IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 75,729

LOUIS K. JOHNSON,

Respondent.

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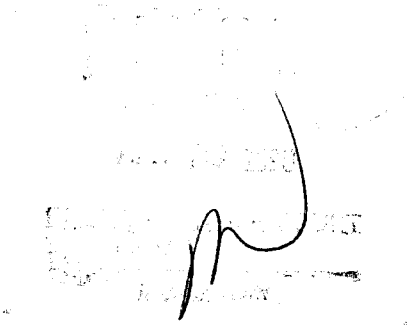

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Louis Johnson was charged by information filed September 24, 1985, with shooting into an occupied conveyance, use of a firearm while committing or attempting to commit a felony, and aggravated assault. (R 14) Johnson entered a plea of guilty to shooting into an occupied conveyance, and in exchange, the state dismissed the other two charges. He was sentenced on April 23, 1987, to a true split sentence of five and one half years in the Department of Corrections with the provision that after serving two and one half years in prison, the balance of his sentence would be suspended and Johnson would be placed on probation. Johnson was released from prison on January 19, 1988, after serving two hundred seventy-one days. (R 7-8)

Seven months later, an affidavit of violation of probation was filed, alleging that Johnson committed twelve separate violations, both technical violations like failure to submit monthly reports or pay costs of supervision and also new substantive offenses of possession of a firearm or weapon by a convicted felon and possession of cocaine. (R 27-28) Johnson entered a plea of no contest to the violation of probation. When he appeared for sentencing on the violation, the other substantive offenses were still pending. (R 3-5)

On December 20, 1988, Johnson was sentenced on the violation of probation to fifteen years' incarceration, with the provision that after serving ten years, the remainder would be suspended and Johnson would be placed on probation. (R 6) The court stated the following reasons for the departure:

> (T)he offense of violations of probation that the defendant is now before the Court on are serious and substantial and aggregarious (sic) in nature, and that fact standing alone allows the Court to depart beyond the one cell departure;...furthermore, with the defendant having been released from prison on January 19, 1988, the timing of the violations of probation in relation to his release from prison indicate that the previous imprisonment failed to have a deterrent impact on the defendant including beginning to fail to pay the costs of supervision beginning in July of '88 through and inculding September of '88, and then the substantive law violations of possession of a firearm or weapon, August 23rd of 1988; possessing cocaine, August 23rd of 1988; and another count of possessing a weapon, August 23rd, 1988. Those having been committed within nine months of his release from prison is timing that would allow the Court to give a departure sentence.
>
> Also, the Court finds that the defendant's commission of these offenses shows that he's continuing in a persistent pattern of criminal activity....(R 10)

These reasons were not reduced to writing.

Johnson timely appealed his sentence. On February 22, 1990, the District Court of Appeal, Fifth District, entered its decision in this cause. The court reversed and remanded the sentence and certified the following question to this court for resolution as one of great public importance:

WHETHER LAMBERT V. STATE, 545 SO.2D 838 (FLA. 1989) OVERRULED STATE V. PENTAUDE, 500 SO.2D 526 (FLA. 1987) OR MERELY RECEDED TO THE EXTENT THAT NEW CRIMINAL CONDUCT, WHETHER A CONVICTION IS OBTAINED OR NOT, MAY NOT BE USED FOR DEPARTURE?

On March 20, 1990, the state timely filed its notice to invoke the discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

This court's decision in Lambert, infra held that the sentencing court may not depart in violation of probation cases on the basis of violations which constitute new criminal conduct. However, Lambert left intact that portion of this court's decision in Pentaude, infra that holds that a trial court may depart from the permitted range and impose any sentence within the statutory limit if the noncriminal violations are not minor but are sufficiently egregious. Otherwise, probationers can violate probation with virtual impunity. Trial courts will have lost any power to enforce conditions of probation. Although violation of probation is not an independent offense punishable by law in Florida, neither was it abolished by the sentencing guidelines. The state respectfully requests this court to exercise its review of this case to settle an area of the law "...drastically in need of clarification." Niehenke, infra.

