IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 85,784

CHRISTOPHER WILLIAMS, :

Respondent. :

_____ :



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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## OTHER AUTHORITIES

## STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of case and facts subject to the following additions and clarifications:

The written plea agreement indicated, as among its terms, that "This is a guidelines plea to the Recommended Range, if not, either side may withdraw." (R30).

At the plea hearing, defense counsel stated that Mr. Williams agreed to community control because he had a job and did not wish to go to jail (R7). The trial court established that Mr. Williams had reviewed and signed the plea agreement (R7-8). During the plea colloquy, the following exchange occurred between the trial court and Mr. Williams:

> Q. In return for your plea you are going to be placed on a period of two years community control followed by a period of probation up to the court; you understand that?
> A. Yes sir.
> Q. You understand that would probably be above what the recommended guideline range would be, but you're agreeing to the community control to avoid a possible sentence in the County jail?
> A. Yes sir.

(R9). At the sentencing proceeding Mr. Williams agreed with the community control sentence in order to avoid jail time and agreed with the trial judge that the sentence was an above guidelines disposition, not a recommended disposition as indicated in the plea agreement (R15).

## SUMMARY OF THE ARGUMENT

Mr. Williams signed a written plea agreement which stated that the agreed upon community control sentence was in the range recommended by the sentencing guidelines. At a proceeding in which his plea was accepted, he was informed by the trial court the agreed upon sentence would be above the recommended range. Mr. Williams consented because he did not want to go to jail, but the written plea agreement was not amended. At a later sentencing proceeding, Mr. Williams was informed that the agreed upon sentence was a departure sentence. Mr. Williams consented because he did not want to go to jail. The plea agreement was not amended and no written departure reasons were made part of the record.

Written reasons for departure are necessary upon imposing departure sentences. An exception of the requirement for written reasons should not be made for sentences imposed pursuant to a plea agreement, especially where, as in the instant case, the written agreement does not indicate that a departure sentence is integral to the plea. If an exception is made for departure sentences pursuant to a plea agreement, the written plea agreement should contain, clearly on its face, the express agreement to a departure sentence and valid reasons for imposing a departure sentence. An appellate court should not have to search through transcripts of proceedings for valid departure reasons. The decision of the Second District Court of Appeal reversing for lack of written reasons justifying the departure sentence should be affirmed.

## ARGUMENT

THE DECISION UNDER REVIEW SHOULD BE QUASHED SINCE A VOLUNTARY PLEA AGREEMENT WHICH IS A PART OF THE RECORD ON APPEAL FULLY JUSTIFIES SUCH A DEPARTURE AND NEGATES THE PURPOSE OF PLACING THE REASON FOR DEPARTURE ON THE SENTENCING DOCUMENT BECAUSE IT IS APPARENT ON THE RECORD THAT A PLEA BARGAIN WAS THE REASON FOR THE DEPARTURE. (AS STATED BY PETITIONER)

The State sought discretionary review of the instant case, asserting that the reason for reversal was "at odds with" decisions of this Court and of the First[1], Third, and Fifth[2] District Courts of Appeal (Petitioner's Brief on the Merits at 3, 5). The State

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[1] Petitioner cites Reynolds v. State, 598 So. 2d 188 (Fla. 1st DCA 1992) and Hammond v. State, 591 So. 2d 1119 (Fla. 1st DCA 1992), for the proposition that a negotiated plea agreement is a valid reason for departure without any written reasons. But see Wolf v. State, 595 So. 2d 1078 (Fla. 1st DCA 1992) (departure sentences imposed pursuant to a valid plea bargain were lawful despite the lack of written departure reasons, but, the "better practice dictates a written statement specifying that a departure sentence is based on a negotiated plea agreement")

[2] Petitioner cited Smith v. State, 553 So. 2d 748 (Fla. 5th DCA 1989), which held that "While it would be better form to state the negotiated plea as the written reason for departure the plea is in the record and it alone justifies the enhanced penalty." [Emphasis added.] Smith, 553 So. 2d at 748. However, in Williams v. State, 618 So. 2d 773, 774 n.1 (Fla. 5th DCA 1993), the court stated that "Although a negotiated plea is a basis for departure, it should, nevertheless, be so stated in writing by the trial court." In Brooks v. State, 649 So. 2d 329 (Fla. 5th DCA 1995), the court held that "Although we recognize that standing alone, this departure sentence would require the furnishing of contemporaneous written reasons, we affirm because this sentence was imposed pursuant to a plea agreement in which Brooks specifically agreed to the imposition of a departure sentence." It appears that there may be conflict within the Fifth District Court of Appeal.

takes exception to the Second District Court of Appeal's holding that:

> A plea bargain between the state and the defendant is a valid reason to depart from the guidelines. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988); State v. Ebenshade, 493 So. 2d 487 (Fla. 2d DCA 1986). However, even under these circumstances the sentencing document must reflect a reason for departure. No reason is stated in the court's sentencing order. Because no written reason was given for the departure sentence, we reverse the sentence imposed.

