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IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,845

SABRINA RAHMINGS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar No. 0992348
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

Petitioner, Sabrina Rahmings, seeks review of a decision of the Third District Court of Appeal affirming her sentence imposed pursuant to a postconviction furlough agreement. Petitioner 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. In this brief, the parties will be referred to as "Defendant" and "State" respectively. The symbol "R" refers to the record on appeal, and the symbol "T" refers to the transcript of proceedings in the trial court. The opinion of the Third District Court of Appeal is reported at Rahmings v. State, 636 So. 2d 567 (Fla. 3rd DCA 1994).

STATEMENT OF THE CASE AND FACTS

On the evening of November 2, 1991, Defendant knocked on the front door of the home of John Samms. (T. 175). At home with Mr. Samms were his son Roderick and Roderick's girlfriend. (T. 252). Mr. Samms, looking through the peephole, recognized Defendant from past dealings. (T. 179). Within seconds after Mr. Samms opened his door, Defendant and two armed men rushed into Mr. Samm's home. (T. 183-186). One of the men held a gun on Mr. Samms, and the other went into the kitchen area of the house and, at gunpoint, robbed Roderick. (T. 188-189, 257).

The man holding the gun on Mr. Samms stabbed him three times, and severely beat him with the gun and an iron while attempting to make him reveal the location of a nonexistent safe. (T. 196-203). Mr. Samms was eventually forced to empty his pockets of all his money. (T. 196). Mr. Samms suffered extensive injuries and was hospitalized for about one week. (T. 210-211).

Defendant was tried by jury. The jury found Defendant guilty of aggravated battery as a lesser included offense of attempted first-degree murder, two counts of armed robbery, and one count of burglary with assault. (R. 63-66). The trial court adjudicated her according to the jury verdict. (T. 491).

Defendant had been out on $10,000 bond and house arrest

during trial. (T. 493). Defense counsel requested that Defendant be allowed to "remain out pending sentencing". (T. 491). At that time, Defense counsel indicated that Defendant needed the time to make living arrangements for her three minor children. (T. 491).

The State objected to Defendant's request for the furlough. The basis for the objection was that Defendant's status had changed, she was now a convicted felon who faced certain imprisonment. (T. 496). Nevertheless, the State suggested that if the court was considering granting the furlough, Defendant should be taken into custody and be given a bond hearing. (T. 492-493).

Thereafter the court, defense counsel, and the prosecutor entered into discussions to determine under what conditions the court could grant the requested furlough. The relevant portions of that discussion follow:

> THE COURT: I am going to do this instead. I am going to pick a halfway measure. I am going to, if you would agree with this Mr. Kaiser. In addition to the bond that she already has, I am going to sentence her to-- what is the bump up?
>
> MR. PERIKLES[1]: I haven't really scored her out.
>
> THE COURT: Give me something close.

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[1] Prosecutor.

MR. PERIKLES: There [are] three options: Category three, category four and category five. I think three gives her the highest.

MR. KAISER[2]: Well, judge, it appears that if you are talking about a bump up that would be nine by--that would be [within] the permitted range. I'm not--

THE COURT: What's the next?

MR. PERIKLES: The maximum? It is a felony punishable by life. If the Defendant waives the guidelines, she could be sentenced to life imprisonment.

THE COURT: Let me tell you my thinking....I am thinking of sentencing her to substantially more, giving her a short furlough to take care of her situation with her mother and then having her come back to have a bond hearing that you want to decide whether to take her into custody. At this time, I am talking about over the weekend.

....

THE COURT: He would have to waive his objection to not having a PSI. I would sentence her again. I would mitigate it at the time of the sentencing hearing, if she shows up after the furlough.

MR. PERKILES: I am going to think that one through find if there is any problem.

THE COURT: Think it through because I just thought of it here. So if it is not legal, I won't do it.

MR. PERIKLES: Would you give us a few moments?

....

MR. KAISER: Judge, I have another suggestion. Maybe, if there are still four third degree felonies against her, if the Court is inclined to release her on the

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[2] Defense counsel.

conditions that we have talked--one way we can do that is possibly enter a plea to all four of those counts. The Court could sentence her to whatever the Court wants to sentence her to.

