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IN THE SUPREME COURT OF FLORIDA

CLIFFORD DANIELS,	:	
Petitioner,	:	
vs.	:	Case No. 76,717
STATE OF FLORIDA,	:	
Respondent.	:	

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

DEBORAH K. BRUECKHEIMER
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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STATEMENT OF THE CASE

On September 26, 1985, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Petitioner, Clifford Daniels, with delivery of marijuana in violation of section 893.13(1)(a)(2), Florida Statutes (1985), for an incident occurring on September 5, 1985 (R224, 225). Mr. Daniels plead nolo contendere to the charge and was placed on 4 years of probation on November 18, 1985 (R229, 230). Mr. Daniels' probation was violated on August 28, 1986; and he was replaced on probation for 3 years (R231-238). Mr. Daniels violated his probation again when he failed to report to his probation officer; and he was sentenced to 5 years imprisonment with credit for 133 days served on September 18, 1987. This sentence was ordered to run consecutive to that imposed in a robbery charge (R242, 249-253).

On September 16, 1986, the State filed another information against Mr. Daniels charging him with robbery with a deadly weapon in violation of section 812.13(2)(b), Florida Statutes (1985), for an incident occurring on August 24, 1986 (R270-272). Mr. Daniels went to trial with a co-defendant on this charge on November 18, 1986, Acting Circuit Court Judge Bonanno presiding (R1, 111, 264). The voir dire was conducted on November 18 (R264), but the jury was not sworn until November 20, 1986 (R8). Mr. Daniels was present for the voir dire, but he failed to appear for any other part of the trial (R4-7, 122). Over objection, the trial court continued on with the trial. During trial the judge

instructed the jury that an element of robbery was a temporary or permanent intent to deprive (R153, 299). Both Mr. Daniels and his co-defendant were found guilty as charged on November 21, 1986 (R4-7, 109, 171, 172, 320, 321).

When Mr. Daniels was eventually located, he was sentenced to 9 years imprisonment with credit for time served of 101 days. The guidelines recommended 7 to 9 years. This sentence was ordered to run consecutive to the marijuana charge noted above. Sentencing occurred on September 18, 1987 (R324-325, 333-337, 188-207). Mr. Daniels timely filed his Notice of Appeal on September 22, 1987, on both the robbery and the marijuana charges and these notices were consolidated (R256, 338, 346). The Second District Court of Appeal issued an en banc opinion on September 14, 1990, rejecting all of Mr. Daniels' issues.

STATEMENT OF THE FACTS

Kimberly Sebine and Melody Schott were driving around Tampa at about midnight trying to locate a particular address and became lost (R18, 19, 65, 66). When they pulled under a street lamp to ask for directions from a black man walking down the street, they were surrounded by several black males who proceeded to bang on various parts of their car. The driver, Ms. Sebine, had her window down while asking for directions; and her wallet with her written directions was sitting in her lap (R20, 21, 66, 67). Three black males reached through the windows at about the same time and pulled at Ms. Sebine in order to get her wallet. One of them grabbed her wallet; and when she reached for it, Ms. Sebine was cut with a knife (R21, 22, 67). At this point Ms. Sebine put the car in gear and drove away (R22, 68).

The ladies drove to a public place and called the police. Officer Simpson was one of the officers who responded, and he asked the ladies to drive him to the location of the incident. The ladies drive around, but could not find the spot; so the officer guided them towards an area known for its problems (R22, 23, 68, 69, 87-89). The ladies identified the location, and the officers began rounding individuals up for the ladies to identify. Mr. Berry, the co-defendant, was identified as one of the men who had reached into the car (R23-25, 28, 69-72, 89-91). Ms. Sebine pointed out a house where she thought she had seen one of the men running to, and the officer approached Mr. Daniels who was sitting on the porch (R26, 91, 92). When Mr. Daniels informed the officer

that something he might be looking for might be in a nearby bush, the officer searched the bush, found Ms. Sebine's wallet, took Mr. Daniels to the ladies, and obtained an identification of Mr. Daniels as one of the three (R29, 92, 93, 101).

The man who had actually taken the wallet and had the knife was never located (R26, 93). Both women indicated that Mr. Berry had a scar on his face even though he did not have a scar (R26, 45, 72, 79).

