IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,960

DCA NOS. 94-1301 & 94-1545
(consolidated)

HENRY FRANQUIZ,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
(CERTIFIED CONFLICT)

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,960

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-vs-

THE STATE OF FLORIDA

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INTRODUCTION

Petitioner, Henry Franquiz, was the Defendant in the trial court and the Appellee before the District Court of Appeal of Florida, Third District. The Respondent, the State of Florida, was the prosecution in the trial court, the Appellant before the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent or by proper name where appropriate. References to the appendix to this brief are marked "A." References to the Record transmitted to this Court by the Clerk of the Third District Court of Appeal on August 21, 1995, are designated "R.".

STATEMENT OF THE CASE AND FACTS

Petitioner Henry Franquiz was the defendant in a criminal case pending before the Eleventh Judicial Circuit of Florida. Mid-trial, the parties entered into a plea bargain resulting in a term of community control for Mr. Franquiz, to be followed by probation (R. 229). The probationary term was a downward departure from his recommended guidelines range of seventeen to twenty-two years (R. 198). During the negotiations for the plea, the court noted that Mr. Franquiz could be facing a long jail sentence in the event of a violation, but this was not a certainty, for the court said that in the event of a violation, "You stay in jail until the time of the hearing, and then I'll decide whether you are going to stay in jail a lot longer or [receive] some other type of treatment." (R. 218). While the State expressly stated that it wanted as terms of the deal an adjudication, a term of community control, and counseling, it made no express request regarding the consequences of violation or whether any sentence imposed in the event of a violation necessarily would have to be within the guidelines (R. 207, 214, 230, 235).

The State later filed an affidavit of violation of community control against Mr. Franquiz (R. 164-67). The trial court offered Mr. Franquiz the option of a plea to the violation on the condition that he take a polygraph examination; if he passed, the court would dismiss the affidavit and restore the community control but if he did not pass, the court would sentence him to ten years in prison saying that although there were violations, "I don't consider them more serious than 10 years in the penitentiary." (T. 7, 10, 12). The State objected to this offer on the basis that ten years would be a downward departure from the guidelines (T. 9). Mr. Franquiz accepted the offer and, when the court determined that he had not successfully completed the polygraph, sentenced Mr. Franquiz to ten years in prison in accordance with the deal, to be followed by probation (R. 181-82; T. 12-14). The court did not enter written reasons for the downward departure sentence. The State appealed to the District Court of Appeal of Florida, Third District, the trial court's failure to provide timely written reasons for

the downward departure (R. 186).[1]

While the appeal, *State v. Franquiz*, was pending before the Third District Court of Appeal, another state appeal implicating the same issues also was pending before the Third District, *State v. Zlockower*. Like Mr. Franquiz, Mr. Zlockower initially had been placed on probation pursuant to a plea bargain with the State; the probationary sentence was a downward departure from Mr. Zlockower's guidelines. When Mr. Zlockower violated his probation, the court sentenced him to a prison term that was itself a downward departure from the guidelines. The court provided no written reasons for the downward departure sentence.

The Third District decided *Zlockower* first and therein agreed with the State, ruling that this Court's decisions in *Pope v. State*, 561 So. 2d 554 (Fla. 1990), and *Ree v. State*, 565 So. 2d 1329 (Fla. 1990),[2] required written reasons for departure in all circumstances.[3] *State v. Zlockower*, 650 So. 2d 692 (Fla. 3d DCA 1995). The Third District cited *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994), and *State v. McMahon*, 605 So. 2d 544 (Fla. 2d DCA 1992), as supporting its decision but recognized that its decision also was in conflict with several decisions directly on point from the Fourth and Fifth District Courts of Appeal, *State v. Glover*, 634 So. 2d 247 (Fla. 5th DCA 1994); *Schiffer v. State*, 617 So. 2d 357 (Fla. 4th DCA 1993); *State v. Hogan*, 611 So. 2d 78 (Fla. 4th DCA 1992).

The Third District also noted that, contrary to the decision of the Fourth District Court of Appeal in *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA), *rev. denied*, 519 So. 2d 988 (Fla. 1987), had the court placed its reason for the departure in writing and stated that reason as being the fact that the original downward departure was made pursuant to a plea bargain to

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[1]Mr. Franquiz filed a notice of cross-appeal from the revocation, and the appeals were consolidated.

[2]*Modified, Lyles v. State*, 576 So. 2d 706 (Fla. 1991), *Smith v. State*, 598 So. 2d 1063 (Fla. 1992).

[3]The *Zlockower* opinion is set forth fully in the Appendix to this brief and therefore is not quoted fully in this Statement of the Case and Facts; Petitioner nevertheless incorporates it herein as if fully set forth.

which the state was a party, the Third District would not find that reason sufficient. That is to say, the Third District did not approve a prior agreement to a downward departure to probation as a valid reason supporting a subsequent downward departure upon revocation of that probation, unless the State expressly agreed to this possibility at the time of the original departure. *Zlockower*, 650 So. 2d at 694 (A. 5).

