

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 LOUIS K. JOHNSON, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO.: 75,729

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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CASE NO.: 75,729

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

Respondent, Louis K. Johnson, accepts the statement of the case and facts set out in Petitioner's brief on the merits.

SUMMARY OF ARGUMENT

Respondent's Motion to Dismiss should be granted because the issue raised in this appeal is a moot point in Mr. Johnson's case. However, should the Court choose to address the certified question, there is no compelling reason to modify the Lambert decision. Violation of probation is not a substantive offense. The one cell "bump-up" contemplated by the sentencing guideline rule presents an adequate and fair remedy for non-criminal violations of probation.

## ARGUMENT

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?

Mr. Johnson first contends that this Court should grant his motion to dismiss, filed May 10, 1990. Mr. Johnson's initial sentence was a guideline departure without any written reasons. After the District Court's reversal Mr. Johnson was legally resentenced and released from custody. No matter what the result of this State appeal, Mr. Johnson cannot be sentenced again and reincarcerated. Pope v. State, 15 FLW S 243 (Fla. April 26, 1990). In fact, the state's brief does not even request that the decision of the District Court of Appeal be reversed or that anything be done with regard to Mr. Johnson's sentence. Important issues, such as the one raised by the District Court's certified question, are best resolved when the Court hears argument from interested parties.

Mr. Johnson next contends that even if he could be resentenced, the certified question would still have no relevance to his case. It is clear from the trial court's (oral) departure reasons that the only violations of probation committed by Mr. Johnson which could even arguably be considered "sufficiently egregious" to warrant departure, would be criminal violations. Thus, even if this Court decided that egregious non-criminal

conduct resulting in a violation of probation could justify departure, no such conduct occurred in Mr. Johnson's case.

Finally, should this court choose to answer the certified question, counsel for the Respondent contends that the Lambert decision should not be modified. How ironic it would be if committing a crime while on probation could not justify departure, while failing to pay probation costs could.

The key to the Lambert decision was the statement that a violation of probation is not a substantive crime in Florida. If a defendant has served the maximum guideline sentence for an offense, and the trial judge determined at his initial sentencing that no reasons for departure existed, then there is no reason that a technical violation of probation should result in a substantial new prison term. For in this type of case, probation was not granted as a matter of grace instead of a prison sentence, it was imposed as an additional sanction along with the maximum guideline incarceration. If new criminal convictions have resulted from behavior while on probation, then of course departure could be related to sentencing for those new convictions. However if no new crimes have occurred a one cell departure is all that is contemplated by the guideline rule, and is all that is warranted. Again, it should be emphasized, it is one thing when a term of probation is imposed to give an offender one more chance instead of incarceration. It is quite another where the maximum guideline prison sentence has already been imposed. In the former case a substantial prison sentence would

normally be available even for technical, non-criminal violations of probation. In the later case, the "one-cell bump up" is a fair sanction and is all that is contemplated by the sentencing guideline rule.



CONCLUSION

Based on the argument and authorities cited herein, Respondent respectfully requests that this Honorable Court deny review in this case.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

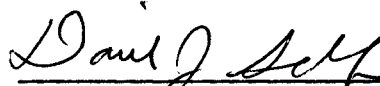


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal, this 23rd day of May, 1990.



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DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER