IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,845

SABRINA RAHMINGS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

Petitioner, Sabrina Rahmings, was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. This brief refers to the parties as the "state" and the "defendant." The symbols "T." and "R." denote the transcript of the proceedings in the trial court and the remainder of the record on appeal. The symbol "A." denotes the appendix to this brief, consisting of the opinion of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

This petition seeks review of a decision of the Third District Court of Appeal upholding an upward departure sentence imposed for failure to return from a postconviction furlough.

The petitioner, Sabrina Rahmings, was convicted after a jury trial. (R. 63-68; T. 489-91).[1] Defense counsel requested that a presentence investigation report be prepared because Ms. Rahmings had no prior convictions and no minimum mandatory provisions applied. (T. 491). Counsel also requested that Ms. Rahmings

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[1]She was found guilty of aggravated battery, two counts of armed robbery, and burglary with assault. (R. 63-68; T. 489-91). The incident giving rise to the charges occurred on November 2, 1991. At trial, the state presented evidence showing that two men entered the home of John Samms, and robbed him and his son Roderick, after Mr. Samms opened the door to Ms. Rahmings. (T. 181-208, 254-57, 292-99). The two robbers carried firearms. (T. 181-85, 188-89). Mr. Samms was stabbed in the back and severely beaten by one of the men in an effort to make him disclose the location of a nonexistent safe which the men believed contained $30,000 in cash. (T. 195-200, 258). Meanwhile, Roderick and his girlfriend, Karen Wilson, were held at gunpoint in the kitchen. (T. 255-59, 296-300). The two men left after taking the money that was in Mr. Samms' and Roderick's pockets. (T. 195-96, 207-8, 257).

The evidence of Ms. Rahmings' participation was that she had knocked on the door and asked for Mr. Samms. (T. 254, 292-94). None of the witnesses saw her after the robbers entered the house. (T. 230-31, 260, 283, 295, 314). Ms. Rahmings was charged as a principal with the offenses of attempted first-degree murder (count 1), armed robbery (counts 2 and 3), and burglary with assault (count 4). (R. 1-4). Additional counts of uttering a forged instrument and grand theft were severed before trial (R. 5-8, 17), and were subsequently dropped.

not be taken into custody until sentencing. (T. 491). Her mother had been injured in an accident and was unable to care for the defendant's three small children. (T. 491, 498). The prosecutor asked that Ms. Rahmings be taken into custody, or that a bond be set. (T. 491-92). The judge proposed that Ms. Rahmings be released over the weekend, and that a bond hearing be held when she returned to determine whether she should be released during the four to six weeks that would be required to prepare a presentence investigation report. (T. 494-95). She would be sentenced to forty years, which would be mitigated when she surrendered on February 2, 1993. (T. 499). Defense counsel agreed to waive the presentence investigation report for this purpose. (T. 498-99). The court explained the proposed furlough arrangement as follows:

> * * * I will adjudicate her in accordance with the jury's verdict. I will sentence her now to 40 years, which is essentially life under DOC guidelines on the counts already charged. I'm not making any sentence or ruling on the counts that have been severed. I will allow her to take a furlough to get her children placed in child care and take care of whatever other necessities that she needs. She will return on Tuesday February 2nd, 1993. When she surrenders on that date, I will mitigate the sentence and I will suspend entry of any sentence until she gets the PSI.

(T. 499).

After being sworn, Ms. Rahmings was questioned by the court. She stated that she was twenty-two-years old, and had stopped school at the eleventh grade. (T. 499-500). She understood that if she did not return she would have to serve forty years. (T. 500-501). She agreed to surrender herself on Tuesday, February 2nd. (T. 501).

A sentencing order was filed the same day, January 29, 1993, imposing a

forty-year prison sentence for all four counts. (R. 69-70).[2]

Ms. Rahmings duly surrendered herself as agreed, on February 2, 1993, and was taken into custody. (T. 506). A presentence investigation report was ordered. (T. 506). An order was filed vacating the forty-year sentence previously imposed. (R. 71).

Ms. Rahmings remained incarcerated awaiting sentencing until March 25, 1993, when she was released by the trial judge on a one-day furlough. (T. 511). As in the case of the previous furlough, the court would impose a forty-year sentence which would be vacated if the defendant did not return. (R. 72-73; T. 511-12). An order was filed the same day, imposing a single forty-year sentence for all four counts and awarding ninety-seven days credit for time served. (R. 72-73). The trial court also reinstated the defendant's $10,000 bond. (T. 513). The court explained its reasons for giving the furlough as follows: "Ms. Rahmings has extensive ties in the community, never failed to appear at any hearing, even after the trial when I gave her a furlough before. She has three children of tender years. Her mother works in the Department of Corrections and has shown an active interest in the case." (T. 512).