THE COURT: Let me say one thing. That I don't think I was clear about. My inclination is not to let her be out for six weeks pending PSI. If she is going to do prison time, my inclination would be let her out a little bit, have a bond hearing, try to convince me. Otherwise, probably, I am not going to let her out again. The only reason for the furlough...is I let them take care of a couple of affairs in light of the automobile accident, in light of fact she has been ill with doctor's note, but I am not hell bent on---

MR. KAISER: I think the other counts I don't think they are going to want to proceed, assuming that we do get a prison sentence. I don't think. Maybe not, but I don't think they are going to want to proceed to trial on these. Those ones, they are third degree felonies.

....

MR. PERIKLES: That is the position I am put in. I am concerned about a couple of things. One is that we have been in trial for a week now and there has been this distinct possibility that she was going to be convicted. I think it is kind of incumbent upon the defendant or defense counsel to try to get some of these things taken care of in the event a person is convicted because generally people are taken into custody.

THE COURT: Absolutely.

MR. PERIKLES: Particularly with a case of this nature where there is going to be a prison sentence...I guess I am a little concerned about the precedent it sets in terms of letting people go. ...I lodge any objection to any release at this point....

....

MR. KAISER: I am just suggesting the mechanics the Court could use to force her to come back to court, so to speak and that would be to give her really high sentence her on the last four which the court mitigates if she showed up next week or whatever.

THE COURT: I can give her a real high sentence on that one, if you agree to it.

MR. KAISER: Yes, I think we would be willing to agree to that. She wants to, definitely wants to make those arrangements before she gets sentenced.

....

THE COURT: I tell you I am not thrilled with the idea. I would normally take her into custody. I'm only concerned because she has been ill this week, and this is unusual. She may not have thought through getting her life in order.

....

THE COURT: ...Miss. Rahmings, how many kids have you got?...

THE DEFENDANT: Three.

THE COURT: Does your mother take care of them or do you?

THE DEFENDANT: I take care of my little children.

THE COURT: Have you someone that you have got now to take care of them?

THE DEFENDANT: No. I have to find someone.

THE COURT: Can you do that over the weekend?

THE DEFENDANT: I'll try.

THE COURT: You're going to have to accomplish it because I think I am going to, if you agree to waive PSI for these purposes.

MR. KAISER: Yes, we will.

THE COURT: And any objections that you have to the...sentence which is going to be 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 will suspend entry of any sentence until she gets the PSI.

....

MR. PERIKLES: If you are going to do this, the only thing I ask is that you explain to the defendant what exactly she is doing.

THE COURT: I an going to ask her to be sworn.

(T. 493-499).

Defendant testified that she was twenty-two (22) years old with an 11th grade education. (T. 500). She indicated that she understood, the negotiations that had occurred, and that she would be sentenced to forty (40) years if she did not return on Tuesday. She also indicated that she understood that she had the right to have a presentence investigation report, which may recommend a lesser sentence, and that she would be giving up that right if she accepted the furlough. (T. 500-501).

Pursuant to this agreement, Defendant was sentenced to forty (40) years imprisonment. (R. 69). Defendant was granted the furlough until February 2, 1993, at which time the 40 year sentence would be vacated.

Defendant returned to court on the agreed date, February 2, 1993 and was taken into custody. (T. 506-507). The 40 year sentence was vacated. (R. 71). A sentencing hearing was set for March 17, 1993.

On February 24, 1993, Defendant filed a Motion for Furlough. (R. 74). In that motion Defendant requested six (6) days furlough to attend to housing matters. At the hearing on the motion on March 25, 1993, the State again objected to the motion. (T. 511). However, the State informed the court that Defendant would have to, on the record, waive sentencing under the guidelines for the purpose of giving herself the furlough. (T. 512). In granting the furlough the court stated:

> Let me make my reasonings before, that over the prosecutor's objections, I'm doing this for the following reasons. 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 with the Department of Corrections and has shown an active interest in the case.
>
> ....
>
> ... And I think that risk on bond, which I'm reinstating anyway, of $10,000, I think and so I believe there is a very good likelihood that she will return tomorrow.

I understand why the State is objecting.

(T. 512-513). The court offered Defendant a one-day furlough under the same terms as before, 40 years to be vacated upon Defendant's return.

