**ORIGINAL**

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IN THE SUPREME COURT OF FLORIDA

ARTHUR L. BROWN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88,468

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referred to as Respondent or the State. Petitioner, ARTHUR L. BROWN, the Appellee in the First District Court of Appeal and the defendant in the trial court, will be referred to as Petitioner or by his proper name.

The symbol "R" will refer to the record on appeal; the symbol "T" will refer to the trial transcripts; the symbol "IB" will refer to the initial brief of the Petitioner. Each symbol will be followed by the appropriate page number in parentheses. All double underlined emphasis is supplied.

Two cases, State v. Delgadillo, 659 So. 2d 1264 (Fla. 3d DCA 1995), *rev. granted,* 668 So. 2d 603 (Fla. February 1, 1996)(No. 86,558) and State v. Franquiz, 654 So. 2d 1068 (Fla. 3d DCA 1995), *rev. granted,* 668 So. 2d 603 (Fla. February 1, 1996)(No. 85,960), containing this same issue are currently pending in this Court.

## STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts with the following clarification:

1. While the State agreed to the original departure sentence, the State did not agree to downward departure after petitioner violated his community control. The State contemporaneously objected to the trial court's downward departure. (T. 42).

## SUMMARY OF ARGUMENT

The State originally agreed to a downward departure sentence of community control instead of the potential twelve year guidelines sentence. Petitioner's subsequent violation of community control denied the State the benefit of its bargain under the plea agreement and nullified the agreement. It is irrational and contrary to law to expect or to require the State to agree to another departure downward departure after the defendant violates community control and the original plea agreement. The trial court erred, as a matter of law, by not providing written reasons for the departure sentence.

The First District Court's decision below and that of the Third District in State v. Zlockower, 650 So. 2d 692 (Fla. 3d DCA 1995), *rev. dismissed*, 659 So. 2d 1091 (Fla. 1995), which required the trial court to provide written departure reasons in this situation, should be approved and the decisions of the Fourth District in State v. Hogan, 611 So. 2d 78 (Fla. 4th DCA 1992), and Schiffer v. State, 617 So. 2d 357 (Fla. 4th DCA 1993) and the Fifth District in State v. Glover, 634 So. 2d 247 (Fla. 5th DCA 1994), which do not require written reasons disapproved.

## ARGUMENT

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROVIDE WRITTEN REASONS FOR THE DOWNWARD DEPARTURE SENTENCE IMPOSED FOLLOWING PETITIONER'S VIOLATION OF COMMUNITY CONTROL?

Petitioner argues that the trial court was not required to provide written reasons supporting a departure sentence following the revocation of petitioner's community control because the State had agreed to a departure sentence when petitioner was initially placed on community control. The State respectfully disagrees. Although the State had agreed to the prior departure, the State did not agree to the second departure. It is irrational to expect the State to agree to a second downward departure when the defendant violates his community control or probation. The State no longer agreed to the departure sentence after the petitioner violated his community control. Instead, the State sought a guidelines sentence following the violation. Therefore, the previous departure reason, *i.e.*, that both parties agreed to the sentence, no longer existed. Thus, the trial court could not depart based on an agreed upon sentence when the sentence was not agreed to by the State. Moreover, because petitioner breached the agreement by violating his community control, the State is not and should not be bound by that agreement. Therefore, the trial court committed reversible

error by failing to provide written departure reasons to support its departure sentence, and the First District properly vacated that sentence and remanded the case for resentencing within the guidelines.

Petitioner was originally charged in a five count information. (R. 1-2). Pursuant to the negotiated plea agreement, petitioner pled guilty to three counts. State v. Brown, 675 So. 2d 991 (Fla. 1st DCA 1996). Petitioner's scoresheet calculations reflected a guidelines permitted range of five and a half years to twelve years, and a recommended range of eight years. However, the trial court, following the terms of the plea agreement, placed petitioner on two years' community control. This original departure sentence was agreed to by the State.[1] Petitioner then violated his community control. At the sentencing hearing, the State urged that petitioner be sentenced within the guidelines. Petitioner's scoresheet, which now included a one-cell enhancement due to his violation, called for a permitted range of seven to seventeen years. The trial court, without any explanation, imposed a downward departure of one year in prison to be followed by one year of probation. The State objected to the sentence as "being

[1] A negotiated plea constitutes a valid reason for departure. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988).

illegal, below the guidelines sentence." (T. 42). The trial court failed to support this significant downward departure with written reasons. The State appealed the trial court's departure to the First District Court of Appeals.

The First District reversed the downward departure and instructed the trial court on remand to impose a guidelines sentence. The First District reasoned that the plain mandate of the relevant statute and the relevant rule of criminal procedure required that <u>any</u> departure sentence be supported by written reasons. (emphasis in original). The First District certified conflict between its decision in this case and the Fourth District's decision in <u>State v. Hogan</u>, 611 So. 2d 78 (Fla. 4th DCA 1992), and <u>Schiffer v. State</u>, 617 So. 2d 357 (Fla. 4th DCA 1993); and the Fifth District's decision in <u>State v. Glover</u>, 634 So. 2d 247 (Fla. 5th DCA 1994). This issue is currently pending in this Court. <u>Franquiz v. State</u>, 654 So. 2d 1068 (Fla. 3d DCA 1995), *rev. granted*, 668 So. 2d 603 (Fla. February 1, 1996)(No. 85,960); <u>Delgadillo v. State</u>, 659 So. 2d 1264 (Fla. 3d DCA 1995), *rev. granted*, 668 So. 2d 603 (Fla. February 1, 1996)(No. 86,558).

The statutes, the Rules of Criminal Procedure, and the relevant case law all require that any sentence outside the permitted guidelines range be accompanied by written reasons. The

sentencing guidelines require a trial court to provide written reasons for departing from the guidelines. Section 921.001(6), Fla. STAT. (1993)[2] provides:

> The sentencing guidelines shall provide that any sentence imposed outside the range recommended by the guidelines be explained in writing by the trial court judge.

Also, Florida Rule of Criminal Procedure 3.701(d)(11)(1993) states in part:

> Departures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. Any sentence outside the permitted range must be accompanied by a written statement delineating the reasons for the departure.

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[2] Section 921.0016(1)(c) of Florida Statutes now provides:

> A State prison sentence which varies upward or downward from the recommended guideline prison sentence by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure, filed within 15 days after the date of sentencing. A written transcription of orally stated reasons for the departure is permissible if it is filed by the court within 15 days after the date of sentencing.

However, the fifteen day allowance applies to crimes committed on or after January 1, 1994. State v. Colbert, 660 So. 2d 701, 702 n.1 (Fla. 1995). Petitioner's crimes were committed in 1993. (R. 1). Even the fifteen day allowance would not avail the trial court in this case because the court failed to enter written reasons at anytime.

Finally, this Court has held that written departure reasons must be contemporaneously entered at the time of sentencing. Ree v. State, 565 So. 2d 1329 (Fla. 1990), *reaffirmed in*, State v. Colbert, 660 So. 2d 701 (Fla. 1995). The rule is quite clear: a trial court which departs from the sentencing guidelines must provide contemporaneous written reasons for doing so.

All five district courts have reached this issue. State v. Zlockower, 650 So. 2d 692 (Fla. 3d DCA 1995), *rev. denied*, 659 So. 2d 1091 (Fla. 1995). The First District, the Second District, and the Third District all require a trial court to provide written reasons for a downward departure following the revocation of probation or community control. State v. Roman, 634 So. 2d 291 (Fla. 1st DCA 1994); State v. McMahon, 605 So. 2d 544, 545 (Fla. 2d DCA 1992); Zlockower, *supra*. However, the Fourth and Fifth Districts view the State's prior agreement to a downward departure to be a valid ground for departure, notwithstanding the defendant's subsequent violation. Hogan, *supra*; Glover, *supra*.

Petitioner urges this Court to adopt the reasoning of the Fourth and Fifth District courts on this issue[3]. But the reasoning of the

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[3] Petitioner further argues that the First District misapprehended its prior holding in State v. Nickerson, 541 So. 2d 725 (Fla. 1st DCA 1989), in both Roman, *supra*, and in the instant case. Thus, according to petitioner, two panels of the First

District Courts is neither sound, nor in accord with the sentencing guidelines. In State v. Glover, 634 So. 2d 247 (Fla. 5th DCA 1994), the Fifth District stated that allowing a downward departure is sound public policy because it gives trial judges greater flexibility. Id at 248. This "flexibility" is not in accord with the sentencing guidelines. The sentencing guidelines require that the sentence imposed, after revocation of probation, be in accordance with the guidelines and within the guidelines range. Fla. R. Crim. P. 3.701(14)(1993)[4]. According to the guidelines, petitioner should have received a guidelines sentence. The "flexibility" mentioned in Glover allows the trial court to undermine the sentencing guidelines' goal of uniformity.

