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IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

DCA NO. 97-2805

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

This is the Petitioner's brief on jurisdiction requesting that this Court grant discretionary review based on an express and direct conflict between the district court decision below and decisions of this Supreme Court or other district courts of appeal 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. References to the appendix to this brief are marked "A."

STATEMENT OF THE CASE AND FACTS

Petitioner Eric Weiss was convicted following a jury trial. (A. 1). The trial judge imposed an upward departure sentence upon the Petitioner. (A. 3). Ten days later, the trial judge filed written reasons in support of the departure sentence. (A. 3). Petitioner argued before the Third District Court of Appeal that because the departure was more than 7 days from the date of pronouncement of sentence, the sentence should be reversed and the petitioner/ defendant should be sentenced within the guidelines. (A. 4).

The Third District Court of Appeal disagreed and affirmed in *Weiss v.* State, __ So. 2d __, 23 Fla. L. Weekly D2380 (Fla. 3d DCA October 21, 1998).

The court determined that no error occurred because the requirement that written reasons justifying departure from the sentencing guidelines be filed "within 7 days after the date of sentencing" means that written reasons must be filed **within 7 days from the date sentence is rendered**, rather than 7 days from the date on which sentence is pronounced. (A. 4-5). Moreover, even if an error occurred, the Appellate Reform Act requires a demonstration of prejudice or harm and the "meaningless procedural hiccup involved could constitute no more than non-prejudicial, harmless error" and therefore did not warrant reversal. (A. 6).

Petitioner filed a timely petition to invoke the discretion of

this Court.

QUESTION PRESENTED

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *State v. Colbert*, 660 So. 2d 701 (Fla. 1995),AND *State v. Lyles*,576 So. 2d 706 (Fla. 1991), AS WELL AS DECISIONS OF OTHER DISTRICT COURTS.

SUMMARY OF THE ARGUMENT

Weiss v. State, __ So. 2d __, 23 Fla. L. Weekly D2380 (Fla. 3d DCA October 21, 1998) is in conflict with decisions of this Court and other District Courts of Appeal. First, the court in *Weiss* held that failure to file written reasons within 7 days from the date sentence is pronounced is a meaningless procedural error and therefore does not warrant reversal. The court declared in a footnote that the Appellate Reform Act expressly overrules this Court's opinion in *Ree v. State*, 565 So. 2d 1329, 1332 (Fla. 1990). Conflict with *Ree* is therefore expressed on the face of the opinion. The court's pronouncement in *Weiss* that violation of the rule in *Ree* is harmless error and therefore does not warrant reversal also conflicts with this Court's decisions in *State v.* Colbert, 660 So. 2d 701 (Fla. 1995), as well decisions of other district courts.

Second, the court's interpretation of the word "sentencing" in Section 921.0016(1)(c), Florida Statutes (1995) to mean time of rendition rather than pronouncement, for the purposes of defining when the 7 day period begins is in direct contravention to this

Court's holding in *State v. Lyles*, 576 So. 2d 706 (Fla. 1991), this Court's decision in *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), and decisions of other district courts of appeal.

ARGUMENT

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *State v. Colbert*, 660 So. 2d 701 (Fla. 1995), AND *State v. Lyles*, 576 So. 2d 706 (Fla. 1991), AS WELL AS DECISIONS OF OTHER DISTRICT COURTS.

In *State v. Colbert*, 660 So. 2d 701, 702 (Fla. 1995), this Court reiterated its holding in *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), that if a trial judge departs upward from the sentencing guidelines, the court must file contemporaneous written reasons at the time of sentencing, for the reason that if not promptly filed, a decision to appeal might have to be made without the benefit of those reasons.

The legislature later extended the time in which a trial judge must file accompanying written reasons to 15 days, and later restricted this period to 7 days. *See* § 921.0016(1)(c), Florida Statutes (1997); Ch. 95-184, § 6, at 1344, Laws of Florida (1995). *See also* Rule 3.702(d)(18)(A), Fla. R. Crim. P. (1994); Rule 3.703(d)(29)(A), Fla. R. Crim. P. (1995).