Because Mr. Daniels was not present when Ms. Sebine and Ms. Schott testified, the ladies were given a photograph of Mr. Daniels. From this photograph the ladies identified Mr. Daniels (R362-364).

Although the ladies identified Mr. Berry and Mr. Daniels, it was noted that the entire incident took only 15-20 seconds late at night, the car was surrounded by several black males, and the ladies were frightened. It was also noted that Ms. Sebine was concentrating on reaching for her wallet (R31, 38-45, 73-78).

SUMMARY OF THE ARGUMENT

The trial court erred in trying Mr. Daniels in absentia. Because the jury had not yet been sworn, the trial had not yet started. Mr. Daniels' disappearance before the swearing in of the jury was not a voluntary absence, and the trial court should not have conducted Mr. Daniels' trial in his absence.

The trial court also erred in its reading of the jury instruction on robbery by adding the element of "temporary" to the taking requirement. Robbery does not involve a "temporary taking." Such an error should be considered fundamental.

Last but not least, the trial court erred in departing from the guidelines because Mr. Daniels had violated his probation twice.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN ALLOWING THE CASE AGAINST APPELLANT TO GO TO TRIAL AND IMPOSE A JUDGMENT AND SENTENCE WHEN APPELLANT DISAPPEARED BEFORE THE JURY WAS SWORN AND NEVER APPEARED DURING THE TRIAL?

After voir dire but before the jury was officially sworn, Mr. Daniels failed to return to court. The trial court decided that the trial had already started and Mr. Daniels had voluntarily absented himself, so he could be tried in absentia. Over continuing objection, Mr. Daniels' trial continued on without him; and he was convicted of robbery (R4-7, 109, 353-357, 367). The question at trial was identity, and the witnesses identified Mr. Daniels from a mug shot taken on the night of the arrest (R360-364). During the trial the witnesses had difficulties with their descriptions of the alleged perpetrators. For example, they claimed that Mr. Berry had a scar when he did not (R26, 45, 72, 79). The distractions and fear and mass of people helped to contribute to this difficulty (R31, 38-45, 73-78). The issue is whether a defendant can be tried in absentia when the jury had been selected but not sworn. In other words, when does trial begin for constitutional purpose of the right to be present at one's own trial. In light of the constitutional ramifications and the importance of the identity issue, it cannot be said that this issue is harmless.

Florida Rule of Criminal Procedure 3.180(b) states:

> If the defendant is present at the beginning of the trial and shall thereafter, during the progress of said trial or before the verdict of the jury shall have been returned into court, voluntarily absent himself from the presence of the court without leave of court;...the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of said case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times.

The important phrases are "present at the beginning of the trial" and "during the progress of said trial." It is Mr. Daniels' contention that the trial does not really begin until the jury is sworn and the trial is not "in progress" until after the jury is sworn. Mr. Daniels' disappearance before the jury was sworn, therefore, does not come under Florida Rule of Criminal Procedure 3.180; and the trial court erred in conducting the trial and allowing the jury to reach a verdict in Mr. Daniels' absence.

In dicta this Court has stated that a trial begins when the selection of a jury begins. State v. Melendez, 244 So.2d 137 at 139 (Fla. 1971). The cases referred to in Melendez, and other cases on this issue, factually do not involve the defendant disappearing during voir dire but before the swearing in. In Mulvey v. State, 41 So.2d 156 (Fla. 1949), the defendant was present when the jury was impaneled and sworn before he failed to show up for the rest of his trial. In Lowman v. State, 80 Fla. 18, 85 So. 166 (1920), the defendants voluntarily absented themselves for a few minutes and not for the entire trial. In Henzel v. State, 212 So.2d 92 (Fla. 3d DCA 1968), the opinion does not

specifically state when the defendant absented himself, only noting that he was not present on the second day of his 4-day trial. There the list of missed witnesses was read aloud to the defendant, and he made no objection. The rest of the trial then proceeded and concluded with the defendant present. The court found error, if any, to have been waived due to a lack of objection. In Diaz v. United States, 223 U.S. 442 (1912), the defendant was present at the time the trial was begun and during the trial itself. He only absented himself on two occasions during testimony, and at this time he expressly voluntarily waived his right not to be present. In Taylor v. United States, 414 U.S. 17 (1973), the court held that a defendant who voluntarily absents himself during his trial has waived his right to be present. Even though he was not warned of the consequences of his absence, his absence would be deemed an effective waiver. The conclusion of the trial in the defendant's absence was found to be proper. The facts, however, as set forth in more detail at United States v. Taylor, 478 F.2d 689, 690 (1st Cir. 1973), demonstrate that the defendant disappeared after witnesses started testifying.

