IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2162

**CARLOS MANDRI**,

Petitioner,

-vs-

**THE STATE OF FLORIDA**,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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# PETITIONER'S BRIEF ON THE MERITS

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**FLORIDA RULES OF CRIMINAL PROCEDURE**

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## INTRODUCTION

This is the Petitioner's brief on the merits requesting that this Court grant certiorari, quash the decision below, answer the certified question in the affirmative and order the district court below to reverse the Petitioner's sentence and remand for imposition of a guidelines sentence. Petitioner, Carlos Mandri, was the defendant in the trial court and the appellant in the Third District Court of Appeal; the Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent. In this brief, the symbol "R" indicates the record on appeal, the symbol

"T" indicates the transcripts of hearings, and the symbol "A." indicates the appendix to this brief.

## STATEMENT OF THE CASE AND FACTS

Petitioner Carlos Mandri was convicted following a jury trial on attempted first degree murder, aggravated assault with a firearm on a law enforcement officer and armed robbery. (R. 117).

On April 6, 1999, Mr. Mandri was sentenced. (R. 126). The trial court departed upward from the sentencing guidelines and sentenced Mr. Mandri to life in prison on the attempted first degree murder and armed robbery counts. (R. 171-72). On May 3, 1999, defense counsel filed a motion to correct sentence, on the grounds that the trial court never filed a written order containing reasons for its upward departure from the guidelines. (R. 119-120). Defense counsel moved the trial court to vacate the sentence and enter a guidelines sentence. (R. 120).

The motion to correct was filed under the old rule 3.800(b), Florida Rules of Criminal Procedure (1996), within thirty days of rendition of sentence. (R. 119-121). The Petitioner's sentence thus fell within the window between this Court's creation of the thirty-day rule 3.800(b), rules of criminal procedure (1996), which was created to accompany the enactment of section 924.051, Florida Statutes (1996 Supp.), and this Court's amendment of the rule in *Amendments to the Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140 & 9.600*, 761 So. 2d 1015 (Fla. 1999), *reh'g granted* (Fla. Jan. 13, 2000).

On May 19, 1999, the trial court held a hearing on the motion. The trial court heard argument on whether defense counsel had been prejudiced by its failure to file written reasons. (R. 190). The trial court denied the motion on the grounds that the defendant was not prejudiced by the court's failure to file written reasons. (R. 196). Thereafter, the trial court filed written reasons in support of its departure sentence. (R. 196, 122).

The Petitioner appealed and the Third District Court of Appeal affirmed, citing this Court's opinions in *Maddox v. State*, Nos. SC92805, SC93000, SC93207, SC93966 (Fla. May 11, 2000)[1] and *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (A. 65). The Petitioner filed a motion for rehearing/ motion for certification of question of great public importance. (A. 66-70). The district court denied rehearing, but granted certification and certified the following as a question of great public importance:

> WHERE A TRIAL COURT FAILS TO FILE WRITTEN REASONS IN SUPPORT OF A GUIDELINES DEPARTURE SENTENCE BUT, THEREAFTER, IN RESPONSE TO A FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) MOTION FILED BY DEFENDANT, DOES FILE WRITTEN REASONS JUSTIFYING THE DEPARTURE, IS DEFENDANT ENTITLED TO A REVERSAL AND A REMAND FOR A GUIDELINES SENTENCE, UNDER *MADDOX v. STATE*, 760 So. 2d 89 (Fla. 2000)?

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[1]760 So. 2d 89 (Fla. 2000).

(A. 71-72). The Petitioner filed a timely notice to invoke discretionary review.

## QUESTION CERTIFIED

WHERE A TRIAL COURT FAILS TO FILE WRITTEN REASONS IN SUPPORT OF A GUIDELINES DEPARTURE SENTENCE BUT, THEREAFTER, IN RESPONSE TO A FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(B) MOTION FILED BY DEFENDANT, DOES FILE WRITTEN REASONS JUSTIFYING THE DEPARTURE, IS DEFENDANT ENTITLED TO A REVERSAL AND A REMAND FOR A GUIDELINES SENTENCE, UNDER *MADDOX v. STATE*, 760 So. 2d 89 (Fla. 2000)?