In *Weiss v. State*, __ So. 2d __, 23 Fla. L. Weekly D2380 (Fla. 3d DCA October 21, 1998), the Third District Court of Appeal concluded that no reversal is warranted where a trial judge fails to file written reasons within 7 days from the date on which sentence is pronounced because such an error is non-prejudicial. The court additionally interpreted Section 921.0016, Florida Statutes (1997) to require that written reasons be filed within 7 days form the date the sentence is **rendered** rather than 7 days from the date sentence is pronounced. *Weiss* conflicts with this Court's

decisions and decisions in other district courts.

First, the pronouncement in *Weiss* that this sentencing error is a "meaningless procedural hiccup" undeserving of reversal absent demonstration of prejudice conflicts with this Court's decisions as well as decisions out of the district courts. The court noted in *Weiss* that "it is clear" that the passage of the appellate reform act, section 924.051, Florida Statutes (1996), "was meant to and did overrule such cases as" *Ree v. State*, 565 So. 2d 1329 (Fla. 1990). (A. 6 at n.4). On its face, therefore, the opinion in *Weiss* is in conflict with this Court's opinion in *Ree*.

A requirement that the appellant demonstrate prejudice before deserving reversal where a trial court departs upward yet fails to timely file its written reasons is also in conflict with this Court's opinions in *State v. Colbert*, 660 So. 2d 701, 702 (Fla. 1995), *Pope v. State*, 561 So. 2d 554 (Fla. 1990)(holding that proper action when trial court fails to file written reasons is reversal, remand, and re-sentencing within the guidelines); *Donaldson v. State*, No. 88205, 23 Fla. L. Weekly S245 (Fla. April 30, 1998)("Where the trial judge fails to provide written reasons for the departure sentence, the Appellate court must reverse with instructions to resentence the defendant in accordance with the sentencing guidelines without possibility of departure."), citing *Owens v. State*, 598 So. 2d 64 (Fla. 1992); *Blair v. State*, 598 So. 2d 1068 (Fla. 1992) (same). This Court has consistently reversed, remanded and ordered re-sentencing within the guidelines where a trial court fails to timely file written reasons in support of an upward departure. No decision from this Court reviewing this error

has required a showing of prejudice by the defendant.

Weiss is also in conflict with decisions from the district courts of appeal. In *Evans v. State*, 696 So. 2d 368 (Fla. 1st DCA 1996), the court held that failure of a trial court to timely file written reasons required reversal and re-sentencing within the guidelines. The court reversed, even though the lateness was apparently attributable to a clerical error, because "courts have consistently strictly construed the requirement that written reasons supporting departures be timely filed." *Id.* at 368. There was no clerical error in *Weiss*. The trial judge's order was prepared 9 days after sentence was pronounced. (A. 3). *Weiss* is also in conflict with decisions in *Hooks v. State*, 656 So. 2d 624 (Fla. 1st DCA 1995), *Wright v. State*, 617 So. 2d 837, 841 (Fla. 4th DCA 1993), and *Wilcox v. State*, 664 So. 2d 55 (Fla. 5th DCA 1995).

Second, the court's conclusion in *Weiss* that no error occurred because a trial court must file its written reasons justifying departure within 7 days from the **date sentence is rendered, not from the date sentence is pronounced**, is in conflict with this Court's decision in *State v. Lyles*, 576 So. 2d 706 (Fla. 1991) as well as decisions out of other district courts.[1] The Third District relied

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[1] In its decision issued just prior to *Weiss* in *Pierre v. State*, 708 So. 2d 1037 (Fla. 3d DCA 1998), the court had a contrasting interpretation of the statute. The court stated in *Pierre that* "[a]lthough the trial judge **announced at sentencing** that she was imposing an upward departure sentence because of subsequent crimes, ... she did not file written reasons in support of the departure **within seven days thereafter** as required by section 921.0016(1)(c), Florida Statutes (1997)." 708 So. 2d at 1037. (emphasis added). The Court in *Weiss* tried to reconcile this conflict by explaining that *Pierre* was not governed by the

upon this Court's opinion in *Lyles* for its conclusion that if a trial judge files written reasons within 7 days from the date sentence is **rendered** or filed with the clerk, then the judge has complied with the rule. (A. 4-5).

