IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,325

WILLIAM SHAUN JORDAN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGES**

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

INTRODUCTION

This is the petitioner's initial brief on the merits in this conflict jurisdiction case to the Third District Court of Appeal. Petitioner requests that this Court grant certiorari and quash the decision of the Third District below on the sentencing issue herein.

Citations to the record are abbreviated as follows:

(R) - Circuit Court Clerk's Record on Appeal

(T) - Transcript of Proceedings

(SR) - Supplemental Record from Circuit Court Clerk

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The petitioner was tried and found guilty by a jury of the lesser included offense of attempted second degree murder with a firearm on a law enforcement officer and two counts of aggravated assault with a firearm on a law enforcement officer. (R: 44-46) The evidence at trial was that three undercover police officers - members of the "jump out team," dressed in jeans and T-shirts so as not to be recognizable as police and to give "the element of surprise" when they jumped out of their car - drove their unmarked Chevy Blazer sport vehicle up to four men, one of whom was the petitioner, standing on the corner in a housing project area, and jumped out. (T: 278-302, 330-334, 407-417, 681-684) Two officers began patting down two of the men, one of whom had a marijuana

cigarette, but when the third officer, Officer Macken, called the petitioner over, the petitioner took off running. (T: 308, 423, 687) The officers admitted the defendant was not doing anything illegal when they came up on the group of men and that Officer Macken chased him simply because he ran. (T: 340-346) Although the officers had not seen any firearms and there was no evidence at that time the petitioner had a firearm, Officer Macken nonetheless immediately took out his service revolver and chased the petitioner on foot. (T: 308, 347) The foot chase continued through the housing project with the petitioner pulling out a firearm and shooting at the pursuing officer and Officer Macken shooting back at the petitioner. (T: 310-320, 435-441) The petitioner was subsequently apprehended. (T: 798)

The petitioner testified at trial that he was merely standing on the corner with his friends when three men he did not know drove up in the Chevy blazer and began grabbing his friends. (T: 758) He testified he did not know they were undercover police and that when he saw one of them had a gun, he panicked because he thought he was going to be robbed or shot. (T: 760) He ran away, but when he saw the man chasing him with his gun drawn and pointed at him, he panicked and thought he was going to be shot. (T: 764-772) The petitioner then drew out his own gun and shot in self defense; he kept running as fast as he could to get away, never realizing the person chasing him was an undercover police officer. (T: 780-796)

During the sentencing hearing on June 4, 1997, the permitted sentencing guidelines range was 19-32 years in prison. (R: 62) The state sought a departure sentence of 40 years on the grounds the defendant created a substantial risk of death or great bodily harm to many persons. (R: 128; SR: 4-6) The petitioner objected to the departure sentence and requested a youthful offender sentence or a downward departure sentence, pointing to the testimony and evidence adduced at the sentencing hearing that the petitioner was only 17 years old at the time, had no extensive or violent juvenile past, was very bright with a gifted IQ and great potential, but had come from a dysfunctional family where both parents were drug addicts. (R: 113, 121-127)

The trial judge did not impose a juvenile or youthful offender sentence on the petitioner, but instead departed upward from the guidelines and sentenced him on the attempted second degree murder with a firearm, count 1, to 30 years in prison, and on the aggravated assault counts, counts 2 and 3, to 5 years in prison on each, all counts to run consecutively with each other, for a total sentence of 40 years. (R: 137) The judge orally announced his reasons for departure on the record and stated that a written order would be typed by the judicial assistant "this evening and tomorrow it will become part of the court file." (R: 132; A: 7) Although dated the same day - June 4, 1997 - the departure order was not actually filed in the clerk's office as shown by the clerk's stamp until June 26, 1997, which was twenty-two days later. (R: 148; A: 7)

On appeal to the Third District Court of Appeal, the petitioner challenged the scoring of the guidelines score sheet and the reasons for departure, both of which were affirmed by the Third District. (A: 1-2) The petitioner further argued the applicable statute, §921.0016(1)(c), Fla. Stats. (1995), and rule of procedure, 3.703(d)(29), Fla.R.Crim.P. (1995), required a guidelines departure order to be filed within 7 days after the date of sentencing, and since the petitioner's departure order was not filed in the clerk's office until the 22nd day, it was untimely and invalid and must be reversed for sentencing within the guidelines as per Ree v. State, 565 So.2d 1329 (Fla. 1990). (A: 1, 3)

