors which "are more solicitous of personal liberty than pecuniary interests." *Id.* Therefore, under *Bain*, there are four

possible categories of sentencing error, three which may be reviewed by an appellate court, and two which may not.

First are preserved sentencing errors. These encompass illegal, fundamental, serious or nominal errors which are preserved by objection (if apparent at the time of sentencing) or motion to correct sentence.

Second are unpreserved, yet serious patent sentencing errors, which may only be raised if appended to an additional, preserved issue properly before the court. The reasoning is that where a preserved issue is properly before the court, it meets the mutual objective of the courts and legislature to correct the unpreserved yet serious error on appeal, rather than tie up a trial court with a prisoner's pro se efforts.

Third are fundamental sentencing errors. These include illegal sentences and errors which affect a prisoner's liberty interest.

Fourth, are unpreserved and nominal sentencing errors. If a serious, patent sentencing error is not preserved by objection or motion to correct, then it may not be solely used as a basis for appeal. Scriveners errors, improper cost assessment, public defender's lien and the like should not be the sole basis for an appeal before a district court. This appears to fit squarely within the objectives of the reform act. This category of appeal eliminated, appellate caseloads would be reduced and these issues properly brought before trial courts.

Under the *Bain* proposal, Mr. Weiss's error may be reviewed in two ways. First, as a fundamental sentencing error. Mr. Weiss' liberty interest has been seriously affected where he received a sentence which was twice that recommended at the top of the sentencing guidelines, and the trial judge failed to follow the strict rule laid out in rule 3.703, rules of criminal procedure and section 921.0016, Florida Statutes. Second, if not fundamental, the error could be reviewed as a serious, patent sentencing error appended to one preserved error and one fundamental error. On direct appeal, the petitioner raised a double jeopardy issue, reversed as fundamental error by the court, and an evidentiary issue, preserved by objection and motion for mistrial. (A. 2-3). The error is patent, or obvious on the face of this record, affects his liberty interest and therefore was reviewable on direct appeal.

Even if this Court were to deem this sentencing error as one which is neither serious, patent nor fundamental, because the error has historically resulted in reversal and remand for imposition of a guidelines sentence, failure to preserve has acted as a complete bar to review where otherwise, the appellant would have been entitled to reversal and remand for a guidelines resentencing. Such failure to preserve, under *Mizell*, constitutes ineffective assistance on the face of the record and this Court should accordingly reverse. 716 So. 2d 829, 830.

C. Harmful Error

C1.The appellant need not demonstrate harmful error in a sentencing context.

One of the reasons for the "per se reversal" rule set forth in *Ree* is judicial economy, ironically, the wellspring of the appellate reform act. In *Pope v. State*, 561 So. 2d 554 (Fla. 1990), this Court adopted the reasoning set forth in *Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987) for the per se reversal rule. This Court explained in *Pope* that

> "[t]o avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure, a sentencing judge could impose only a sentence within the guidelines when resentencing a defendant on remand.

The Third District is now using the Reform Act and a perceived requirement that the appellant in a sentencing error must demonstrate "harmfulness" to dismantle the rule in *Ree* and *Pope*. *Weiss*, 720 So. 2d at 1115. It was this concept of harmfulness which the court in *Weiss* found to be most persuasive as a reason to affirm. The Third District's conclusion, that per se errors no longer exist in a sentencing context and the appellant must demonstrate harm is in error.

First, under the analysis in *Bain*, an appellant, in order to obtain review of a sentencing error need not demonstrate harmfulness. The appellant must only show either (1) that the error is fundamental or (2) that this is a serious, patent sentencing error being raised along with preserved or fundamental errors. The court in *Bain* and *Denson* did not create an additional requirement that the appellant must demonstrate harm. The reasoning

makes sense. It is the distinction between fundamental/ serious errors and nominal errors (which the court defined in *Denson* as improper cost assessment, improper conditions of probation or jail credit issues) which should provide the fulcrum of determining whether a sentencing error warrants reversal.

C2. The legislature may not constitutionally abrogate a procedural rule, absent a two-thirds bicameral majority vote to do so. The requirement of harmfulness is a nullity.

Even if this Court were to determine that Mr. Weiss was required to and failed to meet the lower court's requirement that he demonstrate "harmfulness," he is still entitled to enforcement of the rule in *Ree* where this added requirement imposed by the Legislature is a nullity.

Unless and until the Legislature directly overrules this procedural rule by a bicameral two-thirds majority vote, the passage of the Appeals Reform Act of 1996, section 924.051, Florida Statutes, does not have the effect of overruling the rule in *Ree*, or rule 3.703(28)(A), Florida Rules of Criminal Procedure. *See* Art. V, Section (2)(a), Fla. Const.

Article V, section 2(a) of the Florida Constitution provides:

> (a) The supreme court shall adopt rules for the practice and procedure in all courts . . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

This Court explained the difference between the province of the Legislature and the province of the judiciary as follows:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions. See In re Clarification of Florida Rules of Practice and Procedure, 272 So.2d 65, amended 272 So.2d 513 (Fla. 1973).

Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975). Under this definition, it is clear that only this Court can promulgate the rules governing the means and the method of requiring a trial judge to provide written reasons in support of a guidelines departure sentence where these rules are procedural. More importantly, the **enforcement** of the rule, the rule in *Ree* and *Pope*, is also a matter of procedure, and this Court is the sole authority which shall promulgate such rules.[5] *See Carridine v. State*, 721 So. 2d 818 (Fla. 4th DCA 1998) (holding that the Appeals reform Act does not overrule the requirements set forth

---

[5] Even if the Legislature had the power to overrule *Ree* and section 921.0016, it is not clear that it had the legislative intent to do so. Under the accepted rules of statutory construction, a "specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994). The provision governing departure sentences, therefore, controls over the provision dealing with the general right of appeal, and evinces a legislative intent to retain the provision.

in Rule 3.702 because only the judiciary has the authority to change a procedural rule).