The recommended guidelines range was five-and-half to seven years; the permitted range was four-and-a-half to nine years. (R. 77). The scoresheet filed on March 25, 1993, states as the reason for departure that the defendant "waived guidelines to get furlough--failed to turn herself in." (R. 77).

Ms. Rahmings appeared at the required time on the following day, March 26, 1993. (T. 517). The furlough was extended over the weekend, until Monday, March 29, 1993, to enable her to find an apartment for her mother. (T. 517-18).

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[2]This order was signed for the sentencing judge by a different judge, as were the subsequent sentencing orders and the scoresheet giving the reason for departure. (R. 69-70, 71, 72-73, 77).

The court stated that if she failed to appear or committed any violations of the law, the previously-imposed forty-year sentence would stand. (T. 518).

On the day she was to surrender herself, March 29, 1993, Ms. Rahmings came to court, but was not in the courtroom when her case was called. (T. 522). A different judge was handling the calendar for the trial judge. (T. 522). The court rejected the prosecutor's suggestion to reset the matter until the return of the trial judge. (T. 522-23). After a brief search of the ladies' room and of that floor of the courthouse, an order was issued committing Ms. Rahmings to the Department of Corrections, to serve the forty-year sentence previously imposed. (T. 523-24).

On appeal from the conviction and sentence the defendant argued that the furlough arrangement could only be enforced within the limits of the guidelines, because it was not part of a plea bargain and, under *Williams v. State*, 500 So. 2d 501 (Fla. 1986) and *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988), the failure to appear pursuant to a furlough agreement is not a valid reason to depart unless the furlough is an integral part of a plea bargain. It is the plea bargain which justifies departure, not the defendant's agreement to return pursuant to the conditions imposed by the court in granting a furlough. (A. 3).

The Third District Court of Appeal affirmed, holding that a departure sentence may be based upon failure to appear "when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court. Whether or not one of the elements of such a agreement is a guilty plea is not dispositive of the agreement's enforceability." (A. 4). According to the district court, "[t]he rationale of *Quarterman* focused not on the fact that a guilty plea had been entered but on the existence of an agreement between the defendant and the court." (A. 4). The district court reasoned that "it was the knowing and voluntary nature of the agreement which justified its use as a reason for the departure

sentence," not the fact that the agreement was part of a plea bargain. (A. 4). The district court concluded:

> [W]e read Quarterman as approving a departure sentence based upon the failure to appear, when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court. Whether or not one of the elements of such a agreement is a guilty plea is not dispositive of the agreement's enforceability.

(A. 4).

While approving the enforcement of the furlough agreement, the court reversed and remanded for resentencing because the forty-year sentence was an impermissible general sentence (and exceeded the statutory maximum for aggravated battery). (A. 5). On remand, Ms. Rahmings was sentenced to concurrent fifteen-year terms on all of the counts. She had previously petitioned this Court for discretionary review on the ground that the district court's decision was in express and direct conflict with this Court's decision in *Williams v. State*, 500 So. 2d 501 (Fla. 1986), *as clarified in Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988). This Court accepted jurisdiction. This brief follows.

QUESTION PRESENTED

WHETHER A DEFENDANT'S FAILURE TO RETURN FROM A FURLOUGH IS A VALID REASON FOR AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES, WHERE THE FURLOUGH IS NOT PART OF A PLEA BARGAIN.

SUMMARY OF ARGUMENT

Ms. Rahmings was convicted after a jury trial. The maximum sentence permitted by the guidelines was nine years. While she was in custody awaiting sentencing, she requested a one-day furlough. The trial judge agreed to grant a furlough, but only after imposing a forty-year sentence which would be mitigated upon the defendant's return. The reason given for departure was "waived guidelines to get furlough--failed to turn herself in." Ms. Rahmings returned the next day and the furlough was extended over the weekend. She failed to appear and was committed to serve the forty-year sentence. The Third District Court of Appeal affirmed, holding that under this Court's decision in *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988), a departure sentence may be based upon failure to appear when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court, regardless of whether or not that agreement is part of a plea bargain.

Contrary to the Third District's interpretation, the *Quarterman* decision did not give blanket approval to all upward departure sentences which are based on a defendant's "agreement," and it certainly did not approve departures based on postconviction sentencing "agreements" to which the state is not even a party.

In *Quarterman* this Court (1) recognized that because a negotiated plea agreement is a valid reason upon which to base a departure, a sentencing agreement which is an "integral part" of a valid plea bargain is likewise a valid basis for departure, and (2) declined to make an exception for plea bargains which involve a furlough. Where a furlough is <u>not</u> part of a plea bargain, it remains the law that a defendant's failure to appear as required cannot justify a departure sentence even when the defendant agreed or acquiesced to the furlough conditions set by the court.

