IN SUPREME COURT OF FLORIDA

BRADLEY JAMES JACKSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-2383

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant/Cross-Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Bradley James Jackson, the Appellee/Cross-Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The original record on appeal consists of three (3) volumes. “R” will designate the Volume I, followed by any appropriate page number. “SRI” will designate Supplemental Volume I, followed by any appropriate page number. “SRII” will designate Supplemental Volume II, followed by any appropriate page number. "IBM" will designate Petitioner's Initial Brief on the Merits. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts Defendant’s statement of the case and facts as generally supported by the record, subject to the following supplementation and corrections:

On April 28, 2008, the State filed an information against Petitioner for one count of sale or delivery of cocaine and one count of possession of less than twenty (20) grams of cannabis. (R.7). On June 25, 2008, Petitioner entered a straight-up plea of guilty on one count of sale or delivery of

cocaine and one count of possession of less than twenty (20) grams of cannabis. (R.8-9).

During the sentencing hearing, the prosecutor stated the following as to the sentencing of defendant:

> Your Honor, the defendant has just pled to a sale or delivery of cocaine. This is not an isolated incident. The defendant's prior record consists of 1998, possession of cocaine, did eight months in jail; 1990, possession of cocaine, as well as sale of cocaine and another possession of cocaine, all concurrent sentences, did a year and a day in Florida state prison; 1992, possession of cocaine, was adjudicated and time served; 1994, possession of cocaine and did four months; 1993, I'm going a little backwards, sorry, possession of cocaine, three months; 1997, possession of a firearm by a convicted felon, did 20 months in Florida state prison; had one nine misdemeanors –- has nine misdemeanor convictions sprinkled throughout that.
>
> The Court, excuse me, the State will just let the Court know that the defendant scores 14 months through 15 years as far as his guidelines and would be –- the State is requesting eight years Florida state prison for this sale of cocaine.

(R.30-31). The trial court found the following and sentenced Petitioner accordingly:

> All right. On your plea of guilty, I adjudicate you to be guilty. You're sentenced to nine months in the county jail, with credit for 72 days time served.
>
> I find the defendant is amenable to rehabilitation and has requested assistance, and on that basis I'm deviating downward from the guidelines. You are to enroll in and complete the Matrix program at the Duval County Jail, and you're to pay $441 court costs and a $90 Public Defender fee. If you believe this sentence to be illegal, you have 30 days from today's date to commence an appeal. If you wish to prosecute and appeal but can't afford an attorney, I'll appoint one for you at no cost to you.
>
> Do you understand that?
>
> *****
>
> That's concurrent on both counts. Step over and be fingerprinted.

(R.31). The State objected to "the Court's decision to go below guidelines and

the reasons given". (R.31).

On June 25, 2008, the trial court entered its written judgment, finding Petitioner guilty, and the trial court filed the Criminal Punishment Code Scoresheet ("Scoresheet"). (R.10-17). The Scoresheet noted Petitioner's prior offenses were six different possession of cocaine convictions, sale of cocaine, possession of a firearm by a convicted felon and nine different misdemeanor convictions. (R.16.). The Scoresheet yielded a total of 46.6 points, which resulted in a lowest permissible prison sentence of 13.95 months. (R.17). The trial court did not check the mitigated departure and/or plea bargain check boxes. (R.17). Also, the trial court did not write anything in the space for "Other Reason". (R.17). The trial court sentenced Petitioner to 9 months in jail with 72 days of time served. (R.14, 17). No probation was imposed. (R.17).

On June 26, 2008, the State filed its notice of appeal. (R.18). On September 18, 2008, the State filed its initial brief. On October 13, 2008, the State filed a motion for extension of time, and on October 24, 2008, this Court granted it.