The Third District affirmed the departure sentence and held the petitioner did not preserve the issue for appeal because he did not file a Rule 3.800(b) motion to correct the sentencing error within 30 days of the sentencing as required under the Criminal Appeal Reform Act, §924.051, (Supp. 1996), and Rule 9.140(d), Fla.R.App.P. (1997). (A: 3-5) Jordan v. State, 728 So.2d 748 (Fla. 3d DCA 1998), 23 FLW D2130 (Fla. 3d DCA, Sept. 16, 1998), 24 FLW D640 (Fla. 3d DCA, Mar. 10, 1999) (on motion for rehearing). The court also held the failure to timely file the departure order was not fundamental error that could be raised on appeal despite the lack of preservation. (A: 3-5) The court further held that even if it could entertain the petitioner's unpreserved claim of error, the departure sentence should still be affirmed because there was no showing that the late

filing of the departure order was prejudicial as required under the Criminal Appeal Reform Act. (A: 4)

The petitioner then filed a motion for rehearing and certification. (A: 1) The Third District denied the motion for rehearing and certification and again held the failure to timely file the written reasons for departure was not preserved for appellate review by the filing of a motion to correct sentence as per the Criminal Appeal Reform Act and was not fundamental error. (A: 1) The Third District acknowledged that its decision was in conflict with the decision of the Fifth District Court of Appeal in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), review granted, 718 So.2d 169 (Fla. July 7, 1998, Case No: 92,805), on the issue of whether an unpreserved sentencing error can be treated as fundamental and entertained by the appellate court. (A: 1, 4) The Third District stated that, contrary to the Maddox decision, sentencing errors can be fundamental error and the appellate courts still could entertain fundamental sentencing errors. (A: 1, 4) However, the Third District stated the unpreserved sentencing error in this case was not fundamental error and thus would not be reviewed on appeal. (A: 1, 4)

The petitioner filed a timely notice to invoke discretionary review in this Court and this Court has accepted jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

The petitioner submits the decision of the Third District in this case should be quashed where the Criminal Appeal Reform Act, §924.06, Florida Statutes (1996), has not overturned this Court's long standing rule announced in Ree v. State, 565 So.2d 1329 (Fla. 1990), and its progeny that the failure of the trial court to timely file the written reasons for an upward guidelines departure sentence requires reversal and resentencing within the sentencing guidelines.

ARGUMENT

THE DECISION OF THE LOWER COURT IN THIS CASE SHOULD BE QUASHED WHERE THE CRIMINAL APPEAL REFORM ACT, §924.06, FLORIDA STATUTES (1996), HAS NOT OVERTURNED THIS COURT'S LONG STANDING RULE ANNOUNCED IN REE V. STATE, 565 So.2d 1329 (FLA. 1990), AND ITS PROGENY THAT THE FAILURE OF THE TRIAL COURT TO TIMELY FILE WRITTEN REASONS FOR AN UPWARD GUIDELINES DEPARTURE SENTENCE REQUIRES REVERSAL AND RESENTENCING WITHIN THE GUIDELINES.

The petitioner was convicted of the lesser included offense of attempted second degree murder and aggravated assault with a firearm on a law enforcement officer, and the trial judge orally pronounced sentence on June 4, 1997. (R: 132) The judge departed from the recommended guidelines sentence of 19 to 32 years and imposed an upward departure sentence of 40 years in prison. (R: 137) The judge gave his reasons for departure orally and told the parties that his written sentencing order would be typed up and filed in the court file the next day. (R: 132) However, the judge's written sentencing order departing from the guidelines was not filed in the court file the next day; instead, it was filed on June 26, 1997, which was 22 days - over three weeks - later. (R: 148)