Additionally, it is a fiction to allow the trial court to rely on a departure reason which no longer exists[5]. For example, in

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District misconstrued the case. This argument is properly made in a motion for rehearing en banc in the District Court, but it is not proper for this court to resolve intradistrict conflicts. ART. V. (b)(3), FLA. CONST. Thus, the State will not address this argument.

[4] Petitioner committed his offense in 1993.

[5] It should be noted that defendants are only resentenced for additional violations of the law, *e.g.*, violations of community control or probation. Thus, when a criminal defendant initially agrees to an upward departure in return for the state dropping or reducing the charges, the defendant has received the full benefit of the plea agreement. Should the defendant subsequently violate either community control or probation, the State is entitled to the benefit of its initial plea agreement, including the upward

this case, the State did not agree to the departure following the revocation; indeed, the State strenuously objected. This fiction provides a windfall to the defendant, for there is little or no penalty for a violation of probation. This leaves society without recourse against those who violate the terms of their probation.

Bilyou v. State, 404 So. 2d 744, 745 (Fla. 1981)(*quoting* Mulder v. State 356 So. 2d 870, 871 (Fla. 4th DCA 1978)).

This Court has held that the State is not and should not be bound by the punishment outlined in the plea agreement if the defendant violates his probation. Bilyou v. State, 404 So. 2d 744 (Fla. 1981). The plea agreement at issue in Bilyou provided for a cap of ten years' probation. The trial court, following the terms of the plea agreement, placed Bilyou on eight years' probation. However, when Bilyou violated his probation, the trial court incarcerated him for fifteen years. Bilyou argued that the incarceration was illegal because it exceeded the punishment outlined in the plea agreement. This Court rejected this argument, holding that a probationer who violates his probation may be sentenced in excess of the plea agreement. Id at 746. In such a

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departure. Thus, the defendant is subject to an upward departure on resentencing of an additional one cell from the original sentence. The trial court, in its departure order, would cite the original plea agreement as the reason for the upward departure.

case, the State is not limited by the terms of the plea agreement but may seek, following revocation, any punishment within the statutory maximum.[6] The Bilyou Court concluded that as long as the original sentence was within the terms of the plea agreement, the State had fulfilled its part of the agreement and was no longer bound by the original agreement following revocation. This Court stated: "Petitioner violated the agreement reached and should not now be allowed to bind the state to that bargain". Id. at 745. Contrary to the holding in Bilyou, petitioner seeks to permanently bind the State to a downward departure regardless of his subsequent conduct. The State, in this case, fulfilled its part of the bargain by agreeing to the original departure sentence. The State should not be bound to the departure sentence in this case, just as the State was not bound to the original agreed upon punishment in Bilyou, *supra*.

This Court recently held that no written reasons are required to support a departure sentence which is agreed to by the parties. State v. Williams, 667 So. 2d 191 (Fla. 1996). Williams was

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[6] Bilyou was a pre-guidelines case. Hence, the court referred to a statutory maximum, rather than a guidelines sentence. But given that guidelines sentences tend to be significantly under the statutory maximum, the rationale of allowing the State to seek guidelines sentencing, following a violation of community control or probation, is even more compelling.

charged in a three count information. Pursuant to the plea agreement, the State dropped one count and Williams pled guilty. The trial court, following the terms of the plea agreement, sentenced Williams to two years' community control. Both the State and Williams thought that the sentence was an upward departure.[7] The trial court did not provide written reasons for the "departure" sentence. On appeal, the Second District remanded for resentencing based on the failure of the trial court to provide written reasons. This Court, based on conflict with its prior holding, quashed the Second District's decision. This Court held that a departure sentence, imposed pursuant to a valid plea agreement, does not need written reasons to justify the departure. Id. at 193. The fact of the agreement is "spread out in the record for all the world to see fully justifies such a departure." Id. at 193, *quoting* Casmay v. State, 569 So. 2d 1351, 1353 (Fla. 3d DCA 1990). However, for the sake of clarity, this Court recommended the trial court state, in writing, that the plea agreement is the reason for departure. Id. at 194. However, in this case, the State did not agree to the departure following the revocation of petitioner's community

[7] This Court noted that the sentence was not in fact a departure. Id. at 194, n.4. The sentencing guidelines called for any non-state prison sanction and two years' community control is a non-state prison sanction.