After receiving the State's initial brief, on October 22, 2008, Appellate Defense Counsel filed the following Motion to Correct Sentencing Error, in pertinent part:

> Issue Presented:
>
> > THE COURT ERRED IN IMPOSING SENTENCE BELOW THE LOWEST PERMISSIBLE SENTENCE OF THE CRIMINAL PUNISHMENT CODE WITHOUT ENTERING A WRITTEN ORDER CONTAINING ITS REASON(S) FOR THE UNDER-DEPARTURE.
>
> Although the lowest permissible sentence calculated on the criminal punishment code scoresheet was 13.95 months, the Court instead imposed

concurrent nine-month sentences for sale or possession of cocaine, and possession of less than 20 grams of cannabis.

Florida Rule of Criminal Procedure 3.704(d)(27) (A) provides:

> (A) If a sentencing judge imposes a sentence that is below the lowest permissible sentence, it is a departure sentence and must be accompanied by a written statement by the sentencing court delineating the reasons for the departure, within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time of sentence was imposed is sufficient if it is filed within 7 days after the date of sentencing. The sentencing judge may alone list the written reasons for departure in the space provided on the Criminal Punishment Code scoresheet.

Here, while the Court did recite oral reason(s) for departure, the Court did not file a written statement within seven days after sentencing, the Court did not file of written transcription of the orally stated reasons, nor did the Court list the reason(s) on the scoresheet.

(SRI.2-3); Footnote omitted. The trial court did not rule on Petitioner's First Motion to Correct Sentencing Error within the sixty days as required by the rule, therefore, the motion was procedurally denied.

On January 20, 2009, Appellate Defense Counsel filed a Second Motion To Correct Sentencing Error which was the exact same motion as the Motion To Correct Sentencing Error filed on October 22, 2008. (SRII.1-4). On January 7, 2009, the trial court entered the following Order Denying Defendant's Motion To Correct Sentencing Error:

> This matter came before this Court on Defendant's Florida Rule of Criminal Procedure 3.800(b) (2) Motion to Correct Sentencing Error filed through, Carl McGinnes on October 24, 2008.
>
> On June 25, 2008, pursuant to plea of guilty, the Defendant was convicted of Sale or Delivery of Cocaine (Count One) and Possession of Less Than Twenty (20) Grams of Cannabis (Count Two) and was sentenced to concurrent terms of nine (9) months incarceration. (Exhibits "A,""B.") The State has filed a Notice of Appeal in the First District Court of Appeal, but has not yet filed its initial brief. (Exhibit "C.")

In this instant Motion, the Defendant asserts that the trial court erred in imposing a departure sentence below the lowest permissible sentence without entering a written order containing the reasons for the departure. The Defendant requests that this Court now enter a written order that contains the reasons for the downward departure. This Court notes, however, that "a trial judge is without jurisdiction to file a written reasons for departure once a notice of appeal has been filed from a properly rendered judgment." *Domberg v. State*, 661 So.2d 285, 286-87 (Fla. 1995)(citing, *Wright v. State*, 617 So.2d 837 (Fla. 4th DCA 1993); *Davis v. State*, 606 So.2d 470 (Fla. 1st DCA 1992)). As the State has filed a Notice of Appeal with the First District Court of Appeal, this Court is without jurisdiction to grant the relief requested by the Defendant.

In view of the above, it is:

ORDERED AND ADJUDGED that the Defendant's Motion to Correct Sentencing Error is DENIED.

(SRII.5-6).

SUMMARY OF ARGUMENT

Petitioner maintains that because Williams, Davis and Berry have the same controlling material facts and the Third District reached an opposite result in all three cases, the present case is in conflict. The State disagrees. It is clear that all three conflict cases are factually and procedurally dissimilar to the present case; therefore, no direct conflict exists. As there is no "direct conflict" between the case below and the Third District cases, the State respectfully requests this Court to discharge jurisdiction and dismiss the proceeding.

In his initial brief on the merits, "Petitioner contends the district court erred in relying upon ***Pope*** and ***Shull v. Dugger***, as those decisions are distinguishable, and no longer good law." (IBM.13). The State disagrees. First, contrary to Petitioner's assertion, there are still opportunities for upward departure sentences of defendants that committed offenses prior to October 1, 1998. Second and more importantly, even without the potential of upward departures with the enactment of the Criminal Punishment Code, the rationale of Shull v. Dugger still applies today, even though the specific holding of Pope does not.