In the brief filed by the Attorney General's office at the Second District Court of Appeal level, circuit federal cases were cited that are also distinguishable: United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986), cert. denied, 479 U.S. 989; United States v. Schocket, 753 F.2d 336 (4th Cir. 1985); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); and United States v. Tortora, 464 F.2d 1202 (2d

Cir. 1972), cert. denied, sub nom, Santor v. United States, 409 U.S. 1063 (1972), all dealt with the problem of one disappearing defendant immediately prior to a complex, multi-defendant, multi-count indictment. Faced with a problem not uncommon in federal court where several defendants are all tried at one time with many charges combined in a trial that can take several weeks or several months, the Second and Fourth Circuits have created a rule that allows the trial to go on and try a defendant in absentia if the trial court considers the public interest to outweigh the defendant's interest. The trial court must consider the complexity of the case in making this determination; and some of the factors to consider were the number of co-defendants, the number of counts in the indictment, the number of witnesses, the number of out-of-state witnesses, the need to protect confidential informants, the length of the trial, the difficulty in conducting a second trial, and the difficulty in rescheduling a second trial. Such factors were present in these federal cases, so the defendant's right was found to be secondary to the public interest. United State v. Fernandez, 829 F.2d 363 (2d Cir. 1987), it not factually applicable in that it, like Taylor, involved the defendant's disappearance after the trial had started and all that remained were summations.

Brewer v. Raines, 670 F.2d 117 (9th Cir. 1982), is a case that Appellant cannot distinguish and put under the special rule created by the Second and Fourth Circuits. Brewer was arraigned and given a trial date, but he did not appear for trial. The trial took place without the defendant even though it was only a two-day

trial with only one defendant. The State court held this to be waiver of presence, and the Ninth Circuit did not overturn this decision. On the other hand there is United States v. Benavides, 596 F.2d 137 (5th Cir. 1979), where the short trial for two defendants (husband and wife) *in absentia* was overturned because there were no extenuating circumstances to try the defendants *in absentia*.

Factually, none of the Florida cases fit Mr. Daniels' situation; and some of the federal cases do not factually apply. What is left is a rule of expediency created by two federal circuits and tacitly approved by two others to be used in complex cases. Although Appellant does not believe that the constitutional rights of the individual must give way on the grounds of judicial economy, it must be acknowledged that the federal court system with its multi-defendants, multi-counts, multi-months trials is a system totally different from that utilized in the State of Florida. The question becomes whether the State of Florida needs to impose a rule of judicial expediency at the cost of the individual's constitutional right to be present at his trial. If this Court decides to uphold the constitutional right of the individual, the next question is whether a procedural rule should take precedence over a substantive constitutional right.

Although Mr. Daniels had a constitutional right to be present at all preliminary hearings of importance, at his voir dire, at his trial, and at his sentencing, he could not be tried in absentia in violation of his constitutional rights to be present

and confront witnesses under the United States Constitution, Sixth Amendment, and Florida Constitution, Article 16, just because he may have shown up for a preliminary hearing. The trial itself cannot be started if the defendant is not present, and it is Mr. Daniels' contention that the trial does not start for constitutional purposes until jeopardy has attached with the swearing in of the jury. To start a trial, to swear the jury in without the defendant being present, is to violate the constitutional right to be present at one's trial and to face one's accusers. The voir dire process is a preliminary matter to the actual trial and can be likened to pretrial motions. The actual swearing in of the jury need not take place immediately after voir dire, but can take place days or weeks later. For example, in the case of Compo v. State, 525 So.2d 505 (Fla. 2d DCA 1988), the court held it was quite permissible for a trial court to begin the voir dire process 12 days before the actual trial could be conducted in order to comply with Florida's speedy trial rule of procedure. The jury was selected on July 26, 1986, but not sworn. Trial was scheduled to take place on August 7, 1986. Had the defendant failed to return to court on August 7, would the trial have been conducted in absentia? Constitutional rights require more protection than that of a procedural rule. The answer must be in the negative.