Shortly after issuing the opinion in *Zlockower*, the Third District reversed the instant case on the basis of *Zlockower* and remanded with instructions to sentence Mr. Franquiz within the guidelines or permit him to withdraw his plea to the violation, but certified in this case the same conflict as it certified in *Zlockower* (A. 1-2). Petitioner then filed a timely notice to invoke the discretionary jurisdiction of this Court.[4]

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[4]Zlockower also initially sought review before this Court, but ultimately dismissed that review before this Court addressed the merits when the parties reached an agreement. No. 85,442 (Fla. May 23, 1995).

The Third District Court of Appeal has stayed issuance of its mandate in this case pending this Court's review.

QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE STATE'S AGREEMENT TO A DOWNWARD DEPARTURE TO PROBATION CANNOT PROVIDE A SUFFICIENT BASIS TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE IMPOSED UPON REVOCATION OF THAT PROBATION WITHOUT NEED FOR OTHER REASONS NOR ANY WRITTEN STATEMENT OF THE REASON FOR DEPARTURE?

SUMMARY OF ARGUMENT

The Third District Court of Appeal held that where the parties expressly agreed to a downward departure to probation, if upon revocation of probation the trial court wishes to impose a downward departure sentence, the trial court must have a reason for doing so other than the State's original agreement to a downward departure, and it must state that reason in a writing made contemporaneously with the imposition of the sentence. This decision conflicts with decisions of the Fourth and Fifth District Courts of Appeal holding that the State's prior agreement is a sufficient reason for downward departure, and that the trial court therefore need not provide any written justification for the downward departure.

The Fourth and Fifth District Courts of Appeal have the better argument in this case. Their position not only finds support in this Court's decisional law, but also rests on several important and fundamental policy considerations: 1) in such a situation, the parties already have agreed that a guidelines sentence is not necessarily appropriate, or at least necessary, in the case so where upon revocation the trial court elects to impose a sentence that is more than probation but not fully up to the guidelines, the State should not be heard to complain; 2) probation is a matter of grace with the court, and the court ought be given as much freedom as possible to effectively manage its probationers and tailor an appropriate form of supervision; 3) the purpose of requiring trial judges to state departure reasons in writing is to allow the parties time to reflect on whether there are grounds to appeal from the departure, but where the reason for departure is a free and voluntary agreement by the parties to that departure, then neither party has cause for appeal nor accordingly, need for such written reasons. This Court should quash the decision of the Third District Court of Appeal.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT THE STATE'S AGREEMENT TO A DOWNWARD DEPARTURE TO PROBATION CANNOT PROVIDE A SUFFICIENT BASIS TO JUSTIFY A DOWNWARD DEPARTURE SENTENCE IMPOSED UPON REVOCATION OF THAT PROBATION WITHOUT NEED FOR OTHER REASONS NOR ANY WRITTEN STATEMENT OF THE REASON FOR DEPARTURE.

It has long been the policy of this State that a plea agreement between the parties to a criminal case is a sufficient justification for the trial court's imposition of sentence that departs from the sentencing guidelines. *E.g.*, §§ 921.0016(3)(a), (4)(a) (legitimate, uncoerced plea bargain is justifiable reason for departure), Fla. Stat. (Supp. 1994); *Smith v. State*, 529 So. 2d 1106, 1107 (Fla. 1988) (approving upward departure and holding, "Once a plea agreement is negotiated which specifies the permissible sentence, the agreement is binding and is sufficient without any stated reasons to justify a departure from the presumptive sentence."); *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988) (defendant's agreement that his failure to appear after furlough would result in specific departure sentence was legitimate reason to depart); *Holland v. State*, 508 So. 2d 5 (Fla. 1987); *State v. Collins*, 482 So. 2d 388 (Fla. 5th DCA 1986) (State's agreement to downward departure was sufficient basis to support downward departure); *Bell v State*, 453 So. 2d 478 (Fla. 2d DCA 1984).[5]

The instant case and its companion *State v. Zlockower*, 650 So. 2d 692 (Fla. 3d DCA 1995), *rev. dismissed*, No. 85,442 (Fla. May 23, 1995), involve, in the specific context of the revocation of probation or community control, the intersection of that policy with this Court's pronouncements in *Pope v. State*, 561 So. 2d 554 (Fla. 1990), and *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified*, *Lyles v. State*, 576 So. 2d 705 (Fla. 1991), *modified, Smith v. State*, 598 So. 2d 1063 (Fla. 1992), that departures must be for a legitimate reason that is stated in a writing made contemporaneously with the pronouncement of sentence.