Williams v. State, 653 So. 2d 407, 408 (Fla. 2d DCA 1995).

"The general rule in sentencing is to sentence within the guidelines; departure from the guidelines is the exception to the rule." Wemmett v. State, 567 So. 2d 882, 886 (Fla. 1990). See Lambert v. State, 545 So. 2d 838, 842 (Fla. 1989) ("Departures are to be affirmatively discouraged."). "The exception of upward departure is intended to apply when extraordinary circumstances exist to reasonably justify aggravating ... the sentence." Wemmett, 567 So. 2d at 886.

Neither the Florida Statutes or the Florida Rules of Criminal procedure indicate an exception to the requirement for written reasons to accompany a sentencing guidelines departure sentence. Section 921.001(6), Florida Statutes (1993) ("The sentencing guidelines shall provide that any sentences imposed outside the range recommended by the guidelines be explained in writing by the trial court judge."); Florida Rules of Criminal Procedure 3.701 (b)(6) ("departures from the presumptive sentences established in the guidelines shall be articulated in writing ..."); Florida Rules

of Criminal Procedure 3.701 (d)(11) ("Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure.").

> Requiring a court to write its reasons for departure at the time of sentencing reinforces the court's obligation to think through its sentencing decision, and it preserves for appellate review a full and accurate record of the sentencing decision.

Smith v. State, 598 So. 2d 1063, 1067 (Fla. 1992).

In Smith v.State, 529 So. 2d 1106, 1107 (Fla. 1988), this Court did state that "Once a plea agreement is negotiated which specifies the permissible sentence, the agreement is binding and is sufficient to justify a departure from the presumptive sentence." However, this Court also stated in State v. Jackson, 478 So. 2d 1054, 1056 (Fla. 1985), that "The legislature and this Court, by statute and rule have clearly mandated written orders to assure effective appellate review." In Troutman v. State, 630 So. 2d 528 (Fla. 1993), this Court held that when a juvenile enters into a plea agreement authorizing the imposition of adult sanctions, a finding of the suitability for adult sanctions must be made and contemporaneously reduced to writing. This holding was made in light of the right to treat juveniles differently from adults, but relied directly on the requirements of written findings in imposing death sentences and guideline departure sentences. Troutman, 630 So. 2d at 531-532. This Court should find written departure reasons necessary even where the sentence may be authorized by a plea agreement.

If this Court holds that written reasons may not be necessary in a case where the sentence may have been authorized by a plea, it should hold that the written plea agreement in such cases should be facially sufficient to establish valid departure reasons. The plea agreement in the instant case indicated, as among its terms, that "This is a guidelines plea to the Recommended Range[3], if not, either side may withdraw." (R29-31). The plea agreement indicated a sentence of two years of community control followed by a term of probation to determined by the trial court (R30). In this plea agreement Mr. Williams did not agree to a departure sentence. On the contrary, this agreement specifically stated that the sentence was to be within the guidelines recommended range.

A trial court can not rely on a written plea agreement to substantiate a departure sentence where the agreement specifically states that the sentence will be within the guidelines. Calleja v. State, 562 So. 2d 395 (Fla. 5th DCA 1990); Cecil v. State, 596 So.2d 461 (Fla. 1st DCA 1992) (reversal for imposition of guidelines sentence where no written reasons for departure were given, and not only did defendant not agree to be sentenced outside the guidelines as part of her plea bargain, guidelines sentencing was a part of her agreement). The written plea agreement in this case

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[3] The sentencing guidelines recommended and permitted any nonstate prison sanction (R27). Where the guidelines permit any nonstate prison sanction, two years of community control is in excess of the twenty-two months of community control allowed by Section 921.001(5), Florida Statutes (1993). Thompson v. State, 617 So. 2d 411 (Fla. 2d DCA 1993).

is not a competent substitute for valid written reasons for departure.

The case principally relied upon by the petitioner, Casmay v. State, 569 So. 2d 1351, 1353 (Fla. 3d DCA 1990), supports this view. The Third District Court of Appeal held that "Where, as here, a sentencing-guidelines departure is imposed pursuant to a valid plea agreement, no stated reasons, written or oral, are necessary to justify the subject departure; a voluntary plea agreement spread out for all the world to see fully justifies the departure." Casmay, 569 So. 2d at 1353; (Petitioner's Brief on the Merits at 7). See Musgrove v. State, 599 So. 2d 725 (Fla. 1st DCA 1992) (plea agreement did not provide a valid reason for departure because the plea agreement did not make clear that the defendant understood that the guidelines would not apply). Compare Brooks v. State, 649 So. 2d 329 (Fla. 5th DCA 1995), (affirming departure sentence without written reasons because the sentence was imposed pursuant to a plea agreement in which the defendant specifically agreed to the imposition of a departure sentence). In the instant case, the written plea agreement does not establish "for all the world to see" that a departure sentence was a part of the plea agreement.

