IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

FLORIDA RULES OF APPELLATE PROCEDURE

LAWS OF FLORIDA

PRELIMINARY STATEMENT

The Petitioner, ERIC WEISS, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal (hereafter, “Third District”). The State of Florida was the prosecution in the trial court and the Appellee in the Third District. In this brief, the parties will be referred to as they stood in the trial court or as they stand before this Court. The symbols “R.” and “T.” refer to the record on appeal and transcript of proceedings, respectfully. The symbol “S.R.” will refer to the supplemental record on appeal. The symbol "App." will refer to the appendix to the Petitioner’s brief on jurisdiction.

CERTIFICATE OF FONT AND TYPE SIZE

The undersigned has utilized 12 point courier in preparing this brief.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case and facts as a substantially correct recitation of the relevant facts and procedural history of this case. Any additions will be discussed in the argument portion of the Respondent's brief.

POINT INVOLVED ON APPEAL

WHETHER THE PETITIONER FAILED TO PRESERVE THE SENTENCING ISSUE, AND EVEN IF PRESERVED, WHETHER THE PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S ACTIONS WHERE THE TRIAL COURT PROVIDED WRITTEN REASONS FOR THE DEPARTURE SENTENCE AND WHERE THE EVIDENCE SUPPORTED THE REASONS FOR DEPARTURE.

SUMMARY OF THE ARGUMENT

The *Weiss* Court correctly held that the defendant's claim that his case must be remanded for resentencing because of the trial court's failure to timely file the written departure reasons was unpreserved for appellate review.

Further, as the Third District correctly reasons, one can't very well appeal a departure sentence until there is a written sentencing order. Without a signed written order the threshold requirement for an appeal cannot be met because without the written signed order there is nothing to appeal. Therefore, a trial court must file its written reasons for an upward sentencing departure within seven days of the filing of the written sentence, not the oral pronouncement of sentence.

The Criminal Appeal Reform Act, by its terms, does not prohibit an appellant from raising a claim of fundamental error for the first time on appeal. However, failure to timely file written reasons for a sentencing departure does not constitute fundamental error. In addition, the claim that an appellant may raise a "non-fundamental unpreserved sentencing issue raising serious, patent sentencing error," is not properly before this Court, as it was never presented to either the trial court or the district court of appeal.

The Reform Act permits reviewing courts to reverse a sentence only if they determine that the properly preserved error constitutes prejudicial error. To constitute prejudicial error, the error in the trial court must harmfully affect the sentence. Therefore, the Third District was entirely correct that before appellant was entitled to a reversal of his sentence, he was required to demonstrate harm.

ARGUMENT

THE PETITIONER FAILED TO PRESERVE THE SENTENCING ISSUE, AND EVEN IF PRESERVED, THE PETITIONER WAS NOT PREJUDICED BY THE TRIAL COURT'S ACTIONS WHERE THE TRIAL COURT PROVIDED WRITTEN REASONS FOR THE DEPARTURE SENTENCE AND WHERE THE EVIDENCE SUPPORTED THE REASONS FOR DEPARTURE.

The Petitioner urges this Court to quash the decision of the Third District Court of Appeal in *Weiss v. State*, 720 So. 2d 1113 (Fla. 3d DCA 1998). In *Weiss*, the Third District held that: (1) the "date of sentencing" under 921.0016 must, in context, be read to mean, not the oral pronouncement of sentence, but rather the filing of the written sentencing order, and (2) even if a technical error did occur in the trial court's filing of written reasons for departure, it may not be made the basis of reversal under the Criminal Appeal Reform Act of 1996, section 924.051, without a showing of preservation and harm. Respondent will demonstrate that the Third District was entirely correct in its holding.

A. Defendant failed to preserve the issue raised herein - failure to timely file written reasons for an upward departure - for review.