On Friday March 26, 1993, Defendant returned to court as per the furlough agreement. At that time Defendant requested another day's furlough as she was unable to secure housing for her children. (T. 517). Again, over the State's objection, the court granted Defendant a furlough over the weekend, under the same terms as before, to return Monday March, 29, 1993, at nine o'clock in the morning. (T. 517-518).

On March 29, 1993, Defendant was not present before the court when her case was called. Defense counsel informed the court that she was "using the bathroom or something". (T. 522). The judge suggested that someone should go to the ladies' room and look for her, in the meantime, the court passed the case and went on to consider other matters. (T. 523).

Defendant's case was called a second time, where upon the following occurred:

> THE COURT[3]: Sabrina Rahmings. Where is Miss. Rahmings? She is not in the bathroom?

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[3] The trial judge, Judge Barr, was away and the case was called before Judge Ferro. Judge Ferro signed the sentencing order and guidelines scoresheet reflecting the reason for the departure sentence.

MR. KAISER: Judge, I looked on the second floor. I can't find her on the second floor.

THE COURT: All right, she has already been adjudicated and found guilty?

THE CLERK: Yes, Judge.

THE COURT: At this time, was it the agreement that she would be sentenced to 40 years?

THE CLERK: She was given 40 years.

THE COURT: If she didn't come back today?

THE CLERK: Given a furlough to return, actually, to return last Friday which she did and then they gave her--actually last Thursday, then she extended it to Friday, then extended it to today.

THE COURT: Okay. She is going to do 40 years.

(T. 523).

A sentencing guidelines scoresheet was prepared indicating a recommended sentence of five-and-a-half to seven (5½-7) years in state prison, and a permitted range of four-and-a-half to nine (4½-9) years. (R. 77). The court indicated, as the reason for imposing the departure sentence, that Defendant "waived guidelines to get furlough-failed to turn herself in". (R. 77).

Defendant appealed to the Third District Court of Appeal. On appeal, Defendant argued, inter alia, that the 40 year sentence was an illegal departure sentence. Relying on Williams v. State, 500 So. 2d 501 (Fla. 1986), Defendant argued that her

failure to appear for sentencing was not a valid basis for the departure. Defendant argued that the breach of a furlough agreement did not justify a departure sentence because the furlough agreement was not an integral part of a plea agreement. Thus, Defendant argued, Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), did not control this case.

The Third District Court of Appeal disagreed. Relying on Quarterman, the district court held that Defendant's breach of the furlough agreement justified the departure sentence. That court found that Defendant knowingly and voluntarily entered into the furlough agreement. Reasoning that the rationale of this Court's holding in Quarterman, was based on the fact of a bargained for exchange between the court and that defendant, the district court concluded that the bargained for furlough agreement is indistinguishable from the plea agreement, "it was the knowing and voluntary nature of the agreement [in Quarterman] which justified its use as a reason for the departure sentence". Rahmings, 636 So. 2d at 568. On this basis, the court reasoned, the bargained for furlough agreement is distinguishable from cases such as Logue v. State, 547 So. 2d 351 (Fla. 3rd DCA 1989), where the trial court simply imposed the conditions of the furlough.

The district court observed that, defendants who exercised their right to trial would suffer a disadvantage if furlough

agreements were enforceable only as an integral part of a plea agreement. The court reasoned that under those circumstances, trial courts would be reluctant to grant furloughs, thereby creating a disincentive for defendants to exercise their right to trial. Id. The court opined that such a result would be "improper". Id.

Accordingly, the court held that the furlough agreement justified the departure sentence. However, the court reversed Defendant's sentence on the basis that the forty (40) year sentence was an impermissible general sentence. Defendant petitioned this Court for review. This Court accepted jurisdiction on September 2, 1994.

QUESTION PRESENTED

WHETHER A DEFENDANT'S BREACH OF A BARGAINED FOR FURLOUGH AGREEMENT IS A VALID REASON FOR AN UPWARD DEPARTURE SENTENCE WHERE THE DEFENDANT EXPRESSLY AGREED TO THE TERMS OF THE FURLOUGH AND KNOWINGLY AND VOLUNTARILY ENTERED INTO THE AGREEMENT.