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[5]The guidelines were established in 1983.

The Third District held below that this Court's decisions in *Pope v. State*, 561 So. 2d 554 (Fla. 1990), and *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *modified, Lyles v. State*, 576 So. 2d 705 (Fla. 1991), *modified, Smith v. State*, 598 So. 2d 1063 (Fla. 1992), require that *every* departure be accompanied by specific written reasons, even those downward departures given upon revocation of probation[6] where, as here, the basis for the departure is that the State expressly agreed to the original downward departure to probation. *State v. Zlockower*, 650 So. 2d 692, 694 (Fla. 3d DCA 1995); *State v. Franquiz*, 654 So. 2d 1068, 1068 (Fla. 3d DCA 1995). Because the trial court failed to issue written reasons at all, the Third District reversed and remanded for resentencing within the guidelines. The court went further, however, and stated that if presented with the question directly, it would hold that the State's prior agreement to a downward departure would not be a sufficient reason to support the subsequent departure on revocation.

In so holding, the Third District recognized that its decision conflicted directly with decisions of the Fourth and Fifth District Courts of Appeal: *State v. Glover*, 634 So. 2d 247 (Fla. 5th DCA 1994); *Schiffer v. State*, 617 So. 2d 357 (Fla. 4th DCA 1993); *State v. Hogan*, 611 So. 2d 78 (Fla. 4th DCA 1992), and further noted conflict with *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA), *rev. denied,* 519 So. 2d 988 (Fla. 1987).[7] The Fourth District explained in *Hogan*:

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[6]Or community control; references throughout this brief to probation are intended to encompass community control as well.

[7]The Third District cited *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994), as supportive of its decision that *Pope* requires remand for resentencing within the guidelines because no written reasons were stated. However, *Roman* itself cites to *State v. Nickerson*, 541 So. 2d 725 (Fla. 1st DCA 1989), in which the First District recognized that a prior state agreement to a downward departure *will* support a downward departure upon revocation. *Nickerson* relied on both this Court's decision in *Smith* and the Fourth District's decision in *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA), *rev. denied*, 519 So. 2d 988 (Fla. 1987), in so holding, reversing only for clarification of whether the *Smith-Devine* doctrine had been the trial judge's reason for departing. *Nickerson*, 541 So. 2d at 727.

In relying on *Roman*, the Third District acknowledged *Nickerson* in a footnote, 650 So. 2d at 694 n.3, but did not explore its import or note conflict with it.

> Upon revocation of his probation, the appellee was sentenced to a new, extended period of probation. The sentence does not contain written reasons supporting a downward departure from the guidelines. Nevertheless, we affirm.
>
> The appellee initially received a split sentence of four years in prison followed by two years of probation. That sentence, which was a departure below the 5 1/2-12 year permitted guideline range, was negotiated and *agreed to* by the state. That agreement was reflected on the initial scoresheet.
>
> * * *
>
> [W]e do not deem those authorities [which require reversal for lack of written reasons and remand for guidelines sentence] as controlling with respect to a downward departure following a violation of probation where the initial sentence validly departed downward.
>
> This court has held that the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines. *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA), *rev. denied,* 519 So. 2d 988 (Fla. 1987). Additionally, section 948.06(1), Fla. Stat. (1991) authorizes a trial court, in sentencing following a violation of probation, to impose "any sentence which it might originally have imposed before placing the probationer on probation. . . ."

Id. at 79.[8] In *Glover*, the Fifth District Court of Appeal articulated this further policy reason for the doctrine: "it gives trial judges greater flexibility when dealing with the many variables involved in violation hearings." *Glover*, 634 So. 2d at 248.[9]

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[8]The *Devine* court characterized the State's prior agreement as a reason supporting a mitigation.

[9]In rejecting *Hogan* and *Glover*, the Third District relied on the dissenting opinion of Chief Judge Harris in *Glover*. Judge Harris opined that because section 948.06 specifically states that upon revocation, a judge is authorized to impose any sentence that originally might have been imposed before placing the defendant on probation, the necessary implication is that a downward departure is not within the realm of possibilities. This argument proves too much: if Judge Harris were right that the court is hemmed in by the guidelines on revocation, then the court could not consider a sentence *above* the original guidelines. But as we know, the court is not limited to the original guidelines upon revocation; rather, the trial court is permitted to give any sentence within the original cell *plus* any sentence within the next cell up from the defendant's guidelines, a so-called "one cell bump-up." Fla. R. Crim. P. 3.701(d)(14) ("Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure."); *Lambert v. State*, 545

Hogan and *Glover* make for sound policy. The existence of a plea agreement in the first instance reflects an agreement of the parties that for whatever reason (often not specified), the defendant in a given case is not necessarily an appropriate candidate for the sentence prescribed by the guidelines. The fact that a defendant could not complete probation may justify *some* prison sentence, but it does not render meaningless the original thinking that a *guidelines* sentence is too harsh for the defendant in the given case.[10] And while it is not every case in which a trial judge will wish to craft a sentence below the guidelines on revocation, this policy merely holds open for the court in that class of cases where the court thinks it appropriate, the flexibility to render a just and appropriate result based on all the factors of a case before it where the State *already has agreed* in the exercise of its broad prosecutorial discretion that a guidelines sentence is not necessarily the appropriate result for a given defendant in a given case.