The *Weiss* Court correctly held that the defendant's claim that his case must be remanded for resentencing because of the trial court's failure to timely file the written departure reasons was

unpreserved for appellate review. At the time of sentencing, August 19, 1997, the judge stated that the written reasons would be filed within seven days, in accordance with statutory requirements. The trial judge filed the written sentence on August 26, 1997. The written order of departure was dated August 28, 1999, but was not stamped by the clerk until one day later. Although the defendant had no basis for objecting at the time of sentencing, he failed to file a motion to correct the sentencing error under Rule 3.800(b) within thirty days, the claim was thus unpreserved, as it was not fundamental error.

In 1996, the legislature enacted the Criminal Appeal Reform Act of 1996 (ch. 96-248, § 4, Laws of Fla.), which became effective on July 1, 1996.[1] This Act conditions the right to appeal upon the preservation of a prejudicial error or the assertion of fundamental error:

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or,

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[1] The trial court announced the reasons for departure when the sentence was orally pronounced on August 19, 1997, filed the written sentence on August 26, 1997. The written reasons for departure, which closely tracked those stated at the hearing, were prepared by the trial court on August 28, 1997 and stamped by the clerk on August 29, 1997. (R. 74, 75-77, S.R. 26-27). Therefore, section 924.051 of the Florida Statutes applies to the present case.

> 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*.

§ 924.051(3), Fla. Stat. (1997) (emphasis added).

To "preserve" an issue, a defendant must timely raise the issue before the trial court and receive a ruling on the issue by the trial court. § 924.051(1)(b), Fla. Stat. (1996). In view of the legislature's enactment of the Criminal Appeal Reform Act of 1996, and in recognition of the scarce resources being unnecessarily expended in appeals relating to sentencing errors, this Court amended the Florida Rules of Appellate Procedure and Florida Rules of Criminal Procedure. *See Amendments to Fla.R.App.P. 9.020(g) and Fla.R.Crim.P. 3.800,* 675 So. 2d 1374 (Fla. 1996); *Amendments to the Fla.R.App.P.*, 685 So. 2d 773 (Fla. 1996); *Amendments to the Fla.R.Crim.P.*, 685 So. 2d 1253 (Fla. 1996).

This Court amended the Rules of Appellate Procedure to harmonize with the Criminal Appeal Reform Act of 1996 and, in part, to require that sentencing issues first be raised in the trial court. *See Amendments*, 685 So. 2d 773, 807. Significantly, this Court added a provision to Fla.R.App.P. 9.140 which it entitled "Sentencing Errors" and which states that "[a] sentencing error may

not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b)." [2] *Amendments*, 685 So. 2d 801. This Court also amended subdivisions (g) and (g)(3) of Fla.R.App.P. 9.020 to ensure that filing a motion to correct a sentence would postpone rendition of the sentencing order and that an appeal from a judgment of guilt would not waive the defendant's right to file a motion to correct a sentence. *See Amendments*, 675 So. 2d 1375, 1376.

Since the enactment of the Criminal Appeal Reform Act of 1996, appellate courts have applied § 924.051, Fla. Stat. (Supp. 1996) and Fla.R.Crim.P. 3.800(b) to appeals involving alleged sentencing errors and have affirmed the sentences where appellants have failed to properly preserve the issues for appeal. *See, e.g., Jordan v. State,* __ So. 2d __, 23 Fla.L.Weekly at D2130 (Fla. 3d DCA September 16, 1998) (claim of failure to timely file written reasons for upward sentencing departure not preserved for appellate review where defendant failed to raise issue in the trial court,

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[2]This Court added subdivision (b) to authorize the filing of a motion to correct a sentence, "therefore providing a vehicle to correct sentencing errors in the trial court and to preserve the issue should the motion be denied." *See Amendments*, 685 So. 2d at 1271.