What the court ignored about *Lyles*, however, and what places its opinion in *Weiss* in clear conflict with *Lyles* is that this Court required in *Lyles* 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 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 7 days after sentence was pronounced and file them the next business day. The trial judge's order is in the opinion in its entirety and was entered 9 days after sentence was

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Reform Act (although in *Pierre*, the court cites to the 1997 enactment of Florida Statutes, and the passage of the Reform Act did nothing to change how the word "sentencing" in section 921.0016, Florida Statutes should be interpreted). The court further receded from *Pierre* in *Weiss*. (A. 5).

pronounced and filed 10 days after sentence was pronounced. (A. 3).

The court's interpretation of time limits in Weiss is also in conflict with decisions out of the district courts. See *Wilcox v. State*, 664 So. 2d 55, 56 (Fla. 5th DCA 1995) ("[The trial judge] failed to comply with the balance of the new rule that requires that a written articulation (in some form) of the reasons for departure be signed by the trial judge and placed in the record, within fifteen days after the sentencing hearing."); *Wright v. State*, 617 So. 2d 837, 840-41 (Fla. 4th DCA 1993) (explaining that under *Ree*, it is proper to file written reasons the next business day only if the reasons are prepared contemporaneously with the day of oral pronouncement, and may not be filed several days later).

There is no excuse on the face of the opinion in *Weiss* for the trial court's failure to abide by the time requirements in section 921.0016, Florida Statutes. It is apparent that this Court and the district courts have required that written reasons be filed within statutorily set time limits which begin when sentence is pronounced not when sentence is rendered. This Court and the district courts of appeal have repeatedly and consistently responded to this error by reversing and remanding with instructions to impose a guidelines sentence without possibility of departure. *See Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990). *Weiss* is in conflict with the aforementioned decisions and this Court should therefore accept discretionary review jurisdiction based upon this conflict.

CONCLUSION

For the foregoing reasons, the Petitioner submits that conflict jurisdiction exists in this case and requests that this Court accept discretionary review jurisdiction based upon this conflict.

Respectfully submitted,

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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 30th day of November, 1998.

_____
LISA WALSH
Assistant Public Defender

A P P E N D I X

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1998

ERIC WEISS, **

Appellant, **

vs. ** CASE NO. 97-2805

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 96-13045

Appellee. **

Opinion filed October 21, 1998.

An Appeal from the Circuit Court for Dade County, Victoria Platzer, Judge.

Bennett H. Brummer, Public Defender and Lisa Walsh, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Roberta G. Mandel, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON and GODERICH, JJ.

SCHWARTZ, Chief Judge.

The defendant appeals from criminal convictions and a ten-year upward departure sentence based on adverse jury verdicts for his involvement in a particularly brutal home invasion robbery in

which, among other things, he terrorized a crippled man and a three-year-old-child.

I.

As the State concedes, the conviction for home invasion robbery must be vacated on double jeopardy grounds as subsumed by the "greater" conviction for burglary with an assault. See Elmy v. State, 667 So. 2d 392 (Fla. 1st DCA 1995). We find no merit in the sole claim of trial error, see State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), however, and therefore affirm the remaining conviction.

II.

In considering the defendant's two challenges to the sentence--neither of which was presented to the trial court--we first summarily reject his claim that the grounds assigned by the trial court[1] are legally insufficient for departure. See §

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[1]

ORDER

THIS CAUSE was heard before this Court on August 19, 1997, on the State's motion to depart from sentencing guidelines. The Court makes the following findings:

1. This was a home-invasion robbery, in which the intruders threatened the victims - none of whom offered resistance - with death.

2. The degree of force used against victim Warren Hart was excessive and the victim was especially vulnerable due to both age and physical disability. Mr. Hart is a crippled older man who offered no resistance and was dragged with crutches through the house.

3. The crime was committed in the presence of a three year old and created a substantial risk of harm to the child.

4. Victim Freda Jaglal suffered extraordinary

921.001(7), Fla. Stat. (1995); § 921.0016(3), Fla. Stat. (1995); Capers v. State, 678 So. 2d 330 (Fla. 1996); State v. Rousseau, 509 So. 2d 281 (Fla. 1987); Perez v. State, 604 So. 2d 916 (Fla. 3d DCA 1992), review dismissed, 613 So. 2d 9 (Fla. 1992).