Historically, what occurred in the creation of the rules pertinent in the instant controversy is the following. This Court promulgated the contemporaneous filing requirement and the reversal and resentencing rule, the enforcement provision. *Ree*, 565 So. 2d 1329, 1332, *Pope*, 561 So. 2d 554, and *Lyles*, 576 So. 2d 706, 708-09.

In response, the Legislature enacted section 921.0016, enlarging the time in which to file written reasons to 15 days, and later reduced the time to 7 days. *See* Ch. 93-406, § 13, at 2941-2942, Laws of Florida (1993); Ch. 95-184, § 6, at 1344, Laws of Fla. (1995).

This Court responded by adopting rules which mirror the statutory time enlargements. *See* Rule 3.702 (18)(A), Florida Rules of Criminal Procedure (1994)(enlarging the time period to 15 days); Rule 3.703(28)(A), Florida Rules of Criminal Procedure (1995) (reducing the period to 7 days).

This Court has often promulgated rules in accordance with recently passed legislation pertaining to procedural matters in an effort to avoid separation of powers concerns, multiple appeals and confusions of the courts. *See, e.g., In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (adopting provisions of the evidence code as rules). The fact that this Court has been willing to support the public interest in adopting rules to give effect to statutory provisions does not, however, confer upon the Legislature the ability

to overrule a procedural rule once it has been created, absent a bicameral 2/3 majority vote. This point is illustrated by this Court's opinion in *In re Clarification of Florida Rules of Practice and Procedure (Florida Constitution, Article V, Section 2(a))*, 281 So. 2d 204, 205 (Fla. 1973). The Legislature promulgated a law setting forth a procedural rule, and this Court adopted a companion rule to give the provision effect. Then, the Legislature tried to amend the statute. This Court rejected the amendment, explaining,

> The fact that this Court may adopt a statute as a rule does not vest the Legislature with any authority to amend the rule indirectly by amending the statute. In other words, an attempt by the Legislature to amend a statute which has become a part of rules of practice and procedure would be a nullity.

281 So. 2d at 205. It follows that if the Legislature cannot amend a rule of procedure, even one adopted to conform to a statute, it cannot indirectly abrogate a rule of procedure.

The Fourth District Court of Appeal addressed a similar issue in *Carridine v. State*, 721 So. 2d 818 (Fla. 4th DCA 1998). In *Carridine*, the trial court orally announced its reasons for upward departure at sentencing and filed the guidelines scoresheet departure checklist **the same day**, but failed to sign the checklist. 721 So. 2d at 818. The court held that where the trial court failed to comply with the strict requirements set out by criminal rule of procedure 3.702, reversal is mandated. 721 So. 2d at 820. The passage of the Appellate Reform Act has no effect upon the rule, because under Article V, Section 2(a) of the Florida Constitution, the supreme court is vested with the power to promulgate rules of

procedure and the power to determine the appropriate penalty for failure to follow procedural rules. *Id.* Absent passing a "`general law enacted by two-thirds vote of the membership of each house of the legislature,'" the rule still has effect. *Id.*, citing Art. V, § 2(a), Fla. Const.

The Third District in *Weiss*, presumes that the passage of the reform act implicitly overrules the rule expressed in *Ree* and its progeny. It is not even clear that the Third District's assumption in *Weiss*, that the Legislature intended to overrule the rule, is accurate.

The Legislature, as argued above, may not overrule a rule of procedure, absent a 2/3 vote in both houses to do so. Art. V, § 2(a), Fla. Const. The appellate reform act, section 924.051, Florida Statutes (Supp. 1996), according to the Third District, *implicitly* overruled this procedural rule by imposing an additional requirement upon the appellant to demonstrate harm, even in a sentencing error. *Weiss*, 720 So. 2d at 1115. This Court has explained, however, that the legislature cannot overrule a rule of procedure by implicit or subtle act and still abide by the strictures of Article V, section 2(a) of the Florida Constitution. "It must . . . be presumed that the Legislature would not attempt to repeal . . . an important rule without expressing the intent to do so." *Swan v. State*, 322 So. 2d 485, 489 (Fla. 1975).

The Legislature, in enacting section 924.051, Florida Statutes, did not expressly

overrule the procedural rule established by this Court in Rule 3.703(28)(A). What most clearly demonstrates that it did not even have the intent to do so is that the guidelines departure statute, section 921.0016, was re-enacted without change at the same time the reform act was made law. In addition, while the Appellate Reform Act Bill was before the Florida Senate, a Senate Amendment was proposed to strike the provision from section 924.06, appeal by defendant, which permits a defendant to appeal a sentence on the grounds that it constitutes a departure from the guidelines. (A. 123). This proposal was not enacted into law. *See* § 924.06(e) (1997).

In conclusion, since 1990, the State has advanced the same theory in an effort to dissuade this Court from the rule in *Ree*, that a trial court failing to abide by the requirement of timely filing written reasons justifying a departure sentence is a procedural error. This argument again appears before this Court, now with the Appeals Reform Act as its support. This Court should again repeat its long standing rule that guidelines sentences are extraordinary and should be accompanied by timely filed written reasons so as to comport with this Court's rationale in *Ree*. The three conclusions in *Weiss v. State*, were in error and this Court should quash the lower court's opinion.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court quash the lower court's opinion in *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998), and remand for resentencing within the guidelines.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1960

BY:_____
LISA WALSH
Assistant Public Defender
Florida Bar No. 964610

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was hand-delivered to Roberta Mandel, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, this 28th day of April, 1999.

_____
LISA WALSH
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

_____

LISA WALSH
Assistant Public Defender