SUMMARY OF THE ARGUMENT

Defendant and the court entered into a specific agreement for furlough. Defendant understood the terms of the agreement, and voluntarily entered into the agreement. Pursuant to the terms of the agreement, the court granted Defendant the requested furlough, and imposed a forty (40) year sentence, which would be vacated upon Defendant's return from furlough. Defendant failed to return from furlough. Relying on Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), the Third District Court of Appeal held that Defendant's breach of this specific agreement with the court justified the upward departure sentence, where the Defendant knowingly and voluntarily entered into the agreement.

The district court read Quarterman as approving the breach of a furlough agreement as a valid reason for departure where the defendant knowingly and voluntarily entered into the agreement. The district court's conclusion that it is the fact of a knowing and voluntary agreement which justified the departure sentence is correct because there is basically no difference between a plea bargain and a furlough agreement. In both agreements the defendant bargains for a particular benefit.

From the defendant's perspective, a plea bargain consists of a defendant agreeing to waive his, or her, right to trial and accepting adjudication of guilt in exchange for a bargained for

sentence . The plea bargain, therefore, allows a defendant to bargain for a particular sentence. Thus, it is the bargained for sentence that is the 'benefit of the bargain' for which the defendant entered the plea.

Similarly, the furlough agreement in the instant case allowed Defendant to bargain for a particular 'benefit'. Although Defendant did not waive her right to trial, Defendant agreed to waive the pre-sentence investigation and the sentencing hearing and accepted the forty (40) year sentence in exchange for the furlough. Defendant received the benefit of her bargain, the furlough.

In this respect, there is no difference between a sentence imposed pursuant to a plea bargain and a sentence imposed pursuant to a furlough bargain. Accordingly, the bargain in this case, clearly justified the departure sentence.

Defendant, nevertheless, attempts to limit Quarterman only to cases where the defendant has entered a plea. Defendant argues that Williams, should control this case because she was convicted by after a trial. However, Williams should not control this case because the facts of this case are distinguishable.

In that case, the trial court began with the presumption that the defendant would not be sentenced under the guidelines,

unless the defendant, inter alia, appeared for sentencing. The defendant did not bargain for that condition, as the Defendant did in this case. Moreover, there is no indication in that case that the defendant had any option but to accept the condition imposed upon him. Additionally, at that time, the court did not indicate the sentence that it would impose if the defendant did not appear for sentencing. The defendant therefore could not know the penalty for his failure to appear.

Nevertheless, Defendant took the benefit of her bargain. Defendant's only obligation under this agreement was to return to court on the agreed date. Defendant took the benefit of her bargain, but did not fulfill her obligation. Defendant should be estopped from challenging the legality of the agreement.

Moreover, Defendant knew, in advance, the penalty that would be imposed if she did not return to court as she agreed. (T. 500-501). Defendant, therefore, made a conscious choice to breach the agreement and expose herself to the forty (40) year sentence. Defendant should not now be allowed to void the agreement.

This Court should therefore affirm the district court's decision .

ARGUMENT

A DEFENDANT'S BREACH OF A BARGAINED FOR FURLOUGH AGREEMENT IS A VALID REASON FOR AN UPWARD DEPARTURE SENTENCE WHERE THE DEFENDANT EXPRESSLY AGREED TO THE TERMS OF THE FURLOUGH AND KNOWINGLY AND VOLUNTARILY ENTERED INTO THE AGREEMENT.

Defendant and the court entered into a specific agreement for furlough. Defendant understood the terms of the agreement, and voluntarily entered into the agreement. (T. 499-501). Pursuant to the terms of the agreement, the court granted Defendant the requested furlough, and imposed a forty (40) year sentence, which would be vacated upon Defendant's return from furlough. Defendant failed to return from furlough. Relying on Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), the Third District Court of Appeal held that Defendant's breach of this specific agreement with the court justified the upward departure sentence, where the Defendant knowingly and voluntarily entered into the agreement.

Defendant now argues that the district court's decision conflicts with this Court's holding in Williams v. State, 500 So. 2d 501 (Fla. 1986) and Quarterman. Defendant argues that under Williams and Quarterman, the furlough could not provide the basis for the upward departure sentence because it was not part of a negotiated plea bargain. However, the district court's decision is in accord with Quarterman and does not conflict with Williams.

THE DISTRICT COURT'S DECISION IS IN ACCORD WITH QUARTERMAN

Defendant knowingly and voluntarily entered into furlough agreement. Under this agreement Defendant waived sentencing under the guidelines in exchange for the furlough. On this basis, the district court's decision is in accord with Quarterman.