It is undisputed the judge failed to timely file the written departure order. The date of these offenses was January 26, 1996. (R: 1) Consequently, the applicable statutes are

the 1995 Florida Statutes and the applicable guidelines are the 1994 guidelines as amended in 1995, found in Rule 3.703, Florida Rules of Criminal Procedure (1996), effective October 1, 1995. In Re Amendments to Fla. Rules, 660 So.2d 1374 (Fla. 1995). Subsection (d)(28) of Rule 3.703 (1996),[1] states that upward departure sentences must be based on justifiable reasons which must be orally articulated at the sentencing and timely reduced to writing in the form of a written sentencing order or guidelines scoresheet delineating the reasons, signed by the judge and filed in the court file within 7 days after the date of the sentencing, or in the form of a written transcript of the orally articulated reasons from the sentencing hearing which must also be signed by the judge and filed in the court file within 7 days after the date of sentencing:

> (28) Departure from the recommended guidelines sentence provided by the total sentence points should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. A state prison sentence that deviates from the recommended prison sentence by more than 25%, a state prison sentence where the total sentence points are equal to or less than 40, or a sentence other than state prison where the total sentence points are greater than 52 must be accompanied by a written statement delineating the reason for departure. Circumstances or factors that can be considered include, but are not limited to, those listed in subsection 921.0016(3) and (4). Reasons

[1]This subsection, "d(28)," was later renumbered as "d(29)" in the 1997 Rules, Amendments to RCP Re Sentencing Guidelines, 685 So.2d 1213, 1218 (Fla. 1996), and then renumbered as "d(30)" in the 1998 Rules, Amendments to Fla. Rules of Crim. Proc., Re Sentencing Guidelines, 696 So.2d 1171, 1173 (Fla. 1997).

> for departing from the recommended guidelines sentence shall not include circumstances or factors relating to prior arrests without conviction or charged offenses for which convictions have not been obtained.
>
> (A) If a sentencing judge imposes a sentence that departs from the recommended guidelines sentence, the reasons for departure shall be orally articulated at the time sentence is imposed. Any departure sentence must be accompanied by a written statement, signed by the sentencing judge, delineating the reasons for departure. The written statement shall be filed in the court file within 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. (emphasis supplied)

Likewise, §921.0016(1)(c), Florida Statutes (1995), also requires that a written statement delineating the reasons for departure must be filed within 7 days after the date of the sentencing:

> (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 the 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. (emphasis supplied)

Thus, when a judge imposes a departure sentence, the written order listing the reasons

for departure must be filed in the court file within 7 days after the date of sentencing. Here the written order was not filed within the 7 days; it was filed 22 days later and was indisputably very late.

This Court has strictly construed this requirement that written reasons supporting upward departures must be timely filed or the departure sentence will be reversed with directions to impose a guidelines sentence. Beginning with Ree v. State, 565 So.2d 1329 (Fla. 1990), and continuing with State v. Colbert, 660 So.2d 701 (Fla. 1995) and State v. Lyles, 576 So.2d 706 (Fla. 1991), this Court has consistently held that written reasons for a departure sentence must be timely issued and filed and if they are not, the departure sentence is reversed with directions to impose a guidelines sentence. See also Pope v. State, 561 So.2d 554 (Fla. 1990) (when appellate court reverses a departure sentence because there were no written reasons, the court must remand for resentencing with no possibility of departure from the guidelines); Pease v. State, 712 So.2d 374 (Fla. 1997) (written reasons for upward departure must be timely filed by court within 7 days after date of sentencing; unlike downward departure sentence, there is no excuse for mistake of state or court to timely file reasons for upward departure). In Ree, this Court noted that strict adherence to these procedural requirements for upward departure sentences was justified because "a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." 565 So.2d at 1332. In Pope, this

Court explained there are policy reasons for remanding for resentencing within the guidelines, namely "to avoid multiple appeals, multiple resentencings and unwarranted efforts to justify an original departure," 561 So.2d at 556. As the Fourth District noted in Carridine v. State, 721 So.2d 818, 820 (Fla. 4th DCA 1998), the Florida Supreme Court has persistently ruled on this issue "in a way that indicates that 'one wrong move' by the sentencing judge can be fatal to a departure sentence."