Therefore, the State submits the decision below in Jackson, should be approved, and the invalid downward departure sentence entered in the trial court should be reversed and remanded for resentencing within the guidelines.

ARGUMENT

ISSUE I: IS THERE DIRECT CONFLICT BETWEEN THE DECISION BELOW AND STATE V. WILLIAMS, 20 SO.3D 419 (FLA. 3D DCA 2009), STATE V. DAVIS, 997 SO.2D 1278 (FLA. 3D DCA 2009), AND STATE V. BERRY, 976 SO.2D 645 (FLA. 3D DCA 2008)? (RESTATED)

Standard of Review

The standard of review for purely legal issues is de novo. Williams v. State, 957 So.2d 595, 598 (Fla. 2007).

Merits

1. No Conflict Exists.

The First District reversed in State v. Jackson, 22 So.3d 817 (Fla. 1st DCA 2009), holding that the trial court's failure to provide reasons sufficient to justify a departure sentence required reversal and remand for resentencing without a departure. The First District relied Pope v. State, 561 So.2d 554 (Fla. 1990)(citing Shull v. Dugger, 515 So.2d 748 (Fla. 1987)); State v. Owens, 848 So.2d 1199 (Fla. 1st DCA 2003); Jerry v. State, 19 So.3d 1167 (Fla. 1st DCA 2009) and State v. Dunn, 9 So.3d 666 (Fla. 1st DCA 2009). The First District certified conflict with State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009)(reversing and remanding "for resentencing to include written reasons" for downward departure); State v. Davis, 997 So.2d 1278 (Fla. 3d DCA 2009)(reversing a downward departure sentence for lack of written reasons, finding on remand "[t]his ruling does not preclude the imposition of a sentence that departs from the sentencing guidelines…."); State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008)(noting a downward departure sentence without

valid reason for departure must be remanded for resentencing, but finding "[t]he defendant suggests there is a valid reason for departure" which "can be raised in the trial court on remand.").

Petitioner maintains that because Williams, Davis and Berry have the same controlling material facts and the Third District reached an opposite result in all three cases, the present case is in conflict. The State disagrees. It is clear that these conflict cases are factually and procedurally dissimilar to the present case; therefore, no direct conflict exists.

In its opinion below, the First District wrote, "[t]he Third District gave no reason for allowing the trial court a second opportunity to depart from the guidelines." The State agrees that the Third District's reasoning was not explicitly stated as to the remanding and resentencing of the defendants; however, the Third District's reasoning is easily discerned by investigating the cases on which the conflict cases relied.

The first case in this line from the Third District is State v. Gordon, 645 So.2d 140 (Fla. 3d DCA 1994). In Gordon, the defendant entered a no-contest plea, and the court entered a downward departure sentence, stating as grounds that it was a "drug deviation". Id. The Third District reversed the sentence, noting that "[t]his disposition was arrived at pursuant to a plea agreement between the defendant and the trial court-and was expressly objected to by the state". Id. at 141; citing Brown v. State, 245 So.2d 41, 44 (Fla.

1971)[1]. The court continued as follows:

> [A] departure downward from the sentencing guidelines, not otherwise pursuant to a plea bargain between the defendant and state, based on the defendant's drug dependence must follow certain guidelines in order to be valid-and, unfortunately, those guidelines were not followed in this case. Upon remand, however, after the defendant's nolo contendere plea is withdrawn, we do not preclude the trial court, upon a proper conviction, from resentencing the defendant to the same sentence as was imposed below, providing a proper drug use showing is made for a downward departure from the sentencing guidelines as explained in this opinion.

Gordon at 142. The trial court in Gordon improperly negotiated a plea agreement with the defendant over the state's objection, and the defendant relied on the trial court's offer in agreeing to enter a no-contest plea. Under these circumstances, it would be inappropriate to require the court on remand to sentence the defendant without possibility of departure, since the defendant only agreed to enter the plea based upon the court's improper conduct. Instead, the defendant was properly permitted to withdraw the improper plea and begin the process anew, with the possibility of a validly-imposed downward departure sentence. This rationale has been repeatedly followed by the Third District.