Moreover, probation is, in the first instance, a matter of grace with the trial court and is subject to the exercise of a liberal measure of discretion. *McCarthren v. State*, 635 So. 2d 1005 (Fla. 5th DCA 1994); *Bently v. State*, 411 So. 2d 1361 (Fla. 5th DCA) (en banc), *rev. denied*, 419 So. 2d 1195 (Fla. 1985). The policy recognized in *Hogan* and *Glover* honors this

So. 2d 838 (Fla. 1989). *See also State v. Lamar*, 20 Fla. L. Weekly S431 (Fla. Aug. 24, 1995) (when sentencing for revocation and new offense together, not bound by original scoresheet or guidelines as to revocation).

[10]Some reasons for this decision could be inherent in the case. For example, often the State will agree to a plea bargain because it knows it could have difficulty proving its case, and would rather be satisfied with one bird (being a short punishment) in the hand rather than hold out for two birds (a conviction and guidelines sentence) in the bush and risk losing its prey altogether. Or, the state may feel, again in the exercise of its prosecutorial discretion, that although the facts of the case technically could support a conviction, the facts are not the most egregious and the sentence prescribed by the guidelines is not called for. Or, the decision may have to do with the defendant himself -- perhaps he has a prior record that contributes to his guidelines but his prior convictions are dated and a less serious punishment is just. These are a few of the myriad examples of reasons why the State might agree to, or even offer, a plea bargain. As stated in the text, in each of these cases, the fact that a defendant could not complete probation may justify *some* prison sentence, but it does not render meaningless the original thinking that a *guidelines* sentence is too harsh in this case, for this defendant.

This answers the point raised by Chief Judge Harris in his dissent in *Glover*, which the Third District relied on in *Zlockower*, that it was somehow unfair to the State to bind it to its prior agreement where a defendant has breached one of the terms of the agreement.

discretion.

If the State's prior agreement is a legally sufficient reason as Petitioner has demonstrated it must be, then the question remains whether trial court is required to state that this is its reason for departing in a writing made contemporaneously with the imposition of the sentence. Petitioner submits that under case law, the trial court is exempt from this requirement, and further there are sound, logical policy reasons for such an exemption. First, there is *Smith v. State*, 529 So. 2d 1106 (Fla. 1988), wherein this Court said: "Once a plea agreement is negotiated which specifies the permissible sentence, the agreement is binding and is sufficient *without any stated reasons* to justify a departure from the presumptive sentence." *Smith*, 529 So. 2d at 1107 (emphasis added).[11] This Court's decision in *Smith* alone ought be dispositive of the question; the Third District, however, did not recognize *Smith*.[12]

Moreover, it makes good logical sense for the no-written-reasons-required rule to obtain in this case. This Court has explained that departure reasons are to be placed in writing because a writing effectuates a party's right to appeal by providing for more meaningful and expeditious appellate review. *Pope v. State*, 561 So. 2d 554, 555 (Fla. 1990) (construing *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985)). This Court further explained that the written reasons must be issued contemporaneously with the pronouncement of sentence because:

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[11]It is important to recognize that *Pope* and *Ree* did not originate the rule that departure reasons must be in writing. That derives from Florida Rule of Criminal Procedure 3.701(d)(11), and was recognized by this Court in decisional law at least as early as 1985, in *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985). Thus, at the time this Court announced *Smith*, the existing rule was that departure reasons had to be in writing. The statement in *Smith* that no written reasons need be given where the reason for departure is a plea agreement therefore is significant when viewed in this context. Moreover, as Petitioner shall demonstrate *infra* in the text, there is a sound policy reason for this Court's decision in *Smith* that written reasons are not necessary in this context.

[12]Interestingly, the Third District not only overlooked *Smith* but also made no mention of its prior decision in *Casmay v. State*, 569 So. 2d 1351 (Fla. 3d DCA 1990), which held that in the converse situation -- where a *defendant* appeals from an *upward* departure upon revocation that was rendered pursuant to a plea agreement -- the earlier plea agreement binds the defendant and neither *Ree* nor *Pope* applies to require the court to give additional written reasons. *Casmay*, however, did recognize *Smith* as dispositive of the question.