In Quarterman, the defendant requested a few days furlough prior to entering into a plea agreement. Quarterman, 527 So. 2d at 1381. The guilty plea was tendered with the understanding that the defendant would return for sentencing on a specific day, at which time he would be sentenced to five-and-a-half (5½) years incarceration. Id. The defendant understood that if he failed to appear as agreed, the court could sentence him to anything in the court's discretion. Id. "Prior to accepting the plea, the trial court reiterated these conditions, specifically asking Quarterman if he understood the conditions and agreed to them". Id. The defendant failed to appear as agreed, and the court sentenced him, in abstentia, to fifteen (15) years. The recommended guidelines sentence was four-and-a-half to five -and-a-half (4½-5½) years. Id.

This Court found that the departure sentence was based, in part, on the plea agreement itself, and that the conditions were accepted as an integral part of the bargain itself. Id. at 1382. This Court held that the "plea bargain itself serves as a clear and convincing reason for departure". Id.

In that case, this Court distinguished the holding in Williams by noting that the issue in that case was whether a defendant's failure to appear, in and of itself, justified a departure sentence. This Court also observed that since Williams was decided, this Court "has recognized that a plea bargain can constitute a valid reason for departure". [citation omitted] Id. at 1382. This Court concluded that:

> [Williams stands] for the limited 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 [a] defendant acquiesced in the conditions imposed by the trial court". [citation omitted]

Id. at 1382. Quarterman, therefore, limits Williams to cases where failure to appear for sentencing is cited as the sole basis for imposing a departure sentence.

The district court read Quarterman as approving the breach of a furlough agreement as a valid reason for departure where the defendant knowingly and voluntarily entered into the agreement. In reaching this conclusion, the district court observed:

> 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."[citations omitted]. Clearly, it was the knowing and voluntary nature of the agreement which justified its use as a reason for the departure sentence.

Rahmings, 636 So. 2d at 568.

Moreover, in Quarterman, this Court noted that, the defendant in Williams simply acquiesced in the conditions imposed by the court. In the instant case, Defendant did not simply acquiesce in the condition. Defendant, through counsel, actively participated in the negotiations that yielded the forty (40) year sentence. The court reiterated the terms, and Defendant indicated that she understood the conditions and voluntarily accepted them prior to accepting the furlough. The district court observed that "[t]here is no question that the defendant in this case knowingly and voluntarily entered into the furlough agreement with the court". Rahmings, 636 So. 2d at 567.

The district court noted further that, although the furlough agreement in Quarterman was part of a plea agreement, the fact that the agreement in this case was not part of a plea is not dispositive. That court opined that it was the "knowing and voluntary" nature of the agreement which provided the justification for the departure.

FURLOUGH AGREEMENT AND PLEA AGREEMENT ARE BASICALLY THE SAME

The district court's conclusion that it is the fact of a knowing and voluntary agreement which justified the departure sentence is correct because there is basically no difference between a plea bargain and a furlough agreement. In both agreements the defendant bargains for a particular benefit.

From the defendant's perspective, a plea bargain consists of a defendant agreeing to waive his, or her, right to trial and accepting adjudication of guilt in exchange for a bargained for sentence . The plea bargain, therefore, allows a defendant to bargain for a particular sentence. Thus, it is the bargained for sentence that is the 'benefit of the bargain' for which the defendant entered the plea. See, e.g., Hunt v. State, 613 So. 2d 893 (Fla. 1992)(Guilty plea voidable where defendant promised lesser sentence than was in fact received), Parker v. State, 616 So. 2d 1121 (Fla. 1st DCA 1993)(court has affirmative duty to permit defendant to withdraw his or her plea when court decides to impose longer sentence than sentence contemplated when plea was entered).

Like the plea agreement, the furlough agreement in the instant case allowed Defendant to bargain for a particular 'benefit'. Although Defendant did not waive her right to trial, Defendant agreed to waive the pre-sentence investigation and the

sentencing hearing and accepted the forty (40) year sentence in exchange for the furlough. Defendant received the benefit of her bargain, the furlough.

In this respect, there is no difference between a sentence imposed pursuant to a plea bargain and a sentence imposed pursuant to a furlough bargain. Accordingly, the bargain in this case, clearly justified the departure sentence.