The separate, procedural, claim of sentencing error is also without merit. The trial judge announced the reasons for departure when the sentence was orally pronounced on August 19, 1997. The adjudication and sentence were filed with the clerk on August 26, 1997. For unknown reasons, however, the written bases for departure, which closely tracked those stated at the hearing, were not filed until August 29, 1997. Weiss argues that because this date was ten, rather than seven, days after the oral pronouncement

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emotional trauma when she and the three year old child she was holding in her arms were threatened with death. The Defendant placed a pillow over Ms. Jaglal's head, suffocating her, and held an object to her head which the victim believed to be a gun. The Defendant threatened to kill the child and Ms. Jaglal placed herself in a position in order to protect the child which jeopardized her own life.

The Court considered the mitigating factors presented by the Defendant. However, the Court finds that the emotional trauma and excessive force used during the home invasion serve as clear and convincing reasons for departure. Therefore, it is hereby

ORDERED AND ADJUDGED that the Defendant shall be sentenced to ten (10) years in State prison followed by two (2) years of Community Control followed by five (5) years of probation.

DONE AND ORDERED at Miami, Dade County, Florida, this 28th day of August, 1997.

VICTORIA PLATZER
Circuit Court Judge

of sentence, the departure was wholly invalid and must be set aside under section 921.0016(1)(c), Florida Statutes (1995), which provides that:

> (c) 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 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 by the court within 7 days after the date of sentencing.

§ 921.0016(1)(c), Fla. Stat. (1995). For two reasons, we disagree.

Initially, we conclude 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 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>.

<u>Lyles</u>, 576 So. 2d at 708 (emphasis supplied). See generally Jordan

v. State, ___ So. 2d ___ (Fla. 3d DCA Case no. 97-2002, opinion filed, September 16, 1998)[23 FLW D2130, D2132-33]. 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.[2] Because the written reasons for departure were filed only three days after that, there was no violation of section 921.0016(1)(c) at all.

Second, even if, arguendo, a technical error did occur, it may not be made the basis of reversal under the operative provisions of the Criminal Appeal Reform Act of 1996, section 924.051, Florida Statutes (Supp. 1996), which requires both preservation and harm, which preceded the events in this case, and which therefore entirely controls. As this court specifically held in dealing with a similar claim of error in Jordan v. State, ___ So. 2d at ___, 23 FLW at D2130, the arguably late filing of departure reasons is not cognizable here both because it was not raised below, see Jordan, ___ So. 2d at ____, 23 FLW at D2131-33, and because, even if it were, the meaningless procedural hiccup involved could

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[2] It is true that Pierre v. State, 708 So. 2d 1037 (Fla. 3d DCA 1998)(which was not governed by the Reform Act), indicates that the seven day period runs from the announcement of an upward departure at sentencing. That statement was unnecessary to the result, however, because the date of the written sentencing order was not at all in question. See also Jordan v. State, ___ So. 2d at ___, 23 FLW at D2130(written departure reasons filed more than seven days after sentencing order). In light of our direct and specific consideration of the issue in this case, we recede, to this extent, from Pierre.

constitute no more than non-prejudicial, harmless error. Jordan, ___ So. 2d at ____, 23 FLW at D2132-33. As to the latter ground, which we find particularly persuasive, we emphasize that the Reform Act has--we think, quite salutarily[3]--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.[4] 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. See Jordan, ___ So. 2d at ___, 23 FLW at D2132-33. The legislature has now expressly precluded such a result.

Affirmed as modified.

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[3] Contrast the critical reference to the preservation aspect of the Act in Mizell v. State, ___ So. 2d ___, ___ n.1 (Fla. 3d DCA Case no. 97-3638, opinion filed, August 26, 1998)[23 FLW D1978, D1979 n.1].

[4] It seems clear that in this respect the Act was meant to and did overrule such cases as Ree v. State, 565 So. 2d 1329 (Fla. 1990) and Pierre v. State, 708 So. 2d at 1037.