> if a sentence is entered and filed with the clerk on the day of sentencing, but the written reasons are delayed in being prepared and consequently are not filed on the same date, *the decision to appeal may have to be made without the benefit of those written reasons* because the time for appeal begins to run from the date the sentencing judgment is filed, not the written reasons.

State v. Lyles, 576 So. 2d 706, 708 (Fla. 1991) (emphasis added). But where the parties have freely and voluntarily negotiated and agreed to a departure sentence, neither party has any cause to appeal and thus neither party has need for written reasons. Thus, the rule given by *Ree* and *Pope* simply has no meaning in the context of a negotiated plea.[13] It is therefore a meaningless act to require the court to state that reason in writing, as neither party can or would have reason to appeal from the sentence, and this case ought not be governed by *Ree* and *Pope*.[14]

Finally, even if this Court were to hold that the State's initial agreement to a downward departure cannot provide a sufficient basis for a downward departure upon revocation, in this case it would be fundamentally unfair to apply that rule to Petitioner. At the time the initial plea in this case was negotiated in January 1994, in addition to this Court's *Smith* decision, two districts[15] had expressly held that a prior state agreement would be a sufficient basis for downward departure at revocation.[16] Thus, the parties and the court were on notice -- indeed, properly should have engaged in the presumption that, in the event of a violation, the State's original agreement could provide the basis for a departure sentence without the need for any

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[13]This would explain this Court's holding in *Smith* that a plea "agreement is binding and is sufficient without any stated reasons to justify a departure from the presumptive sentence." 529 So. 2d at 1107 (emphasis added).

[14]The Third District cited *State v. Roman*, 634 So. 2d 291 (Fla. 1st DCA 1994), and *State v. McMahon*, 605 So. 2d 544 (Fla. 2d DCA 1992), as supporting its decision. Both decisions amount to no more than a reflexive application of the *Pope* rule without discussion of the issue.

[15]The First, in *Nickerson*; and the Fourth, in *Devine*, *Hogan*, and *Schiffer*. The Fifth District announced *Glover* in March 1994, some two months after the initial plea in this case.

[16]In fact, this had been the law since at least as far back as **1987**, when the Fourth District decided *State v. Devine*, 512 So. 2d 1163 (Fla. 4th DCA), *rev. denied*, 519 So. 2d 988 (Fla. 1987).

additional reason.[17] As a result, if the State did not want its agreement here to be used in such a manner -- that is, if it wanted to contract around the existing law -- then it was incumbent upon the State to make this an express condition of its agreement.[18] There is no doubt on this record that the State participated in the making of the terms of the plea below, for it expressly demanded conditions such as an adjudication rather than a withhold, a term of community control in addition to the term of probation, and counseling; thus, it is beyond dispute that the State had ample opportunity to negotiate for whatever conditions it desired. It is not for the courts now to rescue the State from its failure to do so.

In short, both logic and sound policy considerations compel the conclusion that the Fourth and Fifth District Courts of Appeal have the better of the argument here, and their position should be adopted. Petitioner respectfully requests that this Court do so and quash the decisions (*Franquiz* and *Zlockower*) below.

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[17]*Cf. Pardo v. State*, 596 So. 2d 665, 666-67 (Fla. 1992) (in the absence of authority from the supreme court and its own district court of appeal on a given point of law, a trial court is bound by a decision of another district court of appeal on that point).

[18]In *State v. Glover*, 634 So. 2d 247 (Fla. 5th DCA 1994), Chief Judge Harris asked:

> While it is reasonable to depart based on a negotiated plea at the initial sentencing, is it reasonable to use that original agreement ***which was clearly limited in time and condition***, to justify future departures after the defendant has proved himself unable or unwilling to comply with the conditions that prompted the State to agree in the first instance?

634 So. 2d at 247 (emphasis added). He answered the question in the negative. The Third District agreed on the basis of the facts before it and further stated that in the absence of an express reservation to *allow* the original agreement to support a downward departure in the event of revocation, the silence should be construed in the State's favor. *State v. Zlockower*, 650 So. 2d 692, 694 (Fla. 1995). This is wrong because, as Petitioner pointed out in the text, the presumption is that in the face of silence, existing valid laws are presumed incorporated into the contract; a party who does not wish to be bound by existing law must explicitly contract around it. *See, e.g., Gordon v. State*, 608 So. 2d 800 (Fla. 1992) ("Valid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into the contract. *State ex rel. Select Tenures, Inc. v. Raulerson*, 129 Fla. 346, 176 So. 270 (1937)."), *cert. denied*, __ U.S. __, 113 S. Ct. 1647, 123 L.Ed.2d 268 (1993); *Saunders v. Cities Service Oil Co.*, 46 So. 2d 597 (Fla. 1950) (same); *Estate of Nicole Santos v. Nicole-Sauri*, 648 So. 2d 277 (Fla. 4th DCA 1995) (traditional rule that knowledge that law of place of making of contract will govern the parties is imputed to those parties unless the contract specifies otherwise).