and even if raised there, the error was not prejudicial; furthermore, alleged error did not constitute fundamental error); *Pryor v. State*, 704 So. 2d 217 (Fla. 3d DCA 1998) (sentence affirmed where defendant failed to properly preserve for review and did not show fundamental error by sentencing court; defendant failed to object to allegedly improper sentence below); *Callins v. State*, 698 So. 2d 883 (Fla. 4th DCA 1997) (defendant filed a notice of appeal prior to obtaining a ruling on his motion to correct the sentence; thereby abandoning motion and not securing a ruling on the sentencing error; hence, defendant failed to preserve errors for appeal); *Johnson v. State*, 697 So. 2d 1245 (Fla. 1st DCA 1997) (court affirmed the conviction and sentence where defendant claimed he received an improper upward departure but failed to preserve the issue for appeal and did not file motion to correct sentence; furthermore, the alleged error did not constitute fundamental error); *Cowan v. State*, 701 So. 2d 353 (Fla. 1st DCA 1997) (claim of improper sentencing departure not preserved for appellate review where defendant failed to raise issue in the trial court, and even if raised there, the trial court never ruled on issue; furthermore, alleged error did not constitute fundamental error); *Chojnowski v. State*,705 So. 2d 915 (Fla. 2d DCA 1997) (failure to timely file a 3.800(b) motion forecloses direct or collateral review of an

alleged sentencing error that is not fundamental); *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998)(en banc), *review pending*, under Case No. 93,966 with oral argument heard on May 11, 1999 (sentence affirmed where defendant failed to properly preserve sentencing issues for review and did not file motion to correct sentence; furthermore, alleged errors did not constitute fundamental error).

The foregoing argument demonstrates the propriety of the lower court's conclusions that the sentencing issue raised herein - failure to timely file written reasons for an upward departure sentence - is subject to the preservation requirement.

B. A trial court must file its written reasons for an upward sentencing departure within seven days of the filing of the written sentence.

Petitioner urges this Court that a trial court must file written reasons for an upward sentencing departure within seven days from the date sentence is orally pronounced, not within seven days of the filing of the written sentence as the Third District held. Respondent respectfully submits that the Petitioner is mistaken.

The law of Florida requires sentencing judges who impose departure sentences to (1) reduce his or her reasons for departure

to writing, and (2) file the written statement in the court file within seven days after the date of sentencing. Fla.R.Crim.P. 3.703(d)(29)(A); § 921.0016(1)(c), Fla. Stat. (1995). Rule 3.703(d)(29)(A) also requires sentencing judges to (3) orally articulate his or her reasons for departure at the sentencing hearing, and (4) sign the written statement.

In *Weiss*, the Third District Court of Appeal concluded:

> ...that "the date of sentencing" under section 921.0016 must, in context, be read to mean, not the oral pronouncement of sentence but rather the filing of the written sentencing order. This conclusion is dictated by the [sic] State v. Lyles, 576 So. 2d 706 (Fla. 1991), which holds that written reasons filed the day after an oral pronouncement complied with the then-existing requirement that the reasons be filed contemporaneously with the sentence. This was in part so, because, the court said, the very reason for the rule, as stated in Ree v. State, 565 So. 2d 1329 (Fla. 1990), was that:
>
> > If a sentence is entered and filed with the clerk on the day of sentencing, but the written reasons are delayed in being prepared and consequently are not filed on the same date, the decision to appeal may have to be made without the benefit of those written reasons <u>because the time for appeal begins to run from the date the sentencing judgment is filed, not the written reasons</u>.
>
> (citations omitted) In this case, no appeal from the sentence could be taken until the

> written order was filed with the clerk on August 26, 1997, see Owens v. State, 579 So. 2d 311 (Fla. 1st DCA 1991), which we therefore conclude is the decisive date under the statute. Because the written reasons were filed only three days after that, there was no violation of section 921.0016(1)(c) at all.

(Slip. op at 4-5).

Fla.R.Crim.P. 3.800(b) provides that "[a] defendant may file a motion to correct the sentence . . . within thirty days after the rendition of the sentence." Fla.R.App.P. 9.020(h) provides that "an order is rendered when a signed, written order is filed with the clerk of the lower tribunal." Rule 9.020(h) has been amended to provide that trial court orders are not considered rendered until rulings have been entered on any timely filed motions pursuant to rules 3.170(1) and 3.800(b). 685 So. 2d 773, 776.