A defendant's "agreement" is not in itself a valid reason for departure. The sentencing limitations enacted in the guidelines reflect legislative decisions as to the use of the state's correctional facilities. Those sentencing limitations were not established for the defendant's benefit. There is accordingly no generally-applicable reason why a defendant's agreement should always give the court the authority to disregard the guidelines limits.

A negotiated plea agreement justifies an upward departure not merely because the defendant knowingly and voluntarily agrees, but also because one of the things he agrees to do is to plead guilty. A guilty plea permits conviction without the cost of a trial. This is in the public interest, and gives the defendant something with which to bargain with the state. Negotiated guilty pleas are justified by this perceived mutuality of advantage, constitute an essential component of our system of justice, and it is the declared public policy of this state to enforce and encourage such agreements.

Unlike a plea agreement, a postconviction furlough agreement between a convicted defendant and the court does not result from a process of bargaining and does not advance any public interest that would justify deviation from the sentencing policies embodied in the guidelines.

A postconviction furlough agreement between the defendant and the court is not really an "agreement" at all since there is no real bargaining or negotiation involved. The defendant has already been convicted and has nothing to offer the court in exchange for the furlough except a promise to behave himself while on furlough and to return, both of which the law already requires him to do. Since there is nothing to negotiate, the defendant is in no position to do anything but accept the conditions laid down by the court. This is not bargaining and the result is not an agreement. Rather, the defendant has made a motion, and the court has

ruled, entering an order containing court-imposed conditions.

Moreover, unlike a plea agreement, the court's granting of a request for a furlough advances no public interest that would reasonably justify setting aside the sentencing policies embodied in the guidelines, or the statutory penalties established for failure to appear or for contempt. To allow departures based on furlough arrangements between a convicted defendant and the court simply leads to arbitrary and grossly disproportionate sentences. There is no good reason why this should be permitted. Such sentencing agreements should be enforceable only within the limits established by the guidelines. The Third District's decision in this case must be quashed, and this cause remanded for sentencing within the guidelines.

ARGUMENT

A DEFENDANT'S FAILURE TO RETURN FROM A FURLOUGH IS NOT A VALID REASON FOR AN UPWARD DEPARTURE FROM THE SENTENCING GUIDELINES, WHERE THE FURLOUGH IS NOT PART OF A PLEA BARGAIN.

Ms. Rahmings was convicted after a jury trial. (R. 63-68; T. 489-91). The maximum sentenced permitted by the guidelines was nine years. (R. 77). Two months after the judgment of conviction had been entered, she requested a one-day furlough. (T. 511). The judge granted the furlough, but only after imposing a forty-year sentence which would be mitigated upon the defendant's return. (R. 72-73; T. 511-12). The reason given for departure was "waived guidelines--failed to turn herself in." (R. 77). Ms. Rahmings returned the next day and the furlough was extended over the weekend. (T. 517-18). Ms. Rahmings came to court on the required date, but was not in the courtroom when her case was called. (T. 522). A different judge was handling the calendar. (T. 522). An order of commitment was issued. (T. 523-24). The Third District Court of Appeal affirmed.

The district court's decision conflicts with this Court's decisions in *Williams v. State*, 500 So. 2d 501 (Fla. 1986) and *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988). Under *Williams* and *Quarterman*, the furlough could not be the basis for an upward departure sentence because it was not part of a negotiated plea bargain. The district court's decision must be quashed and the cause remanded for resentencing to no more than the nine years permitted by the guidelines.

In *Williams v. State*, 500 So. 2d 501 (Fla. 1986), this Court held that a defendant's failure to return for sentencing after a furlough could not justify an upward departure from the sentencing guidelines, even if the defendant agreed or acquiesced to the conditions imposed by the court in granting the furlough. This is because failure to appear for sentencing is itself a criminal offense, § 843.15, Fla.