In People v. Parker, 440 N.E.2d 1313 (NY App. 1982), the court refused to find a waiver of the right to appear at trial when the defendant received notice of her trial date but never appeared at trial. The court found no voluntary, knowing waiver inasmuch as

the defendant had never been told the consequences of her failure to appeal; and the court would not imply such a waiver under Taylor inasmuch as the defendant had not failed to appear in the midst of trial. Of even more interest is the dicta that concludes the opinion:

> We consider it appropriate to emphasize that even after the court had determined that a defendant has waived the right to be present at trial by not appearing after being apprised of the right and the consequences of non-appearance, trial in absentia is not thereby automatically authorized. Rather, the trial court must exercise its sound discretion upon consideration of all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear (see United States v. Peterson, 524 F.2d 167 (4th Cir.)). In most cases the simple expedient of adjournment pending execution of a bench warrant could provide an alternative to trial in absentia unless, of course, the prosecution can demonstrate that such a course of action would be totally futile.

Id. at 1317. See also People v. Britton, 482 N.Y.S.2d 136 (A.D. 3 Dept. 1984).

In Mr. Daniels' case jeopardy had not attached when he failed to appear. The State could have easily conducted its case against the co-defendant, and there would have been no harm to the co-defendant's case. The trial would have had to be conducted again for Mr. Daniels, but such problems do occur when defendants fail to appear. There is even a criminal sanction against such conduct. § 843.15, Fla. Stat. (1985). The right to present at trial is geared toward the witness factor--to confront one's

accusers, to bring forth favorable witnesses, and to be heard. Mr. Daniels never participated in any of this process, and the trial court's beginning of the actual trial until its conclusion without Mr. Daniels violated Mr. Daniels' constitutional rights. Mr. Daniels did not voluntarily absent himself during trial--the trial itself had not yet begun. Mr. Daniels is entitled to a new trial.

ISSUE II

DID THE TRIAL COURT ERR IN ITS JURY INSTRUCTIONS?

The trial court instructed the jury that an element of robbery was a temporary or permanent intent to deprive (R153, 299). Although the Second District Court of Appeal had ruled in its prior case of Hall v. State, 505 So.2d 657 (Fla. 2d DCA 1987), that the robbery statute is separate and distinct from the theft statute with robbery having the essential element of intent to permanently deprive, it has decided in Mr. Daniels' case to reverse itself on this issue. Now the Second District Court of Appeal has ruled that robbery has been redefined under the theft statutory change occurring in 1977, and the specific intent required in a robbery can be permanent or temporary. Mr. Daniels disagrees with the Second District Court of Appeal's holding.

In coming to its conclusion, the Second District Court of Appeal went back into the history of "intent" as it applies to theft and robbery cases; but it chose to reject this Court's statement on the subject set forth in State v. Dunmann, 427 So.2d 166 (Fla. 1983). The question as to whether permanent intent was required in a theft situation was hotly contested. The Fifth District Court of appeal had been holding that intent to permanently deprive was a requisite element of theft[1] while the Fourth had

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[1]Baxley v. State, 411 So.2d 194 (Fla. 5th DCA 1981); Dunnmann v. State, 410 So.2d 932 (Fla. 5th DCA 1980); Faison v. State, 390 So.2d 728 (Fla. 5th DCA 1980).

held that it was not.[2] This Court's decision in Bell v. State, 394 So.2d 979 (Fla. 1981), was used by the Fifth District Court of Appeal to justify its position. This Court, however, rejected the Fifth District Court of Appeal's line of cases and held that under the broad language of the 1977 theft statute the intent for theft was not the intent to permanently deprive. This court then specifically noted that the reliance on Bell had been erroneous:

> In Bell v. State, 394 So.2d 979 (Fla. 1981), the third district certified a question regarding section 812.13, Florida Statutes (1975), the robbery statute, in which that district court equated the intent to permanently deprive an owner of his property to the specific intent required by section 812.13. By relying on Bell and Allen, several district courts have been led to the opposite conclusion from what we reach in this opinion. See, e.g., Baxley; Dunnmann; Faison; Hilty. While section 812.13 deals with a similar subject, we do not find that chapter 77-342 had an impact on that section. By the same taken section 812.13 has no impact on the sections involved in this opinion. Therefore, we find Bell to have no effect on the instant case.

