IN THE SUPREME COURT OF FLORIDA

CASE NO. **85,960**

HENRY FRANQUIZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
(CERTIFIED CONFLICT)

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The petitioner, **HENRY FRANQUIZ,** was the defendant in the Eleventh Judicial Circuit Court ("the trial court"), and the appellee in the Third District Court of Appeal ("the Third District"). The respondent, **THE STATE OF FLORIDA,** was the prosecution in the trial court, and the appellant in the Third District Court of Appeal. The symbol "R" will be used to designate the record on appeal. The symbols "TI" and "TII" will be used to designate the transcript of the trial court proceedings conducted on May 19, 1994 and May 24, 1994, respectively. The symbols "SR" and "ST" will be used to designate the supplemental record and transcript on appeal, respectively.

STATEMENT OF THE CASE AND FACTS

On October 15, 1992, the state filed an information, charging the defendant with three counts of sexual battery, one count of kidnaping, and one count of unlawful possession of a firearm while engaged in a criminal offense. (R 1-5). The initial sentencing guidelines scoresheet indicated a recommended prison sentence of seventeen to twenty-two years, and a permitted prison sentence of twelve to twenty-seven years. (SR 1).

The trial court held a hearing on January 4, 1994. During that hearing, the defendant pled guilty to sexual battery, kidnaping, and unlawful possession of a firearm. The trial court adjudged the defendant guilty, and placed him on community control for six months, to be followed by probation for ten years. The trial court stated that, as a condition of community control, "[t]here will be no contact ... by the defendant ... directly or indirectly ... with the victim...." (ST 38-39, R 151). Previously during the hearing, the trial court had stated that if the defendant violated the terms of his community control or probation, he would be subjecting himself to a prison sentence of seventeen to twenty-two years. Immediately subsequent to that statement, defense counsel corrected the trial court by stating that if the defendant violated the terms of his community control or probation, the applicable sentencing range would, in fact, be one cell higher than the sentencing range the trial court had mentioned. (ST 9).

On April 13, 1994, an affidavit charged that the defendant had violated the terms of his community control by failing to remain confined to his residence, and by contacting the victim. (R 164-167). The revised sentencing guidelines scoresheet indicated a recommended prison sentence

of twenty-two to twenty-seven years, and a permitted prison sentence of seventeen to forty years. (SR 2).

On May 9, 1994, the trial court held a hearing. At the beginning of that hearing, when the trial court asked counsel what the plea offer was, the prosecutor interjected: "Judge, the guidelines --."[1] Defense counsel then stated what sentencing range he thought was applicable. (TI 3). The prosecutor stated that she had a copy of the transcript of the previous sentencing hearing, during which she thought "[the trial court had] made it abruptly clear."[2] (TI 4). Subsequently, defense counsel argued that the defendant did not telephone the victim intentionally, because he had pushed a button on his telephone without realizing that it was programmed to automatically dial the victim's number. (TI 1, 5-6). The trial court stated that it would sentence the defendant to ten years in prison if the defendant admitted to having intentionally telephoned the victim, but that it would vacate the plea and dismiss the violation affidavit, if the defendant took and passed a polygraph test, to the effect that he had pushed the button on his telephone without realizing that it was programmed to automatically dial the victim's number. (TI 7). The prosecutor objected to the foregoing offer on the ground that the proposed sentence constituted a downward departure from the sentencing guidelines. (TI 8-9). The prosecutor also stated that she wanted the trial court to know that the trial court, during the original plea negotiations, had represented that if the defendant contacted the victim

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[1] The prosecutor was reminding the trial court that the sentencing guidelines were meant to apply.

[2] The prosecutor was referring to the trial court's representation during the original plea negotiations, that if the defendant violated the terms of his community control, he would be subjecting himself to a prison sentence of seventeen to twenty-two years. (ST 9).

directly or indirectly, it would sentence him to a guidelines prison sentence. (TI 9). Subsequently, the trial court held a plea colloquy with the defendant, during which he admitted to having violated the terms of his community control, and sentenced him to ten years in prison, with the agreement that if he passed the polygraph test, it would vacate his plea and dismiss the violation affidavit. (TI 12).

The trial court held a hearing on May 19, 1994. During that hearing, defense counsel informed the trial court that the defendant had failed the polygraph test. (TII 1, 4). The prosecutor objected to the sentence, on the ground that it constituted a downward departure from the recommended sentencing guidelines range of twenty-two to twenty-seven years. The defendant, before sentencing, admitted to the trial court that he had lied to it about having pushed a button on his telephone without realizing that it was programmed to automatically dial the victim's number. (TII 8). The trial court sentenced the defendant to ten years in prison, with probation to continue until it expired, according to the terms of the original community control order. (TII 9). The prosecutor reiterated her objection to the sentence, on the ground that it constituted a downward departure. (TII 10). The trial court informed the defendant that he could be sure that the state was going to appeal, because it had departed downward from the sentencing guidelines, without having given written reasons for having done so. (TII 11).