Stat. (1993), and Florida Rule of Criminal Procedure 3.701(d)(11) prohibits departures based on offenses for which the defendant has not been convicted. *Id.* at 502-3. If failure to appear could justify departure, the trial judge could circumvent the legislatively-established, five-year maximum for that offense, and impose, without a trial, whatever sentence the judge might arbitrarily choose. *Id.* at 503. Such a "Kafkaesque" situation should not be permitted and is prohibited by the guidelines. *Id.*

However, a different rule applies where the defendant's agreement to appear for sentencing is an integral part of a valid plea bargain. *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988). Because a negotiated plea agreement is a valid reason upon which to base a departure sentence, *Quarterman*, 527 So. 2d at 1382; *Holland v. State*, 508 So. 2d 5, 6 (Fla. 1987), a sentencing agreement which is an "integral part" of a valid plea bargain is likewise a valid basis for departure, *Quarterman* at 1382. There is no exception for plea bargains which involve a furlough, and *Williams* should not be read to hold to the contrary. *Quarterman* at 1382. Where a furlough agreement is "an integral part" of a valid plea bargain, "the plea bargain itself serves as a clear and convincing reason for departure," and therefore failure to appear in accordance with that agreement will justify a departure sentence. *Quarterman* at 1382.

Contrary to the interpretation of the Third District Court of Appeal, the *Quarterman* decision did not completely overrule *Williams*, nor did it give blanket approval to all upward departure sentences which are based on a defendant's "agreement." In *Quarterman*, this Court simply recognized that there is one sort of agreement, namely, a plea bargain, which has been accepted as a valid basis for departure, and declined to make an exception to that rule for cases where the plea bargain involves a furlough arrangement. The *Quarterman* decision did not turn on

any distinction between a "knowing and voluntary agreement" and mere "acquiescence" to a departure sentence as the penalty for breach of furlough conditions. Williams, like Quarterman, "agreed" to the conditions of his furlough. *Williams* at 502; *Quarterman* at 1382. In distinguishing *Williams*, this Court emphasized that Quarterman's furlough was an integral part of a plea bargain, and the conditions of the furlough were not imposed after the plea bargain had been accepted, but were accepted as an "integral part" of the plea bargain itself. *Quarterman* at 1382. As this Court explained, unlike in *Williams*, in *Quarterman*,

> departure was not only based on Quarterman's failure to appear but was also based on the plea agreement itself. Further .... the conditions which Quarterman agreed to were not imposed after the plea bargain had been accepted, * * *, but were accepted as "an integral part of the bargain itself." * * * We agree with the court below that, under these circumstances, the plea bargain itself serves as a clear and convincing reason for departure and recede from any language in *Williams* to the contrary.

Quarterman, 527 So. 2d at 1382 (citations omitted) (emphasis added).

Where, as here, the furlough is not part of a plea bargain, this Court's decision in *Williams* controls, and the defendant's failure to appear as required cannot justify a departure sentence even when the defendant agreed or acquiesced to the furlough conditions set by the court. *See Quarterman* at 1382 (*Williams* stands for the proposition that a defendant's failure to appear for sentencing in and of itself does not constitute a clear and convincing reason for departure from the sentencing guidelines, even when the defendant acquiesced in the conditions imposed by the trial court), *quoting Quarterman v. State*, 506 So. 2d 50, 51 (Fla. 2d DCA 1987); *Payne v. State*, 624 So. 2d 815 (Fla. 4th DCA 1993) (where furlough was not part of a negotiated plea agreement, trial court could not impose an enhanced sentence for failure to appear without giving defendant an opportunity to withdraw the plea); *Logue v. State*, 547 So. 2d 351 (Fla. 3d DCA 1989) (court

could not base departure on failure to return for sentencing after a furlough, where condition to appear was not part of a plea agreement).[3]

A negotiated plea agreement is both negotiated and in the public interest, and therefore reasonably justifies a departure sentence. *See Bell v. State*, 453 So. 2d 478 (Fla. 2d DCA 1984). It does not follow, however, that every other sort of sentencing agreement is equally in the public interest or that a departure should be permitted every time a defendant expresses "agreement." To the contrary, since such agreements are in derogation of the sentencing policies embodied in the guidelines, they are presumptively contrary to the public interest. A departure must be justified by something more than the defendant's agreement to indulge the trial court's dissatisfaction with the sentencing limitations imposed by the legislature.

A defendant's agreement, although necessary in the absence of any other basis for departure, is not enough in itself to justify deviation from the legislative mandate of the guidelines. The guidelines "were not promulgated for the purpose of benefiting criminal defendants, but to promote uniformity in the punishment meted out to those convicted of the same offense, whose prior conviction records and other relevant factors are comparable." *Knight v. State*, 455 So. 2d 457, 458 (Fla. 1st DCA 1984); *see* Fla. R. Crim. P. 3.701(b); *see also* § 921.001(4), Fla. Stat. (1993); Fla. R. Crim. P. 3.702(b). They take into account the finite capacity of state and local correctional facilities, and set priorities for the use of those facilities based on a legislative decision that the "[u]se of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who

