IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,325

WILLIAM SHAUN JORDAN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, WILLIAM SHAUN JORDAN, 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 Respondent accepts the Petitioner's statement with the following elaboration regarding the evidence adduced at trial:

On February 16, 1996, the Defendant was charged by information with: Count I, attempted first degree murder of a law enforcement officer in violation of §§ 782.04(1), 784.07, 775.0825, and 777.04, Fla. Stat.; and Counts II, III, IV, aggravated assault on a law enforcement officer in violation of §§ 784.021, 784.07, and 775.0823, Fla. Stat. (R. 1-4).

A jury trial commenced on February 18, 1997. (R. 6, 12; T. 1). The State's first witness, Officer Marcel Macken ("Officer Macken"), testified that he was a member of the Team Police Unit with the Metro-Dade Police Department on the day of the shooting. (T. 277-278). The unit conducts drug sweeps in the "hot spot areas" of South Dade. (T. 282). Officer Macken testified that the unit had executed approximately twenty or thirty sweeps in the South Miami Heights area prior to the incident in January of 1996. (T. 284). He had participated in a drug sweep in that area one week prior to the day that the Defendant shot him. (T. 285).

At approximately 8:00 o'clock in the morning of January 26, 1996, Officer Macken, Sergeant Edward Gallagher ("Sergeant Gallagher") and Officer Guerrier, initiated a drug sweep operation

in the South Miami Heights area. (T. 286, 325). They rode together in a black Chevy Blazer to the targeted area. (T. 286). They wore jeans, T-shirts, caps, police vests, police badges that either hung from a chain around the neck or were clipped to an article of clothing, holsters with firearms, radios in holders, and handcuffs. (T. 287, 295-298). Officer Macken, Sergeant Gallagher and Officer Guerrier displayed their badges on the outside of their clothing. (T. 289-290, 296, 298, 409, 507).

As Officer Macken turned the vehicle onto Southwest 113th Place, he observed four males standing together; three black males and one white male, the Defendant. (T. 302). Sergeant Gallagher advised Officer Macken to stop the vehicle because he noticed one of the males holding a marijuana cigarette. (T. 419). At that point, Officer Macken stopped the vehicle, and Sergeant Gallagher and Officer Guerrier exited the vehicle from the passenger side. (T. 303).

Officer Macken remained in the vehicle to wait for a car to pass that was approaching from the opposite direction. (T. 303-304). From inside the Blazer, Officer Macken observed Sergeant Gallagher and Officer Guerrier approach two of the males. He continued to watch as Sergeant Gallagher and Officer Guerrier gestured for the two males to place their hands on a vehicle parked

in front of the residence. (T. 304). Officer Macken noticed that while Sergeant Gallagher and Officer Guerrier searched and spoke with the two males, the Defendant and the other male stood and watched the arrest and pat-down. (T. 307-308).

After the approaching car passed by the Blazer, Officer Macken exited the vehicle. As he stepped out of the vehicle, he heard Sergeant Gallagher instruct the Defendant to place his hands on the vehicle too. (T. 308). At that moment, the Defendant ran in a westerly direction behind a residence. (T. 308). Immediately, Officer Macken unholstered his firearm and pursued the Defendant on foot. (T.308-309). He yelled, “Police, stop” but the Defendant continued running. (T. 309-310).

As the Defendant ran behind a residence, he turned and pointed a gun at Officer Macken. Officer Macken fired a shot at the Defendant and missed. The Defendant ran a few more steps, turned, fired a shot at Officer Macken, and missed. (T. 310). The Defendant then ran between two residences, continued fleeing in a southernly direction, ran behind a residence and positioned himself along the east side of a wall separating the patio area of duplex homes. (T. 312). Officer Macken ran to the west side of the wall and leaned his back against it as he advised the Defendant that he was a police officer and instructed the Defendant to drop his gun.

The Defendant responded, " No, drop your gun." (T. 313).

At that point, Officer Macken reached around the wall with his right hand, holding the gun in his right hand. (T. 314). The Defendant fired a sequence of shots along the wall, striking Officer Macken in the face. (T. 314). Officer Macken quickly retreated to the corner of the nearby residence. After a few minutes expired, the Defendant appeared from behind the wall and began running in a southeasterly direction. The Defendant looked back at Officer Macken, pointed his gun and fired a sequence of shots at Officer Macken. The bullets from the Defendant's gun struck Officer Macken in the leg. (T. 314).