This Court's repeated and consistent reaffirmation of Ree throughout the last ten years is made even stronger by the window period now afforded trial judges in which to file their written reasons for departure. When Ree was decided, the written reasons had to be filed contemporaneously with the departure sentence, but under 3.703(d)(28) of the 1996 Rules and §921.0016(1)(c), Florida Statutes (1995), applicable to this case, as well as to current versions of this rule and statute, the trial judge has a seven-day window period in which to timely file the written reasons and is no longer restricted by a contemporaneous filing requirement. Thus, the concern that a trial judge's minor accidental and inadvertent failure to timely file the departure order would create a procedural windfall for a defendant is taken care of by the reasonable window period; there simply is no excuse not to timely file the departure order and failure to do so means reversible error.

In the present case, however, the Third District held that the trial judge's failure

to timely file the departure order was not preserved for appellate review under the Criminal Appeal Reform Act of 1996, §924.051, Fla. Stat. (Supp. 1996). Indeed, in Weiss v. State, 720 So.2d 1113, n.4 (Fla. 3d DCA 1998), review granted, 729 So.2d 396 (Fla. 1998, Case No. 94,460), a case involving the same issue, the Third District even said that the Criminal Appeal Reform Act "was meant to and did overrule such cases as Ree." The Third District's position is that the Criminal Appeal Reform Act requires both prejudicial error and preservation in the trial court, or if not preserved, then fundamental error, and that a sentencing error such as the failure to timely file a departure order cannot be raised on appeal where it was not properly preserved for appeal and does not show fundamental error and harm. Jordan, 728 So.2d at 728, 23 FLW at D2131; Weiss, 720 at 1115.

The Third District's opinion has been rejected by the Second District and the Fourth District; petitioner urges this Court to uphold the decisions of the Second and the Fourth Districts and to reject the Third District's. The Third District's reasoning was rejected by the Fourth District in Carridine v. State, 721 So.2d 818 (Fla. 4th DCA 1998), which involved an upward departure order that was timely filed but missing the judge's signature. The Fourth District found that the strict requirements of the rule and statute had not been complied with and that under Ree and Colbert, the case had to be reversed for imposition of a guideline sentence. The court specifically found that under Article V,

section 2(a), of the Florida Constitution, the supreme court has the power to adopt the rules for practice and procedure, and that the designation of the proper written form of a departure sentence and the method for filing it is a matter of procedure. The supreme court also has the power to set the penalty or remedy for the failure to follow the rule of procedure, which in the failure to follow sentencing departure order procedures is resentencing within the guidelines. The Fourth District expressly found that the Criminal Appeal Reform Act did not modify the strict rule of Ree.

The Second District has also considered the effect of the Criminal Appeal Reform Act on unpreserved sentencing issues in Bain v. State, 730 So.2d 296, 24 FLW D314 (Fla. 2d DCA, Jan. 29, 1999), and Denson v. State, 711 So.2d 1225 (Fla. 2d DCA 1998). In Bain, the Second District noted that under the Act, the appellate court has no jurisdiction to review unpreserved sentencing errors unless the unpreserved error is fundamental. The district courts of appeal are not unanimous in assessing which unpreserved sentencing errors are fundamental under the Act. In Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), review granted, 718 So.2d 169 (Fla. 1998), the Fifth District concluded there is no such thing as a fundamental sentencing error, and that an appeal from unpreserved sentencing errors cannot be considered. The First and Fourth Districts, however, have indicated that illegal sentences are fundamental error and may be considered by the appellate courts. Nelson v. State, 719 So.2d 1230 (Fla. 1st DCA

1998) (en banc); Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998) (en banc). And in the instant case, the Third District stated that a sentencing error could be treated as fundamental. (A: 1, 3)

In Bain, the Fifth District disagreed with Maddox and concluded that certain sentencing errors were fundamental and reviewable under the Act. The court further explained that in the sentencing context, fundamental error was any sentence that was "illegal" and this included not only sentences that exceeded the statutory maximum but any sentence that patently failed to comport with statutory or constitutional limitations and any sentence that improperly extended the defendant's incarceration or supervision and any error which is "so egregious as to demand correction for the sake of protecting the integrity of our system of justice." 24 FLW at D318. The court stated that "an illegal sentence epitomizes error that, if left uncorrected, could undermine public confidence in our system of justice." Thus, even under the Act, the appellate court could review unpreserved sentencing errors that resulted in a sentence exceeding the maximum allowed by law and improperly extending a defendant's incarceration or supervision.