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[3]Such a "sentencing bargain" is enforceable, but--as the Third District held in the pre-*Quarterman* case of *Harris v. State*, 524 So. 2d 1104 (Fla. 3d DCA 1988)--the sentence imposed cannot exceed the outermost limits of the guidelines. The defendant's failure to appear may be the basis for other criminal charges, § 843.15, Fla. Stat. (1993), or for being held in contempt. For that very reason, however, it is not a permissible basis for departure. Fla. R. Crim. P. 3.701(d)(11); *Williams* at 502-3; *Monti v. State*, 480 So. 2d 223, 223 (Fla. 5th DCA 1985).

have longer criminal histories." Fla. R. Crim. P. 3.701(b)(7).[4] Moreover, "the sentencing guidelines, insofar as they limit the length of sentences, are substantive in nature," *Smith v. State*, 537 So. 2d 982, 986 (Fla. 1989), and the establishment of those limits is properly a legislative function, *see id.* at 987; *see also* § 921.001(1), Fla. Stat. (1993).

Because the legislature, not the defendant, decides how the state's prison space should be allocated, the mere fact that the defendant agrees to a greater sentence than the legislature deems appropriate cannot "reasonably justify," Fla. R. Crim. P. 3.701(d)(11), an upward departure from the guidelines. The bargain must include something which reasonably justifies setting aside the policy decisions embodied in the guidelines. A sentencing "agreement" that serves only to evade the guidelines would be manifestly contrary to public policy and cannot be approved, regardless of whether the defendant "agreed." *See Henry v. State*, 498 So. 2d 1006 (Fla. 2d DCA 1986) (an agreement which could frustrate guidelines sentencing and is not part of a normal plea bargain cannot be approved).[5]

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[4]*See also* § 921.001(4)(a)(7), Fla. Stat. (1993) ("Use of incarcerative sanctions is prioritized toward offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.") "To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence." Fla. R. Crim. P. 3.701(b)(7).

[5]In *Henry*, a defendant whose recommended guidelines sentence was any nonstate prison sanction was required, in exchange for being placed on probation rather than being sentenced to jail, to waive his right to be sentenced under the guidelines in the event he violated his probation. Probation was eventually revoked and the court imposed a departure sentence based on the previous waiver of the right to be sentenced under the guidelines. The Second District Court of Appeal reversed (for failure to provide written reasons), and remanded for guidelines sentencing, stating:

> In resentencing appellant, the court should be aware that appellant's waiver of his right to be sentenced under the guidelines cannot constitute a clear and convincing reason for departure. Guidelines sentencing cannot be waived. If appellant's waiver was intended to be an agreement to allow the court to

A negotiated agreement in which the defendant agrees to the entry of a judgment of conviction, i.e. a plea bargain, has two characteristics which set it apart from other "agreements," and particularly from postconviction sentencing "agreements" between the defendant and the court:

First, plea agreements always involve the substantial public benefit of obtaining a conviction without the cost of a trial. Negotiated guilty pleas are "an essential component of the administration of justice," *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), because "[i]f every criminal charge were subjected to a full-scale trial, the States ... would need to multiply by many times the number of judges and court facilities." *Id.*[6]

> depart from the appellant's presumptive sentence, rather than a waiver of guidelines sentencing, it was still invalid. We cannot approve an agreement which could frustrate guidelines sentencing. In this case, unlike the normal plea bargain, appellant, in exchange for receiving probation without incarceration, a sentence already indicated by the guidelines scoresheet, was required to agree to allow the court to depart from a future unknown presumptive sentence if he violated the terms of his probation. *See Green v. State*, 460 So. 2d 378 (Fla. 2d DCA 1984); *Bell v. State*, 453 So. 2d 478 (Fla. 2d DCA 1984).

Henry, 498 So. 2d at 1007.

[6]They have other advantages as well:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative aspects of the guilty when they are ultimately imprisoned. See Brady v. United States, 397 U.S. 742, 751-52, 90 S.Ct. 1463, 1470-71, 25 L.Ed.2d 747 (1970).

Santobello, 404 U.S. at 261, 92 S.Ct. at 498, *quoted with approval in Brown v. State*, 367 So. 2d 616, 622 (Fla. 1979).

Second, that substantial state interest ensures that a negotiated guilty plea is the result of a bargaining process; there is a mutuality of advantage, and both parties can be said to be bound by a contractual obligation. *See Brown v. State*, 367 So. 2d 616, 622 (Fla. 1979) ("Bargained guilty pleas ... are in large part similar to a contract between society and an accused, entered into on the basis of a perceived 'mutuality of advantage.'").