Moreover,

> there is a perceptible difference between a circumstance where the decision to depart originates with the trial court, and where, as here, the departure flows from the defendant's acceptance of the consensually arrived at sentence.

White v. State, 531 So. 2d 711, 713 (Fla. 1988), citing Rowe v. State, 496 So. 2d 857, 859 (Fla. 2nd DCA 1986). In the instant case, Defendant initiated the sentencing negotiation by requesting the furlough. Defendant actively participated in the negotiations that yielded the forty (40) year sentence. Defendant accepted that consensually arrived at departure sentence as a condition of accepting the furlough. Defendant therefore received the sentence for which she bargained. Thus, "there is no reason why the terms of a mutually agreed sentencing bargain should not be enforced". Harris v. State, 608 So. 2d 898, 899 (Fla. 3rd DCA 1992).

WILLIAMS IS DISTINGUISHABLE.

Defendant, nevertheless, attempts to limit Quarterman only to cases where the defendant has entered a plea. Defendant argues that Williams, should control this case because she was convicted by after a trial. However, Williams should not control this case because the facts of this case are distinguishable.

In that case, the defendant entered into a plea agreement with the state. Williams. 500 So. 2d at 501. Prior to accepting the plea, the court informed the defendant that he would be sentenced within the sentencing guidelines only if he, inter alia, appeared for sentencing on the scheduled date. Id. at 501-502. The defendant agreed to the conditions and was subsequently released on his own recognizance. Id. at 502. The defendant absconded and failed to appear for sentencing.

The defendant was eventually recaptured and brought back for sentencing. The defendant's guidelines recommended sentence was any nonstate prison sanction. The court imposed a supra guidelines sentence of fifteen (15) years imprisonment. The court cited the defendant's failure to appear for sentencing as its reason for imposing the departure sentence. Id.

Reasoning that because failure to appear for sentencing is a separate criminal offense[4], this Court concluded that to base a departure sentence on a defendant's failure to appear for sentencing would essentially sentence the defendant for a crime for which he had not been convicted. Id. This Court reasoned further that, because the statutory maximum for failure to appear is five (5) years, a departure sentence in excess of five years would be an illegal sentence. Id. This Court noted, moreover, that because the extent of departure from the guidelines is not subject to appellate review, a departure in excess of five years would circumvent the legislatively established five year maximum. Id. at 503. This Court noted further that, the defendant's acquiescence to the conditions could not confer authority on the court to impose the departure sentence.

In that case, the trial court began with the presumption that the defendant would not be sentenced under the guidelines, unless the defendant, inter alia, appeared for sentencing. The defendant did not bargain for that condition, as the Defendant did in this case. Moreover, there is no indication in that case that the defendant had any option but to accept the condition imposed upon him. Additionally, at that time, the court did not indicate the sentence that it would impose if the defendant did

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[4] See, Section 843.15 Florida Statutes (1985).

not appear for sentencing. The defendant therefore could not know the penalty for his failure to appear.

In the instant case, Defendant initiated the sentencing negotiations by requesting the furlough. Defendant indicated that she needed to make living arrangements for her minor children. The court, defense counsel and the State, in Defendant's presence, entered into negotiations to determine under what conditions the court could grant the furlough. At the conclusion of the negotiations, and under oath, Defendant indicated that she understood the negotiations and agreed to the terms of the furlough. Defendant specifically agreed to the forty (40) year sentence. Defendant therefore waived sentencing within the guidelines recommended sentence in exchange for the furlough.

Thus, unlike the defendant in William, Defendant in this case negotiated for the forty (40) year sentence. The court did not "impose" the condition, and Defendant did not merely acquiesce to that condition. Defendant specifically agreed to the sentence prior to accepting the furlough. Defendant therefore knew the penalty that would be imposed for her breach of that agreement.

Moreover, in Williams, the court indicated, as its reason for imposing the departure sentence, "...DEFENDANT DID NOT APPEAR

FOR SENTENCING ON JULY 20, 1984". Williams, 500 So. 2d at 502. Clearly then, the only basis indicated for the departure sentence was the defendant did not appear for sentencing. This Court therefore framed that issue as "whether a defendant's failure to appear for sentencing constitutes a clear and convincing reason for departure from the guidelines". Id. at 502.