The Third District relied on Gordon in State v. Meyers, 708 So.2d 661 (Fla. 3d DCA 1998). As in Gordon, the defendant in Meyers accepted a plea offer from the trial court, which had agreed to impose a downward departure

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[1] This Court relied on Brown in State v. Warner, 762 So.2d 507 (Fla. 2000).

sentence because the state's case was weak and since the state had nolle prossed the co-defendant's case. Id. The state objected to the departure sentence. Id. The state appealed, and the Third District reversed and remanded the appellee to for either imposition of the mandated violent career criminal sentence or allowed to withdraw his plea. Id.

In State v. Perez, 802 So.2d 1167 (Fla. 3d DCA 2001), the trial court engaged in plea negotiations with the defendant for a downward departure sentence. Id. The state objected to the sentence. Id. The only reason gave by the trial court for the downward departure sentence was its belief that the state could not prove its case. The Third District reversed and remanded the case to allow the defendant to withdrawn the plea. Id.

Gordon, Meyers and Perez provide the background to the three conflict cases. By the time the conflict cases were decided, the Third District had a well-established rule that a departure sentence entered as a result of an improper plea agreement between the court and the defendant would be reversed, but that the defendant would be permitted to withdraw the improper plea and begin the process anew, during which the defendant could possibly receive a properly-imposed departure sentence. The three conflict cases merely followed this well-established rule.

The first of the conflict cases is State v. Berry, 976 So.2d 645 (Fla. 3d DCA 2008). There, the State offered a plea bargain for a downward departure sentence. Id. Once this case was before the trial court, the defendant requested an even lower sentence than the State offered and the trial court accepted it. Id. The State withdrew the plea offer and objected to the

downward departure sentence by the trial court. Id. The Third District held, "[i]n the absence of a valid reason for downward departure, we are obligated to reverse and remand for resentencing consistent with the guidelines, or to permit the defendant to withdraw this plea." Id. at 645 [2]; citing State v. Green, 932 So.2d 365 (Fla. 3d DCA 2006)(the sentence is reversed and the cause remanded either to sentence defendant within the guidelines or to permit him to withdraw his plea.)[3]

The second conflict case is State v. Davis, 997 So.2d 1278 (Fla. 3d DCA 2009). In Davis, the trial court entered into a plea with the defendant over the State's objection. Id. at 1278. The Third District reversed and remanded the case back to the trial court in order to vacate the judgment and sentence

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[2] The Third District stated, "[t]he defendant suggests that there is a valid reason for downward departure. That issue can be raised in the trial court on remand." Berry at 645. It is clear to the State, based on the precedent in the Third District, that the court meant that the defendant could argue again for a departure sentence after the withdrawal of the improper plea agreement, presumably after a properly negotiated plea, a non-negotiated plea, or trial.

[3] The Third District relying on Perez held:

> The state appeals from the downward departure sentence entered pursuant to defendant's plea agreement with the trial court alone, to which the state clearly objected, and from which it said it would appeal. Because there is acknowledgedly no basis for the downward departure, and the state adequately preserved the issue below, the sentence is reversed and the cause remanded either to sentence defendant within the guidelines or to permit him to withdraw his plea.

Id.; (citations omitted).

and allow the defendant to withdraw his plea. The Third District stated, "[t]his ruling does not preclude the imposition of a sentence that departs from the sentencing guidelines, and it supported by valid grounds for the departure." Id. at 1278-1279. Again, the Third District is ruling here, consistent with all of its previous rulings, that the defendant should be permitted to withdraw the improper plea and begin the process over, at which a departure sentence could possibly be imposed following a valid plea or conviction after trial.