It is, accordingly, the declared policy of Florida to encourage plea bargains. *State ex rel. Miller v. Swanson*, 411 So. 2d 875, 877 (Fla. 2d DCA 1981) ("The declared policy of this state is to encourage plea negotiations and agreements."); Fla. R. Crim. P. 3.171(a) ("the prosecuting attorney, and the defense attorney, or the defendant when representing himself or herself, are encouraged to discuss and to agree on pleas that may be entered by a defendant"). This declared public policy in favor of plea bargains reasonably justifies a departure from the sentencing guidelines which is based on this "essential component" of the criminal justice system. *See Bell v. State*, 453 So. 2d 478, 480 (Fla. 2d DCA 1984). As this Court made clear in *Quarterman*, the fact that the bargain includes a furlough as one of its terms does not justify an exception to the general rule: If the furlough is an "integral part" of a valid plea bargain, a departure sentence is justified based upon the "plea bargain itself." *Quarterman*, 527 So. 2d at 1382.

Unlike a negotiated plea agreement, or certain other agreements between a defendant and the state[7], a sentencing "agreement" between a convicted

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[7]Some sentencing agreements between a defendant and the state, which are both negotiated and in the public interest, might justify a departure sentence, for example, a downward departure in exchange for the defendant's testimony.

However, any agreement under which a defendant waives his right to be sentenced under the guidelines should only be upheld if, prior to accepting the agreement, the court establishes on the record that the agreement is knowing and voluntary and made with a full understanding of the consequences.

At a minimum, the defendant must be advised of the complete terms of the agreement, including specifically all obligations the defendant will incur as a result,

defendant and the court, in which the court grants a furlough to the already convicted defendant and imposes a departure sentence for failure to appear, does not involve negotiation and does not advance any substantial public interest that would justify deviation from the sentencing policies embodied in the guidelines.

This type of postconviction furlough "agreement" is not properly an agreement at all because no real bargaining or negotiation is involved. The defendant has already been convicted and has nothing to offer the court in exchange for the furlough except a promise to behave himself while on furlough and to return, both of which the law already requires him to do. Since there is nothing to negotiate, the court's conditions are laid down on a take-it-or-leave-it basis, and the defendant is in no position to do anything but accept them. This is not bargaining and the result is not an agreement, bargain, or contract. Rather, the court has entered an order, with court-imposed conditions, in response to the defendant's motion. The order is enforceable by means of the court's contempt powers, but it does not establish a contractual obligation. In this context, a departure cannot be based on a purported "knowing and voluntary agreement," because, however the situation is characterized, the defendant is in no position do no anything but "acquiesce."

These postconviction sentencing "agreements" do not serve any public interest which would justify the circumvention of the guidelines, and invite the imposition of arbitrary and disproportionate sentences, particularly where, as here, the upward departure sentence is imposed at the time of granting the furlough, with

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and of the recommended and permitted guidelines sentences which he is giving up. *See* Fla. R. Crim. P. 3.172.

"mitigation" to occur upon the defendant's return. (R. 72-73; T. 511).[8] At the time of granting the furlough, the judge is not primarily concerned with the sentence that would be appropriate for the offense of conviction, but with the need to impress upon the defendant his or her obligation to return. The court may not even have before it all of the information relevant to sentencing (e.g., a presentence investigation report, or a scoresheet). Since the court's immediate focus is on the question of posttrial release, rather than sentencing, there is an inevitable temptation to make the penalty imposed in advance for violating the furlough conditions as dramatic as possible. That penalty would usually be limited to the statutory of five years for failure to appear, § 843.15, Fla. Stat. (1993), or one year for contempt, §§ 38.22, 775.02, Fla. Stat. (1993). However, as this Court explained in *Williams*, since departure sentences are only limited by the statutory maximum for the underlying offense, such furlough arrangements allow the court to evade these statutory limitations, as well as the guidelines. *Williams*; *see also Monti*.

As this case illustrates, if these dramatic penalties are available, they will be used. Since the defendant really has nothing to offer, and the court has no particular incentive to grant the furlough, there is no reason why the furlough conditions should not be as draconian as possible. However draconian, they will be regularly accepted: The jails are full of defendants who are imprudent enough (or drug-addicted enough) to risk any potential penalty for a day or two of freedom.

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[8]This procedure should be disallowed. Since a defendant may be sentenced in absentia, *Capuzzo v. State*, 596 So. 2d 438 (Fla. 1992), there appears to be no good reason for sentencing him in advance, rather than deferring the sentencing proceeding to the date of the defendant's return. This procedure creates unnecessary uncertainty and confusion, since it is far from clear what burden of proof, standard of proof, or appellate remedies would apply in the event of a dispute as to the conditions of the furlough or the defendant's compliance with those conditions. The procedure may also be unauthorized, since Florida Rule of Criminal Procedure 3.810 requires the court to commit a sentenced defendant "forthwith."