When Sergeant Gallagher heard the initial gunshots, he placed the male that he had arrested in the front passenger seat of the Blazer. (T. 428). Officer Guerrier placed the other male that she had arrested in the backseat of the Blazer. (T. 429). Sergeant Gallagher and Officer Guerrier then entered the vehicle. As Sergeant Gallagher began driving the vehicle eastward on 189th Terrace, the Defendant suddenly emerged from between the houses. (T. 429). The Defendant looked up and began walking. Sergeant Gallagher proceeded slowly in the Blazer. When the Blazer reached within ten feet of the Defendant, the Defendant raised his gun with one hand, pointed it at Sergeant Gallagher and continued walking.

(T. 430-431).

Sergeant Gallagher was concerned for the safety of the civilian passengers and Officer Guerrier, a new rookie. (T. 433, 434). He stepped on the gas pedal and accelerated passed the Defendant. (T. 433). Sergeant Gallagher looked in the side view mirror and observed the Defendant raise his other hand to the gun and track the Blazer. (T. 435). Only after the Blazer reached the end of the street, did the Defendant lower his firearm. (T. 436). The Defendant then walked back between the houses and leaned against the wall of a house. (T. 436).

Sergeant Gallagher stopped the Blazer, exited, and ran to the location where he observed the Defendant. (T. 437). Sergeant Gallagher noticed that the Defendant was working on his gun, possibly reloading or clearing a jam. (T. 437). When the Defendant looked up and saw Sergeant Gallagher running towards him, he raised his gun with both hands, pointing it at Sergeant Gallagher. Sergeant Gallagher fired four shots at the Defendant and missed. (T. 440-441). The Defendant fell to the ground and slipped away to the backyard of another house. (T. 442).

Meanwhile, Officer Macken announced on his radio that he had been shot by the Defendant and that the Defendant was fleeing in a southeasterly direction. (T. 315). Officer Macken proceeded to

walk back to the roadway. At that point, Officer Tookes drove into the area and observed Officer Macken. Officer Tookes stopped his vehicle and ran to Officer Macken to assist him. (T. 316-317, 514). He instructed Officer Macken to lay on the ground until medical attention arrived. (T. 317, 514).

As Officer Tookes attempted to comfort Officer Macken, he noticed a female coming out of her house with a little boy. Because of the gunfire and the Defendant still armed and running around the neighborhood, Officer Tookes yelled, “Get back in the house.” (T. 516). He then observed the Defendant emerge from behind a residence. (T. 516). Officer Tookes shouted to the Defendant, “Police. Stop. Police” and pointed his gun in a ready position. (T. 516). The Defendant looked directly at Officer Tookes and raised his hand with the firearm. Officer Tookes then fired two shots in the direction of the Defendant. (T. 516). As the Defendant turned away to proceed in another direction, Officer Tookes again yelled, “Police. Police. Stop. Police.” The Defendant again responded by raising his firearm toward Officer Tookes. Again, Officer Tookes fired and missed. (T. 518-519). Meanwhile, Officer Tookes noticed in his peripheral vision, that people were coming out of their front doors. (T. 525). The Defendant fled.

The Defendant testified that he ran from the police because he

thought that he and the other males “were going to be robbed or shot or hurt or something.” (T. 760). He fled through the backyards of the houses and “did the only thing [he] could think of,” he pulled out the gun he was carrying. (T. 774). He wanted “to show this man running behind me with a gun that I had one too.” (T. 779).

> [Defendant]: Immediately after I fired, I was in between the houses. Like I said, there is no fences so I just ran diagonally behind the houses and went around back.
>
> [Defense Counsel]: And what did you do back there?
>
> [Defendant]: I ran for cover, the best place I can find which was the porch area on the other side of the partition.

(T. 782). The Defendant testified that he ran for cover because he did not know who this man was or why the man was shooting at him. He thought the man was trying to kill him. (T. 782-783). After firing some shots, the Defendant ran away from the patio area, reached back with his arm, and fired two more shots. (T. 787). He did not look where he was shooting. (T. 787).

