

IN THE SUPREME COURT OF FLORIDA

LUCIOUS WILLIAMS, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

Case No. 76,016

**FILED**  
SID J. WHITE

JUN 7 1990

CLERK, SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT  
FLORIDA BAR NO. 0143265

MEGAN OLSON  
ASSISTANT PUBLIC DEFENDER

Public Defender's Office  
Polk County Courthouse  
P. O. Box 9000--Drawer PD  
Bartow, FL 33830  
(813) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level, will be referred to by the Symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by informations with aggravated battery and third degree murder (R3, 13). He entered pleas of guilty and was placed on probation for both offenses (R22). The petitioner violated his probation and the order was modified (R26). Ultimately he again was found to be in violation of his probation by the trial court (R41, 55). Although the sentencing guidelines reflected a range of 7 to 12 years, the trial court imposed a 30 year term of imprisonment (R32, 6-9, 18-21, 64). One of fourteen reasons given for departure was the multiple violations of his probation by the defendant.

The Second District Court of Appeal affirmed the departure sentence stating that the recent decision of Ree v. State, 14 F.L.W. 565 (Fla. November 16, 1989), did not address the issue of departure sentences based upon multiple violations of probation or community control.

SUMMARY OF THE ARGUMENT

The imposition of a departure sentence based upon prior violations of probation or community control by a defendant violates the spirit and intent of the sentencing guidelines. In such cases, a trial court should be precluded from imposing a sentence greater than the one-cell enhancement allowed under the sentencing guidelines.

## ARGUMENT

### ISSUE I

DOES A SECOND VIOLATION OF PROBATION  
CONSTITUTE A VALID BASIS FOR A DE-  
PARTURE SENTENCE BEYOND THE ONE-CELL  
DEPARTURE PROVIDED IN THE SENTENCING  
GUIDELINES?

In the case of Williams v. State, 87-2878 (Fla. 2d DCA April 27, 1990), the Second District Court of Appeal stated that multiple violations of probation were a valid reason for imposing a departure sentence in a violation of probation case. Although, in light of Ree and Lambert, supra, the court certified the above-stated question as one of great public importance, it should also be noted that at least two other District Court of Appeals conflict directly with the Second District Court of Appeal on this issue. Maddox v. State, 553 So.2d 1380 (Fla. 1989); Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). Both the Fifth and the Third District Courts of Appeals have held that under such circumstances as those presently before the Court, multiple violations of probation were no longer a valid reason for a sentencing departure. The Second District Court of Appeal felt that the holding of Adams v. State, 490 So.2d 53 (Fla. 1986), which upheld departure sentences based upon repeated violations of probation, had not been invalidated by the recent Florida Supreme Court cases of Lambert and Ree, supra, whereas, the Fifth and Third District Courts of Appeal reasoned that the recent Florida Supreme Court cases did in effect overrule the decision in Adams, supra.

This Court in Lambert v. State, 545 So.2d 8383 (Fla. 1989), discussed the policy reasons for the holding that factors related to a violation of probation or community control could not provide the basis for a departure sentence. This court also receded from the decision in Pentaude v. State, 500 So.2d 526 (Fla. 1987), to the degree it conflicted with Lambert, supra. The policy reasons espoused in Lambert, supra, requiring the recession from Pentaude, supra, are equally applicable to the holding of Adams v. State, 490 So.2d 53 (Fla. 1986). As noted in Lambert, a "...violation of probation is not itself an independent offense punishable by law in Florida... . If departure based upon probation violation were to be approved, the courts unilaterally would be designating probation violation as something other than what the legislature intended." Id. at 841.

When a trial court judge imposes a departure sentence based upon repeated violations of probation or community control, he is in essence unilaterally creating a new substantive offense and affixing the penalty he deems appropriate for its violation. The purpose of Florida Rule of Criminal Procedure 3.701(D)(14), limiting the departure upon a violation of probation or community control to a one-cell increase, is to establish uniformity in sentencing a defendant upon a violation of probation. At the time a defendant is initially placed on probation or community control, the trial court judge, as well as the defendant, is aware of the possible incarcerative sentence which may be imposed upon a violation of probation. If the defendant violates the probation or

community control, the trial court judge determines whether to reinstate the defendant or to impose the applicable prison sentence. The defendant has previously failed to in some way, conform to the requirements of his probationary status, thus a judge's decision to reinstate him must, in all honesty, be made with the knowledge that the defendant may again violate his probation. A defendant should not face a sentence in excess of the applicable guidelines and potentially as great as the statutory maximum for the offense of conviction, because of the trial judge's ultimate decision. In other words, trial court judges should not be allowed to circumvent the basic policy of Florida Rule of Criminal Procedure 3.701(D)(14), limiting the sentences imposed in a violation of probation case to a one-cell increase, by stating that a defendant has repeatedly violated his probation and then impose a departure sentence. Thus, Adams, must have been overruled by Lambert. Otherwise, the effect of such a sentence in reality creates a new substantive offense where a defendant repeatedly violates his probation or community control, allowing for multicell sentencing departures based upon the violation of probation which is "contrary to the spirit and intent of the guidelines." Lambert, supra, at 842.

The decision of the Second District Court of Appeal in Williams, and the consolidate cases is erroneous as they fail to correctly apply the logic and legal reasoning employed in Lambert. Multiple violations of probation or community control should not be