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court quash the decisions of the Third District Court of Appeal in both the instant case and in *State v. Zlockower*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Mark Katzef, Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33128, this 3rd day of September, 1995.

JULIE M. LEVITT
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,960

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HENRY FRANQUIZ,

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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, A.D. 1995

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NOS. 94-1301
94-1545

HENRY FRANQUIZ, **

Appellee. **

Opinion filed May 24, 1995.

An Appeal from the Circuit Court for Dade County, Arthur I. Snyder, Judge.

Robert A. Butterworth, Attorney General, and Mark C. Katzef, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Julie M. Levitt, Assistant Public Defender, for appellee.

Before NESBITT, GERSTEN, and GODERICH, JJ.

PER CURIAM.

We reverse on the authority of State v. Zlockower, 650 So. 2d 692 (Fla. 3d DCA 1995), because the trial court did not provide contemporaneous written reasons for entering a downward departure

at the time of modification of probation. Accordingly, the downward departure sentence is reversed, and the cause is remanded to allow the defendant an opportunity to withdraw his plea, or to be resentenced within the guidelines. See State v. Smith, 627 So. 2d 1345 (Fla. 3d DCA 1993); State v. Grononger, 615 So. 2d 869 (Fla. 4th DCA 1993). We certify to the Florida Supreme Court the same direct conflict certified in Zlockower.

Reversed and remanded; question certified.

inside the home against one victim and an attempted murder of the police officer arriving at the scene outside of the home was held to constitute two separate incidents so as to permit consecutive mandatory sentences). Where, as here, however, a defendant is charged with battery on the arresting law enforcement officer which took place in the same locale as the defendant's commission of the other charged offenses [3] and immediately followed his commission of the other offenses with no significant break in time or place, we are compelled to conclude that all of these offenses arose out of one single criminal episode. *Blount v. State*, 641 So.2d 447 (Fla. 2d DCA 1994); *Walker v. State*, 636 So.2d 207 (Fla. 1st DCA 1994). Thus, under *Hale*, the trial court's imposition of consecutive sentences for each of these offenses was error.

Reversed and remanded for resentencing.

The STATE of Florida, Appellant,

v.

Jay Stephen ZLOCKOWER, Appellee.

No. 94-843.

District Court of Appeal of Florida, Third District.

Feb. 22, 1995.

In community control revocation proceedings, the Circuit Court, Dade County, Celeste H. Muir, J., found defendant had violated his community control and imposed downward departure sentence without written reasons. State appealed. The District Court of Appeal, Cope, J., held that: (1) mere fact that community control officer recommended downward departure sentence was not valid reason for downward departure, and (2) trial court had to provide written reasons for downward departure sentence upon revocation of community control, even though initial placement on community control had been downward departure disposition agreed to by state.

Reversed and remanded, and direct conflict certified.

1. Criminal Law ⇐1302

Mere fact that community control officer recommended downward departure sentence is not valid reason for downward departure sentence.

2. Criminal Law ⇐982.9(7)

Trial court had to provide written reasons for downward departure sentence upon revocation of community control, even though initial placement on community control had been downward departure disposition agreed to by state in plea agreement.

3. Criminal Law ⇐982.9(7)

Fact that defendant was given downward departure disposition to community control pursuant to original plea agreement with state is not alone sufficient reason for another downward departure disposition upon revocation of community control, unless terms of original plea agreement explicitly covered sanction to be imposed in event of violation; downward departure upon revocation requires valid reason for departure to exist at time of revocation.

Robert A. Butterworth, Atty. Gen., and Mark C. Katzef, Asst. Atty. Gen., for appellant.

Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Asst. Public Defender, for appellee.

Before BASKIN, COPE and GERSTEN, JJ.

COPE, Judge.

The State appeals an order imposing a downward departure sentence. We reverse.

3. There is no question that the battery and robbery on the same victim arose out of the same criminal episode.

In 1992 the State charged defendant with two first-degree arsons in Dade County. Pursuant to a plea negotiated with the State, defendant pled no contest. In accordance with the plea agreement between the State and the defendant, defendant was sentenced to a downward departure sentence of 18 months community control, followed by probation for 5 years.

In 1993 defendant committed arson in Broward County. He was prosecuted and sentenced to 20 years.

Thereafter, defendant was returned to Dade County, where the trial court found that the defendant had violated his community control by reason of committing arson in Broward County. The community control officer recommended a downward departure sentence.[1] The trial court accepted the community control officer's recommendation. The court sentenced defendant to 2 years in prison, followed by 5 years of probation, including a special condition of residential psychiatric treatment. The trial court ordered that this disposition would run consecutive to the 20 years imposed in the Broward County case. The trial court did not provide any written reason for the downward departure sentence.