ARGUMENT

WHETHER THE TRIAL COURT CAN DEPART BEYOND ONE CELL WHEN SENTENCING FOR VIOLATION OF PROBATION WHEN THE UNDERLYING NONCRIMINAL CONDUCT VIOLATIONS ARE SUFFICIENTLY EGREGIOUS TO WARRANT DEPARTURE UNDER STATE V. PENTAUDE, 500 SO.2D 526 (FLA. 1987)

In Lambert v. State, 545 So.2d 838 (Fla. 1989), this court answered a question certified to be of great public importance concerning whether departure from the sentencing guidelines was permitted in cases involving violation of probation or community control where the underlying reasons for violation of probation included criminal conduct for which no conviction had been obtained. This court held that Florida Rule of Criminal Procedure 3.701 (d)(11) required that convictions be obtained before utilizing the conduct as a reason for departure. Moreover, the court held that even where conviction on the new offense constituting the violation of probation had been obtained, the sentencing court could not rely upon this factor as a reason for departure without violating the principles of Hendrix v. State, 475 So.2d 1218 (Fla. 1985). An additional reason why the court found this to be improper was that violation of probation is not a substantive offense, and therefore, the defendant is not "resentenced" upon violation of probation. The court stated, "To the extent that this conflicts our earlier ruling in Pentaude, we recede from our decision there." Lambert v. State, 545 So.2d at 842.

Since the certified question involved criminal conduct violations, the rule of law announced in Lambert should apply only to new criminal conduct violations of probation. Otherwise, this court would have overruled Pentaude rather than merely receeding from it. There is no indication in the Lambert decision that this court ever considered the propriety of authorizing departure for noncriminal conduct violations when necessary to encourage compliance with probation or community control. The logical interpretation of Lambert is that it recedes from Pentaude only to the extent that the trial judge may not depart in a violation of probation case based upon new criminal conduct whether or not a conviction is obtained. However, in cases such as this, where the noncriminal conduct violations are more than minor infractions and are sufficiently egregious, the sentencing court is permitted to depart from the presumptive guidelines range and the one cell increase and impose an appropriate sentence within the statutory limit. Pentaude,supra. There is no Hendrix problem because noncriminal violations are not scored on the scoresheet, and hence there is no "double dipping".

The problem in this case is that although three years of possible confinement is permitted under the original sentence, Franklin v. State, 545 So.2d 851 (Fla. 1989) restricts the trial court's discretion to one year (less the 92 days Johnson served in jail awaiting trial on the substantive offenses). The violations in this case were found by the trial judge to be

substantial and serious, yet Johnson's exposure for this conduct is less than nine months' incarceration. When gain time is factored in, the actual time served for violation of probation will be a scant few weeks. This result is absurd and totally undermines probation as a supervising tool to be used by the sentencing court. Johnson refused to accept the responsibilities of probation, and without threat of adequate sanctions, he and thousands like him never will.

A related problem occurs when a probationer repeatedly violates probation. This court held in Adams v. State, 490 So.2d 53 (Fla. 1986) that repeated violations of probation constitute a valid reason for departure. If Franklin and Lambert flatly prohibit any departure in any violation of probation case to the one cell bump up, then "...we have the problem of the multiple probation violator for whom there is no longer any consequence or remedy for fruther probation violations....The trial courts will have lost any power to enforce conditions of probation. This is an area drastically in need of clarification." Niehenke v. State, Case No. 89-749 (Fla. 5th DCA April 19, 1990)(Sharp, J. dissenting) See also, Williams v. State, 15 F.L.W. D 912 (Fla. 2d DCA April 4, 1990)(Question certified whether Lambert recedes from Adams).

The state respectfully requests this court to accept review of this case to clarify the decision in Lambert to reaffirm the vitality of Pentaude.

CONCLUSION

Based upon the argument and authority presented, petitioner respectfully requests this honorable court to exercise its discretionary jurisdiction and review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished, by delivery to Assistant Public Defender Daniel Schafer counsel for respondent at 112 Orange Avenue, Suite A, Daytona Beach, FL 32114, this 19th day of April, 1990.

Belle B. Turner

BELLE B. TURNER
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 75,729

LOUIS K. JOHNSON,

Respondent.