Therefore, if the trial court's order was not "rendered" until the written sentencing order was filed with the clerk's office, the defendant could not have appealed at any point prior to the entry of the written sentencing order. That is, no appeal from the sentence could be taken until the written order was filed with the clerk on August 26, 1997. As the Third District correctly reasons, one can't very well appeal a departure sentence until there is a signed, written sentencing order. Without a signed written order the threshold requirement for an appeal cannot be met because

without the signed written order there is nothing upon which to base an appeal.

In the present case, the trial court orally articulated the sentence and the reasons for departure at the sentencing hearing on August 19, 1997. At the sentencing hearing the trial judge announced her intent to file the written statement within seven days. She reduced the sentence to writing and it was filed on August 26, 1997. (R. 75-77; S.R. 26-27). Because the written reasons were filed only three days after that, the *Weiss* court was correct that there was no violation of section 921.0016(1)(c).

It must also be borne in mind that in 1985 this Court explained the rationale for the requirements of §921.0016(1)(c). *See State v. Jackson*, 478 So. 2d 1054 (Fla. 1985). "The legislature and this Court, by statute and rule, have clearly mandated written orders to assure effective appellate review." *Id.* at 1056. "An absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expansive transcripts to search for the reasons utilized by the courts." *Jackson*, 478 So. 2d at 1055-1056 (quoting *Boynton v. State*, 473 So. 2d 703 (Fla. 4th DCA 1985)). It is not the function of an appellate court to cull the underlying record in an effort to locate findings and underlying reasons which would support the

order. *Id*. In scanning the record, an appellate court could select reasons which were not the reasons chosen by the sentencing judge for imposing a departure sentence. *Id*. This would defeat the purpose of meaningful appellate review.

In its *Jackson* opinion, this Court also recognized that requiring written statements for sentencing departures, increases the probability that sentencing judges will engage in a thoughtful effort at sentencing hearings. *Id*. The precise and considered reasoning involved in reducing a sentence to writing is preferable to the reasoning involved when a sentence is "tossed out orally in a dialogue at a hectic sentencing hearing." *Jackson*, 478 So. 2d at 1056 (quoting *Boynton* 473 So. 2d 703). As summarized in *Smith v. State*, 598 So. 2d 1063, at 1067 (Fla. 1992), "[r]equiring a court to write its reasons for departure at the time of sentencing reinforces the court's obligation to think through its sentencing decision, and it preserves for appellate review a full and accurate record of the sentencing decision."

In the present case, the trial court produced a clear and concise two-page sentencing order that includes its reasons for imposing a departure sentence. (SR. 26-27). The trial court's articulated reasons for the departure were reduced to a written statement without substantive change. The Third District Court of

Appeal was not required to glean the lengthy trial transcript to determine the trial court's underlying reason for the upward departure sentence. Furthermore, the detailed written order reflects the careful thought process that the trial court underwent in determining an appropriate sentence. For purposes of appellate review, this order satisfied the concerns raised by the legislature and this Court when the applicable statute and rules were enacted.

With respect to the Petitioner's concern that the Third District's interpretation somehow encourages trial court's to wait "a week, several, perhaps longer to render the sentence...", Respondent would point out that any defendant who feels that a trial judge has not entered their written sentence in a timely fashion has an available remedy in the form of a Petition for Writ of Mandamus. Respondent would also note that there is currently an emergency amendment pending before this Court, to Rules 3.670 and 3.700 (b), which requires trial courts to furnish parties with a written judgement and sentence within 15 days of oral pronouncement. (proposed Jul. 17, 1998)

Further, although not applicable in the Petitioner's case, Respondent would note that section 921.002 of the Criminal Punishment Code, effective October 1, 1998, provides that there

will be no appeals from departure sentences unless the departure is downward. Fla. Stat. §921.002(1)(g) and (h) (1997). The trial judge can impose an upward departure sentence at will, without explanation, and without appeal. *Id.* Thus, Petitioner's concerns regarding the burden placed on the defendant and his counsel to check the court file for written reasons supporting an upward departure sentence will be largely irrelevant in the not too distant future.

C. A trial court's failure to timely file written reasons for an upward departure sentence is not a fundamental sentencing error entitled to be reviewed for the first time on appeal.

Petitioner also contends that the issue raised herein - a trial court's failure to timely file written reasons for an upward departure sentence - is a fundamental sentencing error entitled to be reviewed for the first time on appeal or urges this Court, in the alternative, to follow the Second District's decisions 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) and allow an appellant to present unpreserved sentencing issues in conjunction with preserved or fundamental sentencing issues. Both contentions should be rejected.

The Respondent acknowledges that the Act, by its terms, does

not prohibit an appellant from raising a claim of fundamental error for the first time on appeal. Section 924.051(3) provides:

> An appeal may not be taken from a judgment 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.**

§ 924.051(3), Fla. Stat. (1997) (emphasis added).

However, failure to timely file written reasons for a sentencing departure does not constitute "fundamental error." *See Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *Fagundo v. State*, 667 So. 2d 476 (Fla. 3d DCA 1996); *Jordan v. State,* __ So. 2d __, 23 Fla.L.Weekly at D2130 (Fla. 3d DCA September 16, 1998). Likewise, an alleged error involving departure from sentencing guidelines does not constitute fundamental error for purposes of section 924.051(3). *Johnson*, 697 So. 2d 1245; *Cowan*, 701 So. 2d 353;. Finally, even if a sentence departs from the guideline calculations on a score sheet, the departure does not constitute fundamental error if the sentence falls within the maximum period allowed by law. *Fagundo*, 667 So. 2d at 477.

The cases relied on by the Petitioner are inapposite to the

instant case because either they involve situations where, unlike here, the sentencing court completely failed to reduce to writing the reasons for departure or the reviewing court reversed the sentence prior to the enactment of the Criminal Appeal Reform Act of 1996. *See Pease v. State*, 712 So. 2d 374(Fla. 1997) (sentencing judge orally pronounced reasons for departure but failed to reduce to writing; nevertheless, sentence affirmed); *Ree v. State*, 565 So. 2d 1329 (Fla. 1990)(decided prior to enactment of Criminal Appeal Reform Act of 1996); *Colbert V. State*, 660 So. 2d 701 (Fla. 1995) (decided prior to enactment of Criminal Appeal Reform Act of 1996); *Evans v. State*, 696 So. 2d 368 (Fla. 1st DCA 1996) (decided prior to enactment of Criminal Appeal Reform Act of 1996).

In his alternative argument to this Court, Petitioner contends that:

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

Brief of Petitioner at 20. The Petitioner bases this contention on the Second District Court of Appeal decisions 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).

Respondent would note that this was never argued by the Petitioner in the trial court and the appellate brief which

Petitioner filed in the Third District Court of Appeal did not contain a single reference to these Second District decisions or to the concept of serious, patent sentencing error.

In view of the foregoing, it must be concluded that the claim that an appellant may raise a "non-fundamental unpreserved sentencing issue raising serious, patent sentencing error," is not properly before this Court, as it was never presented to either the trial court or the district court of appeal. *See*, *Tillman v. State*, 471 So. 2d 32 (Fla. 1985); *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1983).

Finally in his brief to this Court, the Petitioner contends that even if this Court were to deem this sentencing error as one which is not fundamental and decline to follow *Bain*, *supra*, he is still entitled to an automatic reversal of his conviction, by this Court, because the failure by trial counsel to preserve this issue constitutes ineffective assistance of counsel on the face of the trial record. Petitioner is again mistaken.