Where neither the sentencing documents, nor the written plea agreement establishes valid departure reasons, an appellate court should not refer to transcripts of the proceedings to establish a basis for a departure sentence. Where a statute requires that a written order give findings and reasons, a transcript of the

proceedings upon which the order is based can not act as a substitute. Jackson, 478 So. 2d at 1056. See Jones v. State, 639 So. 2d 28 (Fla. 1994), (a downward departure without written reasons on the sentencing order must be reversed with no possibility of departure from the guidelines, even though the records and the transcript of the sentencing proceeding indicate that the trial court had found reasons to justify the departure).

However, should this Court chose to rely on the transcripts to determine whether Mr. Williams agreed to a departure sentence in entering his plea, the following exchange occurred between the trial court and Mr. Williams during the plea colloquy:

> Q. In return for your plea you are going to be placed on a period of two years community control followed by a period of probation up to the court; you understand that?
> A. Yes sir.
> Q. You understand that would probably be above what the recommended guideline range would be, but you're agreeing to the community control to avoid a possible sentence in the County jail?
> A. Yes sir.

(R9). This colloquy establishes that Mr. Williams orally agreed to a sentence above the recommended guideline range in order to avoid possible jail sentence, not that he (or the trial court) was aware that the sentence would be a departure sentence in excess of the permitted guidelines sentence or that he waived his right to a guidelines sentence. See Tirado v. State, 583 So. 2d 730 (Fla. 3d DCA 1991) (defendants' stated preference to jail sentence over community control or probation did not waive their rights under written plea agreement to be sentenced within the guidelines);

Lloyd v. State, 633 So.2d 1205 (Fla. 5th DCA 1994) (departure sentence imposed was invalid because it was not supported by contemporaneous written reasons and the record does not indicate that the defendant agreed to be sentenced outside the guidelines as part of his plea).

The State argues that statements from the transcript of the sentencing hearing indicates support for finding that the plea agreement is binding and sufficient without written reasons to justify the departure (Petitioner's Brief on the Merits at 6). At the sentencing proceeding Mr. Williams agreed with the community control sentence to avoid jail time and agreed with the trial judge that the sentence was an above guidelines disposition, not a recommended disposition as indicated in the plea agreement (R15). This colloquy shows that Mr. Williams now was agreeable to a departure sentence to avoid jail time, not pursuant to, but despite his plea agreement. The transcript of oral statements from a sentencing proceeding is not sufficient to satisfy the statutory requirement of written reasons for a departure sentence. State v. Jackson, 478 So. 2d 1054, 1055-1056 (Fla. 1985). As this Court stated in Jackson, 478 So. 2d at 1056, "To accept the state's interpretation would effectively change the rule and statute to mean that justification for a departure need only be found by an examination of the record. Such an interpretation was the intent of neither the legislature nor this court in directing that any departure be explained in writing." See also Hause v. State, 643 So. 2d 679 (Fla. 4th DCA 1994) (written reasons required for

departure sentence even if the defendant requested the sentence imposed).

The record in this case is inadequate to establish a departure reason based on an agreement. "Departures from the recommended or permitted guidelines sentences should be avoided unless there are circumstances that reasonably justify aggravating or mitigating the sentence." Florida Rules of Criminal Procedure 3.701 (d)(11); Florida Rules of Criminal Procedure 3.701 (b)(6) ("departures from the presumptive sentences established in the guidelines shall be articulated in writing and made when circumstances or factors reasonably justify the aggravation or mitigation of the sentence."). In the instant case, Mr. Williams agreed to a term of community control to avoid jail time and to keep his job (R9, 15). As part of the plea agreement, a charge of possession of marijuana was dropped. However, had Mr. Williams pled straight up to the charges, he would have still fallen in the same cell in the guidelines[4]. Mr. Williams oral agreement at the sentencing proceeding to accept a departure sentence to avoid jail is not a circumstance justifying "aggravating the sentence". "Unless upward or downward departures are justified by valid written reasons, a

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[4] Had Mr. Williams pled straight up, he would have had an additional third degree felony on his scoresheet. This would have yielded an additional 8 points on his scoresheet. Florida Rule of Criminal Procedure 3.988(g). His scoresheet total would have been 66 points instead of 58 points (R27). Both of these point totals yield a guidelines sentence of any nonstate prison sanction in both the recommended and permitted ranges. Florida Rule of Criminal Procedure 3.988(g).

trial judge may not depart from the guidelines recommendation." Branam v. State, 554 So. 2d 512 (Fla. 1990).

The decision of the Second District Court of Appeal to require that "under these circumstances the sentencing document must reflect a reason for departure" should be affirmed.

## CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Respondent asks this Honorable Court to affirm the decision of the Second District Court of Appeal. This Honorable Court should find that written reasons for departure must be filed in all cases where a departure sentence is imposed. In the alternative, this Honorable Court should find that for a written plea agreement to provide an exception to the requirement for written reasons, that the agreement on its face establish that a departure sentence is an integral part of the agreement and that the agreement on its face establish circumstances justifying aggravation of the sentence.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Dale E. Tarpley, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 18 day of September, 1995.

Respectfully submitted,

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