In addition, the Second District in Bain reaffirmed its earlier decision in Denson v. State, 711 So.2d 1225 (Fla. 2d DCA 1998), which also held that under the Act, when an appellate court otherwise has jurisdiction in a criminal appeal to review a preserved error, it has the discretion to correct an illegal sentence or a serious, patent sentencing

error that was not preserved but is identified by appellate counsel or discovered by the appellate court on its own review of the record. Examples of such serious, patent sentencing errors reviewable on appeal despite the absence of preservation are the erroneous imposition of a habitual offender sentences, erroneous running of sentences consecutively instead of concurrently, and written sentences that do not comport with oral pronouncement. Denson; Bain.

Thus, the Second District has concluded that unpreserved sentencing issues may be reviewed on appeal when they constitute fundamental error or improperly extend the defendant's incarceration or supervision or when they involve serious, patent errors that are raised along with other preserved or fundamental issues on appeal. What may not be raised on appeal are the unpreserved nonfundamental errors that do not involve liberty interests such as costs, public defender liens and nonmaterial scriveners errors. 24 FLW at D318. The Second District's way comports with the express purpose of the Criminal Appeal Reform Act.

The petitioner alleged on appeal to the Third District that the trial court's untimely filing of the sentencing guidelines departure order was reversible error requiring that he be resentenced within the guidelines as per Ree v. State, 565 So.2d 1329 (Fla. 1990). The petitioner argued the Criminal Appeals Reform Act did not apply to such sentencing errors and even if it did, the error was a fundamental sentencing error that should be

addressed on appeal despite the failure to file a Rule 3.800(b) motion to correct sentence. In its decision in this case, the Third District recognized that, in conflict with Maddox, a sentencing error can be treated as fundamental error that could be addressed on appeal despite the absence of objection below, but ultimately held that the unpreserved error in this case was not fundamental error and would not be heard on appeal. The Third District's decision conflicts with Denson and Bain. Under Bain, the petitioner's unpreserved issue of failure to timely file the written departure order was reviewable on appeal because petitioner raised three other preserved issues on appeal. Under Denson, petitioner's issue was fundamental error because it allows him to be incarcerated for a greater length of time, 40 years instead of the guidelines 19 to 32 years.

And finally, the Third District's conclusion that there was no showing in the record that the error of late filing the departure order was prejudicial is incorrect. As noted, neither this Court nor the Criminal Appeal Reform Act overruled the long-standing rule of Ree and its progeny and that rule requires a reversal with resentencing within the guidelines with no consideration of harmfulness or prejudice. Likewise, the Second District in Bain and Denson did not apply the harmless error doctrine to such sentencing errors. The added requirement of harmfulness or prejudice was added by the Legislature, but since the Legislature never directly overruled the procedural rules by a bicameral two-thirds majority vote, the passage of the Criminal Appeal Reform Act of 1996 does not

overrule the rule in Ree or Rule 3.703(d)(28)(A). See Art. V, Section (2)(a), Florida Constitution; Benyard v. Wainwright, 322 So.2d 473, 475 (Fla. 1975); Carridine v. State, 721 So.2d 818 (Fla. 4th DCA 1998) (holding that the Act does not overrule 3.703 because only the judiciary has the authority to change a procedural rule).

This Court should quash the Third District's opinion.

CONCLUSION

Based upon the foregoing, the petitioner requests that this Court quash the lower court's decision in Jordan v. State, 728 So.2d 748 (Fla. 3d DCA 1998), and remand for resentencing within the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, 444 Brickell Ave., #950, Miami, Florida 33131, this _____ day of July, 1999.

By:_____
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