_____/

PETITIONER'S APPENDIX

Johnson v. State, 15 F.L.W. D 515 (Fla. 5th DCA 2-22-90)

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the Circuit Court for Orange County, George N. Diamantis, Judge. Tobe Lev of Egan, Lev & Siwica, Orlando, and John Beranek of Klein & Beranek, P.A., West Palm Beach, for Appellants/Cross-Appellees. Michael J. Appleton, Orlando, for Appellees/Cross-Appellants.

(DAUKSCH, J.) This is an appeal from a judgment for costs on appeal. The appeal for which costs were awarded was *Harrod v. Mason*, 513 So.2d 159 (Fla. 5th DCA 1987), *rev. denied*, 520 So.2d 585 (Fla. 1988). This court affirmed the judgment as to four tenants, but reversed the majority of the damages awarded to the remaining 25 tenants. Tenants now argue, *inter alia*, the trial court erred in assessing appellate costs against all 29 tenants. Owners concede that four of the tenants, the Taylors, McClung, Kilmer, and the Cornishes, should not have had appellate costs assessed against them because their awards were completely affirmed on appeal. We agree and, accordingly, strike those portions of the amended final judgment assessing costs against the four named tenants. We find no merit in any other points on appeal; thus we affirm as to the balance of the judgment.

That portion of the judgment which assesses costs against appellants Taylor, McClung, Kilmer and Cornish is stricken. Otherwise, the judgment is affirmed.

It is so ordered. (COBB, J., and LEE, R. E., Jr., Associate Judge, concur.)

* * *

Criminal law—Probation revocation—Sentencing—Upon revocation of probation after incarceration pursuant to a true split sentence, trial court is limited to recommitting defendant to balance of withheld or suspended portion of original sentence, provided that total period of incarceration, including time already served, may not exceed one-cell increase in recommended guidelines sentence—Question certified whether *Lambert v. State* overruled *State v. Pentaude* or merely receded to the extent that new criminal conduct, whether a conviction is obtained or not, may not be used for departure

LOUIS K. JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-43. Opinion filed February 22, 1990. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. James B. Gibson, Public Defender and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Fleming Lee, Assistant Attorney General and Robin A. Compton, Certified Legal Intern, Daytona Beach, for Appellee.

(GOSHORN, J.) Louis K. Johnson appeals his sentence imposed following a revocation of probation. Because he was given an illegal sentence, we reverse and remand for resentencing.

In 1985, Johnson plead guilty to shooting into an occupied conveyance and was given a true split sentence of 5½ years in the Department of Corrections with the provision that after serving 2½ years in prison, the balance of his sentence would be suspended and he would be placed on 3 years' probation.

In 1988 Johnson plead no contest to violating his probation. The recommended guideline range was 12 to 30 months in the Department of Corrections or Community Control. The one cell increase, allowed for the violation of probation, placed the recommended range at 2½ to 3½ years' incarceration. The trial court departed without written reasons and recommitted Johnson to 15 years in the Department of Corrections with the provision that he serve 10 years, after which he would be placed on probation for 5 years.

Upon revocation of probation after incarceration pursuant to a true split sentence, the trial court is limited to recommitting a defendant

> to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d)14. Any further departure for violation of probation is not allowed. *Lambert v. State*, 545 So.2d 838, 841-842 (Fla. 1989).

Franklin v. State, 545 So.2d 851, 852 (Fla. 1989). *See also Poore v. State*, 531 So.2d 161 (Fla. 1988).

Accordingly, this cause is remanded for defendant's recommitment in accordance with *Poore* and *Franklin, supra.* Upon recommitting defendant, the court must give Johnson earned gain time when computing his time served to be credited against this recommitment. *State v. Green*, 547 So.2d 925 (Fla. 1989).[1]

Pursuant to the request of the author of the concurring opinion, we certify the following question to the Supreme Court as being one of great public importance:

> WHETHER *LAMBERT V. STATE*, 545 SO.2D 838 (FLA. 1989) OVERRULED *STATE V. PENTAUDE*, 500 SO.2D 526 (FLA. 1987) OR MERELY RECEDED TO THE EXTENT THAT NEW CRIMINAL CONDUCT, WHETHER A CONVICTION IS OBTAINED OR NOT, MAY NOT BE USED FOR DEPARTURE?