## SUMMARY OF ARGUMENT

This Court held in *Maddox v. State*, 760 So. 2d 89, 106-07 (Fla. 2000), that the complete failure of a trial court to file written reasons for upward departure from the guidelines constitutes fundamental error which may be raised for the first time on direct appeal during the window period between the creation of rule 3.800(b), Florida Rules of Criminal Procedure (1996) and the amendment of the rule on January 13, 2000. The Petitioner's case falls within this window.

The question presented in the instant case is given the trial court's failure to file written reasons supporting a departure sentence, whether the trial court on a motion to correct sentence may "correct" its error by filing written reasons or whether the trial court is required to re-sentence under the guidelines. Then, if the trial court decides to file written reasons in response to a motion to correct, is the trial court's error classified as a "late filing" or a "failure to file" error?

If the error is classified as a "late filing," several problems occur. First, litigants who make an effort under the old rule 3.800(b) to correct their sentences are treated differently on appeal than litigants who did not file a motion below but raised the issue for the first time on appeal. This Court held in *Maddox*, 760 So. 2d at 107, that during this window period, litigants may raise the failure to file written reasons for the first time on appeal. Therefore, a litigant whose attorney made no effort to file a motion to

correct, may raise this issue for the first time on appeal and have his sentence remanded for imposition of a guidelines sentence. However, a litigant in the Petitioner's position, whose attorney filed a motion to correct, receives an affirmance. This disparity of treatment creates a disincentive for attorneys to use rule 3.800(b) during the window period.

Second, calling this error "late filing" would obviate the entire class of "failure to file" errors where the litigant's attorney files a motion to correct. Again, if the trial court is free to file written reasons to "correct" its error, any "failure to file" would be transformed into a "late filing" inactionable on appeal.

The only way to avoid such an unjust result is by permitting a trial court to do on motions to correct only what an appellate court could have done on appeal. On a motion to correct, the trial judge should be required to do what an appellate court would have been required to do -- vacate and enter a guidelines sentence. This Court created rule 3.800(b) to place sentencing errors in the hands of the trial courts, with an eye to lessening the burden of appellate courts on these issues. Rules 3.800(b) was not created to give the trial courts more authority than their district court counterparts or to place an attorney in the position of disadvantaging their client. This Court should reverse the decision below, and remand for the trial court to impose a guidelines sentence.

Finally, even if this error is characterized as a "late filing" error, this Court should

reverse where the trial court was not merely a few days late, but weeks late and "sentencing" now means one thing for the Petitioner and another for the litigants and the courts.

## ARGUMENT

THE PETITIONER'S UPWARD DEPARTURE SENTENCE MUST BE VACATED AND REMANDED FOR IMPOSITION OF A GUIDELINES SENTENCE WHERE THE TRIAL COURT FAILED TO FILE WRITTEN REASONS, DENIED A MOTION TO CORRECT SENTENCE FILED UNDER THE OLD RULE 3.800(B), FLORIDA RULES OF CRIMINAL PROCEDURE (1996), THEN FILED WRITTEN REASONS IN RESPONSE TO THE MOTION TO CORRECT.

The Petitioner was sentenced on counts 1 and 4 to natural life in prison, an upward departure from the recommended sentencing guidelines score. (R.106, 110-11, 113-16). The trial court did not file written reasons in support of the upward departure. Neither did the trial court, in accordance with Rule 3.703(30)(A), Florida Rules of Criminal Procedure (1997), file a **signed** copy of the transcript of the sentencing hearing within 7 days of the sentencing, as required by the rule.

The Petitioner filed a motion to correct sentence within 30 days of rendition of the sentence pursuant to rule 3.800(b), Florida Rules of Criminal Procedure (1996). In a hearing on the motion to correct sentence, the trial court rejected the petitioner's argument that the court was required to re-sentence Mr. Mandri within the guidelines. The court found that the failure to file written reasons did not prejudice Mr. Mandri. Finally, the court entered its written reasons at the conclusion of the hearing. (R. 196-98).