[1] The State has appealed, contending that in the absence of contemporaneous written reasons, the defendant must be resentenced within the guidelines. *See Pope v. State*, 561 So.2d 554 (Fla.1990).[2]

Defendant relies on precedent from the fourth and fifth districts which holds that no reasons for downward departure need to be given upon revocation of probation or community control where the initial placement on probation or community control was a downward departure disposition agreed to by the State. The fifth district has said:

> We find that procedurally, the facts of the instant case are identical to those in *State v. Hogan*, 611 So.2d 78 (Fla. 4th DCA 1992). In *Hogan*, the defendant initially received a downward departure sentence negotiated and agreed to by the state. Hogan violated his probation, and when it was revoked, he was placed on a new and extended probation which was again a downward departure. The trial court's judgment did not set forth any written reasons supporting the downward departure from the guidelines. In affirming the trial court, the Fourth District stated:
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> > This court has held that the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines. *State v. Devine*, 512 So.2d 1163 (Fla. 4th DCA), *rev. denied*, 519 So.2d 988 (Fla.1987). Additionally, section 948.06(1), Fla.Stat. (1991) authorizes a trial court, in sentencing following a violation of probation, to impose "any sentence which it might originally have imposed before placing the probationer on probation...."
>
> *Id.* at 79. We concur. Of course, the trial judge could have sentenced Glover under the guidelines if he believed the facts surrounding the violation [of community control] so justified. We believe *Hogan* is sound public policy because it gives trial judges greater flexibility when dealing with the many variables involved in violation hearings.

State v. Glover, 634 So.2d 247, 248 (Fla. 5th DCA 1994); *accord Schiffer v. State*, 617 So.2d 357, 358 (Fla. 4th DCA 1993) (no written reasons necessary; prior plea agreement provided the reasons to support departure); *State v. Hogan*, 611 So.2d at 79 (no written

1. We express no view on which of the two scoresheets in the file is the correct one. The community control officer made two separate recommendations, both of which were for a downward departure disposition.

2. The fact that the community control officer recommended a downward departure sentence is not a valid reason for departure. *See Scurry v. State*, 489 So.2d 25, 29 (Fla.1986); *Byrd v. State*, 531 So.2d 1004, 1007 (Fla. 5th DCA 1988); *Cahill v. State*, 505 So.2d 1113, 1114 (Fla. 2d DCA 1987); *State v. Eason*, 501 So.2d 696 (Fla. 2d DCA 1987); *State v. D'Alexander*, 496 So.2d 1007, 1009 (Fla. 2d DCA 1986); *Montgomery v. State*, 489 So.2d 1225, 1226 (Fla. 5th DCA 1986); *Tompkins v. State*, 483 So.2d 115, 116 (Fla. 2d DCA 1986).

Consequently, it would make no difference if the trial court had entered a written reason reflecting that the downward departure sentence was entered on account of the recommendation of the community control officer.

departure reasons; downward departure affirmed); *cf. State v. Devine*, 512 So.2d 1163, 1164 (Fla. 4th DCA) (departure reasons given; state's prior agreement to downward departure sentence held to be clear and convincing reason to mitigate), *review denied*, 519 So.2d 988 (Fla.1987).

The first district takes the opposite position regarding the necessity for written reasons for departure. In *State v. Roman*, 634 So.2d 291 (Fla. 1st DCA 1994), the State agreed to a downward departure disposition of community control. Upon revocation, the trial court did not provide a contemporaneous written reason for downward departure. Accordingly, the first district reversed the sentence and remanded for resentencing within the guidelines, on authority of *Pope v. State*, 561 So.2d 554 (Fla.1990), and *Ree v. State*, 565 So.2d 1329 (Fla.1990). 634 So.2d at 292; *see also Smith v. State*, 598 So.2d 1063 (Fla.1992) (modifying *Ree* in part).[3]

It also appears that the second district requires written reasons for downward departure in circumstances like those now before us. *See State v. McMahon*, 605 So.2d 544, 545 (Fla. 2d DCA 1992).[4]

[2] In our view the Florida Supreme Court decisions in *Pope* and *Ree* require written reasons for a downward departure disposition, without exception. *Pope v. State*, 561 So.2d at 556; *Ree v. State*, 565 So.2d at 1331. We agree with *State v. Roman* on this point. We certify conflict with *Schiffer v. State*, *State v. Hogan*, and *State v. Glover*, all of which allowed a downward departure disposition upon revocation of probation or community control without written reasons.