The prosecution then filed an appeal, contending that in the absence of contemporaneous written reasons, the defendant must be sentenced within the guidelines. On May 24, 1995, the Third District Court of Appeal issued an opinion, reversing 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. The Third District also certified to this Court the same direct conflict certified in Zlockower. In Zlockower, the Third District had certified direct conflict with Schiffer v. State, 617 So. 2d 357 (Fla. 4th DCA 1993), State v. Hogan, 611 So.2d 78 (Fla. 4th DCA 1992), and State v. Glover, 634 So. 2d 247 (Fla. 5th DCA 1994), all of which allowed a downward departure disposition upon revocation of probation or community control without written reasons.

The Third and First Districts take the opposite position regarding the necessity for written reasons for departure. See State v. Zlockower, 650 So. 2d 692 (Fla. 3d DCA 1995); State v. Roman, 634 So. 2d 291 (Fla. 1st DCA 1994). It also appears that the Second District requires written reasons for downward departure in circumstances like those now before this Court. See State v. McMahon, 605 So. 2d 544, 545 (Fla. 2d DCA 1992).[3]

[3] 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.

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 THE ARGUMENT

The trial court's downward departure from the sentencing guidelines range, on the basis of a plea bargain between itself and the defendant, over the prosecution's objection and without providing a valid contemporaneous written departure reason, was error. This Court's decisions in Pope v. State, 561 So. 2d 554 (Fla. 1990) and Ree v. State, 565 So. 2d 1329 (Fla. 1990) require valid contemporaneous written reasons for a downward departure disposition, without exception. This Court should affirm the Third District's opinion below, and remand this cause with directions to the trial court to resentence the defendant within the guidelines, for several reasons.

First, any use of the state's prior stipulation to the original downward departure as a valid ground supporting its subsequent sentence below the guidelines would violate the term of the original plea bargain, that if the defendant violated his community control, he would receive a guidelines prison sentence. Second, it is not reasonable to construe the state's original agreement to a downward departure as justifying a subsequent downward departure after the defendant has breached a key condition of the plea bargain. Third, by enacting section 948.06(1), Fla. Stat. (1991), the legislature did not intend to authorize the court to use an outdated negotiated plea agreement as a basis for departing from the guidelines. Fourth, there is no viable reason to apply one rule to revocation of a state-agreed downward departure, and a different rule to all other downward departure dispositions.

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.

The trial court's downward departure from the sentencing guidelines range, on the basis of a plea bargain between itself and the defendant, over the prosecution's objection and without providing a valid contemporaneous written departure reason, was error. This Court's decisions in Pope v. State, 561 So. 2d 554 (Fla. 1990) and Ree v. State, 565 So. 2d 1329 (Fla. 1990) require valid contemporaneous written reasons for a downward departure disposition, without exception. In the absence of same, the defendant must be resentenced within the guidelines.

The cases which the Third District Court of Appeal has certified conflict with in its opinion below, namely, State v. Glover, 634 So. 2d 247 (Fla. 5th DCA 1994), Schiffer v. State, 617 So. 2d 357 (Fla. 4th DCA 1993), and State v. Hogan, 611 So.2d 78 (Fla. 4th DCA 1992), held: (1) the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines; (2) 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...."

This Court should affirm the Third District's opinion below, and remand this cause with

directions to the trial court to resentence the defendant within the guidelines, for the reasons which follow.

I.

USE OF THE STATE'S PRIOR STIPULATION TO THE ORIGINAL DOWNWARD DEPARTURE AS A VALID GROUND SUPPORTING ITS SUBSEQUENT SENTENCE BELOW THE GUIDELINES WOULD VIOLATE THE TERMS OF THE ORIGINAL PLEA BARGAIN.

Bargained-for guilty pleas are similar to a contract between society and the accused. Lopez v. State, 536 So. 2d 226, 229 (Fla. 1989); Brown v. State, 367 So. 2d 616, 622 (Fla. 1979). A plea bargain is a contract. Pate v. State, 547 So. 316, 318 (Fla. 4th DCA 1989); Offord v. State, 544 So. 2d 308 (Fla. 4th DCA 1989).

During the original plea negotiations, the trial court stated that if the defendant violated the terms of his community control or probation, he would be subjecting himself to a prison sentence of between seventeen to twenty-two years. Immediately subsequent to that statement, defense counsel corrected the trial court by stating that if the defendant violated the terms of his community control or probation, the applicable sentencing range would in fact be one cell higher than the sentencing range the trial court had mentioned. (ST 9). Thus, it was stated and understood during the original plea negotiations, that if the defendant violated the terms of his community control or probation, he would be subjecting himself to a guidelines prison sentence.