The third conflict case is State v. Williams, 20 So.3d 419 (Fla. 3d DCA 2009). In Williams, the defendant entered a "non-negotiated plea of guilty" in two separate cases. Id. at 420. In one case, he was designated a habitual felony offender and the other case, he was designated a prison releasee reoffender. The trial court departed downward in both cases, without oral or written reasons. Citing State v. Davis, The Third District reversed, stating:

> As the defendant was sentenced to a lesser sentence under the habitual offender act without oral or written reasons for the downward departure, and as prison release under the act without the reoffender designations, we reverse the trial court's order and the cause is remanded for resentencing, to include written reasons for the departure and designations for habitual offender and prison release, or for withdrawal of the plea.

Id. at 421. The opinion does not reflect whether the "non-negotiated plea of guilty" was entered in reliance on a departure sentence that the judge would impose. However, the citation to Davis makes it appear that it was. More importantly, the defendant in Williams was given the opportunity to withdraw the plea on remand. The only logical reason that the defendant would be permitted to withdraw the plea on remand is if he relied on the downward

departure in entering the plea.

This review of Berry, Davis, and Williams demonstrates why they are not in "direct conflict" with this case below. In each of these cases, the defendant was permitted to withdraw his plea because it was based on a promise of a departure sentence by the trial court. Because the departure sentence, the very basis for the plea, was improper, the defendant was permitted to withdraw his plea. The parties were placed in the position they were prior to the plea. At that point, the defendant could enter a straight-up plea and receive a departure sentence (supported by valid reasons), proceed to trial and if convicted, receive a departure sentence (supported by valid reasons), or enter a valid negotiated sentence with the State (which does not have to be supported by any reasons).

This is clearly not the case presented here. Here, Petitioner entered a straight-up plea that was not induced in any way by a departure sentence proposed or promised by the court. Because the sentence was not entered in reliance on anything improper, unlike in the conflict cases, there was no reason to permit Petitioner to withdraw his plea on remand. The only thing that could have been done on remand in this case was to allow the court to create new reasons to support the departure (which the State contends is improper), or to resentence him within the guidelines. In short, the conflict cases concern a plainly different situation that supports a different conclusion. As there is no "direct conflict" between the case below and the Third District cases, the State respectfully requests this Court to discharge jurisdiction and dismiss the proceeding. See e.g. University of Miami v. Ruiz,

948 So.2d 723 (Fla. 2007)(discharging jurisdiction upon determination that the certified-conflicted cases addressed different situations and were not in conflict); State v. Lovelace, 928 So.2d 1176 (Fla. 2006)(same).

2. Shull applies; however, Pope does not.

In his initial brief on the merits, "Petitioner contends the district court erred in relying upon ***Pope*** and ***Shull v. Dugger***, as those decisions are distinguishable, and no longer good law." (IBM.13). The State disagrees. First, contrary to Petitioner's assertion, there are still opportunities for upward departure sentences of defendants that committed offenses prior to October 1, 1998. See Shores v. State, 15 So.3d 697 (Fla. 1st DCA 2009). Second and more importantly, even without the potential of upward departures with the enactment of the Criminal Punishment Code, the rationale of Shull v. Dugger still applies today, even though the specific holding of Pope does not.

In Shull v. Dugger, 515 So.2d 748 (Fla. 1987), this court held that, when a departure sentence is reversed because the sentencing court's reasons for departure were invalid, the court on resentencing could not enunciate new reasons for a departure sentence. The resentencing court was constrained to impose sentence within the applicable range permitted by the sentencing guidelines. The Court provided the following reasoning for this rule:

> We believe the better policy requires the trial court to articulate all of the reasons for departure in the original order. To hold otherwise may needlessly subject the defendant to unwarranted efforts to justify the original sentence and also might lead to absurd results. One can envision numerous resentencings as, one by one, reasons are rejected in multiple appeals. Thus, we hold that a trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed by an appellate court.

Shull at 750.

In Pope v. State, 561 So.2d 554 (Fla. 1990), the trial court orally gave reasons for a departure sentence, but did not provide reasons in writing, in violation of Florida Rules of Criminal Procedure 3.701(d)(11), the rule governing sentencing under the pre-1994 Sentencing Guidelines.[4] Id. at 555. Applying Shull, this Court ruled that "when an 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." Pope at 556.