Defendant argues alternatively that if this court holds that written reasons are required, then the matter should be remanded to the trial court with permission to enter a downward departure order. Defendant argues that the trial court may have relied on fourth and fifth district decisions and concluded that no written reasons were necessary.[5] Defendant argues that it would be fundamentally unfair to allow the sentencing order to fail on a mere matter of form, where the trial court may have reasonably relied on the fourth and fifth district precedent.

[3] We decline defendant's request on this point. Assuming arguendo that a written order had been entered which followed fourth and fifth district decisions, we do not agree that the fact that the defendant was originally given an agreed downward departure disposition to community control is a sufficient reason for another downward departure disposition upon revocation of community control. We find persuasive the reasons set forth in Chief Judge Harris' dissenting opinion in *State v. Glover*, 634 So.2d at 248–49. It is, of course, permissible for the parties and the trial court to enter into a plea agreement which not only provides for a downward departure disposition, but also explicitly covers what sanctions will be imposed in the event of a violation. Here, there was no such agreement.[6] We concur with Chief Judge Harris that an agreement to one downward departure disposition does not bind the State to a subsequent downward departure upon revocation. In fact, in the original plea colloquy the State announced that in the event of any violation the State "would be back before the Court requesting the maximum possible sentence under the law," and that the defendant had been so informed.

The fourth and fifth district decisions reason that upon a revocation of probation or community control, the trial court is authorized to impose any sentence which it might have originally imposed. *State v. Glover*, 634 So.2d at 248 (quoting *State v. Hogan*, 611

3. Where written reasons are provided, the first district follows *State v. Devine*, and holds that the state's prior agreement to a downward departure is "a clear and convincing reason to mitigate." *State v. Nickerson*, 541 So.2d 725, 727 (Fla. 1st DCA 1989); *see also State v. Roman*, 634 So.2d at 292.

4. Although the opinion does not explicitly state that the original probation dispositions imposed pursuant to a negotiated plea were downward departure sentences, it appears from the guideline ranges set forth in the opinion that the original probation dispositions were, in fact, downward departures.

5. There is no indication in this record that the issue was raised in the trial court.

6. The trial court warned defendant that in the event of a violation defendant could be sentenced to the maximum allowable under the guidelines system.

So.2d at 79, and § 948.06(1), Fla.Stat. (1991)). They reason that if a downward departure sentence was authorized at the original sentencing, then a downward departure sentence is also authorized upon revocation. If that logic is correct then it should apply in all cases where the trial court imposed a valid downward departure disposition of probation or community control, not merely those cases where the downward departure disposition was imposed with the agreement of the State.[7] More to the point, by their terms the sentencing guidelines apply to a revocation of probation or community control. As we view the guidelines, they require a valid reason for departure to exist at the time of revocation, not as of the time of an earlier sentencing.

The sentencing order is reversed and the cause remanded with directions to resentence defendant within the guidelines.[8]

Reversed and remanded; direct conflict certified.

Tyrone COATES, Petitioner,

v.

Terrence J. McWILLIAMS, Esq. As Special Assistant Public Defender, and Mark K. Leban, Esq. As Special Assistant (Appellate) Public Defender and the Circuit Court of the Eleventh Judicial Circuit and the State of Florida, Respondents.

No. 95–301.

District Court of Appeal of Florida, Third District.

Feb. 22, 1995.

By original proceeding in mandamus, petitioner sought to require special assistant public defenders to provide copies of relevant documents relating to conviction. The District Court of Appeal held that counsel was not obligated to bear costs of furnishing documents to petitioner.

Petition denied.

Attorney and Client ⇐132

By accepting appointment as special assistant public defender, counsel did not become obligated to bear cost of furnishing documents to indigent defendant, even though duly constituted public defender's office, which is properly funded for such costs, may be so required.

Tyrone Coates, in pro. per.

No appearance for respondents.

Before BARKDULL, NESBITT and GERSTEN, JJ.

PER CURIAM.

By original proceeding of mandamus, petitioner seeks to require his special assistant public defenders to provide copies of relevant documents relating to his conviction which has been affirmed on direct appeal. *See Coates v. State*, 638 So.2d 70 (Fla. 3d DCA 1994). It is apparent from the attachments to the petition that the documents sought have not been furnished because no funds are provided to reimburse the special assistant public defender for the cost of duplicating and forwarding same to petitioner. It is also noted that the original documents cannot be forwarded to petitioner because a special assistant public defender is required by *In*

7. The *Glover* majority states that trial judges should have greater flexibility when dealing with violations of probation or community control. 634 So.2d at 248. If that is so, then that argument applies to all orders of probation or community control, not just downward departures, and not just State-agreed downward departures. We do not see a viable reason to apply one rule to revocation of a State-agreed downward departure, and a different rule to all other downward departure dispositions.

8. Since there must be a new sentencing proceeding, this necessarily reopens the question whether the sentence should run consecutive to, or concurrent with, the Broward County sentence. We express no view on that issue.