control. The State strenuously objected to the trial court's departure. There was no agreement "spread out in the record for all the world to see" or to justify the departure. Moreover, this Court stated in Williams that no written reasons are required where the terms of the plea agreement are apparent on the face of the record. As the dissent in Glover highlights, because no written reasons are given, the appellate courts must guess that the trial court's departure reason is the prior agreement. Id. at 249 (*Harris dissenting*). This guesswork is also necessary in this case. The trial court in this case gave no departure reasons, either orally or in writing, following its revocation of petitioner's community control. Therefore, this Court must infer that the prior agreement was the departure reason, even though it was never explicitly stated as the reason by the trial court and is certainly not clear from the face of the record. Thus, according to the rationale of Williams, *supra*, the trial court needed to provide written reasons in the absence of an agreement.

Furthermore, despite petitioner's request for a *de novo* sentencing hearing, the First District properly instructed the trial court to impose a guidelines sentence on remand. The trial court was aware that the sentence it imposed constituted a downward

departure. The prosecutor contemporaneously objected to the downward departure saying:

> [Prosecutor]: Your Honor, the state objects to the sentence as being illegal, below the guideline sentence.

The trial court's sole response to the objection was:

> [The Court]: Is there anything further?

(T. 42). Thus, the trial court was aware that it was imposing a departure sentence. If a trial court is aware at the time of sentencing that its sentence is a departure, on remand the trial court must impose a guideline sentence. Pope v. State, 561 So. 2d 554 (Fla. 1990); Whipple v. State, 596 So. 2d 669 (Fla. 1992). Petitioner nevertheless claims that the trial court was under the "impression" that no written reasons were required because other district courts did not require written reasons. IB at 10. However, the First District clearly required written departure reasons in this situation. Roman, *supra*. A trial court is required to follow the decisions of the district court in which it is located and is not free to follow the decisions of other district courts. Pardo v. State, 596 So. 2d 665 (Fla. 1992). Therefore, the First District properly instructed the trial court to impose a guidelines sentence on remand.

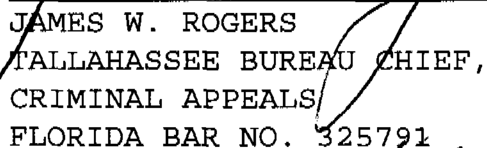
In conclusion, the trial court erred by failing to provide written departure reasons when it imposed a downward departure sentence following its revocation of petitioner's community control. This Court should follow its prior holdings in Bilyou, *supra*, and Williams, *supra*, and not permit the trial court to depart based on a departure reason which no longer exists. This Court should require the trial court to enter valid, written reasons to justify a departure sentence as required by the statute, the rules of criminal procedure and this Court's precedent. A breached plea agreement is not a valid departure reason. This Court should approve the First District's decision in this case.

<u>CONCLUSION</u>

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal in State v. Brown, 675 So. 2d 991 (Fla. 1st DCA 1996) should be approved. The trial court's downward departure sentence should be reversed for failure to provide currently valid departure reasons in writing and this case should be remanded to the trial court with instruction to impose a guidelines sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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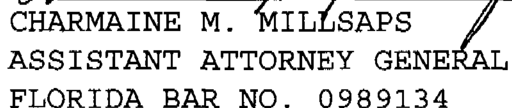

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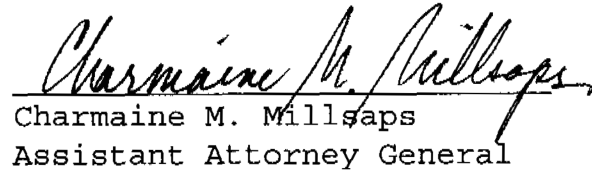
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Lynn A. Williams, 902-A North Gadsden Street, Tallahassee, FL 32303 this 9th day of September, 1996.



Charmaine M. Millsaps
Assistant Attorney General

[A:\BROWNABA.WPD --- 9/9/96,11:46 am]

# Appendix

titled to be discharged, but rather, should be granted a new trial. *Id.*

Similarly, the appellant in the case before us is not entitled to discharge, but instead, must be granted a new trial. *See Reid v. State,* 656 So.2d 191 (Fla. 1st DCA 1995). However, unlike the situation presented in *Sykes,* in which no double jeopardy was presented by a re-trial for grand theft, we find that appellant cannot be retried on the principal charge, aggravated assault of a law enforcement officer. The jury verdict in the case before us amounted to an acquittal of the principal charge. Appellant has not been acquitted of the offense of attempted aggravated assault, which, as argued by the state, is an offense under Florida Statutes. *See Hall v. State,* 354 So.2d 914 (Fla. 2d DCA 1978). We hold that the appropriate remedy, therefore, is a new trial on the offense of attempted aggravated assault.