Petitioner has characterized the instant case as one involving a sentencing court's failure to provide written reasons for departure. By focusing on the lack of written reasons, Petitioner can argue the applicability of Pope to his case. Specifically, Petitioner argues that the advent of Florida Rule of Criminal Procedure 3.800(b)(2) permits him to belatedly obtain written reasons from the trial court when the sentencing court had failed to provide written reasons at sentencing. As such, Petitioner can argue that the adoption of rule 3.800(b)(2) has overruled Pope, and that this Court should, therefore, recede from it.

The State agrees that some of the bases for Pope have been superseded, but

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[4] In 1993, the Legislature substantially altered the Sentencing Guidelines, effective January 1, 1994. Ch. 93-406, Laws of Florida. This Court promulgated Florida Rules of Criminal Procedure 3.702 to govern sentencing under the 1994 Guidelines. Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 628 So.2d 1084 (Fla. 1993).

not the bases Petitioner argues. In fact, the bases of Pope that have been superseded are the ones that support Petitioner's argument, while the bases of Pope that still remains is an appropriate application of Shull.

The major flaw in Petitioner's argument is that it proceeds from the premise that written reasons for departure sentences are invariably required. While this was true when this Court decided Pope, it is no longer an accurate statement of law.

History of the "written reasons" requirement and Pope

Pope was based in large part upon this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985). This Court in Jackson, applying rule 3.701(d)(11), ruled that written reasons for a departure sentence must be made at the time of sentencing. This Court specifically held that a transcript of oral statements made by the judge during sentencing was not sufficient to justify departure from the guidelines. Jackson at 1055. See also State v. Oden, 478 So.2d 51 (Fla. 1985)(companion case to Jackson)(approving the statement of the First District that "[i]t was reversible error for the trial court to depart from the guidelines without providing a contemporaneous written statement of the reasons therefor at the time each sentence was pronounced"); Ree v. State, 565 So.2d 1329 (Fla. 1990)(confirming that written reasons must be "contemporaneous," issued at the time of sentencing).

Pope simply applied the principle of Shull to its holding. Because the sentencing court in Pope violated Jackson by failing to provide contemporaneous written reasons, in spite of the oral reasons, the sentence was error. And, pursuant to Shull, the sentencing court could not re-depart

on remand.

An application of the specific holding of Pope to the facts of this case creates a potential problem, however, because Pope relies primarily upon Jackson, a case superseded by statute and rule. In other words, Pope relies upon a subsequently invalidated premise.

When the Legislature enacted the "1994 Guidelines," it repealed the requirement that the trial court provide written reasons for a departure at the time of sentencing. Instead, a departure sentence was valid if the written reasons were "filed within 15 days after the date of sentencing." § 921.0016(1)(c), Fla. Stat. (1993); Ch. 93-406, § 13, Laws of Fla. Moreover, the statute explicitly overruled the holding of Jackson that a transcript of oral reasons during sentencing was insufficient to justify a departure: "A written transcription of orally stated reasons for departure from the guidelines at sentencing is permissible if it is filed by the court within 15 days after the date of sentencing." § 921.0016(1)(c), Fla. Stat. (1993).

This Court adopted the new requirements into a new rule effectuating the 1994 Guidelines. See Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 628 So.2d 1084 (Fla. 1993). The new rule required the judge to "orally articulate[]" reasons for departure at the time sentence is imposed, and to accompany it with a written statement to be filed within 15 days. Fla. R. Crim. P. Rule 3.702(18)(A). A "written transcription of orally stated reasons for departure articulated at the time sentence was imposed" was deemed sufficient if "signed by the sentencing judge and filed in the court file within 15 days of the date of sentencing." Id.