Grossly disproportionate sentences--which do not even reflect the trial court's own view as to the appropriate sentence for the offense of conviction--are the predictable, if not inevitable, result. In this case, the penalty for failure to appear was thirty-one years. This was more than six times the statutory maximum for the offense of failure to appear for sentencing, and more than three times the maximum nine-year sentence permitted by the guidelines for the underlying offense.

There is no good reason to permit a procedure which invites such arbitrary and disproportionate sentencing. Although postconviction and postsentencing release is permitted under certain circumstances[9], there does not appear to be any declared state policy that would reasonably justify granting such release at the expense of the sentencing policies embodied in the guidelines. Indeed, furloughs granted after the entry of a sentencing order, as happened in this case, seem to be contrary to the requirement that sentenced defendants be committed to custody "forthwith." *See* Fla. R. Crim. P. 3.810.

The Third District's opinion suggests that if furlough agreements involving an upward departure sentence could only be enforced when entered as part of a plea bargain, defendants who had exercised their right to trial would be penalized, because trial courts would rarely, if ever, grant a furlough which could not be enforced by penalties exceeding the statutory limits for failure to appear or for contempt. (A. 4-5). However, it is well established that a trial court's dissatisfaction with the legislatively-imposed limits on the penalties that can be

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[9]*See* Fla. R. Crim. P. 3.550 (providing for continuation of pretrial release after jury verdict of guilty); Fla. R. Crim. P. 3.590(d) (release on bail pending disposition of motion for new trial); Fla. R. Crim. P. 3.691 (release pending appellate review); § 903.132, Fla. Stat. (1993) (same); *see also* § 945.091(1)(a), Fla. Stat. (1993) (authorizing Department of Corrections to grant furloughs for the purpose of allowing the inmate to visit a dying relative, attend a relative's funeral, arrange for employment or a suitable residence for use when released, or to otherwise aid in the inmate's rehabilitation, or "[f]or another compelling reason consistent with the public interest").

exacted is not an appropriate basis for departure. *See, e.g., Scurry v. State*, 489 So. 2d 25, 29 (Fla. 1986) (trial court's opinion "that a lesser sentence is not commensurate with the seriousness of the crime, flies in the face of the rationale for the guidelines" and is not a valid reason for departure because it simply "reflects a trial judge's disagreement with the Sentencing Guidelines Commission"). Courts should be making their release decisions based on the considerations appropriate to that decision and in light of the restrictions (such as bond) and penalties that can lawfully be imposed to ensure the defendant's return.[10]

Postconviction furlough "agreements" between the defendant and the court should be enforceable only within the limits established by the guidelines. *See Harris v. State*, 524 So. 2d 1104 (Fla. 3d DCA 1988).

CONCLUSION

Based upon the foregoing argument and authorities, petitioner requests this Court to quash the decision of the district court of appeal and to remand for sentencing within the guidelines.

Respectfully submitted,

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[10]Of course, dissatisfaction with the guidelines sentence *for the offense of conviction* can never constitute a legitimate basis for the court's granting of a furlough: a court cannot be permitted to make a release decision because it *expects* that decision will turn out to be wrong and thus give it the ability to depart for an invalid reason.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, PAULETTE R. TAYLOR, 401 N.W. 14th Street, Miami, Florida 33101 this 10th day of October, 1994.

LOUIS CAMPBELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,845

SABRINA RAHMINGS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1994

SABRINA RAHMINGS,	**	
Appellant,	**	
vs.	**	CASE NO. 93-983
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed May 10, 1994.

An Appeal from the Circuit Court of Dade County, Robbie M. Barr, Judge.

Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Paulette R. Taylor, Assistant Attorney General, for appellee.

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

LEVY, Judge.

Sabrina Rahmings, the defendant, appeals her upward departure sentence, which was imposed after she breached a presentencing furlough agreement. We affirm in part, reverse in part, and remand.

After a jury trial, the defendant was convicted of two counts of armed robbery, one count of aggravated battery, and one count of burglary. The defendant sought a furlough prior to sentencing in order to tend to some personal matters. The trial judge agreed to furlough the defendant, but only after imposing a 40-year sentence which would be mitigated upon the defendant's return on the agreed upon date. The defendant took the stand and testified that she understood the agreement, and would appear as required. The defendant was released, and subsequently returned as required. A second furlough was later granted on the same conditions, and the defendant again returned as required. Upon her return from the second furlough, the defendant requested an extension of the furlough, which was also granted on the same conditions.