When the Defendant encountered the people in the Blazer, he still did not realize their identities. (T. 789-790). He pointed

his gun at the vehicle, hoping that the driver would continue driving down the street. (T. 790). When the Blazer reached the end of the street, two people exited and pointed guns toward the Defendant. The Defendant still did not realize that they were police officers. (T. 791). He decided to run to his car. (T. 794). As he ran across the street, he noticed a "paddy wagon." Only then, when he saw Officer Tookes standing over Officer Macken, did he realize that he had been shooting at police officers. (T. 798). The Defendant jumped into his car and attempted to flee the neighborhood. (T. 798).

At the conclusion of the trial, the jury entered a verdict of guilty against the Defendant for the lesser included offense of attempted second-degree murder on a law enforcement officer with a firearm, and aggravated assault on Sergeant Gallagher and Officer Guerrier with a firearm. (R. 44-46, T. 1020). The jury entered a not-guilty verdict on the charge of aggravated assault on Officer Tookes with a firearm. (R. 47, T. 1020-1021). The trial court judge adjudicated the Defendant guilty on the above-listed three offenses. (R. 56, T. 1022).

The trial court judge conducted a sentencing hearing on May 29, 1997 and June 4, 1997. (R. 63; SR 1). On the score sheet, the Defendant received a total of 336 sentence points. These

points translated to a minimum nineteen year sentence and maximum thirty-two year sentence in a state prison. (R. 62).

At the conclusion of the sentencing hearing on June 4, 1997, the judge orally sentenced the Defendant to serve thirty years in the state prison on the conviction of attempted second-degree murder against a law enforcement officer with a firearm, and to serve two consecutive five-year terms for the convictions of aggravated assault against law enforcement officers with a firearm. (R. 137-138). The judge imposed three consecutive three-year minimum mandatory sentences for the use of a firearm in each offense. (R. 137-138). In total, the Defendant received a forty year sentence with nine years minimum mandatory served. (R. 138).

In sentencing the Defendant, the judge upwardly departed from the sentencing guidelines and explained that the Defendant's actions created a substantial risk of death or bodily harm to many other persons. (R. 136-137).

> The court further finds that your conduct in this case was so egregious to a degree that can be considered aggravating factors by this court, that your actions created a substantial risk of death or bodily harm to many persons that you discharged your gun in backyards, down residential streets and in the patios of backyards of dwellings and also shot in the direction of other homes, as well.

(R. 136-137).

Prior to orally sentencing the Defendant, the judge stated that, "I will have my [judicial assistant] type it this evening and tomorrow it will become part of the court file." (R. 132). The judge then proceeded to verbally announce the sentencing order, reduce the order to writing, *verbatim*, and sign the order that same day, June 4, 1997. (R. 133-138; 148-153). The written sentencing order was filed on June 26, 1997. (R. 148). On July 3, 1997, the Defendant filed a notice of appeal to the Third District. (R. 154).

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 *Jordan* 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.

Respondent agrees that 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. 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.

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

The District 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. On June 4, 1997, prior to orally sentencing the Defendant, the judge stated that, "I will have my [judicial assistant] type it this evening and tomorrow it will become part of the court file." (R. 132). The judge then proceeded to verbally announce the sentencing order, reduce the order to writing, *verbatim*, and sign the order that same day, June 4, 1997. (R. 133-138; 148-153). The written sentencing order was filed on June 26, 1997. (R. 148). On July 3, 1997, the Defendant filed a notice of appeal. (R. 154).

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, 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.*

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[1] The trial court sentenced the Defendant on June 4, 1997. Therefore, section 924.051 of the Florida Statutes applies to the present case.

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.

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., Weiss v.*

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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.

State, 720 So. 2d 1113(Fla. 3d DCA 1998), *review granted*, 729 So. 2d 396 (Fla. 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, 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 district court's conclusion that the sentencing issue raised herein - failure to timely file written reasons for an upward departure sentence - is subject to the preservation requirement. A review of the record indicates that the Defendant failed to raise the issues presented on appeal in the lower court. On June 4, 1997, after the trial court sentenced the Defendant and announced its reasons for imposing an upward departure, the Defendant voiced no objections. (R. 138-141). Instead, the Defendant asked the trial court to appoint a public defender for the purpose of appeal and schedule the case for report the following week. (R. 138, 139). The record

does not reflect what occurred at the report hearing on June 11, 1977, except that the court appointed a public defender for the Defendant's appeal as noted in the docket sheet. (R. 11).