In the instant case, the court indicated that its reason for imposing the departure sentence was that Defendant "waived guidelines to get furlough-failed to turn herself in". (R. 77). The basis for the departure sentence in this case then, was that Defendant waived sentencing within the guidelines in exchange for the furlough, it was not based on Defendant's failure to return for sentencing. Williams, is therefore distinguishable from the instant case.

Moreover, Williams was decided before Quarterman, and at the time that Williams was decided, this Court had not yet recognized that a defendant could agree to a sentence in excess of the guidelines. See, e.g., Harris v. State, 524 So. 2d 1104 (Fla. 3rd DCA 1988). Thus, because Williams did not contemplate a defendant's agreement to a departure sentence, it should not control this case.

DEFENDANT SHOULD BE ESTOPPED FROM CHALLENGING THE AGREEMENT.

Nevertheless, Defendant took the benefit of her bargain. She indicated that she needed the time to make living arrangements for her children. At that time, the court was under no obligation to grant Defendant's request.[5] The court granted her all the time that she requested. Defendant's only obligation under this agreement was to return to court on the agreed date. Defendant took the benefit of her bargain, but did not fulfill her obligation.

> In a variety of contexts...out courts have held that sentences and other judicial actions which deviate from statutory and even constitutional requirements to the potential benefit of the defendant and to which he agreed may not be the subject of a successful challenge brought after he has failed to carry any burden imposed upon him.

Madrigal v. State, 545 So. 2d 392,394 (Fla. 3rd DCA 1989). In this case, Defendant enjoyed the benefit of her bargain. She took the extended furlough. Her only obligation was to return to court on the agreed date. She failed to carry her end of the bargain. The court was therefore free to tender to Defendant the consideration she bargained for. Defendant having enjoyed the benefit of her bargain cannot now challenge the agreement. See, also, King v. State, 373 So. 2d 78 (Fla. 3rd DCA 1979), cert. denied, 383 So. 2d 1197 (Fla. 1980)(Defendant waived his right to

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[5] See, Fla. R. Crim. P. 3.810, requiring trial court to commit defendant to the custody of the sheriff upon pronouncement of sentence.

challenge the legality of a probation which he had enjoyed and violated), Whitchard v. State, 459 So. 2d 439 (Fla. 3rd DCA 1984)(Defendant who entered guilty plea in exchange for a term of imprisonment followed by parole may not accept and enjoy a probation then challenge it as illegal after violating its terms).

Moreover, Defendant knew, in advance, the penalty that would be imposed if she did not return to court as she agreed. (T. 500-501). Defendant, therefore, made a conscious choice to breach the agreement and expose herself to the forty (40) year sentence. Defendant should not now be allowed to void the agreement.

The State is mindful that the forty (40) year sentence appears excessive, where Defendant scored in the permitted guidelines range of four-and-a-half to nine (4½-9) years. However, Defendant negotiated for this sentence and voluntarily entered into the agreement. This Court should not set aside an agreement which is fully within the law[6] and which was knowingly and voluntarily agreed to by Defendant. McGarry v. State, 471 So. 2d 615 (Fla. 4th DCA 1985).

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[6] Section 812.13 Florida Statutes (1993), provides a penalty of life imprisonment for armed robbery. Defendant was convicted of two counts of armed robbery. The statutory maximum for those two convictions would be two consecutive life sentences. The forty (40) year sentence is clearly within the statutory maximum.

Moreover, as the district court observed, to approve a furlough agreement only when it is tendered as part of a plea agreement would effectly penalize defendants who exercised their right to a trial. Defendants, knowing that their opportunities for presentence furlough would be limited if they were convicted after trial, would naturally be reluctant to opt for trial. Such a result clearly would be "improper". Additionally, a trial court would be reluctant to grant a furloughs in trial conviction because it would not be able to impose a sentence to ensure the defendant's return.

CONCLUSION

Based on the foregoing argument and cited authorities, Respondent respectfully requests that this Court affirm the decision of the district court of appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

P. R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General
Florida Bar No. 0992348
Office of the Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite N921
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **LOUIS CAMPBELL,** Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125 on this 2nd day of December.

P. R. Taylor

PAULETTE R. TAYLOR
Assistant Attorney General

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