This Court should reverse the district court's decision and remand this case for the imposition of a guidelines sentence for the following reasons.

**A. Disparate treatment of the same error**

Recasting the error committed by the trial court in the instant case as a "late filing" rather than "failure to file" results in disparate treatment for litigants who attempt to preserve error as opposed to litigants who remain idle until appeal.

Pursuant to Rule 3.703(30)(A), Florida Rules of Criminal Procedure (1997), if a trial court chooses to impose a departure sentence, the court must either file written reasons within 7 days of the date of sentencing, file a written and **signed** transcription within 7 days of sentencing or file written reasons on the guidelines scoresheet and sign the scoresheet. This rule was adopted to give effect to Section 921.0016(1)(c), Florida Statutes (1997), which contains substantially similar language, but does not include the option of a trial judge filing a signed scoresheet checklist and does not require that a written transcription of the sentencing proceedings be signed by the judge.

This Court has consistently and repeatedly held that failure to timely file written reasons in support of a guidelines departure sentence is reversible error. Failure to timely file written reasons or otherwise comply with the rule requires reversal and imposition of a guidelines sentence. *See Shull v. Dugger*, 515 So. 2d 748 (Fla. 1987), *citing Williams v. State*, 492 So. 2d 1308 (Fla. 1986) (citations omitted); *Ree v. State*,

565 So. 2d 1329 (Fla. 1990); *State v. Lyles*, 576 So. 2d 706 (Fla. 1991); *Pope v. State*, 561 So. 2d 554 (Fla. 1990); *State v. Colbert*, 660 So. 2d 701 (Fla. 1995). *See, e.g.*, *Pease v. State*, 712 So. 2d 374 (Fla. 1997) (affirming downward departure where trial judge failed to file written reasons through fault of State, but reaffirming that the State is not excused from doing what it is obligated to do when it seeks an *upward* departure).

Most recently in *Maddox v. State*, this Court again reiterated the holding that the failure to file written reasons merits a reversal on direct appeal and re-sentencing within the guidelines:

> [c]ommencing with *Pope v. State*, 561 So. 2d 554 (Fla. 1990), we have consistently mandated that noncompliance with the statute and rules governing departure sentences should be addressed on direct appeal, even absent a contemporaneous objection. In *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), this Court explained that strict adherence to the requirement of a written order was required because a "departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court." We have also explained that written reasons for departure are statutorily required to enhance the uniformity of sentences. *See Davis v. State*, 661 So. 2d 1193, 1196 (Fla. 1995); *Smith v. State*, 598 So. 2d 1063, 1067 (Fla. 1992); *State v. Jackson*, 478 So. 2d 1054, 1056 (Fla. 1085).

760 So. 2d 89, 107 (Fla. 2000).

Had the Petitioner's attorney remained idle, done nothing and raised this issue for the first time on appeal, the Third District Court of Appeal would have been

constrained to follow *Maddox* and reverse for a guidelines sentence. However, the Petitioner's attorney[2] filed a motion to correct sentence within 30 days of rendition of sentence under rule 3.800(b) (1996).

Rule 3.800(b) was amended by this Court in response to the enactment of the Appellate Reform Act, section 924.051, Florida Statutes (1996 Supp.), in order to ensure that defendants have a mechanism under which to preserve sentencing errors not apparent on the face of the record at the time of sentencing. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996) (*Amendments I*). At that time, this Court provided that a criminal defendant must file a motion to correct sentence pursuant to rule 3.800(b) within thirty days of rendition of the sentence. 696 So. 2d at 1105.[3]

Later, upon finding that a thirty day period within which to preserve sentencing errors was not a failsafe method of preservation and to ensure protection of a defendant's rights, this Court amended rule 3.800(b) to provide that in a pending appeal,

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[2] Undersigned counsel has represented the Petitioner since the appointment of the Public Defender for appeal.