Dunmann, 427 So.2d at 169, emphasis added. Thus, this Court's decision in Bell, which held that specific intent--defined in the certified question as the intent to permanently deprive--is a requisite element of robbery, was left intact. This Court answered the certified question in the affirmative, and the certified question specifically defined the intent as permanent.

This Court's decision in Bell is not dicta, and the policy for such a decision mandates it should be upheld. Robbery is not the same type of crime as theft. Theft includes a temporary

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[2] State v. McNeill, 407 So.2d 1021 (Fla. 4th DCA 1981).

taking because it is not uncommon for a "borrowing" to take place without obtaining permission. The "joy-riding statute" that this Court discussed in Dunmann and found to be subsumed by the 1977 revised theft statute is an example of such a temporary but illegal taking. Such "borrowings" without permission can result in great inconvenience to the owner and much consternation. Robbery, on the other hand, requires a taking by force or fear of force; and it is most unlikely that a robber would go to such lengths to only "temporarily" deprive the victim of his property. To dilute the intent required by allowing for a "temporary" taking doesn't seem logical. Robbery is a serious crime against persons and should not be weakened by having an element diluted.

Should the Second District Court of Appeal's new definition be allowed to stand, the charge of robbery would be expanded to include charges presently being encompassed by the theft statute. A prime example of this is the abandonment line of cases. In State v. Baker, 540 So.2d 847 (Fla. 3d DCA 1989), the court held that a shoplifter who leaves the store, sees guards chasing him, abandons the property, is caught by the guards, and puts up a struggle is not a robber. Since the shoplifter abandoned the property before force was used, the use of force was not "part of 'a continous series of acts or events' involved with the taking...." Id. at 848. Thus, the taking was only a theft and not a robbery. This case was followed by the Fifth District Court of Appeal in Simmons v. State, 551 So.2d 607 (Fla. 5th DCA 1989). If the Second District Court of Appeal's decision is allowed to stand,

temporary takings such as those in Baker and Simmons could be found to be robberies.

There is, of course, another reason to hold that robbery requires the intent to permanently take. While the district courts were fighting over whether or not theft involved a permanent or temporary taking in 1981, the legislature formally resolved the issue in 1982 with a statutory amendment. Section 812.014, Florida Statutes (Supp. 1982), added the words "either temporarily or permanently" to its definition of theft immediately after the words "intent to." No such change was made to the robbery statute, yet the legislature had to be aware of the district court cases and this Court's decision in Bell. Since no change was made to the robbery statute, it cannot be presumed that a change to the theft statute was meant to have an affect on the robbery statute. These are, after all, two separate statues and two separate crimes. If there is any doubt, the rule of strict construction requires that any vagueness be resolved and strictly construed in the manner most favorable to the accused. Art. I, § 9, Art. II, § 3, Fla. Const. See Perkins v. State, Case No. 75,990 (Fla. March 14, 1991)[16 F.L.W. S207], and cases cited therein.

Although the Second District Court of Appeal did not address this, there is a problem on this issue in Mr. Daniels' case--defense counsel did not object to this erroneous additional element. It is also to be acknowledged that what little defense could be made in Mr. Daniels' absence was based on identity and not intent. This Court's recent decision in State v. Delva, Case No.

75,784 (Fla. Feb. 21, 1991)[16 F.L.W. S186], and the case cited therein of Stewart v. State, 420 So.2d 862 (Fla. 1982), would indicate that the argument of fundamental error is not available to Mr. Daniels. In Stewart the trial court did not instruct on intent to permanently deprive as an element of robbery, but no objection was made and the element of intent was not an issue. This Court noted with approval the fact that district courts of appeal had "held that fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." Id. at 863. This Court then rejected Stewart's issue of fundamental error. This same reasoning was used in Delva when an element of trafficking in cocaine was not read to the jury. Since the element in question was not at issue, this Court found no fundamental error: "Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error and there must be an objection to preserve the issue for appeal." Delva, 16 F.L.W. S186.