REVERSED and REMANDED. (DANIEL, C.J., concurs. HARRIS, J., concurs specially with opinion.)

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[1]Although the legislature recently amended sections 944.28 and 948.06, Florida Statutes, to add revocation of probation to the list of circumstances justifying forfeiture of gain-time, these amendments did not become effective until September 1, 1990 and thus are inapplicable to this case. *See* Ch. 89-526, §§ 6, 8, 52, Laws of Florida.

(HARRIS, J., concurring specially.) I concur, only because it appears to be mandated by *Franklin v. State*, 545 So.2d 851 (Fla. 1989). A literal interpretation of *Franklin*, however, will often, as in this case, lead to an absurd result and totally undermine probation as a supervising tool to be used by the trial court. Surely such was not the intent of the legislature.

In this case appellant pleaded guilty to shooting into an occupied conveyance, a second degree felony. He was sentenced to a 5-1/2 year true split sentence: 2-1/2 years in prison and the remaining three years "stay[ed] and with[held]"[1] pending compliance with the terms of probation. After serving enough time to satisfy the prison requirement, he was released into society. Within about seven months of his release, he was arrested for unlawful possession of cocaine and carrying a concealed weapon. These arrests, which were categorized as failing to "live and remain at liberty without violating any law", were charged along with possession of a firearm, failure to make reports to the probation officer and failure to pay costs of supervision as violations of probation.[2] After spending 92 days in jail (apparently awaiting trial on the cocaine and concealed weapon charges) he pleaded no contest to violation of probation.

Orally stating that the violations were serious and substantial, that the timing of the violations shortly after release from prison indicated the prior short term imprisonment had no deterrent impact, and that his conduct evidenced a "persistent pattern of criminal activity," the judge departed from the guideline range and sentenced defendant to a new split term of 10 years in prison followed by 5 years probation. This was clearly error for two reasons: (1) the judge failed to give *written* reasons for departure, and (2) this was originally a true split sentence, and there can be no "new sentencing". The judge was limited to recommitting

the defendant to serve the balance of the previously imposed sentence.

The problem in this case is that although three years of possible confinement is permitted under the original sentence, *Franklin* restricts the judge's discretion to one year (less the 92 days appellant has spent in jail awaiting trial on the substantive cases) to "punish"[3] the defendant for violating the terms of probation in such a fundamental way. Here not only did the appellant refuse to report to his probation officer, he violated the condition that he "neither possess, carry or own any weapon or firearm" a short time after release from prison for shooting into an occupied conveyance. He also refused to follow instructions and failed to attend drug treatment. In short, he refused to accept probation and, without the threat of adequate sanctions, it appears he never will.

The judge's oral reasons for departure seem sufficient under *State v. Pentaude*, 500 So.2d 526 (Fla. 1987):

> The trial judge has discretion to so depart based upon the character of the violation, the number of conditions violated, the number of times he has been placed on probation, the length of time he has been on probation before violating the terms and conditions, and any other factor material or relevant to the defendant's character.

Except for *Franklin*, I would remand to the trial judge to provide written reasons for departure, and if the reasons were sufficient, would permit confinement up to the three years remaining on the original sentence.

Although the *Franklin* decision, relying on *Lambert v. State*, 545 So.2d 838 (Fla. 1989), makes it clear that a departure from the guidelines should never be permitted in a violation case, *Lambert* is not so clear. In *Lambert* the certified question and the Court's discussion involved whether the trial court could depart from the guideline range in a community control sentence when the violation constituted a substantive crime for which the defendant had not been convicted. The court held that it would be improper to depart on the basis of criminal conduct where no conviction had occurred because of the provisions of Rule 3.701(d)11, Florida Rules of Criminal Procedure. The court also held that it would be improper to depart on the basis of criminal conduct even after conviction because of the problems of the single scoresheet and the addition of status points under legal restraint.[4]

Following the analysis, the court stated:

> Accordingly,[5] we hold that factors related to violation of probation or community control cannot be used as grounds for departure. To the extent that this conflicts with our earlier ruling in *Pentaude*, we recede from our decision there.

Lambert, 545 So.2d at 842.