[3] *Amendments I* enlarged the time period for filing these motions from ten days, as provided in an earlier emergency motion, to thirty days. 696 So. 2d at 1103. This Court first created the ten day motion to correct rule in *Amendments to Florida Rule of Appellate Procedure 9.020(g) & Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996).

a criminal defendant may file a motion to correct sentence at any time prior to filing the initial brief. *Amendments to Florida Rules of Criminal Procedure 3.111(e) and 3.800*, 761 So. 2d 1015 (Fla. 1999), *reh'g granted* (Fla. January 13, 2000) (*Amendments II*).

The Petitioner was sentenced on April 6, 1999, and the initial brief was filed on November 2, 1999, during the window period between *Amendments I* and *Amendments II*. During the pendency of the Petitioner's direct appeal, this Court held in *Maddox* that during the window period between *Amendments I* and *Amendments II*, defendants could challenge upward departure sentences where the trial court failed to file written reasons for the first time on direct appeal. 760 So. 2d at 107. Late filing of written reasons, however, does not constitute fundamental sentencing error which may be raised for the first time on appeal, unless the defendant can establish that the lateness prejudiced the defendant. *Maddox*, 760 So. 2d at 108. The issue then remains whether the instant case presents a late filing or a failure to file error.

If this Court recasts the trial court's error in the instant case as a "late filing" as opposed to a "failure to file," a litigant who attempted to preserve by filing a motion to correct stands in worse stead than a litigant whose counsel failed to preserve. If counsel neglected to file a motion to correct in the instant case and raised this issue on direct appeal as fundamental error, the Petitioner would have been re-sentenced under the guidelines. Because counsel was diligent under the rule, however, the Petitioner is

worse off. This is an inequitable, illogical and unjust result.

Furthermore, treating the trial court's error as a "late filing" creates a disincentive for an attorney to follow the rule of procedure. Realizing that his or her client will be better off through inaction, an attorney will not seek relief in the trial court through a motion to correct, but will remain idle and will raise the issue for the first time on appeal, another undesirable result. Rather than run the risk that the trial court will think that the error can be corrected by filing written reasons, the attorney will wait and raise the issue directly on appeal. Certainly, there should not be a strategic disadvantage to employing rules of procedure that were created for the protection of criminal defendants. This Court, in creating the old 3.800(b), did not create the rule to have lawyers deliberately ignore it.

Finally, calling the trial court's error a "failure to file" error would obviate the entire class of "failure to file" errors during this window period. The trial judge's order, triggered by the motion to correct sentence, and filed weeks after sentencing, cannot now suffice to change the court's failure to file into a mere "late filing." To do so would obviate the entire class of "failure to file" errors. Where a trial court fails to file written reasons, the trial court will simply file those reasons when memory is triggered by the appellants' own lawyer in a motion to correct sentence.

**B. Trial courts on motions to correct are bound by appellate court decisions in reviewing the error alleged in the motion.**

All of the problems outlined above exist because the trial court acted outside the authority of this Court's decisions. The trial court, on a motion to correct, did not follow the precepts laid out by this Court's opinions in *Shull*, *Ree*, *Pope*, and *Colbert*. The inequity between Mr. Mandri and others whose sentences were attacked without preservation on direct appeal is cured if the trial court is required to do what an appellate could would have done in its stead.

The lower court in *Maddox v. State*, recognized in rule 3.800(b) a policy decision to "relieve the workload of appellate courts" and to "place correction of alleged errors in the hands of the judicial officer [trial court] best able to investigate and correct any error." 708 So. 2d 617, 621 (Fla. 5th DCA 1998), *opinion approved in part*, 760 So. 2d 89 (Fla. 1999). Thus, the trial court has been vested with the authority to do what appellate courts previously had done, in the name of efficiency and relieving appellate workload. Nothing in the promulgation of rule 3.800(b) gave the trial courts greater power and authority than the district courts. Therefore, the trial court in the instant case, when faced with the same error the district court could have reviewed without preservation, was constrained to do what the district court would have done -- vacate the sentence and impose a guidelines sentence. The trial court was simply not free to file written reasons at this point to "correct" the error.