REVERSED and REMANDED for new trial in accordance with the foregoing opinion and decision.

MINER and MICKLE, JJ., and SMITH, Senior Judge, concur.

**STATE of Florida, Appellant,**

**v.**

**Arthur L. BROWN, Appellee.**

**No. 95–2755.**

District Court of Appeal of Florida, First District.

June 11, 1996.

In revocation of community control proceeding, the Circuit Court, Leon County, Nikki Ann Clark, J., found that defendant violated conditions of his community control and imposed downward departure sentence without written reasons. State appealed. The District Court of Appeal, Webster, J., held that Circuit Court was required to provide written reasons for its downward departure sentence, even though state had previously agreed to downward departure sentence of defendant's initial placement on community control as part of plea agreement.

Reversed and remanded with directions.

**Criminal Law ⚷982.9(7)**

Trial court was required to provide written reasons for its downward departure sentence following revocation of defendant's community control, even though state had previously agreed to downward departure sentence of initially placing defendant on community control as part of plea agreement. West's F.S.A. § 921.001(6); West's F.S.A. RCrP Rule 3.701(d)(11).

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Robert A. Butterworth, Attorney General; Charmaine Millsaps, Assistant Attorney General, Tallahassee, for Appellant.

Lynn A. Williams, Tallahassee, for Appellee.

WEBSTER, Judge.

The state seeks review of a downward departure sentence imposed, without written reasons, following revocation of community control. Because the sentence is unaccompanied by written reasons, we reverse, and remand for imposition of a guidelines sentence.

In 1994, pursuant to a plea agreement, appellee pleaded guilty to two counts of burglary of a structure, and one count of third-degree felony theft. Also pursuant to the plea agreement, appellee was placed on community control for two years. This was a significant downward departure from the sentencing guidelines recommended sentence of eight years (the permitted range was 5½ to 12 years).

In 1995, appellee was found to have violated the conditions of his community control. At the sentencing hearing, the state urged that appellee's community control be re-

voked, and that he be sentenced according to the guidelines, explaining that the sentence could be enhanced by one cell because of the violation of community control. With a one-cell enhancement, the permitted range was 7 to 17 years. Without explanation, and over the state's objection that such a downward departure constituted an illegal sentence, the trial court sentenced appellee on each count to one year in jail, to be followed by one year of probation, the three sentences to run concurrently. No written reasons were entered by the trial court to support its significant downward departure sentence.

Section 921.001(6), Florida Statutes (1993), states that "[a] court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence in accordance with s. 921.0016.... *Any sentence imposed outside the range recommended by the guidelines must be explained in writing by the trial court judge.*" (Emphasis added.) Similarly, Florida Rule of Criminal Procedure 3.701(d)(11) (1993) states that "[d]epartures from the recommended or permitted guideline sentence should be avoided unless there are circumstances or factors that reasonably justify aggravating or mitigating the sentence. *Any sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure.*" (Emphasis added.) There seems to be little room for interpretation regarding the intent of the foregoing emphasized language. In fact, the supreme court has said repeatedly that this language means what it appears, in relatively unambiguous terms, to say. *E.g., State v. Jackson,* 478 So.2d 1054 (Fla.1985); *Ree v. State,* 565 So.2d 1329 (Fla.1990); *State v. Colbert,* 660 So.2d 701 (Fla.1995). There are, of course, a number of quite valid administrative and procedural justifications for such a requirement, not the least of which is to facilitate appellate review of the propriety of departure sentences.

Appellee candidly concedes that we have previously addressed this precise issue, holding that a downward departure sentence imposed in circumstances substantively indistinguishable from those here must be reversed, and remanded with instructions to impose a guidelines sentence, because the sentence had not been accompanied by written reasons justifying it. *State v. Roman,* 634 So.2d 291 (Fla. 1st DCA 1994). The Second and Third District Courts of Appeal appear to be in accord. *State v. Delgadillo,* 659 So.2d 1264 (Fla. 3d DCA 1995), *review granted,* No. 86,558, 668 So.2d 603 (Fla. Feb. 1, 1996); *State v. Franquiz,* 654 So.2d 1068 (Fla. 3d DCA 1995), *review granted,* No. 85,960, 668 So.2d 603 (Fla. Feb. 1, 1996); *State v. Zlockower,* 650 So.2d 692 (Fla. 3d DCA), *review dismissed,* 659 So.2d 1091 (Fla.1995); *State v. McMahon,* 605 So.2d 544 (Fla. 2d DCA 1992).