Additionally, at the beginning of the May 9, 1994 hearing on the defendant's alleged violation of the terms of his community control, when the trial court asked counsel what the plea

offer was, the prosecutor interjected: "Judge, the guidelines --." (TI 3).[4] Defense counsel then stated what sentencing range he thought was applicable. (TI 3). The prosecutor stated that she had a copy of the transcript of the previous sentencing hearing, during which she thought "[the trial court had] made it abruptly clear." (TI 4).[5] The prosecutor also stated that she wanted the trial court to know, that during the original plea negotiations, it had represented that if the defendant contacted the victim directly or indirectly, it would sentence him to a guidelines prison sentence. (TI 9). Thus, the transcript of the May 9, 1995 hearing on the defendant's alleged violation of the terms of his community control, indicates that both the prosecutor and defense counsel expected that the sentencing guidelines were going to apply, as per the terms of the original plea bargain.

Accordingly, any use of the state's prior stipulation to the original downward departure as a valid ground supporting the subsequent sentence below the guidelines, would violate the term of the original plea bargain, that if the defendant violated his community control, he would receive a guidelines prison sentence. See Chief Judge Harris' dissenting opinion in Glover, supra, at 249.

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[4] The prosecutor was reminding the trial court that the sentencing guidelines were meant to apply.

[5] The prosecutor was referring to the trial court's representation during the original plea negotiations, that if the defendant violated the terms of his community control, he would be subjecting himself to a prison sentence of seventeen to twenty-two years. (ST 9).

II.

IT IS NOT REASONABLE TO CONSTRUE THE STATE'S ORIGINAL AGREEMENT TO A DOWNWARD DEPARTURE AS JUSTIFYING A SUBSEQUENT DOWNWARD DEPARTURE AFTER THE DEFENDANT HAS BREACHED A KEY CONDITION OF THE PLEA BARGAIN.

Rule 3.701(b)(6), Rules of Criminal Procedure, provides:

> While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentence established in the guidelines shall be articulated in writing and made when circumstances or factors reasonably justify the aggravation or mitigation of the sentence. (Emphasis added.)

Judges are directed to deviate only for reasonable circumstances or factors. While it is reasonable to depart based on a negotiated plea at the initial sentencing, it is not 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. It is simply not reasonable to construe the state's original agreement to a downward departure as justifying a subsequent departure after the defendant has breached a key condition of the plea bargain, as the defendant did in this case. See Chief Judge Harris' dissenting opinion in Glover, supra, at 249.

Stated differently, it does not make any sense to use the state's agreement to the original downward departure, when that downward departure, namely, community control and probation, has already failed in its purpose to rehabilitate the defendant, and the defendant has already shown that he is unable or unwilling to take advantage of, and derive benefit from, use of those programs.

III.

BY ENACTING SECTION 948.06(1), THE LEGISLATURE DID NOT INTEND TO AUTHORIZE THE COURT TO USE AN OUTDATED NEGOTIATED PLEA AGREEMENT AS A BASIS FOR DEPARTING FROM THE GUIDELINES.

Glover and Hogan expressly rely on that portion of section 948.06(1), Florida Statutes (1991) which permits the sentencing judge in sentencing one who has violated probation to impose "any sentence which it might originally have imposed before placing the probationer on probation." (Emphasis added.) Glover and Hogan interpret this to mean that if the court had a valid reason for departure prior to originally placing the defendant on probation, it can use that original reason, regardless of new circumstances or conditions, for departure when the defendant is up for sentencing for the violation. Notice, however, that in section 948.06(1), the legislature recognized the distinction between a "sentence" and the "placing" of the defendant on probation. The legislature recognized that probation is not a sentence; it merely defers sentencing. This makes it clear, that by enacting section 948.06(1), the legislature did not intend to authorize the court to use an outdated negotiated plea agreement as a basis for departing from the guidelines. The legislature was merely emphasizing that the previous probation (deferring of sentence) would not restrict the trial court from imposing any appropriate sentence that it could have initially imposed when it finally decides to sentence the defendant. See Chief Judge Harris' dissenting opinion in Glover, supra, at 249.

IV.

THERE IS NO VIABLE REASON TO APPLY ONE RULE TO REVOCATION OF A STATE-AGREED DOWNWARD DEPARTURE, AND A DIFFERENT RULE TO ALL OTHER DOWNWARD DEPARTURE DISPOSITIONS.

As stated above, Glover and Hogan 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. The Glover majority states that trial judges should have greater flexibility when dealing with violations of 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. There is no viable reason to apply one rule to revocation of a state-agreed downward departure, and a different rule to all other downward departure dispositions. More to the point, by their terms the sentencing guidelines apply to a revocation of probation or community control, and require a valid reason for departure to exist at the time of revocation, not as of the time of an earlier sentencing. See Zlockower, supra, at 695.

Accordingly, the appellant respectfully requests this Court to affirm the Third District's opinion below, and to remand this cause to the trial court with directions to resentence the defendant within the guidelines.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant respectfully requests this Court to affirm the Third District's opinion below, and to remand this cause for resentencing, with directions .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **JULIE LEVITT, Assistant Public Defender, 1320 N.W. 14th St., Miami, FL 33125** on this 6th day of November, 1995.

MARK C. KATZEF
Assistant Attorney General