The defendant failed to return as required from this extension of her second furlough. She was not present in the courtroom when her case was called, nor when it was again called at the end of the trial court's calendar. After a search of the ladies' room and the area adjacent to the courtroom failed to locate her, she was sentenced to 40 years pursuant to the agreement. Since 40 years constituted an upward departure sentence, the written reason for departure given on her scoresheet was "waived guidelines to get furlough - failed to turn herself in." The defendant is currently incarcerated under this sentence, and now appeals.

In Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), the Supreme Court approved using a defendant's failure to appear after an agreed-upon furlough as a justification for an upward departure

sentence. Quarterman, 527 So. 2d at 1382. There is no question that the defendant in this case knowingly and voluntarily entered into the furlough agreement with the court. Having clearly breached the agreement, the trial court properly sentenced the defendant pursuant to its terms. See Harris v. State, 608 So. 2d 898 (Fla. 3d DCA 1992).

The defendant, however, attempts to distinguish Quarterman, and contends that her sentence must be reversed based upon Williams v. State, 500 So. 2d 501 (Fla. 1986), and our holding in Harris v. State, 524 So. 2d 1104 (Fla. 3d DCA 1988), which relied upon Williams. Williams and Harris each stood for the proposition that a defendant's failure to appear in court could not itself justify an upward departure sentence, even if the failure to appear constituted the breach of a furlough agreement. Williams, 500 So. 2d at 503; Harris, 524 So. 2d at 1104. Williams, however, was expressly receded from in Quarterman. Quarterman, 527 So. 2d at 1382. We consider this an implicit overruling of our Harris (524 So. 2d 1104) decision.

In attempting to distinguish Quarterman, the defendant points out that the furlough agreement in Quarterman had been entered as part of a plea bargain in that case. Hence, the defendant contends, Quarterman receded from Williams only as to those situations where a furlough agreement is part of a negotiated plea bargain. Therefore, since she was convicted after a jury trial, and not as the result of a plea bargain, Quarterman is inapplicable and Williams controls. We disagree.

The rationale of Quarterman focused not on the fact that a guilty plea had been entered, but on the existence of an agreement between the defendant and the court. As pointed out in Quarterman, the conditions of the furlough "were accepted as 'an integral part of the bargain itself.'" Quarterman, 527 So. 2d at 1382 (quoting Williams, 506 So. 2d at 51). Clearly, it was the knowing and voluntary nature of the agreement which justified its use as a reason for the departure sentence. See also White v. State, 531 So. 2d 711, 714 (Fla. 1988)(where defendant voluntarily pleads guilty, and agreed-to sentencing range constitutes an upward departure, sentence was properly imposed); Smith v. State, 529 So. 2d 1106, 1107 (Fla. 1988)(approving upward departure sentence based upon plea bargain, where bargain had been knowingly and voluntarily entered after consultation with counsel); Jacobs v. State, 522 So. 2d 540, 541 (Fla. 3d DCA)(upward departure sentence proper as part of negotiated plea), rev. denied, 531 So. 2d 1353 (Fla. 1988). Consequently, we read Quarterman as approving a departure sentence based upon the failure to appear, when the sentence is the result of a knowing and voluntary agreement entered into by the defendant and the court. Whether or not one of the elements of such an agreement is a guilty plea is not dispositive of the agreement's enforceability.

Were we to only enforce furlough agreements when entered as part of a plea bargain, trial courts would rarely, if ever, grant a furlough to a defendant who had been convicted by a jury. In effect, we would be penalizing defendants who had exercised their right to a jury trial, by severely curtailing their opportunity

for a presentencing furlough. Additionally, we would be creating an incentive for defendants to forego jury trials, a result we deem improper.

Today's ruling does not conflict with our holding in Logue v. State, 547 So. 2d 351 (Fla. 3d DCA 1989). In Logue, we reversed a sentence entered after a defendant failed to return from a furlough. The opinion recited that "the trial judge told the defendant that he would be sentenced to fifty-six years, which would be mitigated to twelve years if he returned for sentencing after a furlough." Logue, 547 So. 2d at 352 (emphasis added). Since the sentence in Logue was given at the trial judge's direction, and not as part of a knowing and voluntary agreement by the defendant, it was properly reversed, and is consistent with today's ruling.

Although we approve enforcement of the furlough agreement in this case, resentencing is nevertheless necessary because the defendant improperly received a general sentence, instead of being sentenced individually as to each count. See Johnson v. State, 624 So. 2d 807 (Fla. 3d DCA 1993). In resentencing the defendant in accordance with the breached furlough agreement, the trial court should be cognizant of the statutory maximums for each of the offenses. See §§ 784.045(2), 775.082(3)(c), Fla. Stat. (1991).

Affirmed in part, reversed in part, and remanded.