Appellee urges that we recede from *Roman,* and adopt the position of the Fourth District Court of Appeal. In *State v. Hogan,* 611 So.2d 78 (Fla. 4th DCA 1992), that court appears to have held that written reasons need not be filed to justify a downward departure sentence in circumstances such as those presented here. *Accord Schiffer v. State,* 617 So.2d 357 (Fla. 4th DCA 1993). In a 2–1 opinion, the Fifth District has followed *Hogan. State v. Glover,* 634 So.2d 247 (Fla. 5th DCA 1994). We find these decisions unpersuasive. *Hogan* appears to be based on the proposition that "the state's prior stipulation to a downward departure is a valid ground supporting a subsequent sentence below the guidelines." 611 So.2d at 79. This may well be a defensible position, although it would seem that a convincing argument could be made that, the original favorable bargain having been breached by the defendant, there is little justification for continuing to enforce that bargain over the state's objection. However, it seems to us that this position misses the point. As we perceive it, the pertinent question is whether, notwithstanding the validity of such a circumstance as support for a subsequent downward departure, the trial court is still required to state its reasons, in writing, when it decides to impose a downward departure sentence. *Hogan* and its progeny do not address this issue. In particular, they fail to explain why it is that the plain mandate of both section 921.001(6) and rule 3.701(d)(11), that *any* departure from the recommended

guidelines sentence be supported by written reasons, does not apply in this particular situation. They also fail to explain why the administrative and procedural justifications supporting the need for such a rule generally, do not apply in this particular situation.

We adhere to our prior decision in *Roman*, and reverse the downward departure sentence imposed without written reasons. On remand, the trial court is instructed to impose a guidelines sentence. *Pope v. State*, 561 So.2d 554 (Fla.1990). We also certify conflict with *Hogan*, *Schiffer* and *Glover*.

REVERSED and REMANDED, with directions.

MINER and MICKLE, JJ., concur.

**Michael J. McCOY, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 95–02289.**

District Court of Appeal of Florida, Second District.

June 12, 1996.

Defendant was convicted in the Circuit Court, Polk County, Robert L. Doyel, J., of possession of cocaine, and he appealed. The District Court of Appeal, Blue, J., held that: (1) trial court could not impose probation conditions that defendant pay for random testing, drug/alcohol evaluation, and treatment, and (2) trial court could not impose $2 fee for expenditures for criminal justice education degree programs and training courses, and could not impose $33 "cost/fine."

Conviction affirmed; certain costs and probation conditions struck.

**1. Criminal Law ⚷982.5(2)**

Trial court could not require defendant to pay for random testing, drug/alcohol evaluation, and treatment as conditions of probation.

**2. Criminal Law ⚷995(8)**

Form for order of probation provides notice sufficient to obviate the need for oral pronouncement of conditions imposed. West's F.S.A. RCrP Rule 3.986(e).

**3. Costs ⚷314**

Trial court could not impose $2 fee for expenditures for criminal justice education degree programs and training courses as part of sentence, where cost was not announced. West's F.S.A. § 943.25(13).

**4. Costs ⚷292**

Trial court did not have statutory authority to impose a $33 "cost/fine" as part of sentence.

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James Marion Moorman, Public Defender, and Wayne S. Melnick, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa, for Appellee.

BLUE, Judge.

Michael J. McCoy appeals his conviction and sentence for possession of cocaine, arguing that the State failed to prove constructive possession. The record contains independent evidence of circumstances from which the jury could lawfully infer McCoy's actual knowledge of the cocaine. *See Moffatt v. State*, 583 So.2d 779 (Fla. 1st DCA 1991). Because the evidence was sufficient to present a question for the jury, we affirm McCoy's conviction. *See Parker v. State*, 641 So.2d 483 (Fla. 5th DCA 1994).

[1–4] However, we agree with McCoy that the trial court improperly imposed certain costs and probation conditions. Accordingly, we strike the portions of conditions 8 and 20 that require McCoy to pay for random testing, drug/alcohol evaluation, and treatment. *See Luby v. State*, 648 So.2d