The distinction that can be made with Mr. Daniels is that this was not a sin of omission but of co-omission. The trial court did not leave out an element but added an erroneous/non-applicable element. To add an element that makes the burden on the State easier to establish the crime of robbery; i.e., to add an element erroneously so as to dilute the State's burden of proof, should be fundamental error.

In any case the Second District Court of Appeal's failure to mention this area means that the new element it added to robbery

is not just dicta but required law in the Second District Court of appeal. Thus, even if this Court does not believe the issue to be preserved in Mr. Daniels' case, it must address the issue on its merits.

ISSUE III

DID THE TRIAL COURT ERR IN DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE?

The trial court sentenced Mr. Daniels to 9 years imprisonment for the robbery and a consecutive 5 years imprisonment for the marijuana charge he had been on probation for (R242, 249-253, 324, 325, 333-337, 188-207). The guidelines recommended 7 to 9 years. The notation on the scoresheet stated that the 2-step upward departure was because this was the second violation of probation (R240, 241). The Second District Court of Appeal affirmed the sentence based on its decision in Williams v. State, 559 So.2d 680 (Fla. 2d DCA 1990). The Second District Court of Appeal in Williams did note, however, that this Court's recent line of cases may be in conflict and certified the following question:

> Has the Supreme Court in Ree v. State,[3] 14 F.L.W. 565 (Fla. Nov. 16, 1989), and Lambert v. State, 545 So.2d 838 (Fla. 1989), receded from the holding in Adams v. State, 490 So.2d 53 (Fla. 1986), in which it found that where a defendant previously placed on probation, has repeatedly violated the terms of his probation after having had his probation restored, that a trial court may use the multiple violations of probation as a valid reason to support a departure sentence beyond the one cell bump for violation of probation under section 3.701(d)(14), Florida Statutes (1984)?

This question was certified in 16 cases and is presently pending before this Court in Williams, et al., v. State, Case No. 75,919; and Fernandez v. State, Case No. 76, 525.

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[3]The new citation for Ree based on a motion for rehearing is 565 So.2d 1329 (Fla. 1990).

The Second District Court of Appeal's present policy of allowing for departures on violation of probation or community control cases has been rejected by this Court in Ree and Lambert. It has also been rejected by two other district courts of appeal in Maddox v. State, 553 So.2d 1380 (Fla. 5th DCA 1989); and Irizarry v. State, 15 F.L.W. D1288 (Fla. 3d DCA May 8, 1990). The Fifth and Third District Courts of Appeal held that multiple violations of probation were no longer valid reasons for a guidelines departure. This Court's holding on the subject as set forth in Ree and Lambert is that "any departure sentence for probation violation is impermissible if it exceeds the one-cell increase permitted by the sentencing guidelines." Lambert, 545 So.2d at 842; Ree, 565 So.2d at 1331.

The policy argument in favor of upholding multiple violations of probation as a reason to depart is presumably that probationers who are given a second chance warrant more punishment than those who have had only one chance. This argument is unsound, because the amount of mercy shown initially does not logically correlate with the amount of punishment imposed later when the mercy is withdrawn. Twice as much mercy does not logically justify twice as much punishment. The guidelines already provide for a one-cell increase in the recommended sentence for a violation of probation. If a court concludes that a first violation is not so egregious that it warrants incarceration, then it is incoherent to say that this same non-egregious violation could warrant increasing the sentence to the statutory maximum when the court determines the

amount of punishment to impose on a second violation. Such a rule would entice judges to offer probation to defendants twice and thereby give them the rope to hang themselves.

Finally, the Second District Court of Appeal cites to Washington v. State, 564 So.2d 168 (Fla. 5th DCA 1990), for further support for the trial court's ability to go up two steps on the scoresheet range. Undersigned counsel fails to see the application of Washington to Mr. Daniels' case, and the Second District Court of Appeal did not give an explanation. The case appears to allow a one-cell bump for both a probation case and the new substantive offense that caused the violation of probation, but this is all. A two-cell bump does not seem to be factually present in Washington; thus, Washington does not appear to be applicable. Mr. Daniels' sentence must be reduced.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, Appellant respectfully asks this Honorable Court to reverse the sentence of the lower court.

APPENDIX

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