Further, permitting the trial court to "correct" its own failure to file written

reasons by filing written reasons instead of entering a guidelines sentence undermines the rationale of this Court's decision in *Pope v. State*, 561 So. 2d 554 (1990). In *Pope*, this Court reviewed whether a district court reviewing this error may remand for the trial court to then file its written reasons, or whether the district court must remand for imposition of a guidelines sentence. This Court held in *Pope* that a district court must reverse and remand for imposition of a guidelines sentence "[t]o avoid multiple appeals, multiple resentencings, and unwarranted efforts to justify an original departure . . . ." 561 So. 2d at 556, *citing Shull v. Dugger*, 515 So. 2d 748, 750 (Fla. 1987). The trial court in the instant case tried to "justify an original departure" by filing written reasons, an effort characterized by this Court as unwarranted. This Court recognized in *Pope* that it is human nature for a judge to later try to justify its decisions, which is why it is necessary for higher courts to impose strict liability upon the trial court where the rules of procedure are not followed. This Court further justified the rule in *Pope* on the grounds that departure is a serious and extraordinary act.

If the trial court is precluded from entering written reasons on remand from the district court, so should it be precluded from entering written reasons in response to a motion to correct. Permitting the trial court to enter written reasons at this juncture effectively permits an end run by which trial courts may circumvent this Court's mandates in *Pope*, *Colbert* and *Maddox*.

Motions to correct sentence, established by this Court's 1996 rule 3.800(b), were designed to relieve appellate workload by delegating unpreserved sentencing error to be corrected in the trial court. Rule 3.800(b) was not created to give a trial court greater authority than its appellate counterpart.

**C. Even if a "late filing," the Petitioner was prejudiced**.

Even if the trial court were acting within its authority in filing written reasons at the conclusion of the hearing, and even if this error is called a "late filing," the Petitioner can demonstrate prejudice. In the instant case, the trial court was not merely a few days late. At the first hearing on the motion to correct sentence, the trial court was under the impression that there was no obligation to file written reasons and the rule would be satisfied where an unsigned transcript of the sentencing hearing is filed, regardless of when it was filed. (R. 177). At the second hearing, the court claimed that it orally requested that the court reporter file a transcript of the hearing. (R. 187). Even then, the court never signed the transcript, an effort which is required by the rule of procedure and guarantees that a trial court engaging in the extraordinary act of departure has read the transcript within a week of sentencing. Finally, no written order was filed until six weeks after the sentencing, at the conclusion of the hearing. As argued by defense counsel at the hearing, it was inherently prejudicial for "sentencing" to mean one thing for the defendant and another for the court. Fundamental injustice results

when sentencing means one thing for the prisoner and another for the litigants and the courts. *Fox v. District Court of Appeal, Fourth District*, 553 So. 2d 161 (Fla. 1989).

In sum, this Court has repeatedly recognized that the requirement that written reasons be timely provided is an important one. This is because departure is an extraordinary act and the requirement of written reasons ensures that a trial judge will conduct a thorough analysis and make a serious and thoughtful rather than capricious decision. This Court also recognized that a trial judge's inclination on remand to engage in an effort to later justify an earlier departure sentence is unwarranted. Since 1987, this Court has concluded that if a trial court fails to abide by the rule, appellate courts must reverse and remand for imposition of a guidelines sentence. The trial judge's job on a motion to correct should be the same as if the trial judge were acting on remand after a directive from a higher court. On a motion to correct, the trial judge should be required to do what an appellate court would have done -- vacate and enter a guidelines sentence. To permit otherwise, to allow a trial court to try to justify an earlier departure sentence would result in the disparate treatment of those who avail themselves of 3.800(b), would create a disincentive for attorneys to employ the rule, would obviate the class of "failure to file" errors delineated by this Court in *Maddox* and would undermine the entire purpose of the rule in *Pope*. This cannot be the just result. This Court should reverse the decision below, and remand for the trial court to

impose a guidelines sentence.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court quash the lower court's opinion 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 hand-delivered to Paulette Taylor, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, this 28th day of March, 2001.

_____
LISA WALSH
Assistant Public Defender

## CERTIFICATE OF FONT

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

_____
LISA WALSH
Assistant Public Defender