I urge that the logical interpretation of *Lambert* is that it recedes from *Pentaude* only to the extent that the trial judge may not depart in a violation case based upon new criminal conduct whether or not there has been a conviction.[6] There is no indication that the *Lambert* court ever considered the propriety of authorizing departure for noncriminal conduct violations when such authority is necessary to encourage compliance with probation or community control.

In our case the number of violations (twelve alleged), the timing of the violations (seven months after release from prison) and other factors material or relevant to defendant's character (violation of the provision not to carry a firearm while on probation for an offense involving a firearm, and refusing to participate in drug counseling) would seem appropriate for departure under *Pentaude*.

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[1] § 948.01(4), Fla.Stat. (1981).

[2] Also included as violations were use of crack cocaine, loitering and prowling, failure to work diligently, three charges of failure to comply with instructions and failure to report for drug counseling.

[3] It is true that violation of probation is not a separate crime in Florida; however, in order to encourage compliance with the terms of probation, proven violations are punished by returning the defendant to prison. When gain time and other incentive release time is factored in, it is apparent that there is no reason for this defendant to comply with the terms of probation. This is evident by the fact that defendants are now asserting the right to be sentenced to the next higher cell to avoid probation. The right to so choose denied defendants by *Woods v. State*, 542 So.2d 443 (Fla. 5th DCA 1989) and *Evans v. State*, 544 So.2d 1160 (Fla. 5th DCA 1989) has, in effect, now been granted by the *Franklin* decision.

[4] Admittedly, the court also discussed the effect of the legislatures' "one cell bump up" authorization in violation cases in order to determine the legislative intent. But the court seemed more concerned with the gross departures mentioned in its opinion than with whether the legislature intended to eliminate any reasonable sanctions to encourage probation. Also, since this discussion went beyond the issue raised by the certified question, it appears to be obiter dictum. The general statement of law that follows the court's discussion is even more surprising when one considers the unanamous holding in *Pentaude* such a short time earlier:

> Finally, we note agreement with the district court's holding that "[w]here a trial judge finds the underlying reasons for violation of probation (as opposed to the mere fact of violation) are more than a minor infraction and are sufficiently egregious, he is entitled to depart from the presumptive guideline range and impose an *appropriate sentence* within the statutory limit. [emphasis added]

Pentaude at 528.

[5] "Accordingly" indicates that the rule of law about to he announced is based on the analysis that preceeds the statement. Since the certified question did not involve non-criminal conduct violations as grounds for departure, the rule of law announced would seem to apply only to new criminal conduct violations. This would also explain why the court merely receded from *Pentaude* rather than overturned it.

[6] But see *Kramer v. State*, 550 So.2d 557 (Fla. 5th DCA 1989) and *Branton v. State*, 548 So.2d 882 (Fla. 5th DCA 1989).

* * *

Dissolution of marriage—Abuse of discretion to refuse to order partition of marital home and to award husband's interest to wife as lump sum alimony where marital home is only marital asset of significant value, and husband would be shortchanged—Husband's plea for partition substantially complied with statutory requirements although plea did not contain legal description of property—Partition to be stayed, with wife to have exclusive possession of marital home until minor child reaches age of majority or wife remarries

BRUCE H. SAVAGE, SR., Appellant, v. SHEILA G. SAVAGE, Appellee. 2nd District. Case No. 89-00836. Opinion filed February 16, 1990. Appeal from the Circuit Court for Hillsborough County; Thomas E. Stringer, Judge. Terrence S. Buchert of Riden & Earle, P.A., St. Petersburg, for Appellant. Thomas A. Smith and Robert R. Carbonell, Tampa, for Appellee.

(RYDER, Acting Chief Judge.) The husband in this dissolution action challenges the distribution of property and alimony and child support awards in the final judgment dissolving the marriage of the parties. We reverse the award of the husband's interest in the marital home to the wife and remand this case for further proceedings.

The husband asked for partition of the marital home. The parties estimated the value of the home at between $220,000.00 and $235,000.00. This was the only asset of significant value owned by the parties. The trial court denied the plea for partition, and awarded the husband's interest in the marital home to the wife as lump sum alimony in order to achieve equitable distribution. She was also awarded primary residential custody of the two minor