If the Defendant had not yet received a copy of the court's written reasons for departure, the Defendant could have and should have notified the trial court at the report hearing on June 11, 1997, thereby enabling the court to remedy the situation. When the Defendant received a copy of the court's written reasons for departure, the Defendant could have and should have moved the trial court to correct any sentencing errors. The record is devoid of a defense motion in the trial court to correct sentencing errors pursuant to Rule 3.800(b). Likewise, the record is devoid of a ruling by the trial court on the issues now raised on appeal. The trial court never received an opportunity to rule on the issues which the Defendant raises in this appeal. Hence, the *Jordan* Court properly affirmed Jordan's sentence because the Defendant failed to properly preserve the sentencing issues for review.

B. The District Court correctly held that 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.

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). 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. 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. Finally, in *Hyden v. State*,715 So. 2d 960 (Fla 4th DCA 1998), an *en banc* court concluded that the absence of a written order in the sentencing context does not make a sentence illegal.

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).

C. The District Court correctly held that prejudicial error must be demonstrated in a sentencing context.

Lastly, even assuming that the Defendant properly preserved this issue for review, the Respondent submits that the Defendant would not prevail on the merits of his claim. The District Court correctly held that prejudicial error must be demonstrated in a sentencing context. The law in 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.

It must 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 orally articulated the sentence at the sentencing hearing, reduced the sentence to writing on the date of the sentence, and signed the six-page written statement on the date of the sentence. (R. 133-138; 148-153). Although the clerk's office stamped the filing date of June 26, 1997 on the written statement, which exceeds the seven-day filing requirement, the Defendant did not file a notice of appeal until after the filing date. (R. 148; 154). 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 sum, the trial court acted in a manner consistent with spirit of Fla.R.Crim.P. 3.703(d)(29)(A) and § 921.0016(1)(c), Fla. Stat. (1995) and the Defendant suffered no prejudice as a result of the late filing. The trial court produced a clear and concise six-page sentencing order that includes its reasons for imposing a departure sentence. (R. 148-153). In its written statement, the trial court explained that the Defendant's actions created a substantial risk of death or bodily harm to many other persons:

> The Court further finds that your conduct in this case was egregious to a degree that can be considered an aggravating factor by this court. That, your actions created a substantial risk of death or great bodily harm to many persons. That you discharged your gun in backyards, down residential streets, and in the patio in the backyard of a dwelling. That you also shot in the direction of other homes as well.

(R. 151) (citations omitted).

The district court 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 the purposes of appellate review, this order satisfied the concerns raised by the

legislature and the Florida Supreme Court when they enacted the applicable statute and rule. In this case, a reversal based on the late filing would further no legitimate purpose.

The record on appeal in the present case shows that the sentencing judge informed the parties at the sentencing hearing that " tomorrow [the written order] will become part of the court file." (R. 132). The written order, dated and signed by the judge on the date of the sentencing hearing, contained a notation ("cc") for a copy to be provided to each party and the court file. (R. 153). The record indicates that the sentencing judge fulfilled his obligations. Perhaps both parties and the court file received the written order the day after the sentencing hearing. Nevertheless, the filing date stamped on the order reflects that the order entered the court file three weeks later. An error occurred somewhere. Yet, because the Defendant failed to raise this issue in the lower court, the record contains no additional information as to where or how the problem occurred. Under the circumstances, the district court correctly held that the delay in the filing of the departure order must be treated as harmless error.

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 the present case, the district court correctly found that Jordan was required and neglected to show that the filing date stamped on the sentencing order affected his sentence.

Lastly, Petitioner appears to contend that the provisions of the Reform Act are procedural in nature, and not substantive; thus, Petitioner argues in effect, that the requirement that an appellant demonstrate harm, because implemented by the legislature, is a nullity. *See* Petitioner's brief at 17. Respondent respectfully suggests that Petitioner is mistaken.

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).

Additionally, 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).

Thus, contrary to Petitioner's contention, the foregoing analysis demonstrates that the district court correctly considered, as required by Florida law, whether Jordan suffered any prejudice or harm before determining whether or not to resentence Jordan within the sentencing guidelines.

CONCLUSION

Based upon the foregoing, the Respondent requests that this Court approve the decision in *Jordan v. State*, 728 So. 2d 748 (Fla. 3d DCA 1998).

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 August, 1999, to Marti Rothenberg, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida, 33125.

_____
CHRISTINE E. ZAHRALBAN

Assistant Attorney General