The Legislature amended the Sentencing Guidelines again in 1995 ("the 1995 Guidelines"). The 1995 Guidelines amended section 921.0016 to give the sentencing court only seven days (from the previous 15) to file written reasons or a transcript. § 921.0016(1)(c), Fla. Stat. (1995); Ch. 95-184, § 7, Laws of Fla. This Court effectuated the 1995 Guidelines in a new rule, rule 3.703. Amendments to Florida Rules of Criminal Procedure re Sentencing Guidelines, 660 So.2d 1374 (Fla. 1995). Rule 3.703 had a provision identical to rule 3.702(18)(A), except that it adopted the statutory change to permit filing of written reasons or a transcript within seven days rather than 15. Fla. R. Crim. P. 3.703(30)(A).

Finally, the Legislature adopted the Criminal Punishment Code, effective in 1998. The Criminal Punishment Code adopted the provision of the 1995 Guidelines regarding reasons for departure (written departure reasons must be filed within seven days after the date of sentencing; a written transcription of reasons stated orally at sentencing for departure is permissible if filed within seven days after the date of sentencing). § 921.00265(2), Fla. Stat. (Supp. 1998).[5] This provision has remained unchanged since its 1998 enactment.

This Court's rule effectuating the Criminal Punishment Code (rule 3.704) addressed reasons for departure as follows:

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[5] Of course, the Criminal Punishment Code only refers to downward departures, as upward departures are no longer authorized.

> If a sentencing judge imposes a sentence that is below the lowest permissible sentence, it is a departure sentence and must be accompanied by a written statement by the sentencing court delineating the reasons for the departure, filed 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 filed by the court 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 Criminal Punishment Code scoresheet.

Fla. R. Crim. P. 3.704(27)(A). The new rule dispenses with the requirements of rule 3.703(30)(A) for the court to "orally articulate" reasons for departure, and to sign the transcript if used to justify an orally pronounced departure.

Since the enactment of section 921.00265 and the adoption of rule 3.704 in 1998, the district courts have ruled that a departure sentence cannot be reversed, even if no written order is filed, if the orally pronounced reasons, presumably available in a transcript for appellate review, reflect valid reasons for departure. See e.g., State v. Mann, 866 So.2d 179 (Fla. 5th DCA 2004)(explaining "if the trial court fails to [articulate departure reasons in writing], a downward departure sentence may be affirmed if the trial court orally pronounces on the record a valid basis for the sentence"); State v. Grayson, 916 So.2d 51, 53 (Fla. 2d DCA 2005)(same); State v. McCray, 31 So.3d 871 (Fla. 3d DCA 2010)(same). First and Fourth Districts as well as this Court below cited the same rule of law. Jackson, 22 So.3d at 818 ("The trial court failed to file written reasons for departure; therefore, the sentence may be affirmed only if the trial court orally provided valid reasons for

departure"); State v. Baksh, 758 So.2d 1222 (Fla. 4th DCA 2000)(same); Valrio v. State, 700 So.2d 668 (Fla. 1997)(same).[6]

In summary, the written-reasons requirement has transformed from an absolute requirement, violation of which would invariably result in reversal, into a requirement with practically no real effect whatsoever. The law is clear now that a departure sentence will be affirmed if the transcribed oral reasons articulated at sentencing support it. The oft-stated rule in cases in the 1980s and 1990s that the failure to provide written reasons for departure is reversible error, including Jackson and Pope, no longer applies.

Application of the written-reasons requirement to this case

Petitioner has argued that his rule 3.800(b)(2) motions were appropriate because he was merely attempting to have the court reduce its oral departure reasons to writing. Petitioner argues that he must be permitted to do so, because Pope holds that the court's failure to provide written departure reasons is error that requires reversal and remand for sentencing within the Criminal Punishment Code range. This harsh result, Petitioner claims, can and should be avoided by permitting him to obtain a written departure order by rule 3.800(b)(2) motion.

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[6] These decisions also relied on Pease v. State, 712 So.2d 374, 376 (Fla. 1997), which ruled that a downward departure could not be reversed for failure to provide written reasons when the court gave oral reasons but failed to reduce them to writing, because a defendant should not be penalized due to the court's "neglect and inadvertence" in failing to "complete the ministerial act of actually placing the reasons in a separate order."