Defense counsel and his client have thirty days to review the final sentencing order for prejudicial error and to seek correction in the trial court. If the trial court denies relief, the appellant has a right to seek appellate review. If, however, trial counsel fails to identify the prejudicial error and move to correct it, it

can be said as a matter of law that this is not acceptable trial strategy and that trial counsel is ineffective pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998). At this time the defendant is entitled to file a timely 3.850 motion alleging ineffective assistance of his trial counsel. This requires nothing more than a showing of prejudicial sentencing error, which is the exact burden placed on a defendant in a 3.800(b) motion. If relief is not given, the defendant is entitled to seek appellate review and the controlling question, as it would have been on direct appeal had trial counsel performed effectively, is whether there is prejudicial sentencing error.

D. Harmful error must be demonstrated in a sentencing context.

The Criminal Appeal Reform Act of 1996 permits reviewing courts to reverse a sentence only if they determine that the properly preserved error constitutes "prejudicial error." § 924.051(3), Fla. Stat. (Supp. 1996). To constitute prejudicial error, the error in the trial court must harmfully affect the sentence. § 924.051(1)(a), Fla. Stat. (Supp. 1996). In view of the foregoing, the Third District was entirely correct that before appellant was entitled to a reversal of his sentence, he was

required to demonstrate harm.

In the present case, the trial court orally articulated the sentence and the reasons for departure at the sentencing hearing on August 19, 1997. At the sentencing hearing the trial judge announced her intent to file the written statement within seven days. She reduced the sentence to writing and it was filed on August 26, 1997. She signed the two-page written statement delineating the reasons for departure on August 28, 1997 and it was stamped by the clerk's office on August 29, 1997, without substantive change. (R. 75-77; S.R. 26-27). Although the trial court did not file the written reasons until August 28, 1997 and it was not stamped by the clerk's office until August 29, 1997, the defendant did not file a notice of appeal until after the filing date, September 18, 1997. (R. 78). The appeal attacked both the timeliness and substance of the departure order. Accordingly, as the Third District found, the Petitioner suffered no prejudice as a result of the arguable late filing.

In his final point, Petitioner appears to be arguing that the provisions of the Reform Act are procedural in nature, and not substantive; thus, Petitioner contends, the requirement that appellant demonstrate harm, because implemented by the legislature, is a nullity. Once again, this argument was never presented to the

trial court or to the district court of appeal and it is not properly presented herein. *Trushin*, *supra*; *Tillman*, *supra*.

Section 924.051(1)(a) places the burden on the appellant to show that a prejudicial error occurred. Fla. Stat. (Supp. 1996). The United States Supreme Court has recognized that the legislature has the ability to enact a statute setting forth the standard for reversal. *See Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Similarly, this Court, as well as other appellate courts of this state, have also recognized the legislature's ability in this regard. *See State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986); *Goodwin v. State*, 721 So. 2d 728 (Fla. 4th DCA 1998).

Significantly, this Court has already considered and rejected the Petitioner's argument in this regard. In *Amendments to the Florida Rules of Appellate Procedure*, this Court has already upheld §§ 924.051(3) & (4) and the authority of the legislature to place reasonable substantive conditions on the exercise of the right to appeal:

> In their comments, the Committee as well as public defenders and others contend that the provisions of the Act are procedural in nature and cannot override this Court's Rules of Appellate Procedure. On the other hand, the Attorney General insists that the Act's provisions are substantive and, therefore controlling....However, we believe that the

> legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights. Of course, this Court continues to have jurisdiction over the practice and procedure relating to appeals. Applying this rationale to the amendment of section 924.051(3), we believe the legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error.

696 So. 2d 1103, 1104-1105 (Fla. 1996).

CONCLUSION

Based upon the foregoing, the State submits that Third District properly held that (1) the "date of sentencing" under 921.0016 must, in context, be read to mean, not the oral pronouncement of sentence, but rather the filing of the written sentencing order, and (2) even if a technical error did occur in the trial court's filing of written reasons for departure, it may not be made the basis of reversal under the Criminal Appeal Reform Act of 1996, section 924.051, without a showing of preservation and harm. This Court should therefore affirm.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed this ____ day of May, 1999, to Lisa Walsh, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida, 33125.

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