As the history set forth above shows, this argument is a red herring. To the extent that Pope mandates reversal when written reasons are not given, Pope is no longer good law. Again, the law is clear today that transcribed, valid oral reasons are sufficient to support a departure. Petitioner was not entitled to obtain a written departure order, because he did not need a written departure to avoid reversal of the departure sentence.

The First District's opinion below makes this clear. The First District explicitly ruled that it was irrelevant to the validity of the departure sentence that the court failed to provide written reasons. Jackson, 22 So.3d at 818. Any suggestion by Petitioner that his departure sentence was reversed because the court failed to give written reasons is false. The First District reversed Petitioner's sentence for the simple reason that the sentencing court's reasons for departure were invalid. No rule 3.800(b)(2) motion could have corrected that error, other than to urge the sentencing court to come up with an after-the-fact justification for the departure, in direct violation of the reasoning in Shull.[7]

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[7] Mandri v. State, 813 So.2d 65 (Fla. 2002), does not alter this conclusion. First, it is unclear from the short opinion whether the trial court had orally articulated valid reasons for the departure sentence, but had merely failed to reduce to writing. Second, the opinion does not reflect whether the sentence was an upward departure or a downward departure sentence. If the trial court had imposed a downward departure sentence and had given valid oral reasons but failed to reduce them to writing, then pursuant to Pease the sentence could not have been reversed. It seems more likely that the sentence was an upward departure sentence, and the written order was meant merely to reduce the orally-articulated reason to writing. Nothing in Mandri suggests that the court should have been permitted, by order on a rule

The continuing viability of Pope

As stated above, the explicit holding of Pope, that a departure sentence not supported by written reasons must be reversed and remanded for sentencing without a departure, is no longer good law. However, Pope has also been cited for the proposition that a departure sentence supported by no reasons, either oral or written, must be reversed for sentencing without a departure. See e.g., Dunn. In this respect, Pope is merely an extension of Shull: while Shull stands for the proposition that a departure sentence supported by invalid reasons must be reversed and remanded for sentencing without departure, Pope stands for the proposition that a departure sentence supported by no reasons must be reversed and remanded for sentencing without departure.

As such, this aspect of Pope does not apply here. Here, the court gave reasons for departure, but the reasons were invalid. Petitioner's attempt to claim that Pope applies because no written reasons for departure were filed should be rejected. To the extent that Pope concerns the trial court's failure to provide written reasons for departure, this case is governed by Shull, not Pope.

In his summary, Petitioner claims that changes in sentencing law since Shull were decided have superseded the necessity of the rule in those cases.

3.800(b)(2) motion, to articulate new, valid reasons for the departure sentence that had not been articulated in the sentencing hearing. To the extent that Mandri does not make this distinction clear, the State urges this Court to clarify Mandri.

Specifically, Petitioner notes that the "sentencing guidelines 'cells' no longer exist" and that upward departures no longer exist (IBM.10). In fact, neither of these changes, nor any other change to Florida's sentencing law since Shull and was decided, are relevant to the principle set out in Shull. Departure sentences still exist. The possibility that multiple resentencings will needlessly result in "unwarranted efforts to justify the original sentence" including "numerous resentencings as, one by one, reasons are rejected in multiple appeals," Shull at 750, still exists. As none of the changes to the sentencing statutes affect the rationale of Shull, Petitioner has not provided an adequate basis for overturning this long-established rule of law.

Shull has been applied consistently for 33 years, requiring resentencing without a departure when the trial court's departure reasons were ruled invalid on appeal. The trial court's failure to reduce oral reasons to writing is irrelevant to this principle, as a downward departure sentence supported by orally-pronounced valid reasons must be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal in State v. Jackson, 22 So.3d 817 (Fla. 1st DCA 2009), should be approved, and the invalid downward departure sentence entered in the trial court should be reversed and remanded for resentencing within the guidelines.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on August 5, 2010: Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida, 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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